Senator from New Mexico (Mr. ANDERSON), the Senator from Nevada (Mr. BIBLE), the Senator from Mississippi (Mr. EASTLAND), the Senator from Arkansas (Mr. FULBRIGHT), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Hawaii (Mr. INOUYE), the Senator from Minnesota (Mr. MCCARTHY), the Senator from Wyoming (Mr. MCGEE), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from Wisconsin (Mr. NELSON), the Senator from Georgia (Mr. RUSSELL), the Senator from Missouri (Mr. SYMINGTON), the Senator from Maryland (Mr. TYDINGS), and the Senator from Ohio (Mr. YOUNG), are necessarily absent.

I further announce that, if present and voting, the Senator from Arkansas (Mr. FULBRIGHT) would vote "yea."

Mr. GRIFFIN. I announce that the Senator from Kentucky (Mr. COOPER) is absent because of illness in his family.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Tennessee (Mr. BAKER), the Senator from Illinois (Mr. PERCY), and the Senator from Texas (Mr. TOWER) are necessarily absent.

The Senator from New Jersey (Mr. CASE), the Senator from Arizona (Mr. GOLDWATER), the Senator from New York (Mr. GOODELL), the Senator from Oregon (Mr. PACKWOOD), the Senator from Kansas (Mr. PEARSON), and the Senator from Illinois (Mr. SMITH) are detained on official business.

If present and voting, the Senator from Illinois (Mr. PERCY), the Senator from Illinois (Mr. SMITH), and the Senator from Texas (Mr. TOWER) would each vote "yea."

The result was announced—yeas 65, nays 10, as follows:

[No. 264 Leg.]

YEAS—65

Aiken	Fong	Murphy
Allen	Gore	Muskie
Allott	Gravel	Pastore
Bellmon	Griffin	Pell
Bennett	Gurney	Prouty
Boggs	Hansen	Proxmire
Brooke	Hart	Randolph
Burdick	Hatfield	Ribicoff
Byrd, Va.	Holland	Schweiker
Byrd, W. Va.	Hruska	Scott
Cannon	Jackson	Smith, Maine
Church	Javits	Sparkman
Cotton	Jordan, N.C.	Spong
Cranston	Jordan, Idaho	Stennis
Curtis	Long	Stevens
Dodd	Magnuson	Talmadge
Dole	Mansfield	Thurmond
Dominick	Mathias	Williams, N.J.
Eagleton	McClellan	Williams, Del.
Ellender	McGovern	Yarborough
Ervin	Miller	Young, N. Dak.
Fannin	Montoya	

NAYS—10

Bayh	Hughes	Moss
Cook	Kennedy	Saxbe
Harris	Metcalf	
Hartke	Mondale	

NOT VOTING—25

Anderson	Hollings	Percy
Baker	Inouye	Russell
Bible	McCarthy	Smith, Ill.
Case	McGee	Symington
Cooper	McIntyre	Tower
Eastland	Mundt	Tydings
Fulbright	Nelson	Young, Ohio
Goldwater	Packwood	
Goodell	Pearson	

So, Mr. HRUSKA's amendment was agreed to.

The PRESIDING OFFICER. The bill is open to further amendment.

Mr. BYRD of West Virginia. Mr. President, I ask for third reading.

The PRESIDING OFFICER. If there be no further amendment to be proposed, the question is on the engrossment of the amendments and the third reading of the bill.

The amendments were ordered to be engrossed for a third reading, and the bill to be read a third time.

The bill was read the third time.

The PRESIDING OFFICER. The question is, Shall the bill pass?

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, may I announce again that there will be a meeting of Democrats in Room S. 207, but at 10 o'clock rather than 9 o'clock because, beginning tomorrow, we will have nothing but conference reports, insofar as I am aware.

ORDER FOR ADJOURNMENT UNTIL 11 A.M. TOMORROW

Mr. MANSFIELD. Mr. President, I ask unanimous consent that, instead of coming in at 10 o'clock tomorrow morning, when the Senate completes its business tonight it stand in adjournment until 11 o'clock tomorrow morning, at which time the Tasca nomination will be taken up.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUPPLEMENTAL APPROPRIATIONS, 1970

The Senate continued with the consideration of the bill (H.R. 15209) making supplemental appropriations for the fiscal year ending June 30, 1970, and for other purposes.

Mr. BYRD of West Virginia. I ask unanimous consent to include in the RECORD certain documentary material with respect to section 904 of the bill.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[Extract from Senate Report No. 91-616 to accompany the supplemental appropriation bill, 1970]

SECTION 904—THE "PHILADELPHIA PLAN"

The following new language has been included as section 904 of the bill:

"SEC. 904. 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 otherwise 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."

The provision recommended by the committee is to reaffirm the authority of the Comptroller General delegated to him by the Congress when it enacted the Budgeting and Accounting Act of 1921, as amended. Section 304 of this act, 31 U.S.C. 74 provides that "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government." Section 111 of the act, 31 U.S.C. 65 directs the Comptroller General to determine whether "financial transactions have been consummated in accordance with laws, regulations, or other legal requirements." The Comptroller General has exercised the delegated congressional power over the obligation and expenditure of appropriated funds for almost 50 years without serious challenge from the Attorney General of the United States or any other officer of the executive branch. It has been historic that where serious disagreements have arisen with the holdings of the Comptroller General, the proper recourse has been to the Congress or to the Federal courts. The committee holds that this is still true.

The Comptroller General, by letter dated December 2, 1969 informed the committee that a most serious challenge had been posed to his basic authority to determine the legality of obligations and expenditures by the executive branch.

The committee wishes to emphasize that the basic issue here is the constitutional authority of the Congress itself. It must be further emphasized that the Congress has delegated certain of its constitutional authority to the Comptroller General alone. As long as such delegation exists, it must be complete, and not be allowed to be eroded by the executive branch. Therefore the committee strongly recommends the adoption of section 904.

MEMORANDUM

To: Senator Robert C. Byrd, Chairman, Subcommittee on Deficiencies and Supplementals, Committee on Appropriations.
From: Joseph T. McDonnell, Staff Member.
Subject: Challenge to the authority of the Comptroller General, to determine the legality of the expenditure of appropriated funds (re the "Philadelphia Plan").

The question presented is *not* whether the Philadelphia Plan violates or does not violate the Civil Rights Act of 1964. The real question at issue is whether an opinion of the Comptroller General relative to the legality of the expenditure of appropriated funds is or is not ". . . final and conclusive upon the Executive Branch of the Government." (31 U.S.C. Sections 65(d) and 74.)

While it is true that the basic issue arises from the desire of the Executive Department to encourage, and possibly compel, the hiring of more members of minority groups by Government contractors, and at the same time encourage, and possibly compel, the craft unions to admit to membership more members of minority groups, these objectives are secondary to the basic question presented: Whether the Congress—acting through its agent, the Comptroller General—has or does not have the final authority to determine the legality of obligating or expending appropriated funds.

The question presented must necessarily be answered in the affirmative. To say otherwise is to deny the constitutional authority of Congress over appropriated funds and thus limit the congressional function to simply approving or disapproving budget estimates submitted by the Executive Branch.

That the constitutional authority of the Congress is far broader is amply illustrated by its unchallenged actions when approving appropriations, to impose limitations and conditions on the expenditure of said funds.

The complete authority of Congress over appropriated funds is nowhere better illustrated than by the creation in 1921 and continued existence of the office of Comptroller General, who exercises as the agent of Congress the delegated congressional authority to determine the legality of expenditures of appropriated funds.

Congress has decreed that such determinations will be ". . . final and conclusive upon the Executive Branch of the Government."

By delegating its own constitutional authority to an agent, Congress in no way limits its authority. Thus, to advance the proposition that an advisory opinion of the Attor-

ney General can over-rule an opinion of the Comptroller General is to say that the Executive Branch is the final judge of the legality of the expenditure of appropriated funds. Such a proposition is not supportable by reference to the Constitution, nor by the precedents.

While the President cannot be compelled to spend appropriated funds, this presidential power cannot be turned around to mean that the President, once Congress appropriates funds, can direct that such funds can be spent to carry out any program or to achieve any objective that the President alone determines and do so without further authorization from the Congress.

In the instant case, the Comptroller General has held that the expenditure of funds for the purposes of carrying out the so-called "Philadelphia Plan" or any similar plan is not authorized by law. The Attorney General in an advisory opinion has held contra.

Again it must be emphasized that the basic question at issue is the delegated authority of the Comptroller General to determine the legality of the expenditures of appropriated funds—which determination Congress has decreed by statute shall be "final and conclusive upon the Executive Branch."

It is submitted that the question presented must be resolved in favor of the Comptroller General. If the Executive Branch wishes to pursue the "Philadelphia Plan" or institute "plans" having the same objective, then the President should request enactment by Congress of the necessary legislative authorization. Pending such request—unless the Congress desires to completely abdicate its constitutional authority over the expenditure of appropriated funds, and substitute the Attorney General for the Comptroller General—Congress should enact the language contained in Section 1004 proposed as an amendment to H.R. 15209, making supplemental appropriations for fiscal 1970.

II

The discussion above is intended to emphasize that the basic argument in favor of including the proposed amendment in H.R. 15209 is not the merits or demerits of the "Philadelphia Plan," but rather the need for the Congress itself to re-assert its own broad authority to determine the legality of the expenditure of appropriated funds. Of course, in so doing the delegated authority of the Comptroller General is also re-asserted.

III

The following attachments are submitted for your consideration:

1. *Attachment A:* The amendment to the Mutual Security Appropriation Act for fiscal 1960, mentioned by Mr. Thomas J. Scott, and some comments thereon by GAO.

2. *Attachment B:* Statutory citations re the authority of the Attorney General to issue opinions and some comments by the GAO on their force and effect.

3. *Attachment C:* Some examples of restrictions imposed by Congress on the expenditure of appropriated funds.

4. *Attachment D:* Summary prepared by GAO on your question as to how the "Philadelphia Plan" violates the Civil Rights Act of 1964. Attached to this summary is an extract from the Comptroller General's Opinion, B–163026, August 5, 1969, in which he concludes that the "Philadelphia Plan" is in conflict with the Civil Rights Act of 1964.

5. *Attachment E:* Memorandum from GAO re contracts awarded under the "Philadelphia Plan."

FOREIGN ASSISTANCE APPROPRIATIONS

Section 111(d) of the Mutual Security Appropriation Act, 1960, 73 Stat. 720, provided that:

"(d) None of the funds herein appropriated shall be used to carry out any provision of chapter II, III, or IV of the Mutual Security Act of 1954, as amended, in any country, or with respect to any project or activity, after the expiration of the thirty-five day period which begins on the date the General Accounting Office or any committee of the Congress, or any duly authorized subcommittee thereof, charged with considering legislation or appropriations for, or expenditures of, the International Cooperation Administration, has delivered to the office of the Director of the International Cooperation Administration a written request that it be furnished any document, paper, communication, audit, review, finding, recommendation, report, or other material relating to the administration of such provision by the International Cooperation Administration in such country or with respect to such project or activity, unless and until there has been furnished to the General Accounting Office, or to such committee or subcommittee, as the case may be, (1) the document, paper, communication, audit, review, finding, recommendation, report, or other material so requested, or (2) a certification by the President that he has forbidden its being furnished pursuant to such request, and his reason for so doing."

See also, to similar effect, section 2394 of title 22, United States Code, and section 402 of the Foreign Assistance and Related Agencies Appropriation Act, 1969, 82 Stat. 1144, concerning the Office of the Inspector General and Comptroller.

The legislative history of section 111(d) of the 1960 appropriation act shows clearly that the Congress, in providing for a Presidential certification to avoid operation of the statutory injunction, did not intend to yield its prerogatives over the expenditure of appropriated funds. Senator Robertson in explaining the language of his amendment which was substantially enacted as section 111(d) made the following statements:

"In addition, and I wish to emphasize this, the amendment does not yield one iota of the constitutional right of the Congress to demand information concerning the handling of funds it has appropriated, but it makes this much of a concession to the difference of opinion between Congress and the President.

"* * * That difference is this: If the President, in keeping with the well established principle under the Constitution of the right of the President to handle foreign policy, decides that the disclosure of some phase of foreign policy would be against the public interest, he can so certify, and the Congress will not be able to get the information. But Mr. President, it is inconceivable that any President would invoke that privilege to cover up inefficiency of some minor official in some country in the expenditure of the taxpayers' money.

"I say we are not trying to settle the constitutional issue. At some future time we may have to do it, but we are not trying to do it in this bill. We are trying to arrive at a working formula which will enable Congress to have proper information about a program which costs almost $4 billion a year of the taxpayers' money." CONGRESSIONAL RECORD, volume 105, part 15, page 19256.

While recognition of the constitutional doctrine of executive privilege was thus accorded in connection with the appropriation restriction in question as it related to the withholding of information, it should be recognized that a restriction against use of appropriated funds to implement the "Philadelphia Plan" would not encounter this issue.

By decision of December 8, 1960, B–143777, the Comptroller General advised the Secretary of State that in light of the provisions of section 533A(d) of the Mutual Security Act of 1954 as added by section 401(h) of the Mutual Security Act of 1959, 73 Stat. 253, the failure to provide certain documents requested by the Chairman of the Foreign Operations and Monetary Affairs Subcommittee of the House Government Operations Committee required the conclusion that funds were not available for expenses of the office of the Inspector General and Comptroller. The Attorney General in an opinion dated December 19, 1960, advised the President that he did not agree with the Comptroller General's ruling. The matter was ultimately resolved through arrangements worked out with the Subcommittee in connection with the documents in question.

Although the decision in 1960 concerned interpretation of a statute similar to those referred to, it should be noted that the provisions there in question were not contained in an appropriation act.

ATTORNEY GENERAL OPINIONS

5 U.S.C. 3106

"Except as otherwise authorized by law, the head of an executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice * * *."

28 U.S.C. 511

"The Attorney General shall give his advice and opinion on questions of law when required by the President."

28 U.S.C. 512

"The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department." (See 28 U.S.C. 513 regarding military departments.)

28 U.S.C. 516

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or office thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under direction of the Attorney General."

The Attorney General has himself stated that his opinions are advisory only and that he has no control over the action of the head of department at whose request and to whom an opinion is given. 17 Op. Atty. Gen. 332 (1855). The duty of the Attorney General is to advise, not to decide. A thing is not to be considered as done by the head of a department merely because the Attorney General has advised him to do it; and the Department head may disregard the opinion if he is sure it is wrong. 9 Op. Atty. Gen. 36 (1857).

The courts have held that opinions of the Attorney General construing statutes are not, apparently, given greater weight by courts than is conceded to departmental constructions in general. *Lewis Pub. Co.* v *Morgan,* 229 U.S. 288 (1913); *U.S.* v. *Falk,* 204 U.S. 143 (1907); *Harrison* v. *Vose,* 50 U.S. 384 (1850). Opinions as to a law held and expressed by the Attorney General are persuasive, and such deference should be accorded to them as is given to opinions of other able persons learned in the law but no more. *McDonald* v. *U.S.,* 89 F. 2d 128 (1937), certiorari denied 301 U.S. 697, rehearing denied 302 U.S. 773, rehearing denied 325 U.S. 892.

On the other hand, the Attorney General has held that the head of a department cannot require the Attorney General's opinion as to his powers to do an act unless it is his intention to be guided thereby. 3 Op. Atty. Gen. 39 (1836); 21 Op. Atty. Gen. 174 (1895); 20 Op. Atty. Gen. 724 (1894); 20 Op. Atty. Gen. 609 (1893). Although there is no statutory declaration of the effect to be given to Attorney General advice and opinion, administrative officers should regard the opinions of the Attorney General as law until withdrawn by him or overruled by the courts. 5 Op. Atty. Gen. 97 (1849); 20 Op. Atty. Gen. 719 (1894); 20 Op. Atty. Gen. 648 (1893); 7 Op. Atty. Gen. 692 (1856). See also *Berger* v. *U.S.* 36 Ct. Cl. 247 (1901).

EXAMPLES OF APPROPRIATION RESTRICTIONS

DEPARTMENT OF DEFENSE APPROPRIATION ACT, 1969

"SEC. 509. No appropriation contained in this Act shall be available for expenses of operation of messes (other than organized messes the operating expenses of which are financed principally from nonappropriated funds) at which meals are sold to officers or civilians except under regulations approved by the Secretary of Defense * * *.

"SEC. 514. Notwithstanding any other provision of law, Executive order, or regulation, no part of the appropriations in this Act shall be available for any expenses of operating aircraft under the jurisdiction of the Armed Forces for the purpose of proficiency flying except * * *.

"SEC. 515. No part of any appropriation contained in this Act shall be available for expense of transportation, packing, crating, temporary storage, drayage, and unpacking of household goods and personal effects in any one shipment having a net weight in excess of thirteen thousand five hundred pounds.

"SEC. 517. None of the funds provided in this Act shall be available for training in any legal profession nor for the payment of tuition for training in such profession: *Provided,* That this limitation shall not apply to the off-duty training of military personnel as prescribed by section 521 of this Act.

"SEC. 521. No appropriation contained in this Act shall be available for the payment of more than 75 per centum of charges of educational institutions for tuition or expenses for off-duty training of military personnel, nor for the payment of any part of tuition or expenses for such training for commissioned personnel who do not agree to remain on active duty for two years after completion of such training.

"SEC. 522. No part of the funds appropriated herein shall be expended for the support of any formally enrolled student in basic courses of the senior division, Reserve Officers' Training Corps, who has not executed a certificate of loyalty or loyalty oath in such form as shall be prescribed by the Secretary of Defense."

INDEPENDENT OFFICES AND DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT APPROPRIATION ACT, 1969

"SEC. 301. No part of any appropriation contained in this Act, or of the funds available for expenditure by any corporation or agency included in this Act, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before the Congress.

"SEC. 307. None of the funds in this Act shall be available to finance interdepartmental boards, commissions, councils, committees, or similar groups under sec. 214 of the Independent Offices Appropriation Act, 1946 (31 U.S.C. 691) which do not have prior and specific Congressional approval of such method of financial support, except * * *.

DEPARTMENTS OF LABOR, AND HEALTH, EDUCATION, AND WELFARE APPROPRIATION ACT, 1969

"SEC. 409. No part of the funds contained in this Act may be used to force busing of students, abolishment of any school, or to force any student attending any elementary or secondary school to attend a particular school against the choice of his or her parents or parent in order to overcome racial imbalance.

"SEC. 410. No part of the funds contained in this Act shall be used to force busing of students, the abolishment of any school or the attendance of students at a particular school in order to overcome racial imbalance as a condition precedent to obtaining Federal funds otherwise available to any State, school district, or school: *Provided,* That the Secretary shall assign as many persons to the investigation and compliance activities of title VI of the Civil Rights Act of 1964 related to elementary and secondary education in the other States as are assigned to the seventeen Southern and border States to assure that this law is administered and enforced on a national basis, and the Secretary is directed to enforce compliance with title VI of the Civil Rights Act of 1964 by like methods and with equal emphasis in all States of the Union and to report to the Congress by March 1, 1969, on the actions he has taken and the results achieved in establishing this compliance program on a national basis: *Provided further,* That notwithstanding any other provision of law, funds or commodities for school lunch programs or medical services may not be recommended for withholding by any official employed under appropriations contained herein in order to overcome racial imbalance: *Provided further,* That notwithstanding any other provisions of law, moneys received from national forests to be expended for the benefit of the public schools or public roads of the county or counties in which the national forest is situated, may not be recommended for withholding by any official employed under appropriations contained herein."

DEPARTMENT OF DEFENSE APPROPRIATION ACT, 1968, PUBLIC LAW 90–97, 81 STAT. 249

"SEC. 640.

"(b) During the current fiscal year none of the funds available to the Department of Defense may be used to install or utilize any new 'cost-based' or 'expense-based' system or systems for accounting, including accounting results for the purposes prescribed by section 113(a)(4) of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 66a(a)(4)), until forty-five days after the Comptroller General of the United States (after consultation with the Director of the Bureau of the Budget) has reported to the Congress that in his opinion such system or systems are designed to: (1) meet the requirements of all applicable laws governing budgeting, accounting, and the administration of public funds and the standards and procedures established pursuant thereto; (2) provide for uniform application to the extent practicable throughout the Department of Defense; and (3) prevent violations of the antideficiency statute (R.S. 3679; 31 U.S.C. 665)."

FOREIGN ASSISTANCE AND RELATED AGENCIES APPROPRIATION ACT, 1962, PUBLIC LAW 87–329, 75 STAT. 721

"SEC. 602. None of the funds herein appropriated shall be used for expenses of the Inspector General, Foreign Assistance, after the expiration of the thirty-five day period which begins on the date the General Accounting Office or any committee of the Congress, or any duly authorized subcommittee thereof, charged with considering foreign assistance legislation, appropriations, or expenditures, has delivered to the office of the Inspector General, Foreign Assistance, a written request that it be furnished any document, paper, communication, audit, review, finding, recommendation, report, or other material in the custody or control of the Inspector General, Foreign Assistance, relating to any review, inspection, or audit arranged for, directed, or conducted by him, unless and until there has been furnished to the General Accounting Office or to such committee or subcommittee, as the case may be, (A) the document, paper, communication, audit, review, finding, recommendation, report, or other material so requested or (B) a certification by the President, personally, that he has forbidden the furnishing thereof pursuant to such request and his reason for so doing."

INDEPENDENT OFFICES APPROPRIATION ACT, 1952, PUBLIC LAW 82–137, 65 STAT. 286

"No money made available to the Department of Commerce, for maritime activities, by this *or any other Act* shall be used in payment for a vessel the title to which is acquired by the Government either by requisition or purchase, or the use of which is taken either by requisition or agreement, or which is insured by the Government and lost while so insured, unless the price or hire to be paid therefor (except in cases where section 802 of the Merchant Marine Act, 1936, as amended, is applicable) is computed in accordance with subsection 902(a) of said Act, as that subsection is interpreted by the General Accounting Office." (Emphasis supplied.)

All except the last of the foregoing provisions generally are held to be mere restrictions upon the use of appropriations and are not subject to a point of order. Such restrictions applying to "appropriations in this or *any other act*" as in the last-quoted provision are subject to a point of order as being legislation in an appropriation act. The Philadelphia Plan restriction would have to be of the latter type unless it is inserted in each of the pertinent appropriation acts.

SUMMARY OF WHY THE "PHILADELPHIA PLAN" CONFLICTS WITH THE CIVIL RIGHTS ACT OF 1964

The public policy with respect to both employer employment practices and union referral practices is set out in subsections 703 (a) and (c) of the Civil Rights Act of 1964. These provisions of the law clearly spell out that it shall be an unlawful employment practice for an employer to consider race or national origin in hiring or refusing to hire a qualified applicant, and for a labor organization, such as a union, to consider race or national origin in referring, or refusing to refer, a qualified applicant to an employer for employment.

If there were any doubt as to the policy set out in sections 703 (a) and (c), it would be completely dispelled by the provisions of subsection 703(j) which specify that the provisions of Title VII of the act shall not be interpreted to require any employer or labor organization to grant preferential treatment to any individual or group on account of an imbalance which may exist in the employer's work force or the labor organization's membership when the racial or national origin composition of such work force or membership is compared to the total number of persons of such race or national origin in the community or section, or in the available work force in the community or section.

The legislative history of the act is replete with clear indications of the Congressional intent in these areas, and the Comptroller General's opinion of August 5, 1969, quotes more than three pages of such references as examples of such intent.

To the extent that the Philadelphia Plan will require contractors to agree to establish numerical goals of minority group employees, and to exert "every good faith effort" to attain such goals in performing their contracts, the Plan will necessarily require contractors to consider race and national origin in recruiting and hiring employees. And to the extent that the numerical goals and ranges of minority group employees set out in the Plan are directed to correcting imbalances in either, or both, the contractors work force or his union's membership, they must necessarily be considered in violation of the public policy expressed in section 703(j) of the act.

Both the Department of Labor and the Department of Justice appear to recognize that the Plan either will, or may, result in reverse discrimination against non-minority group workers. But they argue that such reverse discrimination is legal if it is necessary to correct that present results of past discrimination. The truth of the matter is that the Departments are relying upon court opinions in school, voting, and housing cases to support their conclusion, and that there are no controlling judicial precedents on the point with respect to employment practices. Not

only is the Executive branch of the Government attempting to legislate in this area, it is also attempting to interpret and apply inapplicable and conflicting opinions of the courts in a manner contrary to the intent of Congress in enacting the Civil Rights Act of 1964, and in a manner clearly not intended by the judiciary. The action of the Departments in implementing the Plan must therefore be construed as a usurpation by the Executive of the functions of both the Legislative and Judicial branches of the Government. If any additional support for this conclusion should be needed, one need only look to the provisions of subsection 706(g) of the act, which authorize the courts to order such "affirmative action" as may be appropriate when an employer or a union, pursuant to the judicial procedures prescribed by the act, has been found by the court to be engaging in unlawful employment practices.

* * * * *

Section 705(a) (42 U.S.C. 2000e–4(a)) creates the Equal Employment Opportunity Commission, and section 713(a), Rules and Regulations (42 U.S.C. 2000e–12(a)), provides that the Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of that title.

The public policy regarding labor organization practices is delineated in section 703(c) (42 U.S.C. 2000e–2(c)) wherein it is stated that it shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of that section.

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 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.

We view the imposition of such a requirement on employers engaged in Federal or federally assisted construction to be in conflict with the intent as well as the letter of the above provisions of the act which make it an unlawful employment practice to use race or national origin as a basis for employment. Further, we believe that requiring an employer to abandon his customary practice of hiring through a local union because of a racial or national origin imbalance in the local unions and, under the threat of sanctions, to make "every good faith effort" to employ the number of minority group tradesmen specified in his bid from sources outside the union if the workers referred by the union do not include a sufficient number of minority group personnel, are in conflict with section 703(j) of the act (42 U.S.C. 2000e–2(j)) which provides as follows:

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group *on account of an imbalance which may exist with respect to the total number or percentage of persons* of any race, color, religion, sex, or national origin employed by any employer, *referred of 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 of 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, or in the available work force in any area." (Italic added.)

While the legislative history of the Civil Rights Act is replete with statements by sponsors of the legislation that Title VII prohibits the use of race or national origin as a basis for hiring, we believe a reference to a few of such clarifying explanations will suffice to further show the specific intent of Congress in such respect when enacting that title. At page 6549, Volume 110, Part 5, of the Congressional Record, the following explanation by Senator Humphrey is set out:

"* * * As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII.

"The able Senators in charge of title VII (Mr. Clark and Mr. Case) will comment at greater length on this matter.

"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." (Italic added.)

In an interpretative memorandum of Title VII submitted jointly by Senator Clark and Senator Case, floor managers of that legislation in the Senate, it is stated (page 7213, Volume 110, Part 6, Congressional Record):

"With the exception noted above, therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

"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 group in the work force may be a relevant factor in determining whether in a given case a 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.

"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" (Underscoring added.)

At page 7218 of Volume 110 the following objections, which had been raised during debate to the provisions of Title VII, and answers thereto by Senator Clark are printed:

"Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.

"Answer: 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.

* * * * *

"Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

"Answer: Quotas are themselves discriminatory."

While, as indicated above, we believe that the provisions of the Plan affecting employers who hire through unions conflict with section 703(j) of Title VII, and that the above statement by Senator Humphrey further indicates that the act was not intended to affect valid collective bargaining agreements, we further believe that the appropriate direction of any administrative action to be taken where it is the policy of a union to refer only white workers to employers on Federal or federally assisted construction is indicated in the following question and answer set forth in the interpretative memorandum by Senator Clark and Senator Case (page 7217, Volume 110):

"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? If the hiring hall sends only white males is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.

"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 whites, he is not guilty of discrimination—but union hiring halls would be."

We believe it is especially pertinent to note

that the "Findings" stated in section 4 of the order of June 27 as the basis for issuance thereof, consist almost entirely of a recital of practices of *unions*, rather than of contractors or employers. Thus, in attempting to place upon the contractors the burden of overcoming the effects of union practices, the order appears to evince a policy in conflict with the interpretation of the legislation as stated by its sponsors.

In this connection your Solicitor's memorandum contends that the principle of imposing affirmative action programs on contractors for employment of administratively determined numbers of minority group tradesmen, when such programs are for the purpose of correcting the effects of discrimination by unions prior to the Civil Rights Act of 1964, is supported by the decisions in *Quarles* v. *Philip Morris,* 279 F. Supp. 505; *U.S.* v. *Local 189, U.P.P. and Crown Zellerbach Corp.,* 282 F. Supp. 39; and *Local 53 of Heat and Frost Insulators* v. *Vogler,* 407 F. 2d 1047. We find, however, that decisions of the courts have differed materially in such respect; see *Griggs* v. *Duke Power,* 292 F. Supp. 243; *Dobbins* v. *Local 212,* 292 F. Supp. 413; and *U.S.* v. *Porter,* 296 F. Supp. 40.

Additionally, your Solicitor's memorandum cites cases involving affirmative desegregation of school faculties (*U.S.* v. *Jefferson County,* 372 F. 2d 836 (1966), and *U.S.* v. *Montgomery County,* 289 F. Supp. 647, affirmed 37 LW 4461 (1969) in particular). However, there is a clear distinction between the factual and legal situations involved in those cases and the matter at hand. The cited school decisions required reallocation of portions of existing school faculties in implementation of the requirement for desegregation of dual public school systems, which had been established on the basis of race, as such requirement was set out in the 1954 and 1955 decisions of the Supreme Court in the *Brown* v. *Board of Education* cases (347 U.S. 483 and 349 U.S. 294). In the *Brown* cases desegregation of faculties was regarded as one of the keys to desegregation of the schools, and in the *Jefferson County* case the court read Title VI of the Civil Rights Act as a congressional mandate for a change in pace and method of enforcing the desegregation of racially segregated school systems, as required by the *Brown* decisions.

MEMORANDUM FROM GAO RE CONTRACTS AWARDED UNDER "PHILADELPHIA PLAN"

Information on file in the General Accounting Office indicates that four contracts containing the revised Philadelphia Plan have already been awarded. One of these contracts was awarded to Bristol Steel and Iron Works, Inc., in the amount of $3,986,200, as low bidder for furnishing and erecting structural steel at Children's Hospital in Philadelphia.

The remaining three contracts were for general construction work, mechanical work, and electrical work in connection with an addition to the Law School at Villanova University. The contract for general construction work was awarded to Palladino-Fleming Company as low bidder at $988,100. However, the low bids submitted by Kirk Plumbing and Heating Corporation on the mechanical work and by Robinson Electrical Company, Inc., on the electrical work, in amounts of $252,000 and $154,960, respectively, were rejected for failure to offer to comply with the Plan. Contracts for both types of work were thereafter awarded to the second lowest bidder, The Gerngross Corporation, at its bid prices of $168,791 for electrical work and $253,800 for mechanical work, or $15,631 more than the low bids.

Both the Children's Hospital and Villanova University projects are subject to grants of Federal funds by the Department of Health, Education, and Welfare.

QUESTIONS PREPARED BY SENATOR ROBERT C. BYRD AND SUBMITTED TO THE COMPTROLLER GENERAL AND THE ANSWERS THERETO:

Question. Why should we give the Comptroller General all of this power?

Answer. This provision gives the Comptroller General no additional power whatsoever. It is merely a confirmation of the authority given the Comptroller General by the Budget and Accounting Act of 1921. 31 U.S.C. 74 provides, and I quote:

"Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government."

This very question—that is, the finality of the Comptroller General's decision—came up during the debate preceding the 1921 Act. Let me read two of the statements made by Chairman James W. Good during those 1919 hearings:

"If he (the Comptroller) is allowed to have his decisions modified or changed by the will of an Executive—Mr. Good said—then we might as well abolish the office."

Mr. Good also observed:

"There ought to be an independent body, independent of the Executives, with an official who could say, 'This appropriation can or cannot be used for this purpose'."

Congress took care of this point by enacting the provision of the Budget and Accounting Act I just quoted.

Question. Does this provision give the Comptroller General any additional authority over expenditures which he does not already have today?

Answer. No, it does not. This provision only applies to those activities where the Comptroller General has the authority to settle the accounts of the accountable officers and to make binding decisions. It does not include Government activities which have been excluded from the Comptroller General's authority. Examples of the latter are: jurisdiction over Internal Revenue assessments and refunds, veterans' compensation payments, and the expenditures of Government corporations.

Question. Just what did the Attorney General say which conflicts with the authority of the Comptroller General?

Answer. The Attorney General, in an opinion to the Secretary of Labor, not only upheld the action of the Secretary of Labor but went on to say, and I quote:

"I hardly need to add that the conclusions expressed herein may be relied on by your Department and other contracting agencies and their accountable officers in the administration of Executive Order No. 11246."

This, in effect, tells the agencies to ignore the opinion of the Comptroller General. Now, where will this lead? If this position is allowed to stand, it will be used in other cases, and Congress might as well forget about trying to exercise its Constitutional authority.

Question. Why not let the Comptroller General take a matter to court when there is a difference between his office and the Executive Branch of the Government?

Answer. Congress has only authorized the Department of Justice, and a few other agencies, to handle litigation involving the United States. The Comptroller General has not been granted this authority.

As a result, in any case involving one of his decisions which goes to court, the Comptroller General must be represented by the Attorney General. Obviously, where there is a difference between the Attorney General and the Comptroller General, certainly the views of the Comptroller General would not be advocated by the Attorney General.

Question. What is the legal authority for the "Philadelphia Plan"?

Answer. The "Philadelphia Plan" was issued under the authority of Executive Order No. 11246, which requires affirmative action programs to be taken to assist minority groups. The Executive Order does not spell out the details of the "Philadelphia Plan". That was done by the Secretary of Labor. The Comptroller General has not questioned the authority of the President to issue the Executive Order. He has questioned the implementation of the Executive Order by the Department of Labor through the "Philadelphia Plan".

Question. Isn't what is at issue here is the power of the President to issue Executive Orders relative to the hiring of members of minority groups?

Answer. The power of the President to issue Executive Orders is not at issue. The issue here is the legality of the implementation of an Executive Order and not the Presidential power to issue the Executive Order. In fact, the Comptroller General has recognized the power of the President to issue the order. However, he is of the opinion that the "Plan" issued under the order violates the Civil Rights Act of 1964.

Question. When the Civil Rights Act of 1964 was being considered, was it intended to cover situations such as the "Philadelphia Plan"?

Answer. Section 703(j) of the Civil Rights Act of 1964 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 subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group *on account of an imbalance which may exist with respect to the total number or percentage of persons* of any race, color, religion, sex, or national origin employed by 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 of 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." (Emphasis added.)

While the legislative history of the Civil Rights Act is replete with statements by sponsors of the legislation that Title VII prohibits the use of race or national origin as a basis for hiring, we believe a reference to a few of such clarifying explanations will suffice to further show the specific intent of Congress in such respect when enacting that title. At page 6549, Volume 110, Part 5, of the Congressional Record, the following explanation by Senator Humphrey is set out:

"* * * As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII.

"The able Senators in charge of title VII (Mr. Clark and Mr. Case) will comment at greater length on this matter.

"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." (Emphasis added.)

In an interpretative memorandum of Title VII submitted jointly by Senator Clark and Senator Case, floor managers of that legislation in the Senate, it is stated (page 7213, Volume 110, Part 6, Congressional Record):

"With the exception noted above, therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

"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 group in the work force may be a relevant factor in determining whether in a given case a 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.

"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" (Italic added.)

At page 7218 of Volume 110 the following objections, which had been raised during debate to the provisions of Title VII, and answers thereto by Senator Clark are printed:

"Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.

"Answer: 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.

* * * * *

"Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

"Answer: Quotas are themselves discriminatory."

While, as indicated above, we believe that the provisions of the Plan affecting employers who hire through unions conflict with section 703(j) of Title VII, and that the above statement by Senator Humphrey further indicates that the act was not intended to affect valid collective bargaining agreements, we further believe that the appropriate direction of any administrative action to be taken where it is the policy of a union to refer only white workers to employers on Federal or federally assisted construction is indicated in the following question and answer set forth in the interpretative memorandum by Senator Clark and Senator Case (page 7217, Volume 110):

"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? If the hiring hall sends only white males is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.

"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 whites, he is not guilty of discrimination—but the union hiring hall would be."

Question. What is the real distinction between the word, "quota", and the word, "goals", insofar as the "Philadelphia Plan" is concerned?

Answer. First, let me say that I think everyone agrees that "quotas" are illegal in that they are discriminatory. Now, when you require a contractor to agree to meet a "goal" of minority group workers and threaten a penalty, such as possible contract cancellation and debarment from future Government work unless he can show that he has made every good faith effort to meet his "goal", then the distinction between a "goal" and a "quota" is lost.

As the Comptroller General stated in his opinion of August 5, 1969, the question of whether the "Philadelphia Plan" is a "quota system" or a "goal system" is largely a matter of semantics. This argument 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.

Question. What is the legal authority for the Attorney General to issue a binding opinion in which the Attorney General states that the Department of Labor and other agencies may rely on his opinion in requiring contractors to meet the hiring provisions of the revised "Philadelphia Plan"?

Answer. The Attorney General is required to give advice to the heads of the Executive departments. However, there is no provision of law that they are binding but, of course, the Executive departments may feel that they should abide by the Attorney General's opinions. With reference to the advice furnished by the Attorney General that his conclusions could be relied on by the Labor Department and other contracting agencies in the administration of Executive Order No. 11246, such advice clearly conflicts with the Budget and Accounting Act of 1921, which gives the Comptroller General authority to decide on the legality of expenditures and makes his decisions final and conclusive upon the Executive Branch of the Government.

Question. The Comptroller General stated that the General Accounting Office was not opposed to equal employment opportunities for minority groups. Since the Civil Rights Act of 1964, Executive Order No. 11246, and the "Philadelphia Plan" all seek to achieve this goal, why is section 904 needed at this time?

Answer. The Comptroller General has made it quite clear that he is not against greater opportunities for minority groups. In fact, none of us here are. The real issue is whether the Executive Branch can take actions to achieve this objective which conflict with laws enacted by the Congress. The Comptroller General, as well as many others, believe that the "Philadelphia Plan" does conflict with Title VII of the Civil Rights Act.

The need for section 904, in my opinion, is best illustrated by a paragraph contained in the Committee report on this provision, and I quote:

"The committee wishes to emphasize that the basic issue here is the constitutional authority of the Congress itself. It must be further emphasized that the Congress has delegated certain of its constitutional authority to the Comptroller General alone. As long as such delegaton exists, it must be complete, and not be allowed to be eroded by the executive branch. Therefore the committee strongly recommends the adoption of section 904."

Question. Since the Civil Rights Act was designed to assist black people and the "Philadelphia Plan" is aimed at that objective, why is there objection to it?

Answer. The Comptroller General has made it quite clear that he is not against greater opportunities for minority groups. However, he believes that actions taken by the Executive Branch in achieving this objective must be in accord with the laws enacted by Congress. He is of the opinion, after careful research of the plan and of the Civil Rights Act of 1964, that the plan is in conflict with Title VII of the Act and is therefore unauthorized. It is not a question of helping the black people, but a question of helping them in a way which does not conflict with the laws passed by Congress and the Constitutional power of Congress itself.

Question. Why can't this matter be put off until early next Session? What would be the adverse effect of delay?

Answer. One of the cases presently involved is the question of the legality of the "Philadelphia Plan." The Comptroller General has found the plan to be in violation of the Civil Rights Act of 1964. The Attorney General thinks otherwise, and has advised the Department of Labor to go ahead with the plan. I understand that four contracts containing the "Philadelphia Plan" have already been awarded in the Philadelphia area. Also, I understand that the Department of Labor plans to extend the plan to other areas. Also, the Secretary of Transportation has adopted the "Philadelphia Plan" procedures in the awarding of highway construction contracts. Any delay in meeting this issue would allow expenditures to be made which the Comptroller General has found to be illegal. The longer Congress waits in acting on this matter, the deeper we become involved, and a precedent is being firmed up for the Executive Branch, acting on advice of the Attorney General, to in effect "call the shots" on Government expenditures, rather than the Comptroller General, the agent of Congress, exercising his clear authority under the Budget and Accounting Act of 1921.

LETTER TO SENATOR ROBERT C. BYRD FROM COMPTROLLER GENERAL AND ATTACHMENTS THERETO

DECEMBER 2, 1969.

HON. ROBERT C. BYRD,
Chairman, Subcommittee on Deficiencies and Supplementals, Committee on Appropriations, U.S. Senate.

DEAR MR. CHAIRMAN: I want to bring a matter to your attention which I think is of utmost importance to the Congress and to the General Accounting Office. This involves

the "Philadelphia Plan" promulgated by the Department of Labor to increase the number of minority group workers in certain construction trades.

The basic facts are (1) the Department of Labor issued an order requiring that major construction contracts in the Philadelphia area, which are entered into or financed by the United States, include commitments by contractors to goals of employment of minority workers in specified skilled trades; (2) by a decision dated August 5, 1969, advised the Secretary of Labor that I considered the Plan to be in contravention of the Civil Rights Act of 1964 and would so hold in passing upon the legality of the expenditure of funds under contracts made subject to the Plan; and (3) the Attorney General on September 22, 1969, advised the Secretary of Labor that the Plan is not in conflict with the Civil Rights Act; that it is authorized under Executive Order No. 11246, and that it may be enforced in awarding Government contracts.

On the basis of the Attorney General's Opinion, the Department of Labor has proceeded with the Plan in the Philadelphia area, and it is planning to go ahead in several other metropolitan areas. Also, we understand that the Secretary of Transportation has adopted the "Philadelphia Plan" procedures in the awarding of highway construction contracts.

Senator Ervin, as Chairman of the Subcommittee on Separation of Powers of the Senate Judiciary Committee, held hearings on this controversy in October of this year, and I understand he is sending a letter to the Senate Appropriations Committee suggesting to the Committee that it consider an appropriation bill limitation to prevent the Plan from being carried out in the Philadelphia area and from being placed in effect in other areas.

I want to make it clear that the General Accounting Office is not against greater opportunities for minority groups. However, we believe that actions taken by the Executive Branch in achieving this objective, must be in accord with the laws enacted by the Congress. As stated in our opinion of August 5, 1969, we believe that the "Philadelphia Plan" is in conflict with Title VII of the Civil Rights Act of 1964 and is therefore unauthorized.

The Attorney General in his opinion of September 22, 1969, concluded with a statement that the contracting agencies and their accountable officers could rely on his opinion. Considering that the sole authority claimed for the Plan ordered by the Labor Department is the Executive order of the President, it is quite clear that the Executive Branch of the Government is asserting the power to use Government funds in the accomplishment of a program not authorized by Congressional enactment, upon its own determination of authority and its own interpretation of pertinent statutes, and contrary to an opinion by the Comptroller General to whom the Congress has given the authority to determine the legality of expenditures of appropriated funds, and whose actions with respect thereto were decreed by the Congress to be "final and conclusive upon the Executive Branch of the Government." We believe the actions of officials of the Executive Branch in this matter present such serious challenges to the authority vested in the General Accounting Office by the Congress as to present a substantial threat to the maintenance of effective legislative control of the expenditure of Government funds.

The opinion of the Attorney General and the announced intention of the Labor Department to extend the provisions of the Plan to other major metropolitan areas can only create such widespread doubt and confusion in the construction industry and in the labor groups involved (which may also be shared to a considerable extent by the Government's contracting and fiscal officers) as to constitute a major obstacle to the orderly prosecution of Federal and federally assisted construction. We further believe there is a definite possibility that, faced with a possibility of not being able to obtain prompt payment under contracts for such work as well as the probability of labor difficulties resulting from their efforts to comply with the Plan, many potential contractors will be reluctant to bid. Of course, if this occurs the Plan will result in restricting full and free competition as required by the procurement laws and regulations. Also, those who do bid will no doubt consider it necessary to include in their bid prices substantial contingency allowances to guard against loss.

In view of the situation I have outlined, I urge that the Senate Appropriations Committee give serious consideration to including in the Supplemental Appropriation Bill, 1970, which is now pending before the Committee, a limitation on the use of funds to finance any contract requiring a contractor or subcontractor to meet, or to make every effort to meet, specified goals of minority group employees. Language to accomplish this request is enclosed for your consideration.

I am also enclosing a copy of my decision of August 5, 1969; a copy of the Attorney General's opinion of September 22, 1969; a copy of Senator Ervin's statement of October 27, 1969; a copy of my statement of October 28, 1969, before the Subcommittee on Separation of Powers of the Senate Judiciary Committee; a copy of an article by James E. Remmert, which appeared in the November 1969, issue of the American Bar Association Journal, entitled "Executive Order 11246: Executive Encroachment," and copies of recent letters to me from Senator Ervin, Senator Russell, Senator McClellan, Senator Randolph, Senator Jordan, and Congressman Cramer. In connection with the latter expression of views, I would point out that there are other members of the Senate and of the House who support the Plan.

We are available to discuss this problem with you or the Appropriations Committee at any time.

Sincerely,

ELMER B. STAATS,
Comptroller General of the United States.

OPINION OF COMPTROLLER GENERAL RE PHILADELPHIA PLAN

AUGUST 5, 1969.

DEAR MR. SECRETARY: We refer to an order issued June 27, 1969, to the heads of all agencies by the Assistant Secretary for Wage and Labor Standards, Department of Labor. The order announced a revised Philadelphia Plan (effective July 18, 1969) to implement the provisions of Executive Order 11246 and the rules and regulations issued pursuant thereto which require a program of equal employment opportunity by contractors and subcontractors on both Federal and federally assisted construction projects.

Questions have been submitted to our Office by members of Congress, both as to be propriety of the revised Philadelphia Plan and the legal validity of Executive Order 11246 and of various implementing regulations issued thereunder both by your Department and by other agencies. In view of possible conflicts between the requirements of the Plan and the provisions of Titles VI and VII of the Civil Rights Act of 1964, Pub. L. 88-352, discussions have been held between representatives of our Office, your Department, and the Department of Justice, and your Solicitor has furnished to us a legal memorandum in support of the authority for issuance of the Executive Order as well as the revised Philadelphia Plan promulgated thereunder.

The memorandum presents the following points in support of the legal propriety of the Plan:

I. The Executive has the authority and the duty to require employers who do business with the Government to provide equal employment opportunity.

II. The passage of the Civil Rights Act of 1964 did not deprive the President of the authority to regulate, pursuant to Executive Orders, the employment practices of Government contractors.

III. The revised Philadelphia Plan is lawful under the Federal Government's procurement policies, is authorized under Executive Order 11246 and the implementing regulations, and is lawful under Title VII of the Civil Rights Act of 1964.

Without conceding the validity of all of the arguments advanced under points I and II, we accept the authority of the President to issue Executive Order 11246, and the contention that the Congress in enacting the Civil Rights Act did not intend to deprive the President of all authority to regulate employment practices of Government contractors.

The essential questions presented to this Office by the revised Philadelphia Plan, however, are (1) whether the Plan is compatible with fundamentals of the competitive bidding process as it applies to the awarding of Federal and federally assisted construction contracts, and (2) whether impositions of the specific requirements set out therein can be regarded as a legally proper implementation of the public policy to prevent discrimination in employment, which is declared in the Civil Rights Act and is inherent in the Constitution, or whether those requirements so far transcend the policy of nondiscrimination, by making race or national origin a determinative factor in employment, as to conflict with the limitations expressly imposed by the act or with the basic constitutional concept of equality.

Our interest and authority in the matter exists by virtue of the duty imposed upon our Office by the Congress to audit all expenditures of appropriated funds, which necessarily involves the determination of the legality of such expenditures, including the legality of contracts obligating the Government to payment of such funds. Authority has been specifically conferred on this Office to render decisions to the heads of departments and agencies of the Government, prior to the incurring of any obligations, with respect to the legality of any action contemplated by them involving expenditures of appropriated funds, and this authority has been exercised continuously by our Office since its creation whenever any question as to the legality of a proposed action has been raised, whether by submission by an agency head, or by complaint of an interested party, or by information coming to our attention in the course of our other operations.

The incorporation into the terms of solicitations for Government contracts of conditions or requirements concerning wages and other employment conditions or practices has been a frequent subject of decisions by this Office, many of which will be found enumerated in our decision at 42 Comp. Gen. 1. The rule invariably applied in such cases has been that any contract conditions or stipulations which tend to restrict the full and free competition required by the procurement laws and regulations are unauthorized, unless they are reasonably requisite to the accomplishment of the legislative purposes of the appropriation involved or other law. Furthermore, where the Congress in enacting a statute covering the subject matter of such conditions has specifically prohibited certain actions, no administrative authority can lawfully impose any requirements the effect of which would be to contravene such prohibitions.

It is within the framework of these principles that we consider the order promulgating the revised Philadelphia Plan.

The Assistant Secretary's order states the policy of the Office of Federal Contract Compliance (OFCC) that no contracts or subcontracts shall be awarded for Federal and federally assisted construction in the Philadelphia, Pennsylvania, area (including the counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia) on projects whose cost exceeds $500,000 unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitations for bids, in trades utilizing the seven classifications of employees specified therein.

The order further relates that enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 has posed special problems in the construction trades; that contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construction craft unions as their prime or sole source of their labor; that collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; that even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working the specified classifications are referred to the jobs by the unions; and that because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

It is also stated that because of the exclusionary practices of labor organizations, there traditionally have been only a small number of Negroes employed in the seven trades, and that unions in these trades in the Philadelphia area 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. The OFCC found, therefore, that special measures requiring bidders to commit themselves to specific goals of minority manpower utilization were needed to provide equal employment opportunity in the seven trades.

Section 7 of the Assistant Secretary's order of June 27 indicates that the revised Plan is to be implemented by including in the solicitation for bids a notice substantially similar to one labeled "Appendix" which is attached to the order. Such notice would state the ranges of minority manpower utilization (as determined by the OFCC Area Coordinator in cooperation with the Federal contracting or administering agencies in the Philadelphia area) which would constitute an acceptable affirmative action program, and would require the bidder to submit his specific goals in the following form:

Identification of trade

Est. total employment for the trade on the contract

Number of minority group employees

Participation in a multi-employer program approved by OFCC would be acceptable in lieu of a goal for the trade involved in such program.

The notice also provides that the contractor will obtain similar goals from his subcontractors who will perform work in the involved trades, and that "Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 6 of the Order * * *." Since Section 6 of the order contains nothing relative to "failure," we assume the intended reference is to Section 8, which reads as follows:

"Post-award compliance

"a. Each agency shall review contractors' and subcontractors' employment practices during the performance of the contract. If the goals set forth in the affirmative action program are being met, the contractor or subcontractor will be presumed to be in compliance with the requirements of Executive Order 11246, as amended, unless it comes to the agency's attention that such contractor or subcontractor is not providing equal employment opportunity. 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 performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions. Where the agency finds that the contractor or subcontractor has failed to comply with the requirements of Executive Order 11246, the implementing regulations and its obligations under its affirmative action program, the agency shall take such action and impose such sanctions as may be appropriate under the Executive Order and the regulations. Such noncompliance by the contractor or subcontractor shall be taken into consideration by Federal agencies in determining whether such contractor or subcontractor can comply with the requirements of Executive Order 11246 and is therefore a 'responsible prospective contractor' within the meaning of the Federal procurement regulations.

"b. It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in Federally-involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders."

It is our opinion that the submission of goals by the successful bidder would operate to make the requirement for "every good faith effort" to attain such goals a part of his contractual obligation upon award of a contract. The provisions of Section 8 of the order would therefore become a part of the contract specifications against which the contractor's performance would be judged in the event he fails to attain his stated goals, just as much as his stated goals become a part of the contract specifications against which his performance will be judged in the event he does attain his stated goals.

As indicated at page 4 of the order, the original Philadelphia Plan was suspended because it contravened the principles of competitive bidding. Such contravention resulted from the imposition of requirements on bidders, after bid opening, which were not specifically set out in the solicitation. The present statement of a specific numerical range into which a bidder's affirmative action goals must fall is apparently designed to meet, and reasonably satisfies, the requirement for specificity.

However, we have serious doubts covering the main objective of the Plan, which is to require bidders to commit themselves to make every good faith effort to employ specified numbers of minority group tradesmen in the performance of Federal and federally assisted contracts and subcontracts.

The pertinent public policy with respect to employment practices of an employer which may be regarded as constituting unlawful discrimination is set out in Titles VI and VII of the Civil Rights Act, Title VI, concerning federally assisted programs, provides in section 601 (42 U.S.C. 2000d) that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Section 703(a) (42 U.S.C. 2000e–2(a)) of Title VII states the public policy concerning employer employment practices by declaring it to be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges 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. Section 705(a) (42 U.S.C. 2000e–4(a)) creates the Equal Employment Opportunity Commission, and section 713(a), Rules and Regulations (42 U.S.C. 2000e–12(a)), provides that the Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of that title.

The public policy regarding labor organization practices is delineated in section 703(c) (42 U.S.C. 2000e–2(c)) wherein it is stated that it shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of that section.

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 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.

We view the imposition of such a requirement on employers engaged in Federal or federally assisted construction to be in conflict with the intent as well as the letter of the above provisions of the act which make it an unlawful employment practice to use race or national origin as a basis for employment. Further, we believe that requiring an employer to abandon his customary practice of hiring through a local union because of a racial or national origin imbalance in the local unions and, under the threat of sanc-

tions, to make "every good faith effort" to employ the number of minority group tradesmen specified in his bid from sources outside the union if the workers referred by the union do not include a sufficient number of minority group personnel, are in conflict with section 703(j) of the act (42 U.S.C. 2000e–2(j)) which provides as follows:

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group *on account of an imbalance which may exist with respect to the total number or percentage of persons* of any race, color, religion, sex, or national origin employed by 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 of 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." (Italic added.)

While the legislative history of the Civil Rights Act is replete with statements by sponsors of the legislation that Title VII prohibits the use of race or national origin as a basis for hiring, we believe a reference to a few of such clarifying explanations will suffice to further show the specific intent of Congress in such respect when enacting that title. At page 6549, Volume 110, Part 5, of the Congressional Record, the following explanation by Senator Humphrey is set out:

"* * * As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII.

"The able Senators in charge of title VII (Mr. Clark and Mr. Case) will comment at greater length on this matter.

"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." (Italic added.)

In an interpretative memorandum of Title VII submitted jointly by Senator Clark and Senator Case, floor managers of that legislation in the Senate, it is stated (page 7213, Volume 110, Part 6, Congressional Record):

"With the exception noted above, therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

"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 group in the work force may be a relevant factor in determining whether in a given case a 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.

"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" (Italic added.)

At page 7218 of Volume 110 the following objections, which had been raised during debate to the provisions of Title VII, and answers thereto by Senator Clark are printed:

"Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.

"Answer: 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.

* * * * *

"Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

"Answer: Quotas are themselves discriminatory."

While, as indicated above, we believe that the provisions of the Plan affecting employers who hire through unions conflict with section 703(j) or Title VII, and that the above statement by Senator Humphrey further indicates that the act was not intended to affect valid collective bargaining agreements, we further believe that the appropriate direction of any administrative action to be taken where it is the policy of a union to refer only white workers to employers on Federal or federally assisted construction is indicated in the following question and answer set forth in the interpretative memorandum by Senator Clark Case (page 7217, Volume 110):

"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? If the hiring hall sends white males is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.

"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 whites, he is not guilty of discrimination—but the union hiring hall would be."

We believe it is especially pertinent to note that the "Findings" stated in section 4 of the order of June 27 as the basis for issuance thereof, consist almost entirely of a recital of practices of *unions,* rather than of contractors or employers. Thus, in attempting to place upon the contractors the burden of overcoming the effects of union practices, the order appears to evince a policy in conflict with the interpretation of the legislation as stated by its sponsors.

In this connection your Solicitor's memorandum contends that the principle of imposing affirmative action programs on contractors for employment of administratively determined numbers of minority group tradesmen, when such programs are for the purpose of correcting the effects of discrimination by unions prior to the Civil Rights Act of 1964, is supported by the decisions in *Quarles* v. *Philip Morris,* 279 F. Supp. 505; *U.S.* v. *Local 189, U.P.P. and Crown Zellerbach Corp.,* 282 F. Supp 39; and *Local 53 of Heat and Frost Insulators* v. *Vogler,* 407 F. 2d 1047. We find, however, that decisions of the courts have differed materially in such respect; see *Griggs* v. *Duke Power,* 292 F. Supp. 243; *Dobbins* v. *Local 212,* 292 F. Supp. 413; and *U.S.* v. *Porter,* 296 F. Supp. 40.

Additionally, your Solicitor's memorandum cites cases involving affirmative desegregation of school faculties (*U.S.* v. *Jefferson County,* 372 F. 2d 836 (1966), and *U.S.* v. *Montgomery County,* 289 F. Supp. 647, affirmed 37 LW 4461 (1969) in particular). However, there is a clear distinction between the factual and legal situations involved in those cases and the matter at hand. The cited school decisions required reallocation of portions of existing school faculties in implementation of the requirement for desegregation of dual public school systems, which had been established on the basis of race, as such requirement was set out in the 1954 and 1955 decisions of the Supreme Court in the *Brown* v. *Board of Education cases* (347 U.S. 483 and 349 U.S. 294). In the *Brown* cases desegregation of faculties was regarded as one of the keys to desegregation of the schools, and in the *Jefferson County* case the court read Title VI of the Civil Rights Act as a congressional mandate for a change in pace and method of enforcing the desegregation of racially segregated school systems, as required by the *Brown* decisions.

The requirements of the revised Philadelphia Plan do not involve a comparable situation. 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. The distinction becomes more apparent when it is recognized that the order of June 27 pertains to *hiring* practices of an employer. Hiring was not at issue in the school cases, and those cases do not purport to hold that a school district must, or even may, correct a racial imbalance in its faculty by affirmatively requiring that a stated proportion of its teachers shall be hired on

the basis of race. To the contrary, the court recognized in its decision in the *Jefferson County* case (page 884) that the "mandate of Brown * * * forbids the discriminatory consideration of race in faculty selection," and such consideration is expressly prohibited by section VIII of the court's decree in Appendix A of that case.

The recital in section 6b.2 of the order (and in the prescribed form of notice to be included in the invitation) that the contractor's commitment "is not intended and shall not be used to discriminate against any qualified applicant or employee" is in our opinion the statement of a practical impossibility. If, for example, a contractor requires 20 plumbers and is committed to a goal of employment of at least five from minority groups, every nonminority applicant for employment in excess of 15 would, solely by reason of his race or national origin, be prejudiced in his opportunity for employment, because the contractor is committed to make every effort to employ five applicants from minority groups.

In your Solicitor's memorandum it is argued that the "straw man" sometimes used in opposition to the Plan is that it "would require a contractor to discriminate against a better qualified white craftsman in favor of a less qualified black." We believe this obscures the point involved, since it introduces the element of skill or competence, whereas the essential question is whether the Plan would require the contractor to select a black craftsman over an *equally* qualified white one. We see no room for doubt that the contractor in the situation posed above would believe he would be expected to employ the black applicant, at least until he had reached his goal of five nonminority group employees, and that if he failed to achieve that goal his employment of a white craftsman when an equally qualified black one was available could be considered a failure to use "every good faith effort." In our view such preferential status or treatment would constitute discrimination against the white worker solely on the basis of color, and therefore would be contrary to the express prohibition both of the Civil Rights Act and of the Executive order.

It is also contended in your Solicitor's memorandum that substantial judicial support for administrative affirmative action programs requiring commitments for contractors for employment of specified numbers of minority group tradesmen is contained in the decision of the Ohio Supreme Court in *Weiner* v. *Cuyahoga Community College District,* 19 Ohio St. 2d — (July 2, 1969). That decision upheld the award of a federally assisted construction contract to the second low bidder, as a proper action in implementation of the policies of the Civil Rights Act of 1964, after approval of award to the low bidder was withheld by the Federal agency involved for failure of the low bidder to submit an affirmative action program (including manning tables for minority group tradesmen) which was acceptable to that agency pursuant to an OFCC plan established for Cleveland, Ohio.

While the decision in *Weiner* case (which was a majority opinion by five of the justices with dissenting opinions by two) has some bearing on the issues here involved, since the decision appears to be based in substantial part on the conflicting opinions of Federal courts cited earlier we do not believe the decision can be considered as controlling precedent for the validity of the revised Philadelphia Plan.

In support of the required procedure, which is admitted at page 33 of the Solicitor's memorandum to require contractors to take actions which are based on race, the memorandum relies upon the acceptance by the courts, in school, housing and voting cases, of the use of race as a valid consideration in fashioning relief to overcome the effects of past discrimination. Aside from other distinctions, we believe there is a material difference between the situation in those cases, where enforcement of the rights of the minority individuals to vote or to have unsegregated educational or housing facilities does not deprive any member of a majority group of his rights, and the situation in the employment field, where the hiring of a minority worker, as one of a group whose number is limited by the employer's needs, in preference to one of the majority group precludes the employment of the latter. In other words, in those cases there is present no element of reverse discrimination, but only the correction of the illegal denial of minority rights, leaving the majority in the full exercise and enjoyment of their corresponding rights.

In addition it may be pointed out that in those cases the judicial relief ordered is directed squarely at the parties responsible for the denial of rights, and we therefore do not consider them as supporting requirements to be complied with by contractors who, under the findings of the Plan, are themselves more the victims than the instigators of the past discriminatory practices of the labor unions. Moreover, in the court cases the remedies are applied after judicial determination that effective discrimination is in fact being practiced or fostered by the defendants, whereas the Plan is a blanket administrative mandate for remedial action to be taken by all contractors in an attempt to cure the evils resulting from union actions, without specific reference to any past or existing actions or practices by the contractors.

While it may be true, as stated in the Plan, "that special measures are required to provide equal employment opportunity in these seven trades," it is our opinion that imposition of a responsibility upon Government contractors to incur additional expenses in affirmative action programs which are directed to overcoming the present effects of past discrimination by labor unions, would require the expenditure of appropriated funds in a manner not contemplated by the Congress. If, as stated in the Plan, discrimination in referral is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, it is our opinion that the remedies provided by the Congress in those acts should be followed. See also in this connection section 207 of Executive Order 11246.

While, as indicated in the foregoing opinions and in your Solicitor's memorandum, the President is sworn to "preserve, protect and defend the Constitution of the United States," we question whether the executive departments are required, in the absence of a definitive and controlling opinion by the Supreme Court of the United States, to assess the relative merits of conflicting opinions of the lower courts, and embark upon a course of affirmative action, based upon the results of such assessment, which appears to be in conflict with the expressed intent of the Congress in duly enacted legislation on the same subject.

In this connection, it should be noted that, while the phrase "affirmative action" was included in the Executive order (10925) which was in effect at the time Congress was debating the bills which were subsequently enacted as the Civil Rights Act of 1964, no specific affirmative action requirements of the kind here involved had been imposed upon contractors under authority of that Executive order at that time, and we therefore do not think it can be successfully contended that Congress, in recognizing the existence of the Executive order and in failing to specifically legislate against it, was approving or ratifying the type or methods of affirmative action which your Department now proposes to impose upon contractors.

We recognize that both your Department and the Department of Justice have found the Plan to be legal and we have given most serious consideration to their positions. However, until the authority for any agency to impose or require conditions in invitations for bids on Federal or federally assisted construction which obligate bidders, contractors, or subcontractors, to consider the race or national origin of their employees or prospective employees for such construction, is clearly and firmly established by the weight of judicial precedent, or by additional statutes, we must conclude that conditions of the type proposed by the revised Philadelphia Plan are in conflict with the Civil Rights Act of 1964, and we will necessarily have to so construe and apply the act in passing upon the legality of matters involving expenditures of appropriated funds for Federal or federally assisted construction projects.

In this connection it is observed that by section 705(d) of the act, Congress charges the Equal Employment Opportunity Commission with the specific responsibility of making reports to the Congress and to the President on the cause of and means of eliminating discrimination and making such *recommendations for further legislation* as may appear desirable. That provision, we believe, not only prescribes the procedure for correcting any deficiencies in the Civil Rights Act, but also shows the intent of Congress to reserve for its own judgment the establishment of any additional unlawful employment practice categories or nondiscrimination requirement, or the imposition upon employers of any additional requirements for assuring equal employment opportunities.

We realize that our conclusions as set out above may disrupt the programs and objectives of your Department, and may cause concern among members of minority groups who may believe that racial balance or equal representation on Federal and federally assisted construction projects is required under the 1964 act, the Executive order, or the Constitution. Desirable as these objectives may be, we cannot agree to their attainment by the imposition of requirements on contractors, in their performance of Federal or federally-assisted contracts, which the Congress has specifically indicated would be improper or prohibited in carrying out the objectives and purposes of the 1964 act.

Sincerely yours,

ELMER B. STAATS,
Comptroller General of the United States.

[Opinion of Attorney General re Philadelphia plan]

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., September 22, 1969.

The HONORABLE, THE SECRETARY OF LABOR:

MY DEAR MR. SECRETARY: You have requested my opinion as to the legality of the Department of Labor's order of June 27, 1969, the Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction.

The Philadelphia Plan has been issued to implement Executive Order 11246 of September 24, 1965, as amended (30 F.R. 12319, 32 F.R. 14303, 34 F.R. 12986), in which the President has directed that Federal Government contracts and federally-assisted construction contracts contain specified language obligating the contractor and his subcontractors not to discriminate in employment because of race, color, religion, sex, or national origin.[1] The Secretary of Labor is responsible

[1] The essential part of the contractor's obligation under this order is:

"The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their

for the administration of Executive Order 11246 and is authorized to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." E.O. 11246, § 201.

Among the undertakings required of contractors by Executive Order 11246 is to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." E.O. 11246, § 202(1). The obligation to take "affirmative action" imports something more than the merely negative obligation not to discriminate contained in the preceding sentence of the standard contract clause. It is given added definition by the Secretary's regulations, which require that contractors develop written affirmative action plans which 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." 41 C.F.R. 60–1.40.

The Department of Labor order of June 27th is based upon stated findings relating to the enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 with respect to the construction trades in the Philadelphia area. The Department of Labor has found that contractors must ordinarily hire a new employee complement for each construction job and that whether by contract, custom, or convenience this hiring usually takes place on the basis of referral by the construction craft unions. The Department of Labor has found further that exclusionary practices on the part of certain of these unions, including a refusal to admit Negroes to membership in unions or in apprenticeship programs, and a preference in work referrals to union members and to those who have worked under union contracts, have resulted in the employment of only a small number of Negroes in the six construction trades in the area affected by the Philadelphia Plan. Accordingly, the Department of Labor has found that special measures were required in the Philadelphia area to provide equal employment opportunity in these six specified construction trades.[2]

The Revised Philadelphia Plan requires that with respect to construction contracts in the Philadelphia area which are subject to Executive Order 11246 and where the estimated total cost of the construction project exceeds $500,000, each 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 for bids. This standard will be a range of minority manpower utilization for the trades covered by the Plan and will be determined prior to the invitation for bids by the Department's area coordinator on the basis of the extent of minority group participation in the trade, the availability of minority group persons for employment in such trade, and other stated factors. As an alternative to setting such specific goals, the bidder may agree to participate in a multi-employer affirmative action program which has been approved by the Department of Labor's Office of Federal Contract Compliance.

The Plan provides that the contractor's commitment to specific goals "is not intended and shall not be used to discriminate against any qualified applicant or employee," (§ 6(b)(2)). Furthermore, the obligation to meet the goals is not absolute. "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 performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions," (§ 8(a)).

In response to Congressional inquiries the Comptroller General has, in his letter to you of August 5, 1969, expressed the opinion that the provision of the Philadelphia Plan for commitment to specific goals for minority group participation is in conflict with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and consequently unlawful, and he has indicated further that such illegality may affect the lawfulness of expenditures of appropriated funds under contracts entered into under the terms and procedures of the Philadelphia Plan. *Cf.* 42 Comp. Gen. 1 (1962).

I have reached a contrary result, and conclude that the Revised Philadelphia Plan is not in conflict with any provision of the Civil Rights Act, that it is a lawful implementation of the provisions of Executve Order 11246, and that it may be enforced in accordance with its terms in the award of Government contracts.

Before undertaking detailed analysis of the contentions involved, it is important to consider the functions of the Executive order and the Philadelphia Plan, as well as the provisions of the Plan itself. Executive Order 11246 is a lawful exercise of the Federal Government's authority to determine the terms and conditions on which it is willing to enter into contracts.[3] That order lays down a rule which governs only those employers who enter into contracts with the United States, construction contracts financed with Federal assistance, or subcontracts arising under such Federal or federally-assisted contracts. Neither the order nor the Philadelphia Plan, which implements the order with respect to certain construction contracts, regulates the practices of employers generally. While the power of the Government to determine the terms which shall be included in its contracts is subject to limitations imposed by the Constitution or by acts of Congress, the existence of such power does not depend on an affirmative legislative enactment. In evaluating the Comptroller General's challenge to the Philadelphia Plan on the basis of conflict with Title VII of the Civil Rights Act, it is important to distinguish between those things *prohibited* by Title VII as to all employers covered by that act, and those things which are merely *not required* of employers by that act. The United States as a contracting party may not require an employer to engage in practices which Congress has prohibited. It does not follow, however, that the United States may not require of those who contract with it certain employment practices which Congress has not seen fit to require of employers generally.

The requirements which the Plan would impose on contractors may be briefly summarized.[4] The contractor must

(a) in his proposal set specific goals for minority group hiring within certain skilled trades, which goals must be within the range previously determined to be appropriate by the Secretary;

(b) he must make "every good faith effort" to meet these goals;

(c) but he may not, in so doing, discriminate against any qualified applicant or employee on grounds of race, color, religion, sex or national origin.

If a plan such as this conflicts with Title VII of the Civil Rights Act, its validity concededly cannot be sustained. But in my view no such conflict exists. Section 703(a) of the Civil Rights Act makes it 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."

Nothing in the Philadelphia Plan requires an employer to violate section 703(a). The employer's obligation is to make every good faith effort to meet his goals. A good faith effort does not include any action which would violate section 703(a) or any other provision of Title VII. If the provisions of the Plan were ambiguous on this point, its interpretation would be governed by the principle that "where two constructions of a written contract are possible preference will be given to that which does not result in violation of law," *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686, 691 (1931). However, to remove any doubt the Plan specifies that the contractor's commitment shall not be used to discriminate against any qualified applicant or employee.

Nevertheless, it might be argued—and the Comptroller General appears to take this position—that the obligation to make good faith efforts to achieve particular goals is meaningless if it does not contemplate deliberate efforts on the part of the contractor to affect the racial composition of his work force, that this necessarily involves a commitment "to making race or national origin a factor for consideration in obtaining [his] employees," and that any such action would violate Title VII.

It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an

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race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. * * *." E.O. 11246, § 202(1).

In addition the contractor agrees to furnish required information and reports, to comply with orders and regulations implementing the Executive order, and to include these contractual provisions in subcontracts.

[2] The order of June 27, issued by the Assistant Secretary for Wage and Labor Standards, is reprinted at 115 Cong. Rec. S 8837–39. All of the findings summarized above appear in section 4 of the order, 115 Cong. Rec. S 8838. The order originally extended to seven construction trades, but one trade has been removed from coverage.

[3] The order is generally similar to its predecessor, Executive Order 10925 of March 6, 1961, which, in 42 Ops. A.G. No. 21 (1961), was held to be a valid exercise of presidential authority. See also 40 Comp. Gen. 592 (1961); *Farkas* v. *Texas Instrument, Inc.*, 375 F. 2d 629, 632 (C.A. 5, 1967). The contract compliance program under these Executive orders has received legislative recognition in the Civil Rights Act of 1964, § 709(d), 42 U.S.C. 2000e–8(d), and in subsequent appropriations legislation. The Comptroller General does not challenge the validity of Executive Order 11246, as such, but concludes that the Revised Philadelphia Plan is not a permissible implementation of the order because of an asserted conflict with Title VII of the Civil Rights Act.

[4] I put to one side the bidder's option of participating in an OFCC-approved multi-employer program, since the details of such programs have yet to be worked out and the legality of such programs has not been called into question.

evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria. *Gaston County* v. *United States,* 395 U.S. 285 (1969) (*voting*); *Offermann* v. *Nitkowski,* 378 F. 2d 22 (C.A. 2, 1967) (*schools*); *Local 189, United Papermakers, etc.* v. *United States,* F. 2d —, 60 L.C. ¶9289 (C.A. 5, 1969) (*employment*).

There is no inherent inconsistency between a requirement that each qualified employee and applicant be individually treated without regard to race, and a requirement that an employer make every good faith effort to achieve a certain range of minority employment. The hiring process, viewed realistically, does not begin and end with the employer's choice among competing applicants. The standards he sets for consideration of applicants, the methods he uses to evaluate qualifications, his techniques for communicating information as to vacancies, the audience to which he communicates such information, are all factors likely to have a real and a predictable effect on the racial composition of his work force. Title VII does not prohibit some structuring of the hiring process, such as the broadening of the recruitment base, to encourage the employment of members of minority groups. *Local 189, etc.* v. *United States, supra* at ; see *Offermann* v. *Nitkowski, supra* at 24. The obligation of "affirmative action" imposed pursuant to Executive Order 11246 may require it. 41 C.F.R. 5–12.805–51(b), (c); Matter of Allen-Bradley Co., CCH Empl. Prac. Svce. ¶ 8065 (1968).

Viewed in this light, the example cited in the Comptroller General's opinion is not an argument against the legality of the Plan. The Comptroller General poses the example of a contractor requiring twenty plumbers, with a specified "goal" that five of these plumbers be from minority groups. If the contractor has filled fifteen of these posts with nonminority plumbers, says the Comptroller General, the next white applicant for one of the five vacancies will inevitably be discriminated against by reason of the fact that he is not a member of a minority group. Doubtless a part of the good faith effort required of the contractor to achieve the stated goals would have been to avail himself of manpower sources which might be expected to produce a representative number of minority applicants, so that the situation posed in the Comptroller General's example would arise but infrequently. Yet, quite clearly, if notwithstanding the good faith efforts of the employer such a situation does arise, the qualified nonminority employee may be hired. The fact that the minority employment goal was to this extent not reached would not in itself be sufficient ground for concluding that the contractor had not exerted good faith efforts to reach it.

The Philadelphia Plan addresses itself to a situation in which, according to the Department of Labor's findings, the contractors have in the past delegated an important part of the hiring function to labor organizations by selecting their work force on the basis of union referrals. The referral practices of certain unions, whether or not amounting to violations of Title VII, have in fact contributed to the virtual exclusion of Negroes from employment in certain trades in the Philadelphia area. Continued reliance by contractors on established hiring practices may reasonably be expected to result in continued exclusion of Negroes. The purpose of the Philadelphia Plan is to place squarely upon the contractor the burden of broadening his recruitment base whether within or without the existing union referral system, as he shall determine. The contractor's obligation is phrased primarily in terms of goals; the choice of methods is his, provided only that he does not discriminate against qualified employees or applicants. Unless it can be demonstrated that the hiring goals *cannot* be achieved without unlawful discrimination,[5] I fail to see why the Government is not permitted to require a pledge of good faith efforts to meet them as a condition for the award of contracts.

The Comptroller General argues that inasmuch as Title VII does not require labor organizations to achieve a racial balance in their memberships or in referrals (§ 703(j)), Executive Order 11246 cannot be used to require an employer "to abandon his customary practice of hiring through a local union" even though experience has demonstrated that the union refers very few members of minority groups. I confess I find this argument difficult to follow. Since, as stated above, the obligation of affirmative action comprehends more than bare compliance with Title VII and may under proper circumstances include an obligation on the part of the employer to broaden his recruitbase, the order would be an exercise in futility if the employer may evade this obligation by contracting away his power to perform it. Whether or not the law permits him to accept referrals only from unions which are or may be discriminating,[6] the law does not require him to do so. To comply with his affirmative action obligation an employer may be forced to depart from his customary reliance on union referrals (though this will depend to a great extent on the unions' own response to the Plan), but since the law permits an employer to obtain employees from additional sources, I see no reason why the Government is not free to bargain for his assurance to do so. In other words, the employer may have a right to refuse to abandon his customary hiring practices, but he has no right to contract with the Government on his own terms. *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113 (1940); *Copper Plumbing & Heating Co.* v. *Campbell,* 290 F. 2d 368, 370–71 (C.A. D.C. 1961). Accordingly, I conclude that the Philadelphia Plan is not inconsistent with any provision of Title VII of the Civil Rights Act.

Another argument might be urged against the legality of the Philadelphia Plan. Let it be conceded, this argument runs, that the Government may lawfully require a contractor to take certain forms of affirmative action to increase employment of members of minority groups, and conceded further that on its face the Philadelphia Plan requires no more than legally permissible forms of affirmative action to achieve the goals set by the contractor in response to the bidding invitation. Nevertheless, by stating the contractor's primary obligation in terms of a numerical result, by failing to specify what "good faith efforts" will be acceptable in lieu of the achievement of such result, and by placing upon the contractor who has failed to achieve his "goal" the burden of proving that, in effect, he did all that was legally permissible to meet it, the Government so weights the procedural scales against the nonachieving contractor as to coerce him in fact, if not in law, into discriminating. In other words, although the substance of the contractor's obligation under the Philadelphia Plan may be permissible, the Plan does not provide a fair method for resolving questions regarding compliance. *Cf. Speiser* v. *Randall,* 357 U.S. 513, 520–26 (1958).

This argument appears to me to be premature and speculative at this time. It is true that the Philadelphia Plan might be clearer if it were to state what good faith efforts are expected of contractors. But the general requirements of affirmative action, particularly in the area of recruitment, have been stated elsewhere in regulations, 41 C.F.R. 5–12.805–51(b), (c), and other publications, and there is no reason to believe that the Department of Labor officials administering the Plan would be unwilling to describe to any interested contractor the kind of actions expected of him. In short, I cannot assume that any contractor who desires to participate in good faith in the Philadelphia Plan will be forced, as a practical matter, to choose between noncompliance with his affirmative action obligation and violation of Title VII. If unfairness in the administration of the Plan should develop, it cannot be doubted that judicial remedies are available. *Cf. Copper Plumbing & Heating Co.* v. *Campbell, supra.*

Finally, the Comptroller General appears to suggest that although Title VII contemplated the continued operation of the contract compliance program under Executive orders, nevertheless the substantive provisions of Title VII somehow limit and preempt those of the order. The basis for this conclusion is nowhere explained. There is no question that the Executive order cannot require what Title VII forbids, but as has been pointed out above, the Philadelphia Plan does not seek to do so. The Comptroller General argues further, in effect, that the Executive order can neither require nor forbid actions or practices which Title VII declines to interfere with. This is the inference which must be drawn from the Comptroller General's references to expression in the legislative history of the Civil Rights Act regarding what Title VII would *not* do.[7] But Title VII is not and was not understood by Congress to be the exclusive remedy for racially discriminatory practices in employment, *Local Union No. 12* v. *NLRB,* 368 F. 2d 12, 24 (C.A. 5, 1966), *cert. denied,* 389 U.S. 837 (1967), *rehearing denied,* 389 U.S. 1060 (1968). Nothing in the language or legislative history of that statute suggests that "affirmative action" may not be required of Government contractors under the Executive order above and beyond what the statute requires of employers generally.[8]

It is, therefore, my view that the Revised Philadelphia Plan is legal and that your Department is authorized to require Federal contracting and administering agencies to implement the Plan in accordance with its terms in the award of contracts in the Philadelphia area. E. O. 11246, § § 201, 205. Where a contractor submits a bid which does not comply with the invitation for bids issued pursuant to the Plan, such a bid may be rejected as not responsive. 38 Ops. A. G. 555 (1937); *Graybar Electric Co.* v. *United States,* 90 C. Cls. 232, 244 (1940). I hardly need add that the conclusions expressed herein may be relied on by your Department and other contracting agencies and their accountable

[5] The Plan provides that the goals will be determined with particular attention to the factual situation in each affected trade. Accordingly, there is every reason to assume that the goals will represent an informed administrative judgment of what an effective affirmative action plan may be expected to achieve.

[6] On the facts before me it is impossible to determine whether the present practices of the unions affected by the Philadelphia Plan are in violation of Title VII and such a determination is not necessary to the resolution of the question of the legality of the Plan.

[7] On the view I take of the question before me, it is not necessary to consider the correctness of all the Comptroller General's conclusions regarding the scope of Title VII, and my failure to do so implies neither agreement nor disagreement with such conclusions.

[8] In the one instance where the statute deals with the overlap of Title VII and the Executive order, reporting requirements, it is the order and not the statute which is accorded priority. § 709(d).

officers in the administration of Executive Order 11246. 28 U.S.C. 512, 516; 37 Ops. A. G. 562, 563 (1934); 38 Ops. A. G. 176, 178–81 (1935); *Smith* v. *Jackson,* 241 Fed. 747, 773 (C.A. 5, 1917), *aff'd,* 246 U.S. 388 (1918).

Sincerely,

JOHN N. MITCHELL,
Attorney General.

OPENING STATEMENT OF SENATOR SAM J. ERVIN, JR., CHAIRMAN, SUBCOMMITTEE ON SEPARATION OF POWERS OF THE COMMITTEE ON THE JUDICIARY, HEARINGS ON ADMINISTRATIVE AGENCIES: THE DEPARTMENT OF LABOR'S "PHILADELPHIA PLAN," OCTOBER 27, 1969

Today, the Subcommittee on Separation of Powers begins two days of hearings on the Department of Labor's revised Philadelphia Plan, a controversial effort to raise the percentage of minority group members working in six Philadelphia area construction trades.

Over the past three months, the Philadelphia Plan has become the focal point of pressures and discontent which reach far into American society. At this moment, the Labor Department and the Comptroller General of the United States are in complete disagreement about the Plan's legality. The Comptroller General, who believes the Plan conflicts with Title VII of the 1964 Civil Rights Act, has refused to allow any government funds to be spent under the Plan. The Labor Department, supported by the Attorney General, contends that the Plan is legal and intends to implement it in nine other cities, with or without the Comptroller General's approval.

During the next two days, our purpose will not be to debate the wisdom of the Philadelphia Plan, although its wisdom has been challenged in the Congress and in the streets of Chicago, Pittsburgh, and Seattle. We will not assess the social and political consequences which are inherent in any such policy. Rather, we will examine the Plan as it relates to the doctrine of separation of powers and to try to determine whether the Labor Department has usurped Congressional authority and violated legislative intent.

We will ask the Labor Department to explain, in clear English, precisely what it means by "affirmative action goal" and by "specific numerical range". That task may not be easy. The Brookings Institution, in a report called *Jobs and Civil Rights,* perpared for the U.S. Commission on Civil Rights some two years ago, aptly summarized the response of Labor Department officials when asked to define such terms:

"Compliance officials", the report found, "do everything they can to avoid directly facing questions involving preferences. The usual response when confronted with this issue is to fall back on the standard semantics that compliance is not so much a matter of set requirements as it is a matter of taking affirmative actions which produce results . . . The current approach may enable the government to go further than the Congress and public opinion would allow if its goals in this area had to be made more explicit."

Throughout the controversy over the Philadelphia Plan, one of the Labor Department's recurring arguments has been that the Plan has been misunderstood by its critics. If the Department is sincerely concerned about any misunderstandings, now is the time to clarify them. Now is the time for the Department to be more candid than in the past: to explain its policies in everyday English, not to cloak them in the misleading language which the Brookings report describes. For the Department to persist in using "the standard semantics" would be to leave its policies as unclear and confusing as ever.

I would like to point out that the Labor Department has been something less than cooperative in its dealings with the Subcommittee. On the several occasions in which the Subcommittee requested information from the Department, those requests were either ignored, answered incompletely, or answered after substantial delays. Ordinarily these would be small points, and I do not intend for them to become issues in these hearings. But if the Labor Department has in fact been misunderstood, perhaps this lack of cooperation is partly responsible for that situation.

We will also ask the Labor Department to make clear what is meant by the "good faith effort" which is required of contractors under the Philadelphia Plan. Nowhere in the Plan is that term defined. Does that "good faith effort" compel contractors to discriminate against workers who are not members of any minority group, workers with seniority in their unions, workers with the immediate skills needed to complete a Federal construction project within the contract deadline? My observation is that it does, in view of the harsh pressures which the Office of Federal Contract Compliance can bring to bear on contractors subject to the Plan.

The Subcommittee wants to be shown that the Philadelphia Plan, in forcing contractors to raise the percentage of minority group employment, does not violate Title VII of the 1964 Civil Rights Act. That act certainly does not authorize any racial quota systems, by whatever names they may be called. At this point, I want to read into the record Section 703(j) of Title VII:

"(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title 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."

I will also read into the record a section of the interpretative memorandum prepared in 1964 by Senators Clark and Case, the floor managers of Title VII. In their statement, in the CONGRESSIONAL RECORD, vol. 110, pt. 6, p. 7213, they stated:

"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."

To me, the texts of Title VII and of the interpretative memorandum constitute clear evidence that the Philadelphia Plan contravenes the intent of the most avid proponents of the 1964 Civil Rights Act. They show that Executive Order 11246, which was designed merely to guarantee equal employment opportunity regardless of race, has been stretched beyond the limits of reason to lend legal justification to the Philadelphia Plan.

I ask the Labor Department to explain why the Philadelphia Plan does not compel contractors to hire on the basis of race. I ask the Department to show that the Plan does not ignore the intent expressed in the Clark-Case memorandum.

The Philadelphia Plan, according to the Labor Department itself, requires minority group employment of 22 to 26 per cent among ironworkers by 1973. It requires 20 to 24 per cent among plumbers, and among pipefitters, and among steamfitters. It requires 19 to 23 per cent among sheetmetal, electrical, and elevator construction workers. These percentages rise every year. It would be a travesty for the Department to claim that they are not based on race.

We want the Labor Department to explain, without resorting to semantic devices, why the Philadelphia Plan disregards the intent of Congress that Title VII should not hold contractors responsible for the membership practices of labor unions, practices over which the contractors can exercise absolutely no control.

I want to read another section of the Clark-Case memorandum into the record at this point:

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? If the hiring hall sends only white males is the employer guilty of discrimination within the meaning of this title? . . .

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 whites, he is not guilty of discrimination—but the union hiring hall would be.

We would like the Labor Department to justify the Philadelphia Plan's apparent conflict with the intent of Congress that Title VII should not interfere with union seniority systems.

In debating Title VII in 1964, Senator Humphrey said that ". . . 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 balance."

I believe the Philadelphia Plan requires just such a racial balance or quota, whether that quota is disguised as a "target", a "goal", a "range", or a "standard". The Brookings Institution report found, in fact, that "the compliance specialist often applies a form of *subjective quota* in deciding how hard to push a given contractor." That report was completed more than two years ago, long before the revised Philadelphia Plan was adopted.

There is something very disquieting in all of this. In a statement made in January 1967, former OFCC Director Edward C. Sylvester admitted that "there is no firm and fixed definition of affirmative action. I would say that in a general way, affirmative action is anything you have to do to get results."

In making this statement, Mr. Sylvester no doubt had the high purpose of giving effect to his desire that all citizens be guaranteed equal employment opportunity according to ability. But his emphasis on results at the expense of procedure concerns me. We seem to have forgotten the admonition of Justice Frankfurter that "the history of American freedom is, in no small measure, the history of procedure." In seeking to raise artificially the percentage of minority group workers in Philadelphia through this misuse of an Executive Order, the Labor Department is establishing a nearsighted precedent. For if we are lax today in adhering to the law, what may happen tomorrow when that practice is adopted by those who would subvert procedure to their own evil purposes? The power to twist procedure is one no good administrator should want and no bad administrator should have. We cannot allow our legal principles to be frittered away by manipulation of the law.

There is another point which concerns me greatly, a point which has largely been ignored in the arguments surrounding the Philadelphia Plan. Section 202(1) of Executive Order 11246 requires Federal contractors to hire and treat their employees "without regard" to their race, color, religion, or national origin. It seems to me that those two words, "without regard", mean exactly what they say. They are clear and unambiguous.

Since all the sections of a law must be construed together, it is in the context of those words, "without regard", that the more general concept of "affirmative action" must be placed. Yes, the Executive Order requires affirmative action, but only affirmative action which is taken "without regard" to race, color, religion, or national origin. It is here that the Philadelphia Plan is fatally defective. It compels contractors to make decisions based precisely on those four considerations. The Plan is in conflict not only with Title VII of the 1964 Civil Rights Act, it also is in conflict with the very Executive Order under which it was created.

Whatever the courts may have decided about considering race as a factor in remedying inequities, those precedents cannot apply to the Philadelphia Plan. The language of Executive Order 11246 places an ironclad ban on racial considerations in employment by Federal contractors. It is no more legal for the Labor Department to reverse the meaning of the words, "without regard", than it would be for the Department to mis-spend a Congressional appropriation.

I do not argue that the labor unions are violating the 1964 Civil Rights Act, and I want to make it very plain that this hearing is not designed to criticize labor organizations in any way. However, I must point out —and I am sure that the Labor and Justice Departments are aware—that the 1964 Civil Rights Act gives them ample tools to bring suits against labor organizations if they have sufficient evidence of discrimination and can prove it in open court. It therefore appears to me illogical and unfair that the Department of Labor prefers to attack the alleged problem of exclusion by penalizing the contractors, who play no role in the membership practices of labor organizations.

During the course of the Philadelphia Plan controversy, the Comptroller General has been accused of exceeding his authority in finding the Plan unacceptable because it violates Title VII. I want to comment on that criticism now. Under 31 U.S. Code 65, the Budget and Accounting Act of 1921, the Comptroller General is directed to determine whether "financial transactions have been consummated in accordance with laws, regulations, or other legal requirements". Without question, that statute provides the Comptroller General with the authority to check the Philadelphia Plan against any and all laws, not merely those which deal with procurement.

Finally, the Subcommittee has before it S. 931, a bill introduced by Senator Fannin, which would make Title VII the sole means of enforcement and remedy in the field of equal employment. It would suspend the use of Executive Order 11246. We welcome the comments of our witnesses on that bill.

[From the United States General Accounting Office, Washington, D.C.]

STATEMENT OF ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS, SENATE COMMITTEE ON THE JUDICIARY, ON THE PHILADELPHIA PLAN, OCTOBER 27, 1969

Mr. Chairman and Members of the Subcommittee: We appreciate this opportunity to appear before your Subcommittee to discuss our position with respect to the revised "Philadelphia Plan." We are concerned about both the legality of the Plan and the situations which appear to have arisen as a result of our endeavors to discharge our statutory duties and responsibilities in connection with the Plan.

I believe the members of the Subcommittee are by now aware of the basic facts, which are (1) that the Department of Labor has issued an order requiring that major construction contracts in the Philadelphia area, which are entered into or financed by the United States, must include commitments by the contractors to goals of employment of minority workers in specified skilled trades; (2) that by a decision dated August 5, 1969, we advised the Secretary of Labor that we considered the Plan to be in contravention of the Civil Rights Act of 1964 and would be required to so hold in passing upon the legality of expenditures of appropriated funds under contracts made subject to the Plan; and (3) that the Attorney General on September 22, 1969, issued an opinion to the Secretary of Labor advising him of his conclusion that the Plan is not in conflict with any provision of the Civil Rights Act; that it is authorized by Executive Order No. 11246; and that it may be enforced in awarding Government contracts.

We would like to offer for the record copies of our decision and of the Attorney General's opinion.

The revised Philadelphia Plan was issued on June 27, 1969, with the announcement that it was designed to meet GAO's objections to a lack of specificity in a prior plan. The new plan is frank and direct in stating its purpose. It gives a rundown of the history of alleged discriminatory practices by the Philadelphia construction unions in admitting members; it states that the percentage of minority group membership in the unions and the construction trades is far below the ratio of minority group population to the total Philadelphia population, and it advises that the purpose of the Plan is to achieve greater participation of minority group members in the construction trades.

The Plan states that there shall be included in invitations for bids (IFBs) on both Federal and federally assisted construction contracts in the Philadelphia area, specific ranges of minority group employees in each of six skilled construction trades; that each bidder must designate in his bid the specific number of minority group employees, within such ranges, that he will employ on the job; and that failure of the contractor to "make every good faith effort" to attain the minority group employment "goals" he has established in his bid may result in the imposition of sanctions, which might include termination of his contract.

The primary question considered in our decision of August 5 was whether the revised Plan violated the equal employment opportunity provisions of the Civil Rights Act of 1964.

In the formulation of that decision, we regarded the Civil Rights Act of 1964 as being the law governing nondiscrimination in employment and equal employment opportunity obligations of employers. Therefore we considered the 1964 Act as overriding any administrative rules, regulations, and orders which conflicted with the provisions of that Act or went beyond such law and purported to establish, in effect, additional unlawful employment practices for employers who engaged in Federal or federally assisted construction.

We think the basic policy of the equal employment opportunity part of the Act is set out in pertinent part in section 703(a) as follows:

"It shall be an unlawful employment practice for any employer—

"(1) to fail ro refuse to hire * * * any individual * * * because of such individual's race, color, religion, sex, or national origin."

The basic policy of the Act as it relates to federally assisted contracts, is stated in pertinent part in section 601, as follows:

"No person * * * shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Another pertinent provision of the Act is set out in section 703(j), which provides in part as follows:

"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 an imbalance which may exist with respect to the total number or percentage of persons of any race * * * or national origin employed by any employer [or] referred * * * for employment by any * * * labor organization * * * in comparison with the total number or percentage of persons of such race * * * or national origin in any community * * * or in the available work force in any community * * *."

This part of the law is known as the prohibition against "quotas"; that is, the prohibition against requiring an employer to hire a specified proportion or percentage of his employees from certain racial or national origin groups.

It seems to have been generally accepted by Labor, Justice and minority group spokesmen that "quotas" are illegal. But in defense of the Philadelphia Plan the Department of Labor argued that the "goals" for minority group employees which would be included in IFBs and in contracts under the Plan could not violate the Civil Rights Act of 1964 because—

1. A quota is a *fixed* number or percentage of minority group members, whereas *ranges* to be established under the Plan are flexible in that the bidder may choose as his goal any number or percentage within the ranges set out in the IFB.

2. Failure to attain the "goals" does not constitute noncompliance, since such failure can be waived if the contractor can show that he made "every good faith effort" to attain the goals.

3. The Philadelphia Plan was promulgated under Executive Order 11246, not under the Civil Rights Act of 1964, and affirmative action programs under the Executive Order may properly require consideration of race or national origin if such consideration is necessary to correct the present results of past discrimination.

4. The Plan provides that the contractor's commitment to specified goals of minority group employment shall not be used to discriminate against any qualified applicant or employee.

In considering these arguments in our decision of August 5 we said that in our opinion the distinction between quotas and goals was largely a matter of semantics. The plain facts are, however, that the Plan sets a definite minimum percentage requirement for employment of minority workers; requires an employer to commit himself to employ at least a corresponding minimum number of minority workers; and provides for sanctions for a failure to employ that number (unless the contractor can satisfy the agency personnel concerned that he has made every good faith effort to attain such number). It follows, therefore, that when such sanctions are applied they will be a direct result of the contractor's failure to meet his specified number of minority employees.

In our decision of August 5 we also said that the basic philosophy of the equal employment opportunities portion of the Civil Rights Act is that it shall be an unlawful employment practice to use race or national origin as a basis for hiring, or refusing to hire, a qualified applicant. And we said the Plan would necessarily require contractors to consider race and national origin in hiring.

In reply to the Department's contention that the Plan itself says a contractor's goals shall not be used to discriminate against

any qualified applicant or employee, we expressed the opinion that the obligation to make every good faith effort to attain his goals under the Plan will place contractors in situations where they will undoubtedly grant preferential treatment to minority group employees. Later, I will address this point again.

It is our opinion that the legislative history of the Civil Rights Act shows beyond question that Congress in legislating against discrimination in employment recognized the discrimination that is inherent in a quota system, and regarded the term "discrimination" as including the use of race or national origin as a basis for hiring; the assignment of numerical ratios based on race or national origin; and the maintaining of any racial balance in employees.

In considering Labor's contention that it could properly consider race or national origin under affirmative action programs established under Executive Orders, we pointed out that while the term "affirmative action" was included in Executive Order 10925, which was in effect at the time Congress was debating the bill which was subsequently enacted as the Civil Rights Act of 1964, no specific affirmative action requirements of the kind here involved had been imposed upon contractors under authority of that Executive Order at that time. We therefore did not think it could be successfully contended that Congress, in recognizing the existence of the Executive Order and in failing to specifically legislate against it, was approving or ratifying the type or methods of affirmative action which the present Plan imposes upon contractors.

While the Labor Department cited various court cases in support of its position that reverse discrimination may properly be used to correct the present results of past discrimination, our examination of those cases showed that the majority involved questions of education, housing, and voting. We said we could see a *material* difference between the circumstances in those cases and the circumstances which gave rise to the Philadelphia Plan, since in those cases enforcement of the rights of the minority to vote, or to have unsegregated housing, or unsegregated school facilities, did *not* deprive members of the majority group of similar rights, whereas in the employment field, each mandatory and discriminatory hiring of a minority group worker would preclude the employment of a member of the majority group. In those cases which did involve Title VII of the Civil Rights Act of 1964, we found them to be concerned with practices of labor unions or with treatment by employers of their employees in matters of seniority and promotion, and even in such circumstances, we found the courts to be divided between condoning and condemning the practice.

Our decision also pointed out that the effect of the Plan was to require an employer to abandon his customary practice of hiring through a local union if there is a racial or national origin imbalance in the membership of such union, and we concluded that such a requirement would be in violation of section 703(j) of the Act. We cited numerous portions of the legislative history of the Act which supports, we think, the view that Congress intended to prohibit and preclude the sort of program and procedures which are now included in the Philadelphia Plan when it drafted section 703(j).

In this connection we expressed the opinion that it would be improper to impose requirements on contractors to incur additional expenses in affirmative action programs which are designed to correct the discriminatory practices of unions, since such requirements would result in the expenditure of appropriated funds in a manner not contemplated by Congress. And we pointed out that if unions were, in fact, discriminating, they could be required to correct their discriminatory practices under provisions of the National Labor Relations Act, under Title VII of the Civil Rights Act, and under section 207 of Executive Order 11246. We suggested use of one of these remedies.

Finally, we concluded that until the authority for any agency to impose or require conditions in invitations for bids which obligate bidders, contractors, or subcontractors, to consider the race or national origin of their employees or prospective employees, is clearly and firmly established by the weight of judicial precedent, or by additional statutes, we must consider conditions of the type proposed by the revised Philadelphia Plan to be in conflict with the Civil Rights Act of 1964, and we will necessarily have to so construe and apply the act in passing upon the legality of matters involving expenditures of appropriated funds for Federal or federally assisted construction projects.

On August 6, the day after our decision of August 5, the Secretary of Labor held a press conference at which he expressed the opinion that "interpretation of the Civil Rights Act has been vested by Congress in the Department of Justice"; that Justice had already decided that the Philadelphia Plan was not in conflict with the Act; that GAO properly could pass upon whether the Philadelphia Plan violated *procurement* law; and that Labor therefore had no choice but to follow the opinion of Justice and proceed to implement the Plan. For the record, it should be noted that the only Department of Justice opinion Labor had, at the time it issued the revised Plan and at the time the Secretary held his press conference, was one rendered in two short paragraphs by the Assistant Attorney General for the Civil Rights Division. On September 22, 1969, the Attorney General did, however, issue a formal opinion, which was essentially in the form of a critique of our August 5 decision.

The fundamental bases of the Attorney General's opinion are his contention that the Executive has atuhority to include in contracts made by the United States or financed with Government assistance any terms and conditions which are not contrary to a statutory prohibition or limitation on contractual authority; that the requirements imposed upon contractors by the Philadelphia Plan are not prohibited by the Civil Rights Act; and that the fact that the Act does not affirmatively require or authorize the imposition of such requirements upon all employers does not preclude their imposition by the Executive upon employers who enter into contracts with the Government or which are financed through Government assistance.

We believe that the argument with respect to the authority of the Executive to include terms and conditions in contracts fails to take into consideration two material factors: first, with respect to contracts executed by the Government, Congress has imposed a number of specific requirements and limitations, both procedural and substantive, entirely independent of and unrelated to the provisions of the Civil Rights Act, but which we believe to be material to the determination of the validity of the Plan; and second, with respect to contracts financed by Federal assistance, Congress has in the several acts authorizing such assistance prescribed the terms and conditions upon which it is to be furnished. With respect to the latter area, we do not believe it could be argued that the Executive has any authority from the Constitution or from any source other than those Congressional acts, and the Attorney Generals' argument is to that extent inapplicable to federally aided contracts or programs.

Considering the contractual authority of the Federal Government, it is recognized that the Executive agencies may, in the absence of contrary legislative provisions, perform their authorized functions and programs by any appropriate means, including the use of contracts. In doing so, however, they are bound to observe all statutory provisions applicable to the making of public contracts. The Attorney General's opinion states that the power of the Government to determine the terms which shall be included in its contracts is subject to limitations imposed by the Constitution or by acts of Congress, but that existence of the power does not depend upon an affirmative legislative enactment.

Second to the statutory limitation that no contract shall be made unless it is authorized by law or is under an appropriation adequate to its fulfillment (41 U.S.C. 11) the most important congressional limitation on contracting is the requirement that Government contracts shall be made or entered into only after public advertising and competitive bidding, on such terms as will permit full and free competition. The purpose of the advertising statutes is not only to prevent frauds or favoritism in the award of public contracts, but also to secure for the Government the benefits of full and free competition.

The Supreme Court of the United States has adopted the policy, as set out in the procurement laws and regulations issued pursuant thereto, that competitive bidding should obtain the needs of the Government at prices calculated to result in the lowest ultimate cost to the Government. (*Paul* v. *United States,* 371 U.S. 245, 252 (1963)). Even before the decision by the Supreme Court the rule generally applied by my predecessors and at least one of the Attorney General's predecessors, and, so far as I know, never contested by any prior Attorney General, is that the inclusion in any contract of terms or conditions, not specifically authorized by law, which tend to lessen competition or increase the probable cost to the Government, are unauthorized and illegal. The situations in which this rule has been applied have most frequently involved proposals to impose stipulations concerning employment conditions or practices.

In 1890 the Attorney General advised the President as follows; with respect to a request of a labor organization for implementation of the act of June 25, 1868, which provided that eight hours shall constitute a day's work:

"Again sections 3709, etc., require contracts for supplies or service on behalf of the Government, except for prisoners' services, to be made with the lowest responsible bidder, after due advertisement. These statutes make no provision for the length of the day's work by the employees of such contractors, and a public officer who should let a contract for a larger sum than would be otherwise necessary by reason of a condition that a contractor's employees should only work eight hours a day would directly violate the law.

"In short, the statutes do not contain any such provision as would authorize or justify the President in making such an order as is asked. Nor does any such authority inhere in the Executive office. The President has, under the Constitution and laws, certain duties to perform, among these being to take care that the laws be faithfully executed; that is, that the other executive and administrative officers of the Government faithfully perform their duties; but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties.

"The relief asked in this matter can, in my judgment, come only through additional legislation."

On the same principle our Office has

held that a contract could not prescribe minimum wages in the absence of specific statutory authority (10 Comp. Gen. 294 (1931)); compliance with the National Labor Relations Act of 1935 could not be required by contract, nor noncompliance therewith be made ground for rejection of a bid (17 Comp. Gen. 37 (1937)); periodic adjustment of minimum wages incorporated in a contract pursuant to the Davis-Bacon Act could not be stipulated in the contract (17 Comp. Gen. 471 (1937)); provisions of a Procurement Division Circular Letter purporting to require contractors to report payroll statistics could not be incorporated in Government contracts (17 Comp. Gen. 585 (1938)); construction contracts could not contain provisions concerning collective bargaining (18 Comp. Gen. 285 (1938)); a requirement for compliance with the Fair Labor Standards Act could not be included in Government contracts (20 Comp. Gen. 24 (1940)); a low bid on a Government contract could not be rejected because the bidder did not employ union labor (31 Comp. Gen. 561 (1952)); construction contracts could not include provisions for a 40-hour workweek and overtime compensation for excess time, when the only pertinent statute merely required overtime compensation for work in excess of eight hours per day (33 Comp. Gen. 477 (1954)); and a clause requiring contractors to comply with wage, hour and fringe benefit provisions resulting from a labor-management agreement could not be included in construction contracts in the absence of statutory authorization (42 Comp. Gen. 1 (1962)).

Of course, many of those proposed requirements were subsequently authorized by Congressional enactment and, together with other similar requirements, are today accepted features of Government contracting in the social-economic area. The point is, that they were not permitted until the Congress, rather than the Executive, had determined that they should be. So far as I know there was no attempt in any of those instances by the Executive branch to disregard the decisions of the Comptroller General.

In the face of this history, we cannot agree that the Attorney General's position that the Executive may impose upon contractors any conditions which have not been specifically prohibited, is correct.

In contending that the Plan is not in conflict with any provision of the Civil Rights Act, the Attorney General attempts to reconcile provisions of the Plan which we feel are irreconcilable. As summarized by the Attorney General, the Plan requires the contractor to set specific goals for minority group hiring, and to make "every good faith effort" to meet these goals. This, however, he says does not require the contractor to discriminate, because the Plan includes the express statement that he may not in attempting to meet his goals discriminate against any qualified employee on grounds or race, color, religion, sex, or national origin. As we stated in our decision of August 5 this is a statement of a practical impossibility. The provision is, in effect, no more than a statement of the provisions of the Civil Rights Act, and it is difficult to avoid the conclusion that the Attorney General is saying that no requirement, obligation or duty can be considered contrary to law if it is accompanied by a statement that in meeting it the law will not be violated.

It should also be noted that the Attorney General confines his argument to consideration of the provisions of section 703(a) of the act, and ignores section 703(j), which in our view is an express prohibition against imposition of a program such as is included in the Plan.

Finally the Attorney General falls back on the plea that, while the Plan might be clearer if it stated what "good faith efforts" are expected, it must be assumed that the Plan will be so fairly administered that no contractor will be forced to choose between noncompliance with his obligation to achieve his goal and violation of the act. Therefore, he says, it is premature to assert the invalidity of the Plan because of what may occur in its enforcement; any unfairness in administration should be left for judicial remedy.

The foregoing would indicate that the Attorney General does not fully recognize the pressure which the Plan will impose upon contractors to attain their minority group employee goals. A failure to achieve such goals will immediately place the contractor in the role of defendant, and to avoid sanctions he must then provide complete justification for his failure. Furthermore, in the first instance at least, the question whether he made every good faith effort will be determined by the same Federal personnel who imposed the requirement. In our opinion the coercive features inherent in the Plan cannot help but result in discrimination in both recruiting and hiring by contractors subject to the Plan.

In the final sentence of his opinion the Attorney General undertook to advise that the Department of Labor "and other contracting agencies *and their accountable officers*" may rely on his opinion in their administration of Executive Order 11246. We are especially concerned by this statement. In making it the Attorney General appears to have ignored completely section 304 of the Budget and Accounting Act of 1921, 31 U.S.C. 74, which provides that "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government."

In this connection, I would like to point out as emphatically as I can that I believe that one of the most serious questions for the Subcommittee's consideration is whether the Executive branch of the Government has the right to act upon its own interpretation of the laws enacted by the Congress, and to expend and obligate funds appropriated by the Congress in a manner which my Office, as the designated agent of the Congress, has found to be contrary to law.

In our decision, we informed the Secretary of Labor that the General Accounting Office would regard the Plan as a violation of the Civil Rights Act in passing upon the legality of matters involving expenditures of appropriated funds for Federal or federally assisted construction. Our jurisdiction in that respect is derived from the authority and duty to audit and settle public accounts which was vested in and imposed upon the accounting officers of the Government by the act of March 3, 1817, 3 Stat. 366, and which was transferred to the General Accounting Office by the Budget and Accounting Act, 1921, 42 Stat. 24. Under section 8 of the Dockery Act of July 31, 1894, 28 Stat. 207, as amended by section 304 of the Budget and Accounting Act (31 U.S.C. 74), disbursing officers, or the head of any Executive departments, may apply for and the Comptroller General is required to render his decision upon any question involving a payment to be made by them, or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing the disbursement. A similar provision concerning certifying officers and other employees appears at 31 U.S.C. 82d, which also provides that the liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers. It is within the framework of these authorities that we propose to act in the enforcement of our decision of August 5, 1969.

The Attorney General's opinion concluded with the statement that the contracting agencies and their accountable officers could rely on his opinion. Considering the fact that the sole authority claimed for the Plan ordered by the Labor Department is the Executive order of the President, it is quite clear that the Executive branch of the Government is asserting the power to use Government funds in the accomplishment of a program not authorized by Congressional enactment, upon its own determination of authority and its own interpretation of pertinent statutes, and contrary to an opinion by the Comptroller General to whom the Congress has given the authority to determine the legality of expenditures of appropriated funds, and whose actions with respect thereto were decreed by the Congress to be "final and conclusive upon the Executive Branch of the Government." We believe the actions of officials of the Executive branch in this matter present such serious challenges to the authority vested in the General Accounting Office by the Congress as to present a substantial threat to the maintenance of effective legislative control of the expenditure of Government funds.

We believe the opinion of the Attorney General and the announced intention of the Labor Department to extend the provisions of the Plan to other major metropolitan areas can only create such widespread doubt and confusion in the construction industry and in the labor field (which may also be shared to a considerable extent by the Government's contracting and fiscal officers) as to constitute a major obstacle to the orderly prosecution of Federal and federally assisted construction. We further believe there is a definite possibility that, faced with a possibility of not being able to obtain prompt payment under contracts for such work as well as the probability of labor difficulties resulting from their efforts to comply with the Plan, many potential contractors will be reluctant to bid. Of course, if this occurs the Plan will result in restricting full and free competition as required by the procurement laws and regulations. Also, those who do bid will no doubt consider it necessary to include in their bid prices substantial contingency allowances to guard against loss.

In addition to recognizing the chaotic situation which could result from use of the Plan by the Executive agencies, I believe I would not be fulfilling my duties and responsibilities if I ignored the detrimental effect upon the competitive bidding process, and the improper use of public funds which the Plan entails.

On September 23, the day following the Attorney General's opinion, Labor issued another revised Philadelphia Plan which explains, *for the first time*, the manner in which the "ranges" of minority group employment goals have been determined, and the criteria for determining whether a contractor has made good faith efforts to attain his goals.

I stress that these matters are set out for the first time in the September revision of the Philadelphia Plan primarily because our decision of August 5 gave no consideration to the adverse effect that these factors, when established, might have upon application of the rules of competitive bidding to the overall Plan.

We fully expect to receive a bid protest in some future procurement which questions inclusion of the Philadelphia Plan in the IFB and the contract, and we realize the effect a decision sustaining such a protest could have on the construction industry, the contracting agencies and the disbursing officers. But we think the question is sufficiently important to justify and require such a decision.

Basically, it has been our position that the law is to be construed as written and enforced in accordance with the legislative intent when it was enacted. We believe this is what the law requires. Also, we are part of the Legislative branch of the Government and we think this approach is the only proper one we can take.

If, following enactment of a law, it should occur that social conditions, economic conditions, the political atmosphere, or any other circumstances should change to such an extent that different treatment should be given, that different objectives should be established, or that different results should be obtained, it has always been our position that the arguments in favor of change should be presented to the Congress—and if the Congress, in its wisdom, agrees that social, economic, or political circumstances so dictate, it will enact legislation to permit or require the Executive branch to take necessary action to attain new objectives. This is the very procedure which Congress directed should be followed in this particular situation. As we pointed out in our decision of August 5, 1969, by section 705(d) of the Civil Rights Act of 1964, Congress charged the Equal Employment Opportunity Commission with the specific responsibility of making reports to the Congress and to the President on the cause of and means of eliminating discrimination, and making such *recommendations for further legislation* as may appear desirable.

We concur with the authority of the Executive branch to establish and carry out social programs or policies which are not contrary to public policy, as that policy may be stated or necessarily implied by the Constitution, by Federal statutes or by judicial precedent. But we do *not* agree that where a statute, such as the Civil Rights Act of 1964, clearly enunciates Federal policy and the methods for enforcing such policy, the Executive may institute programs designed to achieve objectives which are beyond those contemplated by the statute by means prohibited by the statute.

We therefore hope that, as a result of these hearings, there will issue from Congress a clear and unequivocal indication of its will in this matter by which all parties concerned may be guided in their future actions.

This concludes my statement, Mr. Chairman. We will be pleased to answer any questions.

[Extract from American Bar Journal, November 1969]

Executive Order 11,246: Executive Encroachment

(By James E. Remmert)

(Section VII of the Civil Rights Act of 1964, forbidding discriminatory employment practices, was the product of legislative compromise. Executive Order 11,246, issued by President Johnson in 1965 and applicable to Government contractors, was the product of unlateral Executive judgment and consequently not only forbids discriminatory employment practices but requires employers to take affirmative action to ensure against them. Will the Executive always be serving a good cause when he uses the contract power to skirt the legislative process?)

The Civil Rights Act of 1964 was made the law of the land amidst great controversy, extended debate and considerable compromise. With far less controversy or compromise and with no Congressional debate, President Johnson on September 24, 1965, signed Executive Order 11,246, the latest in a series that has played at least as significant a role in implementing the objective of equal employment opportunity as has Title VII of the 1964 Civil Rights Act.[1] Section 202(1) of this executive order, as amended, requires that every employer who is awarded a Government contract or subcontract that is not exempted by the Secretary of Labor must contractually undertake the obligation not to "discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin".

Since Title VII of the 1964 Civil Rights Act had to endure the rigors of passing both houses of Congress, it is the product of compromise attendant upon the legislative process. Executive Order 11,246, by comparison, was the responsibility of only the President. Consequently, it imposes much broader substantive obligations, and the procedure adopted for its enforcement conveys to the enforcing agency significantly more authority than was given to the Equal Employment Opportunity Commission by the 1964 Civil Rights Act.

Evidence of the broader substantive obligation imposed by Executive Order 11,246 is the fact that Title VII imposes only the obligation not to do that which is prohibited, *i.e.*, discriminate on the basis of race, color, religion, sex or national origin. By comparison, Executive Order 11,246 not only requires that Government contractors and subcontractors not discriminate but also that they "take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color, or national origin [Section 201(1); emphasis supplied]". Regulations issued by Secretary of Labor Willard Wirtz under authority of Executive Order 11,246 further require that Government contractors and subcontractors develop a "written affirmative action compliance program"[2] documenting the steps they have taken and setting goals and timetables for additional steps to fulfill the "affirmative action" obligation. The submission of these written programs has also been imposed as a prerequisite to the award of some Government contracts. However, on November 16, 1968, Comptroller General Elmer B. Staats ruled that "until provision is made for informing bidders of definite minimum requirements to be met by the bidder's program and any other standards or criteria by which the acceptability of such program would be judged",[3] contract awards must be made to the lowest eligible bidder without reference to the affirmative action program.

President simply took power that Congress wouldn't give

That the Executive was willing to assume by executive order significantly greater enforcement authority than Congress was willing to convey to it can be seen by comparing the adjudicatory processes under Title VII and Executive Order 11,246. If an employer disagrees with the Equal Employment Opportunity Commission over the legal requirements imposed by Title VII, or if the employer is unable to comply with the remedies proposed by the commission to rectify a discriminatory practice, he may have traditional recourse through the judicial process before any sanction is imposed. To the contrary, however, the regulations issued by Secretary of Labor Wirtz for the administration of Executive Order 11,246 provide that upon request for a hearing to adjudicate a contractor's or subcontractor's compliance with the executive order, the Secretary of Labor's designee may suspend all contracts or subcontracts held by the employer pending the outcome of the hearing.[4] In addition, as a part of the adjudicatory process, the agency responsible for investigating or supervising the investigation of a contractor's compliance and prosecuting those contractors alleged to be in noncompliance is also responsible for imposing the sanctions of cancellation and suspension from participation in Government contracts.[5] In other words, the chief investigator, prosecutor and final judge with respect to cancellation and suspension of Government contracts is the Department of Labor.

With the contract power, who needs Congress?

These substantive and procedural contrasts between Title VII of the 1964 Civil Rights Act and Executive Order 11,246 illustrate the considerable power that the Executive can acquire by pursuing a social objective through the use of the contract power in addition to or in place of legislation. Such broad and sweeping powers are premised on the concept that the Federal Government has the "unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases".[6] This power is founded on the premise that in the absence of a Congressional prohibition or directive the Executive branch is free to enter into contracts on whatever conditions and provisions are deemed to promote the best interests of the Government.[7]

Without question, Executive Order 11,246 has done much to advance the cause of equal employment opportunity, because the Federal Government's bargaining position enables the Executive to require such terms as are found in this order as a condition to a United States Government contract. Once such a broad and sweeping obligation is accepted, the accepting contractor or subcontractor is in an untenable position to oppose steps that are required by the administering agency with respect to the conditions covered by the contract.

To illustrate the impact of this use of the Executive's contract power, one need only consider a list of the top 100 corporations and institutions holding Defense Department contracts.[8] These corporations are understandably some of the largest in the United States and collectively employ well over ten million persons. Even though the list does not include contractors with any department other than Defense or the many subcontractors involved in Defense Department prime contracts, it aptly illustrates the significant indirect control which the Executive can exert over the private sector of the economy by use of the contract power.

There is very little case law deciding the extent to which the President may by executive order impose ancillary conditions to Government contracts. Some have questioned the validity of Executive Order 11,246 on the ground that the Executive does not have the authority to impose conditions that are unrelated to the purposes for which Congress appropriated funds[9] and on the basis that the affirmative action obligation conflicts with provisions in the 1964 Civil Rights Act. These provide that preferential treatment on the basis of race, color, religion, sex or national origin is not required to correct an imbalance.[10] However, at least one federal district court[11] and two United States courts of appeals[12] have said that Executive Order 11,246 has the full force and effect of statutory law. If these courts are correct and the order is a valid exercise of the Executive's contract power, then some examination of the potential extension of this power is in order.

Although the writer is unaware of any publication listing all firms holding competitively bid or negotiated United States Government contracts or subcontracts, it is the writer's belief that the vast majority of the major commercial enterprises in this country and a great many not-for-profit institutions and smaller commercial enterprises hold one or more Government contracts or subcontracts. Consider, for example, the diverse scope of the organizations holding Government research grants, the utilities and communications services used by federal installations, the dependence of such industries as automotive, aircraft, shipbuilding and munitions on Government contracts, the heavy reliance of the construction industry on such programs as urban renewal and highway construction sponsored by federal funding, and the entrenchment of United States Government financing and deposits as a factor in the financial institutions throughout the country.

Footnotes at end of article.

WHERE DOES THIS PRECEDENT LEAD?

Consideration should also be given to some of the possible future applications of the concept behind Executive Order 11,246. The contract power could be used to circumvent the intrastate-interstate dichotomy that has to some extent precluded complete preeminence of the Federal Government in such fields as air and water pollution control, regulation of common carriers and labor relations. One extension already suggested by the AFL–CIO is the debarment of Government contractors found to have committed flagrant unfair labor practices.

Another avenue for extension of the Executive's contract power is in areas within federal jurisdiction but which Congress has left unregulated or has regulated only to a lesser extent than that deemed desirable by the Executive. An example of this use of the contract power is found in Executive Order 11,246. In enacting Title VII of the 1964 Civil Rights Act, the Congressional consensus was that the prohibition against discrimination on the basis of race, color, religion, sex and national origin was sufficient to accomplish the objective of eliminating employment discrimination on such bases.

The Executive, however, felt that the then-existing executive order prohibiting discrimination by Government contractors did not go far enough in dealing with the objective of equal employment opportunity, and thus the affirmative action obligation was added to place a greater responsibility on Government contractors.

By using the contract power, the Executive could accomplish many objectives deemed desirable without using the legislative process so long as the particular contract clause does not conflict directly with a federal statute. Thus, this technique affords the Executive a limited bypass of the legislative process and gives it the power to give its objective "the force and effect given to a statute enacted by Congress" [13] without the concurrence of Congress.

Several questions should be answered before this procedure proliferates. The first is whether the concentration of this power in the hands of the Executive is desirable in view of the fact that it allows the President to carry an objective into effect without resort to the legislative process established by the Constitution. In this connection, it is significant to note that Congress considered sanctioning the Executive's use of the contract power to achieve equal employment opportunity but rejected the idea. The original House bill (H.R. 7152) that eventually became the 1964 Civil Rights Act, after numerous amendments, contained a Section 711(b), which read as follows:

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

During the consideration of H.R. 7152 by the House, Congressman Emanuel Celler (D. N.Y.) sponsored an amendment to eliminate this section of the bill. The amendment was accepted by the House, and in the course of the discussion Congressman John Dowdy (D. Tex.) voiced the view that, "Many of us felt section 711 to be a highly dangerous section of the bill and accordingly much of our debate has been predicated upon the fact that this language should be removed." [14]

With reference to Executive Order 11,246, it has been argued that although this use of the contract power is extraordinary the need for equal employment opportunity justifies this departure from traditional concepts. Those who would rush to the conclusion that the cause of equal employment opportunity does justify a departure from the legislative process would do well to remember that the sword of Executive power cuts in two directions. Thus, the first question that should be considered in connection with Executive Order 11,246 is not whether equal employment opportunity should be pursued but whether this means is consistent with the basic framework and power balance with which our form of government has successfully endured innumerable crises over the last two centuries.

HISTORY THAT SHOULD BE REPEATED

At another time in our nation's history, the Supreme Court had occasion to consider whether a crisis of similar magnitude justified an expansion of Executive power. In holding that President Truman's executive order seizing the steel mills during the Korean conflict was unconstitutional despite the pending emergency, Justice Douglas in a concurring opinion gave the sage advice that:

"The language of the Constitution is not ambiguous or qualified. It places not *some* legislative power in the Congress; Article 1, Section 1 says "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

* * * * *

"Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade-unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.[15]"

In a separate concurring opinion in the same case, Justice Jackson expressed a similar view concerning the overreaching use of Executive power that is highly relevant and appropriate to the concept behind Executive Order 11,246:

"The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.[16]"

CONGRESS DOES NOT BELONG ON THE SIDELINES

Congress should give thoughtful consideration to and develop a considered national policy on the use of the contract power exemplified by Executive Order 11,246 rather than stand on the sidelines and allow its proliferation without Congressional guidance. Congress should decide the kind of contracts and the kind of ancillary obligations that it will allow the Executive to impose in disbursing the funds that Congress appropriates. A mechanism should be established that will insure a legislative watchdog over the Executive's use of the contract power and will allow the Executive sufficient flexibility to administer efficiently the disbursement of Congressional appropriations.

With specific reference to Executive Order 11,246, Congress should eliminate the double standard that now exists between employers generally, who are required not to discriminate by Title VII of the 1964 Civil Rights Act, and employers who, as Government contractors, are subject to a different standard and a different enforcement procedure in measuring their compliance with the obligation. The identical obligation imposed by Title VII of the 1964 Civil Rights Act should apply, procedurally, substantively and with equal vigor to Government contractors without reference to the extraordinary obligation to take "affirmative action". There is no justification for the multiplicity of government agencies enforcing Title VII of the 1964 Civil Rights Act and Executive Order 11,246. At present, the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance and every agency that awards Government contracts are all involved in enforcement activities. This duplication has produced inconsistent enforcement standards, confusion and a wasteful use of Government manpower and resources.

Congress should immediately take appropriate steps properly to realign Congressional and Executive authority, and in doing so it might well consider some further words from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Company* v. *Sawyer*. In referring to the overextended use of the executive order, Justice Jackson said:

"Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction."

* * * * *

"With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.[17]"

FOOTNOTES

[1] 42 U.S.C. § 2000c.
[2] 41 C.F.R. § 60–1.40.
[3] Comptroller General's Letter B–163026.
[4] 41 C.F.R. § 60–1.26(b)(2)(iii).
[5] 41 C.F.R. § 60–1.24 and 41 C.F.R. § 60–1.27.
[6] *Perkins* v. *Lukens Steel*, 310 U.S. 113, at 127 (1940).
[7] *Kern-Limerick* v. *Scurlock*, 347 U.S. 110 (1954).
[8] TIME, June 28, 1968, at 72.
[9] See Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 VA. L. REV. 837 (1957)
[10] 42 U.S.C. § 200e–2(j).
[11] *United States* v. *Local 189, United Papermakers & Paperworkers*, 282 F. Supp. 39, 43 (E.D. La. 1968).
[12] *Farkas* v. *Texas Instrument*, 375 F. 2d 629, 632 (5th Cir. 1967), and *Farmer* v. *Philadelphia Electric Company*, 329 F. 2d 3, 8 (3d Cir. 1964).
[13] *Farkas* v. *Texas Instrument*, 375 F. 2d at 632.
[14] 110 CONG. REC. 2575 (February 8, 1964).
[15] *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579, at 630, 633–634 (1952).
[16] 343 U.S. at 634.
[17] 343 U.S. at 653, 655.

U.S. SENATE,
Washington, D.C., November 14, 1969.

Hon. ELMER B. STAATS,
Comptroller General of the United States, Washington, D.C.

DEAR MR. COMPTROLLER GENERAL: Permit me to acknowledge your letter of November 12, 1969, with which you enclosed a copy of your statement to the Subcommittee on Separation of Powers, Senate Committee on the Judiciary, concerning the revised "Philadelphia Plan" of the Department of Labor.

I share your opinion that the action of certain officials of the Executive Branch with respect to implementation of this plan without regard to your decision of August 5, 1969, constitutes a threat to Legislative Branch control of Federal expenditures.

I want to assure you that you will have my support in your efforts to preclude the expenditure of appropriated funds under contracts subject to the revised "Philadelphia Plan" until its legality has been established by judicial decision or Congressional action.

With best wishes, I am

Sincerely,

RICHARD B. RUSSELL.

U.S. SENATE,
COMMITTEE ON PUBLIC WORKS,
Washington, D.C., November 25, 1969.

Hon. ELMER B. STAATS,
Comptroller General of the United States, Washington, D.C.

DEAR MR. COMPTROLLER GENERAL: Thank you for your letter of November 12, 1969 en-

closing a copy of your statement before the Subcommittee on Separation of Powers of the Senate Judiciary Committee setting forth your views and recommendations on the Department of Labor "Philadelphia Plan".

As you are doubtless aware, the subject of equal employment has been of special concern to me and the members of the Committee on Public Works because of the problem situations that have arisen in the area of highway construction. Therefore, I am sure that your statement will be of even greater interest and will be most helpful to us in future consideration of the problems of equal employment.

With warm personal regards,

Truly,

JENNINGS RANDOLPH,
Chairman.

U.S. SENATE, COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., November 13, 1969.

Hon. ELMER B. STAATS,
Comptroller of the United States,
Washington, D.C.

DEAR MR. COMPTROLLER GENERAL: I have your letter of November 12, with enclosure, and concur in the statement you submitted to the Subcommittee on Separation of Powers on the "Philadelphia Plan."

Please be assured of my continued support.

With kindest personal regards, I am

Sincerely yours,

JOHN L. MCCLELLAN,
Chairman.

U.S. SENATE,
Washington, D.C., November 13, 1969.

Hon. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR MR. COMPTROLLER GENERAL: Thank you for your November 12 letter and the attached copy of your October 28 statement to the Senate Judiciary Subcommittee on Separation of Powers reaffirming your conclusion that the so-called "Philadelphia Plan" is illegal and indicating that you will use the power of your office to bar spending of federal funds for contracts which include the plan's provisions in the absence of a court or Congressional ruling to the contrary.

I appreciate your letting me know of your position, and I think it is a sound one.

I feel as you do that the plan clearly goes beyond the intent of Congress in attempting to establish required levels of racial employment in a manner not authorized by the civil rights law.

With all best regards,

Sincerely,

B. EVERETT JORDAN.

HOUSE OF REPRESENTATIVES,
Washington, D.C., November 24, 1969.

Hon. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR MR. STAATS: I commend you for the forthright and compelling statement you forwarded to me concerning the revised Philadelphia Plan.

Time and again I have stressed my own reservations to the approach of the Plan. While equalization of employment opportunity for all may be a commendable aim, it should not be pursued in a manner calculated to either thwart the will of Congress or erode the separation of powers and responsibilities which has been the genius and high art of our system of Government.

Whatever the question, whatever the merits, a democratic society should never allow desirable short-term goals to obfuscate or override faithful adherence to principles and institutions which have made the country great and, more importantly, free.

When Congress, as the representative of the people, speaks, the Executive should listen. What kind of Government have we if it does not!

With kindest personal regards, I am,

Sincerely,

WILLIAM C. CRAMER.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., November 17, 1969.

The Hon. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR MR. COMPTROLLER GENERAL: I want to commend you for holding fast to your position on the Department of Labor's revised Philadelphia Plan. I agree with you entirely; the Philadelphia Plan is in patent conflict with the Civil Rights Act of 1964, and its continuation does constitute a threat to maintenance of legislative control over budget expenditures by the Executive branch of government.

Several days ago, I contacted the Department of Labor and requested that the Department amplify its views on two questions: whether a contractor would be absolved of responsibility if union exclusion were responsible for his failure to meet his goal, and how the Department can justify disregarding a "final and conclusive" decision of the Comptroller General. I have been promised an answer within the next few days, and I will inform you immediately of what the Department says.

Be assured that I will continue to give you active support in your efforts.

With all kind wishes, I am

Sincerely yours,

SAM J. ERVIN, Jr.,
Chairman, Subcommittee on
Separation of Powers.

MEMORANDUM OF U.S. DEPARTMENT OF LABOR, JUNE 27, 1969

To: Heads of all agencies.

From: Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards.

Subject: Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction.

1. PURPOSE

The purpose of this Order is to 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.

2. APPLICABILITY

The requirements of this Order shall apply to all Federal and Federally-assisted construction contracts for projects the estimated total cost of which exceeds $500,000, in the Philadelphia area, including Bucks, Chester, Delaware, Montgomery and Philadelphia counties in Pennsylvania.

3. POLICY

In order to promote the full realization of equal employment opportunity on Federally-assisted projects, it is the policy of the Office of Federal Contract Compliance that no contracts or subcontracts shall be awarded for Federal and Federally-assisted construction in the Philadelphia area on projects whose cost exceeds $500,000 unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitation for bids, in trades utilizing the following classifications of employees: Iron workers, plumbers, pipefitters, steamfitters, sheetmetal workers, electrical workers, roofers and water proofers, and elevator construction workers.

4. FINDINGS

Enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 has posed special problems in the construction trades. Contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construction craft unions as their prime or sole source of their labor. Collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working in these classifications are referred to the jobs by the unions. Because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

Because of the exclusionary practices of labor organizations, there traditionally has been only a small number of Negroes employed in these seven trades. These exclusionary practices include: (1) unfair to admit Negroes into membership and into apprenticeship programs. At the end of 1967, less than one-half of one percent of the membership of the unions representing employees in these seven trades were *Negro*, although the population in the Philadelphia area during the past several decades included substantial numbers of *Negroes*. As of April 1965, the Commission on Human Relations in Phildelphia found that unions in five trades (plumbers, steamfitters, electrical workers, sheet metal workers and roofers) were "discriminatory" in their admission practices. In a report by the Philadelphia Local AFL–CIO Human Relations Committee made public in 1964, virtually no *Negro* apprentices were found in any of the building trades classes; [1] (2) failure of the unions to refer *Negroes* for employment, which has resulted in large measure from the priorities in referral granted to union members and to persons who had work experience under union contracts.

On November 30, 1967, the Philadelphia Federal Executive Board put into effect the Philadelphia Pre-Award Plan. The Federal Executive Board found that [2] the problem of compliance with the requirements of Executive Order 11246 was most apparent in Philadelphia in eight construction trades: electrical, sheetmetal, plumbing and pipefitting, steamfitting, roofing and waterproofing, structural iron work, elevator construction and operating engineers; and that local unions representing employees in these trades in the Philadelphia area had few minority group members and that few minority group persons had been accepted in apprenticeship programs. In order to assure equal employment opportunity on Federal and Federally-assisted construction in the Philadelphia area, the plan required that each apparent low bidder, to qualify for a construction contract or subcontract, must submit a written affirmative action program which would have the results of assuring that there will be minority group representation in these trades.

Since the Philadelphia Plan was put into effect, some progress has been made. Several groups of contractors and Local 543 of the International Union of Operating Engineers have developed an area program of affirma-

[1] Marshall and Briggs, *Negro Participation in Apprenticeship Programs* (Dec. 1966), pg. 91.

[2] These findings were based on a detailed examination of available facts relating to building trades unions, area construction volume and demographic data.

tive action which has been approved by OFCC in lieu of other compliance procedures, but subject to periodic evaluation. The original Plan was suspended because of an Opinion by the Comptroller General that it violated the principles of competitive bidding. * * *

6. SPECIFIC GOALS AND DEFINITE STANDARDS

a. General

The OFCC Area Coordinator, in cooperation with the Federal contracting or administering agencies in the Philadelphia area, will determine the definite standards to be included in the invitation for bids or other solicitation used for every Federally-involved construction contract in the Philadelphia area, when the estimated total cost of the construction project exceeds $500,000. 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 unless the bidder participates in an affirmative action program approved by OFCC.

b. Specific goals

1. The setting of goals by contractors to provide equal employment opportunity is required by Section 60–1.40 of the Regulations of this Office (41 CFR § 60–1.40). Further, such voluntary organization of businessmen as Plans for Progress have adopted this sound approach to equal opportunity just as they have used goals and targets for guiding their other business decisions (See the Plans for Progress booklet Affirmative Action Guidelines on page 6.)

2. 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.

c. Factors used in determining definite standards

A determination of the definite standard of the range of minority manpower utilization shall be made for each better-paid trade to be used in the performance of the contract. In determining the range of minority manpower utilization that should result from an effective affirmative action program, the factors to be considered will include, among others, the following:

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.

7. INVITATION FOR BIDS OR OTHER SOLICITATIONS FOR BIDS

Each Federal agency shall include, or require the applicant to include, in the invitation for bids, or other solicitation used for a Federally-involved construction contract, when the estimated total cost of the construction project exceeds $500,000, a notice stating that to be eligible for award, each bidder will be required to submit an acceptable affirmative action program consisting of goals as to minority group participation for the designated trades to be used in the performance of the contract—whether or not the work is subcontracted. Such notice shall include the determination of the range of minority group utilization (described in Section 6 above) that should result from an effective affirmative action program based on an evaluation of the factors listed in Section 6c. The form of such notice shall be substantially similar to the one attached as an appendix to this Order. To be acceptable, the affirmative action program must contain goals which are at least within the range described in the above notice. Such goals must be provided for each designated trade to be used in the performance of the contract except that goals are not required with respect to trades covered by an OFCC approved multi-employer program.

8. POST-AWARD COMPLIANCE

a. Each agency shall review contractors' and subcontractors' employment practices during the performance of the contract. If the goals set forth in the affirmative action program are being met, the contractor or subcontractor will be presumed to be in compliance with the requirements of Executive Order 11246, as amended, unless it comes to the agency's attention that such contractor or subcontractor is not providing equal employment opportunity. 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 performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions. Where the agency finds that the contractor or subcontractor has failed to comply with the requirements of Executive Order 11246, the implementing regulations and its obligations under its affirmative action program, the agency shall take such action and impose such sanctions as may be appropriate under the Executive Order and the regulations. Such noncompliance by the contractor or subcontractor shall be taken into consideration by Federal agencies in determining whether such contractor or subcontractor can comply with the requirements of Executive Order 11246 and is therefore a "responsible prospective contractor" within the meaning of the Federal procurement regulations.

b. It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in Federally-involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders.

9. EXEMPTIONS

a. Requests for exemptions from this Order must be made in writing, with justification, to the Director, Office of Federal Contract Compliance, U.S. Department of Labor, Washington, D.C., 20210, and shall be forwarded through and with the endorsement of the agency head.

b. The procedures set forth in the Order shall not apply to any contract when the head of the contracting or administering agency determines that such contract is essential to the national security and that its award without following such procedures is necessary to the national security. Upon making such a determination, the agency head will notify, in writing, the Director of the Office of Federal Contract Compliance within thirty days.

c. Nothing in this Order shall be interpreted to diminish the present contract compliance review and complaint programs.

10. AUTHORITY

This Order is issued pursuant to Executive Order 11246 (30 F.R. 12319, Sept. 28, 1965) Parts II and III; Executive Order 11375 (32 F.R. 14303, Oct. 17, 1967); and 41 CFR Chapter 60.

11. EFFECTIVE DATE

The provisions of this Order will be effective with respect to transactions for which the invitations for bids or other solicitations for bids are sent on or after July 18, 1969.

APPENDIX

(For Inclusion in the Invitation or Other Solicitation for Bids for a Federally-Involved Construction Contract When the Estimated Total Cost of the Construction Project Exceeds $500,000.)

Notice of requirement for submission of affirmative action plan to ensure equal employment opportunity:

1. It has been determined that in the performance of this contract an acceptable affirmative action program for the trades specified below will result in minority manpower utilization within the ranges set forth next to each trade:

Identification of trade

Range of minority group employment

2. The bidder shall submit, in the form specified below, with his bid an affirmative action program setting forth his goals as to minority manpower utilization in the performance of the contract in the trades specified below, whether or not the work is subcontracted.

The bidder submits the following goals of minority manpower utilization to be achieved during the performance of the contract:

Identification of trade

Estimated total employment for the trade on the contract

Number of minority group employees

(The bidder shall insert his goal of minority manpower utilization next to the name of each trade listed.)

3. The bidder also submits that whenever he subcontracts a portion of the work in the trade on which his goals of minority manpower utilization are predicated, he will obtain from such subcontractor an appropriate goal that will enable the bidder to achieve his goal for that trade. Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 8 of the Order from the Office of Federal Contract Compliance to the Heads of All Agencies regarding the Revised Philadelphia Plan, dated June 27, 1969.

4. No bidder will be awarded a contract unless his affirmative action program contains goals falling within the range set forth in paragraph 1 above, provided, however, that participation by the bidder in multi-employer program approved by the Office of Federal Contract Compliance will be accepted as satisfying the requirements of this Notice in lieu of submission of goals with respect to the trades covered by such multi-employer program. In the event that such multi-employer program is applicable, the bidder need not set forth goals in paragraph 2 above for the trades covered by the program.

5. For the purpose of this Notice, the term minority means Negro, Oriental, American Indian and Spanish Surnamed American. Spanish Surnamed American includes all persons of Mexican, Puerto Rican, Cuban or Spanish origin or ancestry.

6. The purpose of the contractor's commitment to specific goals as to minority manpower utilization is to meet his affirmative action obligations under the equal opportunity clause of the contract. This commitment is not intended and shall not be used to discriminate against any qualified applicant or employee.

7. Nothing contained in this Notice shall

relieve the contractor from compliance with the provisions of Executive Order 11246 and the equal opportunity clause of the contract with respect to matters not covered in this Notice, such as equal opportunity in employment in trades not specified in this Notice.

8. The bidder agrees to keep such records and to file such reports relating to the provisions of this Order as shall be required by the contracting or administering agency.

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE ASSISTANT SECRETARY,
Washington, D.C., September 23, 1969.

ORDER

To: Heads of all agencies.

From: Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards; John L. Wilks, Director, Office of Federal Contract Compliance.

Subject: 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.

1. PURPOSE

The purpose of this Order is to implement Section 6 of the Order issued on June 27, 1969 by Assistant Secretary of Labor Arthur A. Fletcher to the Heads of Agencies outlining a "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction." Section 6 of the June 27 Order provides for the determination of definite standards in terms of ranges of minority manpower utilization. This Order also affirms and in certain respects amends the Order of June 27.

2. BACKGROUND

The June 27 Order requires a bidder on Federal or Federally-assisted construction in the Philadelphia area on projects whose cost exceeds $500,000 to submit an acceptable affirmative action program which shall include specific goals of minority manpower utilization within the ranges to be established by the Department of Labor, in cooperation with the Federal contracting and administering agencies in the Philadelphia Area, within the following 7 listed classifications:

Iron workers; Plumbers, pipefitters; Steamfitters; Sheetmetal workers; Electrical workers; Roofers and water proofers; and Elevator construction workers.

Since that time the Department has determined that minority craftsmen may be adequately represented in the classification and title "roofers and water proofers". For this reason, such classification is hereby temporarily excepted from the provisions of the "Revised Philadelphia Plan," subject to further examination of that trade.

Pursuant to a notice of hearing issued on August 16, 1969, representatives of the Department of Labor conducted a public hearing in Philadelphia on August 26, 27, and 28, 1969 for the purpose of obtaining information and data relevant to the establishment of ranges for the purpose of effectuating the above-referred to June 27, 1969 Order. Section 6 of such Order provides that the following factors, among others, will be used in establishing these ranges:

(a) The current extent of minority group participation in the trade.

(b) The availability of minority group persons for employment in such trade.

(c) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.

(d) The impact of the program upon the existing labor force.

Having reviewed the record of that hearing and additional relevant data gathered and compiled by the Department of Labor, the following findings and Order are made as contemplated by the Order of June 27, 1969.

3. FINDINGS

(a) *Minority Participation in the Specified Trades:* The over-all construction industry in the five county Philadelphia area has a current minority representation of employees of 30%. Comparable skilled trades, excluding laborers, have a minority representation of approximately 12%. The construction trades in the Philadelphia area have grown and developed under similar conditions concerning manpower availability and under identical economic and cultural circumstances. Despite that fact, there are few minorities in the above-designated six trades. The evidence adduced at the public hearing indicates that the minority participation in such trades is approximately 1%. In the June 27 Order, it was found that such a low rate of participation is due to the traditional exclusionary practices of these unions in admission to membership and apprenticeship programs and failure to refer minorities to jobs in these trades. The most reliable data available relates to minority participation in membership in the unions representing employees in the six trades. That data reveals the following:

(1) *Iron Workers:* The total union membership in this craft in the Philadelphia area in 1969 is 850, 12 of whom (1.4%) are minority group representatives.

(2) *Steamfitters:* Total union membership in the Philadelphia area in 1969 stands at 2,308, 13 of whom (.65%) are minority group representatives.

(3) *Sheetmetal Workers:* Total union membership in the Philadelphia area in 1969 stands at 1,688, 17 of whom (1%) are minority group representatives.

(4) *Electricians:* Total union membership in the Philadelphia area in 1969 stands at 2,274, 40 of whom (1.76%) are minority group representatives.

(5) *Elevator construction workers:* Total union membership in the Philadelphia area in 1969 stands at 562, 3 of whom (.54%) are minority group representatives.

(6) *Plumbers & Pipefitters:* Total union membership in the Philadelphia area in 1969 stands at 2,335, 12 of whom (.51%) are minority group representatives.

Based upon these figures it is found and determined that the present minority participation in the six named trades is far below that which should have reasonably resulted from participation in the past without regard to race, color and national origin and, further, that such participation is too insignificant to have any meaningful bearing upon the ranges established by this Order.

(b) *Availability of Minority Group Persons for Employment:* The nonwhite unemployment rate in the Philadelphia area is approximately twice that for the labor force as a whole and the total number of nonwhite persons unemployed is approximately 21,000. There is also a substantial number of persons in the nonwhite labor force who are underemployed. Testimony adduced at the hearing indicates that there are between 1,200 and 1,400 minority craftsmen presently available for employment in the construction trades who have been trained and/or had previous work experience in the trades. In addition it was revealed at the hearing that there is a pool of 7,500 minority persons in the Laborers Union who are working side by side with journeymen in the performance of their crafts in the construction industry. Many of these persons are working as helpers to the journeymen in the designated trades. Also, testimony at the hearings established that between 5,000 and 8,000 prospective minority craftsmen would be prepared to accept training in the construction crafts within a year's time if they would be assured that jobs were available to them upon completion of such training.

Surveys conducted by agencies of the U.S. Department of Labor have provided additional information relative to the availability of minority group persons for employment in the designated trades.

Based upon the number of minority group persons employed in the designated trades for all industries (construction and non-construction) and those minority group persons who are unemployed but qualified for employment in the designated trades, a survey by the Manpower Administration indicated that minority group persons are now in the area labor market as follows:

Identification of trades and number available:	
Ironworkers	302
Plumbers, pipefitters and steamfitters	797
Sheetmetal workers	250
Electrical workers	745

A survey by the Office of Federal Contract Compliance indicated that the following number of minority persons are working in the designated trades and those who will be trained by 1970 by major Philadelphia recruitment and training agencies and those working in related occupations in non-construction industries who would be qualified for employment in the designated trades with some orientation or minimal training:

Identification of trades and number available:	
Ironworkers	75
Plumbers, pipefitters	500
Steamfitters	300
Sheetmetal workers	375
Electrical workers	525
Elevator constructors	43

Based upon this information it is found that a substantial number of minority persons are presently available for productive employment.

(c) *The Need for Training:* Testimony at the public hearing revealed that there is a need for training programs for willing minority group persons at various levels of skill. Such training must necessarily range from pre-apprenticeship training programs through programs providing incidental training for skilled craftsmen who are near the of full journeyman status.[1] As discussed above, between 5,000 and 8,000 minority group persons are in a position to be recruited for such training within a year's time.

Testimony at the public hearings revealed the existence of several training programs which have operated successfully to train a number of craftsmen many of whom are now prepared to enter the trades in the construction industry. In order to further assure the availability of necessary training programs, the Manpower Administration of this Department has committed substantial funds for the development of additional apprenticeship outreach programs and journeyman training programs in the Philadelphia area. It plans to double the present apprenticeship outreach program with the Negro Union Leadership Council in Philadelphia. Presently, this program is funded for $78,000 to train seventy persons. An additional $80,000 is being set aside to expand this program. In addition, immediate exploration of the feasibility of a journeyman-training program for approximately 180 trainees will be undertaken. Both these programs will be directed specifically to the designated trades.[2]

(d) *The Impact of the Program Upon the Existing Labor Force:* A national survey of the Bureau of Labor Statistics indicates that

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[1] Testimony adduced at the hearings indicates that the traditional duration of training to develop competent workmen in the crafts may be longer than necessary to successfully perform substantial amounts of craft level work.

[2] Memorandum from Arnold R. Weber, Assistant Secretary for Manpower to Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, dated September 18, 1969.

the present annual attrition rate of construction trade membership due to retirement is 2.5% per year based upon a total working life of 44 years per employee in each of the above-designated trades.

Based on national actuarial rates for the construction industry published by the National Safety Council, the average disability occurrence rate resulting from death or injury is 1% per year. A conservative estimate of the average rate at which employees leave construction crafts for all reasons other than death, disability and retirement is 4% per year.

Therefore, each construction craft should have approximately 7.5% new job openings each year without any growth in the craft. The annual growth in the number of employees in each craft designated under this "Revised Philadelphia Plan" has been and is projected to be as follows:

(1) *Iron Workers.* The average annual growth rate since 1963 has been approximately 10%. It is projected that an average annual growth rate in employment will be 3.69% in the near future.[3]

(2) *Plumbers and Pipefitters.* The average annual growth rate since 1963 has been approximately 7.38%. It is projected that an average annual growth rate in employment will be 2.9% in the near future.

(3) *Steamfitters.* The average annual growth rate since 1963 has been approximately 2.63% and is projected to be approximately 2.5% for each of the next four years.

(4) *Sheetmetal workers.* The average annual growth rate since 1963 has been approximately 2.06% and is projected to be approximately 2.0% for each of the next four years.

(5) *Electricians.* The average annual growth rate since 1963 has been approximately 4.98%. It is projected that an average annual growth rate in employment will be 2.2% in the near future.

(6) *Elevator Construction Workers.* The average annual growth rate since 1963 has been approximately 2.41% and is projected to be approximately 2.1% for each of the next four years.

Adding the rate of jobs becoming vacant due to attrition to the rate of new jobs due to growth, the total rate of new jobs projected for each craft is as follows:

Percentage of annual vacancy rate

Identification of trade:	
Ironworkers	11.2
Plumbers and pipefitters	10.4
Steamfitters	10
Sheetmetal workers	9.5
Electrical workers	9.7
Elevator construction workers	9.6

Therefore, it is found and determined that a contractor could commit to minority hiring up to the annual rate of job vacancies for each trade without adverse impact upon the existing labor force.

(e) *Timetable:* In an effort to provide practical ranges which can be met by employers in hiring productive trained minority craftsmen, this Order should be developed to cover an extended period of time.

The average length of Federally-involved construction projects in the Area is between 2 and 4 years. Testimony at the hearing indicated that a 4 year duration for the "Plan" is proper.

[3] Projections of the annual growth rate in employment in the designated trades is based on a study by the Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Employment Security, entitled *1960 Census and 1970, 1975 Projected Total Employment.*

Therefore, it is found and determined that in order for this Order to effect equal employment to the fullest extent, the standards of minority manpower utilization should be determined for the next four years.

(f) *Conclusion of Findings:* It is found that present minority participation in the designated trades is far below that which should have reasonably resulted from participation in the past without regard to race, color, or national origin and, further, that such participation is too insignificant to have any meaningful bearing upon the ranges established by this Order.

It is found that a significant number of minority group persons is presently available for employment as journeymen, apprentices, or other trainees.

It is found that there is a need for training programs for willing minority group persons at various levels of skills. There exist several training programs in the Philadelphia area which have operated successfully to train craftsmen prepared to enter the construction industry and, in addition, the Manpower Administration of this Department has committed substantial funds for the development of other apprenticeship outreach programs and journeyman training programs in the Philadelphia area.

Finally, it is found that a contractor could commit himself to hiring minority group persons up to the annual rate of job vacancies for each trade without adverse impact upon the existing labor force in the designated trades.

Based upon these findings, a range shall be established by this Order which shall require contractors to establish employment goals between a low range figure which could result in approximately 20% of the workforce in each designated trade being minority craftsmen at the end of the fourth year covered by this Order.[4]

In addition, trained and trainable minority persons are or shall be available in numbers sufficient to fill the number of jobs covered by these ranges, there being 1200 to 1400 minority persons who have had training and 5000 to 8000 prepared to accept training within a year.

Such minority representation can be accomplished without adversely affecting the present work force. Based upon the projected Annual Vacancy Rate, 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.[5]

4. ORDER

Therefore, after full consideration and in light of the foregoing, be it *ORDERED:* That the Order of June 27, 1969 entitled "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction" is hereby implemented, affirmed, and in certain respects amended, this Order to constitute a supplement thereto as required and contemplated by said Order of June 27, 1969.

Further ordered: That the following ranges are hereby established as the standards for minority manpower utilization for each of the designated trades in the Philadelphia area for the next four years:

[4] Assuming the same proportion of minorities are employed on private construction projects as Federally-involved projects, the lower range should result in 2,000 minority craftsmen being employed in the construction industry in the Philadelphia area by the end of the fourth year.

[5] The one for one ratio in hiring has been judicially recognized as a reasonable, if not mandatory, requirement to remedy past exclusionary practices. *Vogler* v. *McCarty, Inc.*, 294 F. Supp. 368 (E.D. La. 1967).

Range for minority group employment until Dec. 31, 1970

[Percent]

Identification of trade:	
Ironworkers [1]	5–9
Plumbers and pipefitters	5–8
Steamfitters	4–8
Sheetmetal workers	4–8
Electrical workers	4–8
Elevator construction workers	4–8

Range of minority group employment for the calendar year 1971 [2]

[Percent]

Identification of trade:	
Ironworkers	11–15
Plumbers and pipefitters	10–14
Steamfitters	11–15
Sheetmetal workers	9–13
Electrical workers	9–13
Elevator construction workers	9–13

[1] The percentage figures have been rounded.

[2] After December 31, 1970 the standards set forth herein shall be reviewed to determine whether the projections on which these ranges are based adequately reflect the construction labor market situation at that time. Reductions or other significant fluctuations in federally involved construction shall be specifically reviewed from time-to-time as to their effect upon the practicality of the standards. In no event, however, shall the standards be increased for contracts after bids have been received.

Range of minority group employment for the calendar year 1972

[Percent]

Identification of trade:	
Ironworkers	16–20
Plumbers and pipefitters	15–19
Steamfitters	15–19
Sheetmetal workers	14–18
Electrical workers	14–18
Elevator construction workers	14–18

Range of minority group employment for the calendar year 1973

[Percent]

Identification of trade:	
Ironworkers	22–26
Plumbers and pipefitters	20–24
Steamfitters	20–24
Sheetmetal workers	19–23
Electrical workers	19–23
Elevator construction workers	19–23

The above ranges are expressed in terms of man hours to be worked on the project by minority personnel and must be substantially uniform throughout the entire length of the project for each of the designated trades.

Further ordered: That the form attached hereto as an Appendix is hereby made a part of this Order and in accordance with the findings specified above, amends the Appendix of the Order of June 27, 1969.

Each Federal agency shall include, or require the applicant to include, this form, or one substantially similar, in the invitation for bids or other solicitations used for a Federally-involved construction contract where the estimated total cost of the construction project exceeds $500,000.

5. CRITERIA FOR MEASURING GOOD FAITH

Section 8 of the June 27 Order provides that a contractor will be given an opportunity to demonstrate that he has made *every good faith effort* to meet his goal of minority manpower utilization in the event he fails to meet such goal. If the contractor has failed to meet his goal, a determination of *"good faith"* will be based upon his efforts to broaden his recruitment base through at least the following activities:

(a) The OFCC Area Coordinator will maintain a list of community organizations

which has agreed to assist any contractor in achieving his goal of minority manpower utilization by referring minority workers for employment in the specified trades. A contractor who has not met his goals may exhibit evidence that he has notified such community organizations of opportunities for employment with him on the project for which he submitted such goals as well as evidence of their response.

(b) Any contractor who has not met his goal may show that he has maintained a file in which he has recorded the name and address of each minority worker referred to him and specifically what action was taken with respect to each such referred worker. If such worker was not sent to the union hiring hall for referral or if such worker was not employed by the contractor, the contractor's file should document this and the reasons therefor.

(c) A contractor should promptly notify the OFCC Area Coordinator in order for him to take appropriate action whenever the union with whom the contractor has a collective bargaining agreement has not referred to the contractor a minority worker sent by the contractor or the contractor has other information that the union referral process has impeded him in his efforts to meet his goal.

(d) The contractor should be able to demonstrate that he has participated in and availed himself of training programs in the area, especially those funded by this Department referred to in Section 3(c) of this Order, designed to provide trained craftsmen in the specified trades.

6. SUBCONTRACTORS

Whenever a prime contractor subcontracts a portion of the work in the trade on which his goals of minority manpower utilization are predicated, he shall include his goals in such subcontract and those goals shall become the goals of his subcontractor who shall be bound by them and by this Order to the full extent as if he were the prime contractor. The prime contractor shall not be accountable for the failure of his subcontractor to meet such goals or to make every good faith effort to meet them. However, the prime contractor shall give notice to the Area Coordinator of the Office of Federal Contract Compliance of the Department of Labor of any refusal or failure of any subcontractor to fulfill his obligations under this Order. Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 8 of the Order from the Office of Federal Contract Compliance to the Heads of All Agencies regarding the Revised Philadelphia Plan, dated June 27, 1969.

7. EXEMPTIONS

a. Requests for exemptions from this Order must be made in writing, with justification, to the Director, Office of Federal Contract Compliance, U.S. Department of Labor, Washington, D.C. 20210, and shall be forwarded through and with the endorsement of the agency head.

b. The procedures set forth in the Order shall not apply to any contract when the head of the contracting or administering agency determines that such contract is essential to the national security and that its award without following such procedures is necessary to the national security. Upon making such a determination, the agency head will notify, in writing, the Director of the Office of Federal Contract Compliance within thirty days.

c. Nothing in this Order shall be interpreted to diminish the present contract compliance review and complaint programs.

8. EFFECT OF THIS ORDER

In the case of any inconsistency between this Order and the June 27, 1969 Order prescribing a "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction", this Order shall prevail.

9. AUTHORITY

This Order is issued pursuant to Executive Order 11246 (30 F.R. 12319, September 28, 1965) Parts II and III; Executive Order 11375 (32 F.R. 14303, Oct. 17, 1967); and 41 CFR Chapter 60.

10. EFFECTIVE DATE

The provisions of this Order will be effective with respect to transactions for which the invitations for bids or other solicitations for bids are sent on or after ------, 1969.

APPENDIX

(For inclusion in the Invitation or Other Solicitation for Bids for a Federally-Involved Construction Contract When the Estimated Total Cost of the Construction Project Exceeds $500,000.)

NOTICE OF REQUIREMENT FOR SUBMISSION OF AFFIRMATIVE ACTION PLAN TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY

1. It has been determined that in the performance of this contract an acceptable affirmative action program for the trades specified below will result in minority manpower utilization within the ranges set forth next to each trade:

Range of minority group employment until December 31, 1970

[Percent]

Identification of trade:	
Ironworkers	5–9
Plumbers and pipefitters	5–8
Steamfitters	5–8
Sheetmetal workers	4–8
Electrical workers	4–8
Elevator construction workers	4–8

Range of minority group employment for the calendar year 1971

[Percent]

Identification of trade:	
Ironworkers	11–15
Plumbers and pipefitters	10–14
Steamfitters	11–15
Sheetmetal workers	9–13
Electric workers	9–13
Elevator construction workers	9–13

Range of minority group employment for the calendar year 1972

[Percent]

Identification of trade:	
Ironworkers	16–20
Plumbers and pipefitters	15–19
Steamfitters	15–19
Sheetmetal workers	14–18
Electrical workers	14–18
Elevator construction workers	14–18

Range of minority group employment for the calendar year 1973

[Percent]

Identification of trade:	
Ironworkers	22–26
Plumbers and pipefitters	20–24
Steamfitters	20–24
Sheetmetal workers	19–23
Electrical workers	19–23
Elevator construction workers	19–23

2. The bidder shall submit, in the form specified below, with his bid an affirmative action program setting forth his goals as to minority manpower utilization in the performance of the contract in the trades specified below, whether or not the work is subcontracted.

The bidder submits the following goals of minority manpower utilization to be achieved during the performance of the contract:

Identification of trade	Estimated total employment for the trade on the contract until Dec. 31, 1970	Number of minority group employees until Dec. 31, 1970
Ironworkers		
Plumbers and pipefitters		
Steamfitters		
Sheetmetal workers		
Electrical workers		
Elevator construction workers		

Identification of trade	Estimated total employment for the trade on the contract for the calendar year 1971	Number of minority group employees for the calendar year 1971
Ironworkers		
Plumbers and pipefitters		
Steamfitters		
Sheetmetal workers		
Electrical workers		
Elevator construction workers		

Identification of trade	Estimated total employment for the trade on the contract for the calendar year 1972	Number of minority group employees for the calendar year 1972
Ironworkers		
Plumbers and pipefitters		
Steamfitters		
Sheetmetal workers		
Electrical workers		
Elevator construction workers		

Identification of trade	Estimated total employment for the trade on the contract for the calendar year 1973	Number of minority group employees for the calendar year 1973
Ironworkers		
Plumbers and pipefitters		
Steamfitters		
Sheetmetal workers		
Electrical workers		
Elevator construction workers		

(The bidder shall insert his goal of minority manpower utilization next to the name of each trade listed for those years during which it is contemplated that he shall perform any work or engage in any activity under the contract.)

3. The bidder also submits that whenever he subcontracts a portion of the work in the trade on which his goals of minority manpower utilization are predicated, he shall include his goals in such subcontract and those goals shall become the goals of his subcontractor who shall be bound by them to the full extent as if he were the prime contractor. The prime contractor shall not be accountable for the failure of his subcontractors to meet such goals or to make every good faith effort to meet them. However, the prime contractor shall give notice to the Area Coordinator of the Office of Federal Contract Compliance of the Department of Labor of any refusal or failure of any subcontractor to fulfill his obligations under this Order. Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 8 of the Order from the Office of Federal Contract Compliance to the Heads of All Agencies regarding the Revised Philadelphia Plan, dated June 27, 1969.

4. No bidder will be awarded a contract unless his affirmative action program contains goals falling within the range set forth

in paragraph 1 above, provided, however, that participation by the bidder in multi-employer programs approved by the Office of Federal Contract Compliance will be accepted as satisfying the requirements of this Notice in lieu of submission of goals with respect to the trades covered by such multi-employer program. In the event that such multi-employer program is applicable, the bidder need not set forth goals in paragraph 2 above for the trades covered by the program.

5. For the purpose of this Notice, the term minority means Negro, Oriental, American Indian and Spanish Surnamed American. Spanish Surnamed American includes all persons of Mexican, Puerto Rican, Cuban or Spanish origin or ancestry.

6. The purpose of the contractor's commitment to specific goals as to minority manpower utiliaztion is to meet his affirmative action obligations under the equal opportunity clause of the contract. This commitment is not intended and shall not be used to discriminate against any qualified applicant or employee. Whenever it comes to the bidder's attention that the goals are being used in a discriminatory manner, he must report it to the Area Coordinator of the Office of Federal Contract Compliance of the U.S. Department of Labor in order that appropriate sanction proceedings may be instituted.

7. Nothing contained in this Notice shall relieve the contractor from compliance with the provisions of Executive Order 11246 and the Equal Opportunity Clause of the contract with respect to matters not covered in this Notice, such as equal opportunity in employment in trades not specified in this Notice.

8. The bidder agrees to keep such records and to file such reports relating to the provisions of this Order as shall be required by the contracting or administering agency.

OPPORTUNITY

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

SEC. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

SEC. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

SEC. 201. 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 and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

SEC. 203. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. 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. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided,* That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will

affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest, so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section, also exempt certain classes of contracts, tract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D—SANCTIONS AND PENALTIES

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the non-discrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modification of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

SEC. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART E—CERTIFICATES OF MERIT

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant,

contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective thirty days after the date of this Order.

LYNDON B. JOHNSON.

THE WHITE HOUSE, *September 24, 1965.*

EXECUTIVE ORDER 11375—AMENDING EXECUTIVE ORDER NO. 11246, RELATING TO EQUAL EMPLOYMENT OPPORTUNITY

It is the policy of the United States Government to provide equal opportunity in Federal employment and in employment by Federal contractors on the basis of merit and without discrimination because of race, color, religion, sex or national origin.

The Congress, by enacting Title VII of the Civil Rights Act of 1964, enunciated a national policy of equal employment opportunity in private employment, without discrimination because of race, color, religion, sex or national origin.

Executive Order No. 11246[1] of September 24, 1965, carried forward a program of equal employment opportunity in Government employment, employment by Federal contractors and subcontractors and employment under Federally assisted construction contracts regardless of race, creed, color or national origin.

It is desirable that the equal employment opportunity programs provided for in Executive Order No. 11246 expressly embrace discrimination on account of sex.

Now, therefore, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered that Executive Order No. 11246 of September 24, 1965, be amended as follows:

(1) Section 101 of Part I, concerning nondiscrimination in Government employment, is revised to read as follows:

"SEC. 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice."

(2) Section 104 of Part I is revised to read as follows:

"SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission."

(3) Paragraphs (1) and (2) of the quoted required contract provisions in section 202 of Part II, concerning nondiscrimination in employment by Government contractors and subcontractors, are revised to read as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin."

(4) Section 203 (d) of Part II is revised to read as follows:

"(d) The contracting agency or the Secretary of Labor may direct that any bidder or

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[1] 30 F.R. 12319; 3 CFR, 1964–1965 Comp., p. 339.

prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require."

The amendments to Part I shall be effective 30 days after the date of this order. The amendments to Part II shall be effective one year after the date of this order.

LYNDON B. JOHNSON.

THE WHITE HOUSE, *October 13, 1967.*

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass? On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The bill clerk called the roll.

Mr. KENNEDY. I announce that the Senator from New Mexico (Mr. ANDERSON), the Senator from Nevada (Mr. BIBLE), the Senator from Mississippi (Mr. EASTLAND), the Senator from Arkansas (Mr. FULBRIGHT), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Hawaii (Mr. INOUYE), the Senator from Minnesota (Mr. MCCARTHY), the Senator from Wyoming (Mr. MCGEE), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from Wisconsin (Mr. NELSON), the Senator from Georgia (Mr. RUSSELL), the Senator from Missouri (Mr. SYMINGTON), the Senator from Maryland (Mr. TYDINGS), and the Senator from Ohio (Mr. YOUNG) are necessarily absent.

I further announce that, if present and voting, the Senator from New Mexico (Mr. ANDERSON), the Senator from Nevada (Mr. BIBLE), the Senator from Mississippi (Mr. EASTLAND), the Senator from Arkansas (Mr. FULBRIGHT), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Hawaii (Mr. INOUYE), the Senator from Minnesota (Mr. MCCARTHY), the Senator from Wyoming (Mr. MCGEE), the Senator from New Hampshire (Mr. MCINTYRE), the Senator from Wisconsin (Mr. NELSON), the Senator from Georgia (Mr. RUSSELL), the Senator from Missouri (Mr. SYMINGTON), the Senator from Maryland (Mr. TYDINGS), and the Senator from Ohio (Mr. YOUNG) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Kentucky (Mr. COOPER) is absent because of illness in his family.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The Senator from Tennessee (Mr. BAKER), the Senator from Illinois (Mr. PERCY), and the Senator from Texas (Mr. TOWER) are necessarily absent.

The Senator from New Jersey (Mr. CASE), the Senator from Arizona (Mr. FANNIN), the Senator from Arizona (Mr. GOLDWATER), the Senator from Oregon (Mr. PACKWOOD), the Senator from New York (Mr. GOODELL), the Senator from Illinois (Mr. SMITH), and the Senator from Kansas (Mr. PEARSON) are detained on official business.

If present and voting, the Senator from Illinois (Mr. PERCY), the Senator from Illinois (Mr. SMITH), and the Senator from Texas (Mr. TOWER) would each vote "yea."

The result was announced—yeas 74, nays 0, as follows:

[No. 265 Leg.]

YEAS—74

Aiken	Gravel	Montoya
Allen	Griffin	Moss
Allott	Gurney	Murphy
Bayh	Hansen	Muskie
Bellmon	Harris	Pastore
Bennett	Hart	Pell
Boggs	Hartke	Prouty
Brooke	Hatfield	Proxmire
Burdick	Holland	Randolph
Byrd, Va.	Hruska	Ribicoff
Byrd, W. Va.	Hughes	Saxbe
Cannon	Jackson	Schweiker
Church	Javits	Scott
Cook	Jordan, N.C.	Smith, Maine
Cotton	Jordan, Idaho	Sparkman
Cranston	Kennedy	Spong
Curtis	Long	Stennis
Dodd	Magnuson	Stevens
Dole	Mansfield	Talmadge
Dominick	Mathias	Thurmond
Eagleton	McClellan	Williams, N.J.
Ellender	McGovern	Williams, Del.
Ervin	Metcalf	Yarborough
Fong	Miller	Young, N. Dak.
Gore	Mondale	

NAYS—0

NOT VOTING—26

Anderson	Goodell	Pearson
Baker	Hollings	Percy
Bible	Inouye	Russell
Case	McCarthy	Smith, Ill.
Cooper	McGee	Symington
Eastland	McIntyre	Tower
Fannin	Mundt	Tydings
Fulbright	Nelson	Young, Ohio
Goldwater	Packwood	

So the bill (H.R. 15209) was passed.

Mr. GRIFFIN. Mr. President, I move to reconsider the vote by which the supplemental appropriation bill was passed.

Mr. BYRD of West Virginia. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BYRD of West Virginia. Mr. President, I move that the Senate insist on its amendments and request a conference with the House of Representatives on the disagreeing votes thereon, and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to, and the Presiding Officer appointed Mr. BYRD of West Virginia, Mr. PASTORE, Mr. HOLLAND, Mr. ELLENDER, Mr. MCCLELLAN, Mr. MAGNUSON, Mr. STENNIS, Mr. YOUNG of North Dakota, Mrs. SMITH of Maine, Mr. HRUSKA, and Mr. ALLOTT the conferees on the part of the Senate.

Mr. MANSFIELD. Mr. President, the overwhelming approval of this measure by the Senate speaks better than any words of praise for this magnificent achievement of the distinguished Senator from West Virginia (Mr. BYRD). Having assumed the chairmanship of the Subcommittee on Deficiencies and Supplementals just this year, Senator BYRD rose quickly to the task making certain that all phases of Government activity are—in the final analysis—being properly and adequately funded. It is a difficult task; one that requires the highest degree of care and diligence. Surely no Member of this body exceeds Senator BYRD in those capacities. The Senate is deeply grateful.

The Senate is grateful as well to the able and distinguished Senator from Nebraska (Mr. HRUSKA) for his outstanding cooperation and support. As the ranking minority member of the subcommittee, he applied the full measure of his efforts to assure the expeditious and efficient disposition of this funding proposal.

To the many other Senators joining the discussion I wish to pay particular tribute. So to Senator JAVITS, to Senator GRIFFIN, to Senator BAKER, Senator ERVIN, Senator HOLLAND, and the many others, I extend the commendation of the Senate for their outstanding contributions to the discussions.

Mr. YARBOROUGH. Mr. President, I was unfortunately called away from the Chamber at the time of the vote on the amendment of the distinguished Senator from Oklahoma adding $2 million to this bill for medical care for the Indians. I desire that the RECORD show that, had I been present, I would have voted "yea" on that amendment.

Mr. BYRD of West Virginia. Mr. President, I wish to take just a brief moment to express appreciation to the members of the staff of the Appropriations Committee for the exemplary work which they have performed in bringing this bill to the floor; and I want to say that I should not have done the poor job that I was able to do without their assistance.

So often their work is overlooked, and I think we ought to recognize the work that was done by the very, very able staff of the Appropriations Committee. Special praise perhaps is due Mr. Tom Scott and Mr. Joe T. McDonnell. So to them and the others I extend my gratitude.

I also want to express appreciation to the ranking minority member (Mr. HRUSKA) for the fine support he gave all along the way, and to the various Members who conducted hearings because of the fact that I had to be on the floor, and was unable to attend and conduct the hearings myself at times. I thank the other members of the subcommittee for their forbearance, patience, and assistance in this regard.

Mr. President, I thank all Senators for the patience they have shown, and for the fine spirit in which they have conducted the debate on this difficult measure. I think it has been a good day for the Republic.

Mr. GRIFFIN. Mr. President, particularly because the Senator from West Virginia has described his participation and leadership in connection with this bill in a very modest way, I would not want the record not to reflect that Senators on both sides of the aisle have commented about the excellent job that the Senator from West Virginia has done in chairing and providing leadership in connection with this bill. I think the record should show that the whole Senate is indebted to him.

Mr. BYRD of West Virginia. Mr. President, I thank the Senator. He is very gracious; I am extremely grateful.

COMMUNICATIONS FROM EXECUTIVE DEPARTMENTS, ETC.

The ACTING PRESIDENT pro tempore laid before the Senate the following letters, which were referred as indicated:

PAN AMERICAN RAILWAYS CONGRESS ASSOCIATION

A letter from the Acting Assistant Secretary for Congressional Relations, Department of State, transmitting a draft amendment to the joint resolution providing for membership and participation by the United States in the Pan American Railways Congress Association (with accompanying papers); to the Committee on Foreign Relations.

REPORT OF THE COMPTROLLER GENERAL

A letter from the Comptroller General of the United States, transmitting, pursuant to law, a report on opportunities for more effective use of an automated procuremnet system for small purchases, Department of the Navy, dated December 17, 1969 (with an accompanying report); to the Committee on Government Operations.

REPORT ON DISPOSITION OF FOREIGN EXCESS PERSONAL PROPERTY

A letter from the Assistant Secretary of Defense, transmitting, pursuant to law, a report relative to the Department's disposition of foreign excess personal property located in areas outside of the United States, Puerto Rico and the Virgin Islands (with an accompanying report); to the Committee on Government Operations.

MIDDLE RIO GRANDE PROJECT, NEW MEXICO

A letter from the Assistant Secretary of the Interior, transmitting, pursuant to law, their determinations relating to deferment of the February 1 and August 1, 1970, construction payments due the United States from the Middle Rio Grande Conservancy District, Middle Rio Grande Project, New Mexico; to the Committee on Interior and Insular Affairs.

FINANCIAL REPORT OF VETERANS OF WORLD WAR I OF THE U.S.A., INC.

A letter from the National Quartermaster-Adjutant, Veterans of World War I of the U.S.A., Inc., transmitting, pursuant to law, a financial report as of September 30, 1969 (with an accompanying report); to the Committee on the Judiciary.

DISPOSITION OF EXECUTIVE PAPERS

A letter from the Archivist of the United States, transmitting, pursuant to law, a list of papers and documents on the files of several departments and agencies of the Government which are not needed in the conduct of business and have no permanent value or historical interest and requesting action looking to their disposition (with accompanying papers); to a Joint Committee on the Disposition of Papers in the Executive Departments.

The ACTING PRESIDENT pro tempore appointed Mr. McGEE and Mr. FONG members of the committee on the part of the Senate.

PETITIONS AND MEMORIALS

Petitions, etc., were laid before the Senate, or presented, and referred as indicated:

By the ACTING PRESIDENT pro tempore:

A letter, in the nature of a petition, from Mary C. Gordon, of Utica, N.Y., praying for the enactment of legislation to extend the Voting Rights Act of 1965; to the Committee on the Judiciary.

HOUSE BILL REFERRED

The bill (H.R. 15095) to amend the Social Security Act to provide a 15-percent across-the-board increase in benefits under the old-age, survivors, and disability insurance program, was read twice by its title and referred to the Committee on Finance.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. YARBOROUGH, from the Committee on Labor and Public Welfare, with amendments:

S. 2660. A bill to extend and otherwise amend certain expiring provisions of the Public Health Service Act for migrant health services (Rept. No. 91-618).

By Mr. HARTKE, from the Committee on Commerce, with amendments:

S. 1933. A bill providing for Federal railroad safety (Rept. No. 91-619).

By Mr. TYDINGS, from the Committee on the District of Columbia, with an amendment:

S. 2981. A bill to revise the laws of the District of Columbia on juvenile court proceedings (Rept. No. 91-620).

By Mr. JAVITS, from the Committee on Government Operations, without amendment:

H.J. Res. 764. A joint resolution to authorize appropriations for expenses of the President's Council on Youth Opportunity (Rept. No. 91-621).

BILLS INTRODUCED

Bills were introduced read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. STEVENS:

S. 3254. A bill to amend title 5, United States Code, in order to establish certain requirements with respect to air traffic controllers; to the Committee on Post Office and Civil Service, by unanimous consent.

(The remarks of Mr. STEVENS when he introduced the bill appear later in the RECORD under the appropriate heading.)

By Mr. HATFIELD:

S. 3255. A bill to amend the Federal Aviation Act of 1958 to require the Secretary of Transportation to prescribe regulations under which air carriers will be required to reserve a section of each passenger-carrying aircraft for passengers who desire to smoke; to the Committee on Commerce.

(The remarks of Mr. HATFIELD when he introduced the bill appear later in the RECORD under the appropriate heading.)

By Mr. EAGLETON:

S. 3256. A bill for the relief of Dr. Pacelli Escondo Brion; and

S. 3257. A bill for the relief of Maria Badalamenti; to the Committee on the Judiciary.

By Mr. STEVENS:

S. 3258. A bill to confer jurisdiction on the United States District Court for the District of Alaska to hear and determine the claim of the State of Alaska for a refund of a sum paid to the United States for firefighting services; to the Committee on the Judiciary.

(The remarks of Mr. STEVENS when he introduced the bill appear later in the RECORD under the appropriate heading.)

By Mr. KENNEDY (for himself, Mr. BROOKE, Mr. COTTON, Mr. MCINTYRE, Mr. DODD, and Mr. RIBICOFF):

S. 3259. A bill to authorize the Secretary of the Interior to establish the Bunker Hill National Historic Site in the city of Boston, Mass., and for other purposes; to the Committee on Interior and Insular Affairs.

(The remarks of Mr. KENNEDY when he introduced the bill appear later in the RECORD under the appropriate heading.)

By Mr. CASE:

S. 3260. A bill to make it a criminal offense to travel in interstate commerce to avoid service of process or appearing before a crime investigation agency; to the Committee on the Judiciary.

By Mr. BURDICK:

S. 3261. A bill to amend title 18 of the United States Code to authorize the Attorney General to admit to residential community treatment centers persons who are placed on probation, released on parole, or mandatorily released; to the Committee on the Judiciary.

S. 3254—INTRODUCTION OF AIR TRAFFIC CONTROLLERS BILL

Mr. STEVENS. Mr. President, the problems besetting air traffic control and the hard working men who man the air traffic control facilities have been brought to light in the many newspaper and magazine articles on the subject that have recently appeared. The Senate Post Office and Civil Service has held hearings on the proposed early retirement of air traffic controllers, and other bills dealing with the problem of air traffic control have been introduced.

Today, I am introducing at the request of the Anchorage professional air traffic controller employee organization a bill which was drafted by a representative of the air traffic controller of my State.

The bill provides for the formal classification of air traffic controllers into four groups based on training and experience and provides for compensation according to these classifications. It separates management and administrative tasks from air traffic control functions and provides that air traffic controllers shall not be burdened with tasks not directly related to the control of aircraft. Flight familiarization would be required of all air traffic controllers under this bill to assure that the men who control the planes are familiar with the conditions on board the aircraft they are controlling. The bill provides for premium pay and early retirement for controllers in high density facilities.

I am happy to have the opportunity to introduce this bill because it contains provisions drafted on behalf of air traffic controllers and is designed to provide the administration of the air traffic control program that the men who work in it would like to have. I think it is important for the Senate to have the opportunity to examine a bill which is a reflection of the desires of the men whom the bill is designed to assist.

I ask unanimous consent that the bill be referred to the Committee on Post Office and Civil Service, and that the bill be printed in the RECORD.

The PRESIDING OFFICER. The bill will be received and, without objection, the bill will be referred to the Committee on Post Office; and, without objection, the bill will be printed in the RECORD.

The bill (S. 3254) to amend title 5, United States Code, in order to establish certain requirements with respect to air traffic controllers, introduced by Mr. STEVENS, was received, read twice by its title, referred to the Committee on Post