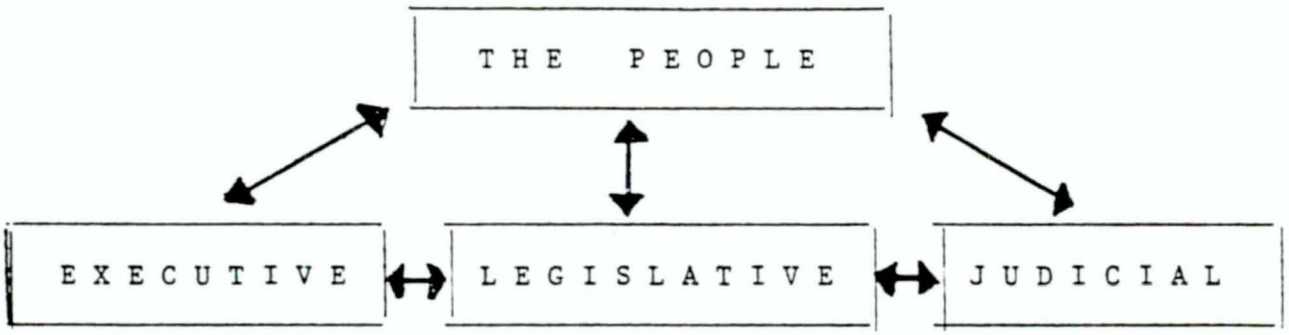
THE QUOTA CONFLICT

(An Historical Perspective of How
And Why Quotas Became an Issue)

Arthur A. Fletcher *

The Checks and Balances System functions as a continuous-flow process which is described as a "Monitoring System"



The Checks and Balances continuous-flow monitoring system is intimidating and threatening, and creates a climate and environment where fear and trepidation is the order of the day. This, in turn, establishes and institutionalizes a "don't rock the boat -- go along to get along" management system. The consequence of such a management system is low morale, buck passing and chaos. The final result is a complete and perfect inability to implement and carry out the intent of the law.

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THE OFFICE OF FEDERAL CONTRACT COMPLIANCE (OFCC)

The Office of Federal Contract Compliance, successor to the President's Committee, was formed in 1965 to enforce the anti-discrimination and affirmative action clauses in government contracts. It was to supervise the employment practices of employers who were government contractors. First the agency was understaffed. The tiny staff of not more than 28 people in 1967 did not effectively supervise the various purchasing agencies, and with the exception of the Newport News situation, was unable to effectively control the major employers. The OFCC did not issue its own regulations until 1968, three years after its formation. When it did issue its own regulations, the regulations were so vague that contractors could go right on discriminating with the excuse that the government had not been specific about what they had to do to avoid discriminating. The various purchasing agencies, notably the Department of Defense, were able to do business as usual with the discriminators, because OFCC did nothing to stop them. OFCC did not develop the data and information necessary to organize an effective and systematic compliance program. It did not consider cancellation or debarment of any contractors until 1968, three years after the agency was created, and at the end of the Johnson administration.

Perhaps the most startling failure of the OFCC reported by the Civil Rights Commission, was its inability to deal with the problem of discrimination in the construction industry. This problem has plagued equal employment opportunity programs from the earliest days and early became the key symbol in the minority community, by which the promises of equal employment opportunities would be measured. Despite this, the OFCC floundered inconclusively, developing different programs in several cities, but implementing none of them in a systematic, orderly way. There was simply a series of improvised approaches to community pressures, each of which was labelled a "plan" with the name of the city attached. These plans were so vague and indefinite, that they did not succeed in influencing the course of discrimination in the trades.

In essence, the report shows that the OFCC from 1965 through 1968 had all the powers to be an effective regulatory agency, but did not use them. It did not give guidance as to what constituted discrimination, nor what steps were required to end it; it did not have systematic enforcement procedures; and it did not establish its credibility by utilizing the sanctions at its command, except in occasional instances, by delay in issuance of contracts.

This was the state of affairs at the end of the Johnson administration - which makes it clear that these inadequacies did not originate with the Nixon administration.

This then is the story of the silent sellout, or how the government which secured the passage of the great Civil Rights Act of 1964, and adopted the tough executive order requiring non-discrimination by government contractors, then failed abysmally in the effectuation of those legal tools to produce equality. The promised land of dignity, equality, work and justice lay within the reach of all Americans but their government did not grasp it.

THE CONSTRUCTION INDUSTRY 1969 - 1971

In the years from 1965 to 1968, OFCC had fumbled with a number of ineffective programs in the construction industry. Through this fumbling the organization had begun to develop some ideas of how to do the job of ending discrimination in that industry. The construction industry organized in a way vastly different from most of the economy. The construction industry consists of vast numbers of general and subcontractors who bid on specific jobs. General contractors are rapidly becoming brokers, who bid, but do no work, subcontracting out most or all of the work. Subcontractors, in turn, maintain a small permanent labor force, and, when they obtain a contract, go out to hire the men necessary to perform it. Thus the demand side of the labor market in the construction industry is characterized by sharp peaks and valleys, as contractors hire men for specific jobs, and then fire them when the job is over. In addition, the demand side is further affected by problems of seasonality (not all work can be done in all weather) and the general level of business in the construction industry.

On the supply side, most of the industry is organized by the 19 craft unions which have always represented the workers in the industry. These unions seek exclusive territorial jurisdiction. They seek to control the access to all the jobs in a certain craft in a certain geographical area. If they control these jobs, they can then allocate them to their members and others, thus assuring at least some union members of regular employment, in the face of fluctuating demand for labor. In addition, by controlling the number of people who come into the trade, they are able to keep the supply of skilled workers at a level which is low enough so that they have strong bargaining power in setting wages which management. The result of this effort, carried on over the years, is that the wage rates in the construction industry are higher than in any other industry. It is important to understand that both the hiring hall, through which the union distributes the jobs, and the decision to restrict the supply of labor are, in themselves, legitimate union objectives, so long as they do not interfere with other, more important values. With such machinery the White-dominated unions have systematically kept Black and Spanish minority workers out of the construction industry.

The NAACP, under the leadership of its fiery director of Labor Relations, Herbert Hill, has focused on the problems of discrimination in construction for nearly two decades, and has made it the central symbol for our time of the quest for equality in employment opportunity. One might argue today that this was a bad choice because the resistance is strongest in this trade, and the payoff in number of jobs is not going to be as great as if, for example, the NAACP had concentrated over the years on a sector of the economic system which was growing more rapidly, such as the white collar area. However, such considerations are not in point, because a decision of twenty years standing has been made that the construction industry is the important symbol. This decision, in the context of our pluralism, is the important one which must be recognized and dealt with.

It was in this context that I came into office, early in 1969. In connection with efforts to persuade construction employers to increase minority employment in Cleveland and Philadelphia, the OFCC used "manning tables" in which contractors projected their minority employment needs throughout the course of the job. These manning tables were negotiated between the government and the contractor after bids had been awarded. The Comptroller General ruled that this approach was illegal because Federal Contract law requires that the elements of the contract must be specified before bids are put out. This decision led the OFCC staff to propose, shortly after I took office, that specific percentage targets for minority employees in several trades be set forth in Philadelphia and incorporated into the bid specifications in all government contracts issued in that area. OFCC wished to be specific with respect to numbers, and then impose a "good faith" obligation to achieve the numerical results. This was designed to avoid the argument that the numbers constituted "quotas" and hence violated the so-called "no quota" provision of Title VII of the 1964 Civil Rights Act. In fact, one might believe that the opponents of equal opportunity had planned a double play against the compliance program. First, they secured the Comptroller's ruling that the government had to specify exactly the numbers of minorities to be employed, because of the principle that contract specifications must be made clear to bidders before they bid. And then, once the Ofcc moved to be specific, the opponents of equal opportunity would claim that the very specificity required under the Comptroller's ruling violated the "no quota" provision of Title VII. The end result was that there was no affirmative action program which was specific enough to have teeth, to advise contractors of their obligations, to assist in increasing minority employment. The government continued to do little in this field, and was criticized by business for not being specific enough.

In spite of this circular argument, I decided to go ahead with the Philadelphia Plan of putting specifications of minority employment goals in all contracts. I did this because my study and experience had convinced me that such targets were essential if we are to measure results in terms of increased minority employment. Without such targets, the paper compliance, and the interminable ineffectiveness of the government programs would continue. I had not come to Washington to preside over a continuation of the ineffective programs of the past.

The Secretary was in agreement. The Philadelphia Plan was announced and the reaction was immediate. The Comptroller ruled that the plan was in violation of the no-quota provision of Title VII and hence illegal.

This precipitated one of the strangest political and constitutional crises of our generation. First, the constitution requires that the Comptroller be a representative of the Congress who keeps track of expenditures of federal government agencies to make sure that monies appropriated by Congress are spent in accordance with congressional intent. His office in fact certifies that the Treasury Department may pay obligations assumed by the Executive branch. In each agency of government, there is an officer who must certify to the Comptroller that the monies spent by the department have been properly spent.

The Comptroller concerns himself with government contract law and his office renders opinions on many aspects of government contracting. Thus, his ruling in 1968 that the manning tables in Philadelphia and Cleveland could not be negotiated after contract had been signed was fully within his jurisdiction. But, the decision in 1969 that the Philadelphia Plan violated the no-quota provision of Title VII was a totally different matter, for he was there in this instance, interpreting the substance of a federal regulatory statute. He is a representative, not of the courts, or of the Executive, but of the Congress. Had his ruling stood, it would have meant that the Congress could not only pass laws, but interpret them as well. This would have been a radical departure from traditional practices which separate the functions of the various branches of government. Traditionally, Congress passes laws, the Executive carries them out and the courts have the final word on what the law means, and determine whether the Executive stayed within the limits of the law. This concept of the separation of powers lies at the heart of our constitutional system of checks and balances, and the Comptroller's attempt to interpret the laws on behalf of the Congress was a clear and distinct challenge to the principle of separation of powers.

Every government agency has its own lawyers, who interpret for it the meaning of the statute which it is to implement. But, the final decision of how any agency in the Executive branch of government may interpret its statute rests not with the agency, but with the chief legal officer in the Executive branch, the Attorney General. Thus, the Comptroller's opposition to the Philadelphia Plan based on an interpretation of Title VII of the Civil Rights Act of 1964, was ultimately an encroachment on the powers of the Attorney General.

The Attorney General, John Mitchell, appeared at the Labor Department for a widely publicized press conference. He came armed with two documents: one, a long and detailed memorandum from the Solicitor of Labor, Lawrence Silberman, arguing that the Philadelphia Plan was legal and did not violate the "no quota" provisions of the Civil Rights Act, and the other, a shorter opinion of his own, maintaining the same view. Attorney General Mitchell was determined to

support the equal employment program which Secretary Shultz and I had developed, both because he believed in it, and because he needed to protect the historic principle of separation of powers. His presentation settled the question of the separation of powers for the time being and the road-block raised by the Comptroller to the Philadelphia Plan was effectively pushed aside.

If there had been an anti-government strategy of the type I mentioned earlier, it was thrown off base by this timely intervention by the Attorney General who always responded with vigor and the full support of his office when I needed him to keep the Plan going. However, those who had such a strategy in mind, did not give up. Rather, in one of those exciting and unpredictable moves which makes life in Washington fascinating, they shifted the same battle to another forum, ie., the Congress. This was accomplished by their having a rider attached to an appropriations bill which would have had the effect of upholding the Comptroller's decision that the Philadelphia Plan was illegal. This would have given the Comptroller general powers to supervise the actions of executive branch agencies, in his decisions with respect to the payment of treasury funds. The rider was to come for a vote in the Senate, and was widely billed as an effort to kill the Philadelphia Plan.

At this point, the President intervened. His Administration was committed to the Philadelphia Plan, and he was himself persuaded that it was a good and workable idea; he was not therefore prepared to have it destroyed in the political arena without a struggle. He publicly and privately placed his political weight against the rider, and began to round up votes in the Senate to kill it. This was his major commitment of the powers of his office, to assist in the carrying out of equal employment opportunity obligations. It was unprecedented. President Johnson had never intervened to help an agency trying to enforce these laws. But President Nixon was convinced of the importance of the program and took all the actions he could to see that the rider was defeated.

In the political arena, as the result of presidential intervention, something unprecedented happened. The civil rights movement in the Legislature, which had long been spearheaded by the "leadership conference", - a loose coalition of liberal, labor and civil rights groups, and had stood together to support the passage of the various civil rights laws of the 1960's, - was shattered by the debate on the rider to kill the Philadelphia Plan. Part of Labor, of course, supported the rider. George Meany, President of the AFL-CIO comes out of the construction industry, and the construction unions are very powerful in the massive AFL-CIO institution. But, some unions refused to go along with the plan to scuttle the Philadelphia Plan. Thus, the united front of labor itself was weakened. More importantly, the civil rights groups, rather surprised that the President was now the spokesman for the civil rights interests, found that they had to side with the President and against their old friends in labor. Their position contributed to the final outcome, in which the Senate killed the rider, and left the Philadelphia Plan intact. The anti-Philadelphia Plan strategy had backfired. We could now say that the Senate had, by inference, declared that the Philadelphia Plan was proper.

We inaugurated the Plan in September, 1969. It was immediately taken into court, and a long court battle began. In the end, the courts upheld the Plan.

Meanwhile, on the operational front, the Plan was having difficulties. They stemmed from two sources: first, the old OFCC notion that only government and government-aided construction workers could be covered by a plan. This nonsensical idea was a holdover from the days when the Executive Order had applied only to federal work, and not to all work of federal contractors. This had been changed in the 1961 Executive Order, but the OFCC had not caught up with the change in the construction field. Obviously, compliance with the Executive Order with respect to all work is a condition for having a government contract, regardless of how much non-government work an employer has. Thus, this limitation in the OFCC thinking was really part of the old failure to enforce the Executive Order.

As long as private construction by government contractors was not covered, they could bunch their minority employees on government work, and t hus defeated our objective of increasing minority employment. When we introduced the Washington Plan in 1970, we covered all work by government contractors, not just government work. Then, in 1971, we amended the Philadelphia Plan to extend it to all work by government contractors, thus eliminating the loophole.

We had great problems in implementing the Plan, because of the OFCC agency system. The OFCC staff was too small to police the Philadelphia Plan, although our area coordinator, Bennett Stalvey, was largely responsible for its creation. He had ro supervise half a dozen government agencies that were financing construction, and the interagency bickering and backbiting which resulted made it difficult to know what was happening in Philadelphia. In addition, another inheritance from the old OFCC days was the failure to have a good informations system to keep track of minority participation. In the old government tradition, the OFCC required the submission of great numbers of documents which were simply shelved because there was no one to read them. I ordered a more efficient information system developed and we were by 1971, able to monitor compliance with the Philadelphia Plan.

The Plan had become controversial. George Meany still did not like it, and the construction unions grumbled constantly; but it became the symbol of progress in civil rights for the Administration. Other cities pressed for the adoption of the Plan. Anticipating the imposition of several more plans, I delivered a speech in March 1971 in Washington, D. C. which outraged the President of the Sheetmetal Workers who wrote to President Nixon demanding my resignation. I responded that his union was probably the worst offender against minorities in the country. That ended the exchange.

See Appendix A "EXCERPTS" for documentary notes and references.

THE QUOTA CONFLICT

APPENDIX A "EXCERPTS"

(Excerpts from CCH Employment Practices Decisions, Vol. 3, 1970 - 1971 ...Decisions Rendered by Federal and State Courts....)

Executive Order No. 11246 requires all applicants for federal assistance to include in their construction contracts specific provisions respecting fair employment practices, including the provision:

"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."

Section 201 of the Executive Order provides:

"The Secretary of Labor shall be responsible for the administration of Parts II [government contracts] and III [Federal assistance] 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."

The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. On June 27, 1969 Assistant Secretary of Labor Fletcher issued an order implementing the Executive Order in the five-county Philadelphia area. The order required bidders, prior to the award of contracts, to submit "acceptable affirmative action" programs "which shall include specific goals of minority manpower utilization." The order contained a finding that enforcement of the "affirmative action" requirement of Executive Order No. 11246 had posed special problems in the construction trades.' Contractors and subcontractors must hire a new employee complement for each job, and they rely on craft unions as their prime or sole source for labor. The craft unions operate hiring halls. "Because of the exclusionary practices of labor organizations," the order finds "there traditionally has been only a small number of Negroes employed in these seven trades."

Acting under this broad delegation of authority the Labor Department in a series of orders of local application made it clear that it interpreted "affirmative action" to require more than mere policing against actual present discrimination."

Acting pursuant to the June 29, 1969 order, representatives of the Department of Labor held public hearings in Philadelphia on August 26, 27 and 28, 1969. On September 23, 1969, Assistant Secretary Fletcher made findings with respect to each of the listed factors and ordered that the following ranges be established as the standards for minority manpower utilization for each of the designated trades in the Philadelphia area for the following four years:

Identification of Trade	Range of Minority Group Employment Until 12/31/70	for 1971	for 1972	for 1973
Ironworkers	5%-9%	11%-15%	16%-20%	22%-26%
Plumbers & Pipefitters	5%-8%	10%-14%	15%-19%	20%-24%
Steamfitters	5%-8%	11%-15%	15%-19%	20%-24%
Sheetmetal workers	4%-8%	9%-13%	14%-18%	19%-23%
Electrical workers	4%-8%	9%-13%	14%-18%	19%-23%
Elevator construction workers	4%-8%	9%-13%	14%-18%	19%-23%

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

Because the Plan requires that the contractor agree to specific goals for minority employment in each of the six trades and requires a good faith effort to achieve those goals, . . .)

The complaints of the Association and the contractors refer to the fact that the Comptroller General of the United States has opined that the Philadelphia Plan Commitment is illegal and that disbursement of federal funds for the performance of a contract containing such a promise will be treated as unlawful."

They allege that the Philadelphia Plan is illegal and void for the following reasons: (* * *)

6. It violates the process because . . .)

(d) it requires quota hiring in violation of the Fifth Amendment. . . .

The Plan, they say, is a rule or regulation of a general nature, and could have been issued only by the Secretary. In the first place the Plan is not general. It is based upon findings as to the available construction manpower in a specific labor market. Moreover, the interpretation of §401 made by the administrator requires the same deference from the courts as is required toward his other interpretations of the order. 'We will not second guess his delegation to the Assistant Secretary of the duty of enforcing the affirmative action covenant.

The Association consists of more than eighty contractors in the five-county Philadelphia area who regularly employ workers in the six specified crafts, and who collectively perform more than $150,000,000 of federal and federally assisted construction in that area annually. Each of the contractor plaintiffs is a regular bidder on federal and federally assisted construction projects. The complaint was filed prior to the opening of bids on the Marsh Creek dam. It sought injunctive relief against the inclusion of a Philadelphia Plan Commitment requirement in the invitation for bids.

The Attorney General has issued an opinion that the Philadelphia Plan is valid," and the President has continued to acquiesce in the interpretation of the Executive Order made by his designee. The Labor Department interpretation of the affirmative action clause must, therefore, be deferred to by the courts.

Plaintiffs also contend that the signing of the June 27, 1969 and September 23, 1969 orders by an assistant secretary rather than by the Secretary of Labor makes those orders procedurally invalid.

"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."

Affirmative Action—Philadelphia Plan—Validity of Hiring Goals.—The Executive Order's general requirement that contractors will not discriminate against employees because of race, creed, color, or national origin does not conflict with, so as to make invalid, the added requirement of a specified affirmative action plan that includes the setting of goals for the increased utilization of minority tradesmen. Nor does the plan become invalid because signed by an assistant Secretary of Labor. The President has acquiesced in the interpretation of the Executive Order, and the Secretary of Labor had delegated his authority under the Order to an Assistant Secretary. Ex. Ord. 11246, Sec. 206.

Affirmative Action—Obligations of Contractors—Geographical Reach of Plan—Quota Hiring.—An affirmative action plan does not violate the due process requirements of the Constitution by placing on affected construction contractors an obligation to remedy a situation created by acts of discrimination by craft unions which have not been preceded against, by extending the plan to a certain geographical area, or by setting goals for the hiring of minority persons. The plan does not impose a punishment for past conduct and was designed to provide adequate tradesmen for performance of contracts at specified locations. U. S. Constitution, Fifth Amendment.

Affirmative Action—Philadelphia Plan—Effect on Union Referral Systems—NLRA Protection.—Provisions of the Philadelphia Plan calling for goals by contractors for increased utilization of minority tradesmen on federally assisted construction projects and requiring bypass of union hiring halls when such minority tradesmen are unavailable through such systems do not violate the National Labor Relations Act by interfering with such referral systems. The NLRA only permits union hiring hall arrangements and does not require them, and nothing in that Act purports to place any limitation upon the power of the federal government to contract for its services. 29 U. S. C. Sec. 158(f).