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Frederick W. Lambert  
*University of Michigan Law School*

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# AFFIRMATIVE ACTION: A ROBIN HOOD HIRING POLICY IN FEDERALLY AIDED CONSTRUCTION

*Frederick W. Lambert\**

## *I. Introduction*

Executive Order 11246,<sup>1</sup> promulgated in September 1965, requires that all federal financial aid applicants incorporate into construction contracts and sub-contracts the same guarantees of equal employment opportunity that are required of parties in a direct contractual relationship with the government.<sup>2</sup> Each contractor must "take affirmative action to ensure that [job] applicants are employed . . . and treated during employment" in a nondiscriminatory manner<sup>3</sup> and must guarantee that his subcontractors will also take such affirmative action.<sup>4</sup> Responsibility for enforcement of the Order was delegated to the newly-established Office of Federal Contract Compliance (OFCC).<sup>5</sup> The OFCC drafted guidelines<sup>6</sup> requiring contractors and major subcontractors to submit pre-award plans of affirmative action that would "have the result of assuring . . . minority group representation in all trades . . . and in all phases of the work."<sup>7</sup> *Weiner v. Cuyohoga Community College*<sup>8</sup> is the first case in which the validity of these guidelines has been contested.

In early 1968, a mechanical contractor, who was bidding for pipefitting work on a federally assisted construction project in Cleveland, Ohio, submitted a detailed plan of affirmative action with the following caveat:

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\*Mr. Lambert is a member of the Editorial Board of *Prospectus*. He would like to thank Wilbur J. Markstrom of the Ohio bar for his kind assistance.

<sup>1</sup> 30 Fed. Reg. 12,319 (1965). The Order was amended by Executive Order 11375 (1967), which substituted the word "religion" for "creed" and added sex as a prohibited basis of discrimination.

<sup>2</sup> *Id.* § 301.

<sup>3</sup> *Id.* § 202.

<sup>4</sup> *Id.* § 202(7) requires the contractor to include in his subcontracts the same affirmative action requirements by which he is bound.

<sup>5</sup> Secretary's Order No. 26-65, 31 Fed. Reg. 6921 (1966).

<sup>6</sup> 31 Fed. Reg. 6881 (1966); 32 Fed. Reg. 7439 (1967). These rules were again amended in mid-1968. See 33 Fed. Reg. 7804 (1968).

<sup>7</sup> Memorandum of May 24, 1967 from Vincent G. Macaluso, Ass't. Dir. of the OFCC for Construction, to all agency compliance officers.

<sup>8</sup> 15 Ohio Misc. 298, 238 N.E.2d 839 (1968) aff'd September 16, 1968, by Ohio Court of Appeals, petition for certification to Supreme Court of Ohio filed, November 2, 1968. The author has spoken to Mr. Charles Doneghy, the Contract Compliance Officer in Cleveland. Mr. Doneghy suggested that the government would require the college to appeal any adverse decision.

"Subject to Availability and Referral . . . of Qualified Journeymen and Apprentices from Pipefitters Local 120."<sup>9</sup> The aid recipient, Cuyahoga Community College, rejected the contractor's low bid on the ground that the plan, because of its conditional language, failed to comply with the guidelines enunciated by the OFCC and the Department of Housing and Urban Development.<sup>10</sup> Suit was instituted to compel acceptance of the bid; the plaintiff contended that "assurances of minority representation"<sup>11</sup> meant that he was required to guarantee a quota of minority workers in violation of Title VII of the Civil Rights Act of 1964,<sup>12</sup> which forbids discrimination in hiring on the basis of race, color, religion, sex or national origin. The Ohio Court of Common Pleas held that the evidence did not establish that the government or the college had required an illegal quota.<sup>13</sup> Moreover, it refused to equate "assurances of minority representation" with a guarantee that minority workers would be hired regardless of qualification.

The court did not have to analyze the statutory and constitutional limitations on affirmative action. The weak factual case presented by the plaintiff allowed the court to base its decision on narrow evidentiary grounds. It did not discuss the possibility that other more demanding affirmative action guidelines might violate the Civil Rights Act.<sup>14</sup> In

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<sup>9</sup> The contractor had an exclusive union hall hiring agreement that required him to accept only pipefitters supplied by Local 120 located in Cleveland. The college contended that both OHIO REV. CODE ANN. §153.591 (Page 1965) and the CIVIL RIGHTS ACT of 1964 invalidated such an agreement because the union was engaging in discriminatory hiring practices. The court did not analyze the plaintiff's response to this argument, which asserted the unconstitutionality of the Ohio statute, because it was able to decide the case on a narrower evidentiary ground. See text accompanying note 16 *infra*.

<sup>10</sup> See generally 1968 CCH *Employment Practices* ¶ 8229.

<sup>11</sup> See note 3 *supra*.

<sup>12</sup> 42 U.S.C. §2000e(2)(j) (1964). It should be noted that Title VII of the ACT, which includes the anti-preference section, does not include federal or state governments in its definition of "employer." *Id.* §2000e(1). Thus it could be argued that the federal government could follow a preferential hiring policy and not be in violation of the statute. Such a hiring policy might violate the "due process" clause of the Fifth Amendment. This is discussed at 193 *infra*.

<sup>13</sup> The court stated that ". . . the evidence does not show that the College set up any ratio between Caucasian and any minority group or that it required the low bidder to guarantee to maintain such [a] thing — a ratio quota system." 15 Ohio Misc. at 297-98, 238 N.E.2d at 844.

<sup>14</sup> However, by negative implication, the court seemed to acknowledge the possibility of a conflict with the CIVIL RIGHTS ACT of 1964.

In this case, the evidence fails to show that the College or any federal official has required "preferential treatment for any individual or any group for the purpose of achieving racial balance." [Citing the Cong. Record, April 8, 1964 at 6986.] Ohio Misc. at 298, 238 N.E.2d at 845.

addition, the court was not compelled to treat the more vexing question whether guidelines not in direct conflict with the statute might, nevertheless, be beyond the executive authority of the President<sup>15</sup> or in violation of the due process clause of the Fifth Amendment.<sup>16</sup> This article will attempt to present a more fundamental analysis of the extent to which affirmative action is permissible to redress the present unequal condition of many minority citizens that has been caused by discriminatory hiring practices in existence before the passage of the Civil Rights Act.

Besides providing a factual context within which to discuss these broader questions, *Weiner* illustrates the weaknesses of the present procedure by which the government's policy of equal employment opportunity is enforced. The Executive Order places a major portion of the enforcement burden on contractors who, as federal aid recipients, are required to guarantee their subcontractor's compliance with the Order and the relevant OFCC guidelines.<sup>17</sup> It will be argued that direct government enforcement of affirmative action would be more equitable to poorer aid applicants, less costly to the government, and more efficient in terms of gaining maximum compliance with the guidelines.

## ***II. Non-Discrimination: The Civil Rights Act of 1964***

By passing Title VII of the 1964 Civil Rights Act,<sup>18</sup> Congress responded to the need for equal employment opportunity in hiring, promotion, and training of employees by private industrial employers engaged in interstate commerce.<sup>19</sup> Labor organizations and employment agencies were also required to observe the general nondiscrimination provisions of the Act.<sup>20</sup> Notwithstanding the comprehensiveness of the statute, it can be argued that it contained two important shortcomings that lessened its effectiveness in correcting the evils of past discrimination and enforcing the newly enunciated policy of equal employment opportunity.

First, the Act did not delegate "cease and desist" powers to the Equal Employment Opportunity Commission (EEOC), the administrative tribunal that was formed to hear complaints and investigate charges of discriminatory practices.<sup>21</sup> Instead, the Act merely permitted the EEOC to

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<sup>15</sup> See text at 192 *infra*.

<sup>16</sup> See text at 193 *infra*.

<sup>17</sup> See note 4 *supra*.

<sup>18</sup> 42 U.S.C. §2000e (1964).

<sup>19</sup> 1964 U.S. CODE CONG. & ADM. NEWS 2355.

<sup>20</sup> 42 U.S.C. §2000e (1964).

<sup>21</sup> As drafted, the bill had delegated to the EEOC cease and desist power to correct discriminatory employment practices. This feature was severely criticized and finally dropped.

Recent attempts to amend the CIVIL RIGHTS ACT to give the EEOC cease and desist power have been blocked by bi-partisan opposition. Sen. Dirksen described the bill (S. 1026 introduced by Sen. Hart on Feb. 21, 1967) as "one of the

"endeavor to eliminate any . . . unlawful employment practice by informal methods of conference, conciliation and persuasion."<sup>22</sup> However, it did provide that a private party alleging a discriminatory practice could institute suit against an employer who rejected a suggested form of voluntary compliance.<sup>23</sup> In such an action, the court could appoint counsel for the complainant if necessary and could allow intervention by the Attorney General if the case were of "general public importance."<sup>24</sup> Furthermore, if an employer refused to obey a court order, the Commission could institute suit in its own name to seek compliance.<sup>25</sup>

Although the EEOC reported a substantial increase in the number of successfully conciliated complaints during the latter months of 1967, those cases reaching the courts seemed to underscore the barriers that confronted an individual in attempting to compel an intransigent employer to observe the terms of the Act.<sup>26</sup> President Johnson, in early 1968, urged passage of a bill introduced by Senator Philip H. Hart that would enable the Commission to issue cease and desist orders after an appropriate hearing.<sup>27</sup> Bi-partisan opposition makes future enactment improbable.<sup>28</sup>

The second shortcoming of the Civil Rights Act was its anti-preferential treatment section,<sup>29</sup> which can be read to limit executive authority for

most offensive pieces of legislation that could come before Congress." BNA, *Labor Policy and Practice*, Bulletin to Management No. 955 at 2, (1968).

As another indication of Congressional feeling toward the EEOC, the House reduced President Johnson's request for funds from \$13.1 million to \$6.9 million. EEOC Chairman Clifford Alexander commented that such action, unless corrected, would "make a mockery of this Nation's commitment to equal employment opportunity." *Id.* at 2.

<sup>22</sup> 42 U.S.C. §2000e(5) (1964).

<sup>23</sup> *Id.* at §2000e(5)(e) (1964).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at §2000e(5)(i) (1964).

<sup>26</sup> See generally Press Release by EEOC Chairman Clifford Alexander, January 10, 1968 CCH *Employment Practices* ¶ 8216.

<sup>27</sup> Excerpts from a speech to Congress on January 24, 1968 CCH *Employment Practices* ¶ 8225.

<sup>28</sup> See note 21 *supra*.

<sup>29</sup> 42 U.S.C. §2000e(2)(j) (1964):

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 by any labor organization, or admitted to, or employed in, any apprenticeship or other training program,

vigorous affirmative action guidelines. This provision negated the possibility of any interpretation of the Act that would require, as a means of rectifying racial imbalances, any hiring of minority persons based upon percentage composition of an employer's work force in comparison to minority representation in the population.<sup>30</sup> Together with the blanket nondiscrimination provision of the Act, the anti-preference section seemed to manifest Congressional disapproval of compensatory hiring by any "employer" as defined by Title VII.<sup>31</sup>

The results of decades of discrimination against minority citizens could hardly be altered by the tepid EEOC enforcement provisions and the insertion of the anti-preference section must have made the Civil Rights Act seem a token advance, if not a Pyrrhic victory, to minority leaders. Having been denied the opportunity to develop skills for so long, how could their people now be expected to compete with non-minority citizens on an equal basis?<sup>32</sup> It is understandable that to some the Act must have seemed, at best, a feeble attack on entrenched discrimination, at worst, legalization of a policy that would further solidify a quasi-caste system.<sup>33</sup>

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in comparison with the total number or percentage of persons of such race, color, creed, sex or national origin in any community, State, section, or other area, or in the available work force in the community, State, section, or other area.

<sup>30</sup> Although no court has so held, the anti-preference section could be read as eliminating any interpretation that would permit the government to require preferential hiring even if it were not based upon a strict *population* or *work force* quota. The legislative history, *supra* note 21, seems to support such an interpretation.

<sup>31</sup> *Cf. Centennial Laundry Co. v. West Side Org.*, 34 Ill.2d 257, 215 N.E.2d 443 (1966). (Demand that employer hire eight Negroes is contrary to state and federal law and enjoined.) It should be noted that Title VI of the ACT, governing federally assisted projects, contains a general anti-discrimination provision. (42 U.S.C. §2000d(3)). This would seem to preclude the government from permitting or requiring discrimination on a federally assisted jobsite.

<sup>32</sup> See generally Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966). Animadvertisers of the antipreference section argued that inequality caused by intentional injustice should be compensated; it would be unjust, they reasoned, to treat unequals equally when they were not to blame for their status. Analogies were made to compensatory treatment given to other disadvantaged members of society, such as the physically handicapped. Anti-preference forces rejoined that Robin Hood tactics with job opportunity would punish those least to blame for the evil effects of discrimination, in addition to perpetuating classification according to race. This response carried the day.

<sup>33</sup> See generally Michigan Construction Industry Study summarized in 1968 CCH *Employment Practices* ¶ 8115. See also 1964 U.S. CODE CONG. & ADM. NEWS 2513-17. These studies show a high disparity between minority population representation and percentage of minority unemployment in all job categories. It would seem logical to assume that many of these people would be unable to compete successfully for jobs with nonminority applicants because of prior discrimination that excluded them from training and job experience.

### III. "Affirmative Action": Executive Order 11246 and OFCC Guidelines

#### A. Obligations under Present Guidelines

In contrast to the recent legislative concern for equal employment opportunity, the executive branch, since 1941, has required contractors and suppliers of the federal government to undertake to eliminate discriminatory hiring practices.<sup>34</sup> A succession of executive orders gradually extended the coverage of the original mandate to all federally assisted construction projects.<sup>35</sup>

As a means of deepening government involvement in the enforcement of nondiscrimination by federal contractors and aid recipients, Executive Order 11246<sup>36</sup> delegated administration of this policy to the Secretary of Labor,<sup>37</sup> who in turn established the OFCC. In 1966-67, the OFCC, through the Secretary of Labor, published compliance guidelines.<sup>38</sup> In addition, certain geographic areas of the country were designated by the Director of the OFCC for "pre-award compliance reviews."<sup>39</sup> The purpose of this designation was "to produce more meaningful and consistent affirmative actions by contractors."<sup>40</sup> At these pre-award meetings contractors were to present detailed plans of affirmative action as required by the terms of Executive Order 11246.<sup>41</sup> In the words of one OFCC memorandum, affirmative action should "have the result of assuring that there is minority group representation in all trades on the job in all phases of the work."<sup>42</sup>

The words affirmative action were not new. They had been incorporated verbatim into the Johnson order from an earlier Executive Order issued by President Kennedy.<sup>43</sup> However, it seemed from the language of some of its memoranda that the OFCC intended to use a more vigorous interpretation of this language as a focal point for requiring increased recruitment and training of minority workers.

The regulations of the OFCC permitted the individual departments of the executive branch to articulate their own specific suggestions for affirm-

<sup>34</sup> Executive Order No. 8802, 6 Fed. Reg. 3109 (1941).

<sup>35</sup> Executive Order No. 10925, 26 Fed. Reg. 1977 (1961).

<sup>36</sup> See notes 1 through 4 *supra*.

<sup>37</sup> The Sec. of Labor retained rule-making power for the OFCC under § 201 of Executive Order No. 11246, 31 Fed. Reg. 6881, 6882 (1966).

<sup>38</sup> See note 6 *supra*.

<sup>39</sup> As to designation of areas, OFCC Director Edward C. Sylvester, Jr., in a Feb. 10, 1967 memorandum to all heads of agencies stated that, "The Cleveland, Ohio area, in addition to the San Francisco Bay Area, St. Louis, and another undetermined city, have been selected."

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Executive Order No. 10925, 26 Fed. Reg. 1977 (1961).

ative action, subject to OFCC approval.<sup>44</sup> On July 10, 1967, the Department of Housing and Urban Development issued instructions for contractors that would be dealing directly with any of its agencies or bidding on its assisted projects.<sup>45</sup> The directive restated the requirement of a written pre-award program in those geographical areas designated by the OFCC and suggested a nine point outline of affirmative action. It suggested that a written policy of equal employment opportunity be distributed to all employees. In addition, a top management official was to be appointed to co-ordinate the specifics of the written program and "serve as a focal point for hearing complaints."<sup>46</sup> The suggested written policy included recruitment and training programs directed toward living areas and schools having substantial minority populations. Apprenticeship and training were to be used "to help equalize opportunity for minority persons."<sup>47</sup> This could be done by "sponsoring and assisting minority youths *as well as others* . . . to enter training." [Emphasis added]<sup>48</sup> The careful wording sought to avoid an interpretation that preferential treatment was to be accorded to minority groups. Nevertheless, it seemed clear that an acceptable plan of affirmative action would have to be vigorous enough to result in a significant increase in minority promotion and hiring.

On May 27, 1968 the Secretary of Labor issued new guidelines for the OFCC that significantly increased the specificity with which federal contractors and aid recipients were to assure affirmative action.<sup>49</sup> These guidelines were to become effective on July 1, 1968. Most controversial was the language that provided:

The contractors' programs should provide in detail for specific steps to guarantee equal employment opportunity keyed to 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. [Emphasis added]<sup>50</sup>

Even before the guidelines became effective, two powerful trade associations, the Associated General Contractors<sup>51</sup> and the National Association of Manufacturers,<sup>52</sup> suggested that

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<sup>44</sup> 1968 CCH *Employment Practices* ¶ 8229.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 33 Fed. Reg. 7804 (1968).

<sup>50</sup> *Id.* at 7811.

<sup>51</sup> 1968 CCH *Employment Practices* ¶ 8241.

<sup>52</sup> *Id.* at ¶ 8253.

this OFCC regulation . . . would seem to require that an employer do specifically what cannot be required of him by statute.<sup>53</sup>

The contractors' association resolved to "exercise its persuasive powers, legal rights, and initiate legislation if necessary, to oppose implementation of unauthorized and unlawful pre-award orders."<sup>54</sup> This statement suggests that the statutory and constitutional limitations on affirmative action, as required by the Executive Order and interpreted by the OFCC, will probably have to be clarified by the courts.

### *B. Limitations on More Demanding Guidelines*

#### *1. Statutory Limitations: Conflict With The Civil Rights Act*

Title VII of the Civil Rights Act forbids any form of discrimination on racial or ethnic grounds in hiring.<sup>55</sup> It states that it shall not be interpreted to require redress of extant racial imbalances.<sup>56</sup> Thus the OFCC could not require federal aid applicants to hire or train a specific number or percentage of its employees from minority groups. However, affirmative action is not necessarily synonymous with preferential treatment. The undecided question is how far the affirmative action requirement can be extended before it is said to constitute preferential treatment.

*Weiner* provides some insight on this question, for it held that the pre-award submission of a "manning table",<sup>57</sup> a statistical abstract of proposed minority representation, could not be interpreted as a quota requirement in violation of the Civil Rights Act.<sup>58</sup> The court quoted at length from a recent case<sup>59</sup> that interpreted Executive Order 11246 and Title VII of the Civil Rights Act as forbidding the use of a seniority system that reflected discrimination in years before the passage of the Act:

We cannot accept the Union's contention that such discrimination is not prohibited . . . and that Title VII cannot be used in any way to alter or affect seniority sys-

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at ¶ 8241.

<sup>55</sup> 42 U.S.C. §2000e(2)(a)(1) (1964).

<sup>56</sup> 42 U.S.C. §2000e(2)(a)(1) (1964).

<sup>57</sup> The trial court found that a manning table was ". . . simply a list of the proposed total number of pipefitters for the College's job, listed by month and year, and showing the number of Negroes who would be on the job. It would just as well be called a 'Hiring List' or a 'Number of Men on the Job Table.'" 15 Ohio Misc. 294, 238 N.E.2d at 842.

<sup>58</sup> 15 Ohio Misc. 289, 238 N.E.2d 839 (1968).

<sup>59</sup> *United States v. Local 189, United Papermakers and Paperworkers*, 282 F. Supp. 39 (E.D. La. 1968).

tems. Where a seniority system has the effect of *perpetrating discrimination*, and concentrating or 'telescoping' the effect of past years of discrimination against Negro employees into the present placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system. We agree wholeheartedly with the conclusion in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) that present discrimination cannot be justified under Title VII simply because Title VII refers to an effective date and because present discrimination is caused by conditions in the past. '*Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.*' *Quarles, supra*, at 516. [Emphasis added]<sup>60</sup>

The *Quarles* case relied on by the court did not involve a government contractor or aid recipient; thus *Quarles* required corrective action solely on the basis of the Civil Rights Act and did not seek support from Executive Order 11246. The question then arises: To what extent can an Executive Order legitimately require some form of affirmative action beyond that required by the *Quarles* interpretation of Title VII?

It is clear that any policy of the executive department that required the hiring of minority workers over better qualified non-minority workers would violate the provisions of Title VII.<sup>61</sup> In some instances, however, there are no non-minority applicants. For example, in *Weiner* a shortage of pipefitters suggested the absence of white applicants for these jobs.<sup>62</sup> Therefore, the hiring of minority applicants would not have been discriminatory. In such cases it would seem possible for an Executive Order to require the hiring of minority personnel. Although the legislative history of Title VII convincingly excludes any implication that a minority group or individual<sup>63</sup> can demand jobs from an employer covered by the

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<sup>60</sup> 15 Ohio Misc. 289, 299, 238 N.E.2d 839, 845-46 (1968).

<sup>61</sup> 42 U.S.C. §2000e(2)(a) (1964).

<sup>62</sup> Memorandum of Edward C. Sylvester, Jr., OFCC Director, of March 15, 1967 to all Agency Compliance Officers.

<sup>63</sup> See generally the legislative history at 1964 U.S. CODE CONG. & ADM. NEWS 2391 *et seq.*

Act, the language of the statute does not seem to preclude an employer from acceding to such a demand and contracting to hire minority personnel if there is no discrimination against more qualified job applicants. One state administrative tribunal has accepted this theory and has ordered the hiring of six minority applicants under a requirement of affirmative action similar to that of Executive Order 11246.<sup>64</sup> A union argument that such a requirement was discriminatory was rejected by the New York Human Rights Commission because of the absence of white job applicants.

## 2. Constitutional Limitations

### (a) Scope Of Executive Authority

The scope of the President's authority may also limit the kind of affirmative action that can be required by way of Executive Orders or guidelines issued pursuant to them. Before the enactment of the 1964 Civil Rights Act, commentators had some difficulty in pinpointing authority for the numerous orders requiring incorporation of nondiscrimination clauses into federal contracts. One observed that the absence of "challenge . . . of this authority by four presidents in nine executive orders over twenty years lends support to Presidential power to prescribe nondiscrimination, at least until Congress acts."<sup>65</sup> As *Youngstown Sheet & Tube v. Sawyer* points out, the President's power to require affirmative action may be derived from two sources:

The . . . power, if any, to issue an order must stem either from an act of Congress or from the Constitution itself.<sup>66</sup>

In other words, it may be implied from his authority to enforce the Civil Rights Act or from his inherent power as chief executive. It was suggested above that the President could not demand affirmative action that would constitute preferential treatment and therefore violate the nondiscrimination provisions of the Civil Rights Act.<sup>67</sup> Therefore the limit imposed on affirmative action depends on whether the sum of his implied powers allows him to demand *any* action as long as it does not constitute preferential treatment or whether his authority ceases at some point short of direct conflict with the Act.

The more stringent limitation on executive power would posit a conceptual vacuum in which the President could not order affirmative ac-

<sup>64</sup> *Miller v. Holly*, 1968 CCH *Employment Practices* ¶ 8206 (New York State Commission for Human Rights).

<sup>65</sup> *Speck, Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 COLUM. L. REV. 243 (1963). This article contains a thorough discussion of all Executive Orders relevant to this topic.

<sup>66</sup> 342 U.S. 579, 585 (1962).

<sup>67</sup> See text at 190 *supra*.

tion, even though it did not directly conflict with the nondiscrimination section of Title VII. Such a theory would also postulate, on the basis of *Youngstown*, that Congress did not intend to delegate power to the President to take all reasonable action that was not in conflict with nondiscrimination provisions. The *Quarles* case, cited earlier in a quotation by the *Weiner* court, and the failure to question the legality of past orders on employment opportunity in federal contracting seem to discredit this theory.<sup>68</sup> Moreover, there are independent policy reasons why any order not in direct conflict with the statute should be found to be valid. Greater certainty results from promulgating guidelines and requiring a form of pre-award review of compliance because the risk of costly suspensions of work is reduced. This might have the further advantage of reducing litigation between private parties and the government.

(b) *Due Process Considerations*

Perhaps it is overly speculative to discuss substantive due process considerations under the present OFCC guidelines. Although the right to hold specific private employment has been held by the Supreme Court to be protected by the Fifth Amendment as a form of "liberty" and "property" in *Green v. McElroy*,<sup>69</sup> it is hard to envision an extension of that decision to include the right of a citizen to freedom from interference with his access to job opportunity information. It would be equally difficult to argue that due process in the public sector requires the federal government to insure dissemination of such information to all citizens. Nevertheless, the nature of such arguments is outlined below to suggest a mode for analyzing future guidelines that might raise more serious substantive due process questions. For example, could the President, pursuant to his broad powers as commander-in-chief, order compensatory discrimination in hiring by private employers on military bases? Could he, under the same authority, require such private establishments to discharge nonminority personnel and hire minority applicants to redress racial imbalance? It is, of course, doubtful that such orders would ever be issued. Nevertheless, recent OFCC activity indicates that future guidelines might raise similar due process questions.

One approach to the problem is suggested by two recent school desegregation cases. In *Hobson v. Hansen*, a far-reaching program of court-ordered integration was said to be constitutionally required to redress racial imbalance in the District of Columbia public schools.<sup>70</sup> In seeming contradiction, *Alabama State Teachers Association v. Alabama Public School and College Authority* held that affirmative action of the kind required in *Hobson* was not constitutionally compelled in higher education because such education, unlike preparatory schooling, is neither compulsory nor

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<sup>68</sup> See text at 192-93 *supra*.

<sup>69</sup> 360 U.S. 474 (1959).

<sup>70</sup> 269 F. Supp. 401 (D.D.C. 1967) *per* S. Wright, Circuit J.

guaranteed as a matter of right.<sup>71</sup> The court did not discuss whether the college officials involved could have *chosen* to act affirmatively, but presumably they could have. For the purposes of analyzing Executive Order 11246 the more important question goes a step beyond the assumption that the college could have acted affirmatively. To *what extent* could the Alabama officials have acted affirmatively and, by analogy, to what extent could the President require similar affirmative action on federally assisted projects?

The question posed might arise in the following factual context. A non-minority laborer, *X*, might complain that but for affirmative action he would have been hired because he was better qualified than some of the minority applicants that were hired.<sup>72</sup> To recover he would have to show that affirmative action deprived him of knowledge of opportunity that he otherwise would have had if the employer had not redirected his usual program of job advertisement.

Because an employer has limited funds for advertisement and recruitment, he must necessarily choose where these resources are to be utilized. As part of an affirmative action plan, he might choose to recruit and advertise in areas predominantly populated by minority groups. Assume that there were well-established channels of communications that he abandoned to permit alternative affirmative action advertising. Would a shift in advertising from newspaper A, with a high non-minority readership, to newspaper B, distributed predominantly in the ghettos, create a right under the due process clause in *X*, a regular reader of the non-minority paper, to question the legality of affirmative action?

*X* probably cannot rely on the *Hobson* case to question the legality of such affirmative action under the due process clause. Even if the court recognized a right to knowledge of employment opportunity on federally aided projects, this right could not be equated with the fundamental right to equality in public preparatory schooling, for employment on federally assisted projects is neither compulsory nor guaranteed as a matter of right. This reasoning, derived from the *Alabama State Teacher's* case, would require the conclusion that the government is not constitutionally compelled under the due process clause to disseminate news of public job opportunities equally, even if its failure to do so might favor a minority group over a non-minority group.

*Greene* might suggest that *X* could claim an unconstitutional interference with his liberty or property, but it is relevant authority only if *X* can show a vested right that has been encroached upon by affirmative action.<sup>73</sup> It held that the due process clause protects the right to pursue

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<sup>71</sup> — F. Supp. — 37 U.S.L.W. 2101 (D.C. Ala. Aug. 28, 1968).

<sup>72</sup> Cf. *Flast v. Cohen*, 392 U.S. 83 (1968). The petitioner would seem to be able to show an individual interest sufficient to meet the standing requirements.

<sup>73</sup> See note 69 and accompanying text, *supra*.

specific private employment.<sup>74</sup> However, that reasoning seems to assume that the right to a job matures after hiring. Before hiring, a man need only be considered on merit when and if he applies. It would seem to be an unwarranted extension of *Greene* to create a vested "right to know" about job opportunities that would invalidate affirmative action. In addition, there would seem to be strong reasons favoring a restrictive interpretation of *Greene*. In that case the exclusion from the employment market was much broader than the exclusion of laborer *X* from a single job. Claiming that affirmative action has illegally excluded him from a job, *X* can recover only by showing that he has superior qualifications and should have been hired. However, if he can show superiority, he can probably also obtain alternative employment.

If an OFCC directive required such vigorous affirmative action that substantive due process issues were raised, it would also seem vulnerable to an attack based upon the nondiscrimination provisions of the Civil Rights Act. However, in the related context of direct federal employment, Title VII would not apply because the federal government is excluded from its definition of "employer"; thus greater reliance would have to be placed on a *Hobson* or *Greene* argument.

#### IV. Criticism Of Enforcement Procedure

The procedural posture of *Weiner* illustrates some of the inequities that result from requiring aid recipients to enforce affirmative action. The real dispute was between the union, which was allegedly engaging in a discriminatory hiring practice, and the government, which was seeking to carry out the terms of Executive Order 11246. Yet the suit that resulted was between the federal aid applicant and the president of the contracting company, who sued as a taxpayer to compel acceptance of his company's low bid. The trial court in *Weiner* alluded to the burdens placed upon applicants for federal aid by the enforcement provisions of Executive Order 11246:

Under the statutes the College was bound by the provisions of the law. Clearly the federal government was bound to endorse equal employment by the College. The College also had to follow the federal directive and reject Reliance's bid because Reliance had equivocated and tried to pass the buck to Pipefitters Local #120.

It is unfortunate that the College and Reliance are caught in the middle.<sup>75</sup>

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<sup>74</sup> *Green v. McElroy*, *supra* note 69 at 492-493.

<sup>75</sup> 15 Ohio Misc. at 296, 238 N.E.2d at 843.

The College's decision to reject the bid was not difficult, for Reliance had clearly failed to meet government standards. Nevertheless, the College had to bear the cost of litigation to defend its decision. Moreover, it was exposed to a potentially expensive work stoppage.

A federal aid recipient is placed in a dilemma if he is unsure whether a contractor or subcontractor will comply with its affirmative action program. If the recipient rejects a low bid, he is vulnerable to a costly suit to compel acceptance. However, if he accepts the bid, he may be risking a suspension of federal aid because his subcontractors may fail to comply with their affirmative action program.<sup>76</sup> Similarly, a small subcontractor with an exclusive union hall hiring agreement may risk a breach of contract action if he determines that compliance with affirmative action requires rejection of workers from a local that engages in discriminatory practices.<sup>77</sup>

The burdens of enforcement seem arbitrarily to favor the more financially independent federal aid applicants and similarly situated subcontractors. Because of their size, they are better able to insure compliance by procuring alternative sources of labor; in addition, they can better absorb the cost of litigation and work stoppage. Although it is doubtful whether these considerations would deter small political subdivisions and contractors from applying for federal aid or bidding on projects, it is at least arguable that they should not be required to shoulder the disproportionate burdens of litigation. Moreover, it would seem more economical to have the government directly enforce affirmative action rather than indirectly pay the cost through the federal aid recipient. The specialized staff of the Department of Justice could probably handle the case more efficiently from its inception and it would seem that the spectre of direct government intervention might serve as a strong incentive toward voluntary compliance.

Currently there are two sections of the Executive Order that provide for intervention by the United States Attorney General. When two private parties are involved in litigation, the Attorney General may intervene to protect the interests of the United States. In addition, when an applicant fails to comply with guidelines of an administering agency, the agency may ". . . refer the case to the Department of Justice for appropriate legal proceedings."<sup>78</sup> In actions brought under the latter section, the procedures for termination or suspension of federal aid under the Civil Rights Act of 1964 are to be followed.<sup>79</sup> It does not appear that the OFCC has invoked

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<sup>76</sup> See note 4 *supra*.

<sup>77</sup> The plaintiff in *Weiner* argued that the NATIONAL LABOR RELATIONS ACT gave him the right to contract for a single source of labor, notwithstanding the provisions of the CIVIL RIGHTS ACT and the Executive Order. The Court rejected this argument on the ground that Congress showed its intent to have prior legislation read in light of the anti-discrimination provision of the CIVIL RIGHTS ACT of 1964.

<sup>78</sup> Executive Order No. 11246, §§ 202(6) and 209(2), 30 Fed. Reg. 12319, 12320, 12322 (1965).

<sup>79</sup> *Id.*

this section of the Executive Order. However, the hearing procedure for termination set out in the text of the Order has been invoked recently against five large companies who are accused of engaging in discriminatory employment practices.<sup>80</sup> This enforcement pattern suggests that the Department of Labor has chosen to avoid the courts.<sup>81</sup>

A greater involvement of the federal government in enforcement seems required to avoid the apparent unfairness and diseconomy of the present procedure. Perhaps it would be less burdensome and more economical to allow an aid recipient to request intervention by the Attorney General when the recipient is involved in litigation as a result of a good faith effort to assure the implementation of affirmative action guidelines. As an alternative, a cost-sharing section might be added to the current Executive Order that would partially reimburse private parties for litigation that did not directly involve enforcement of affirmative action but arose as a consequence of it. Under such a provision the college, in the *Weiner* case, could have asked for the intervention of the Attorney General to defend its rejection of the bid. Other parties, such as labor unions, might be joined under the section of the Civil Rights Act that allows the Attorney General to bring a civil action to compel compliance with the Act.

A contractor or subcontractor, who is receiving aid indirectly through a federally assisted bidder should also be able to request intervention of the Justice Department to enforce the terms of the Executive Order. In cases that do not involve an attempt to enforce affirmative action but arise from rescission of a subcontract for non-compliance, the contractor should be partially compensated for his costs. In addition, when a party anticipates breaking a contract with a contractor or subcontractor on the grounds that the latter has not complied with his affirmative action obligations, that party should be required to give notice to the Attorney General. The government could then choose either to intervene in a subsequent defense of any damage claim arising from the breach of the contract or to compensate the private party's defense of such action. The government would probably choose to intervene if it could join a claim against the contractor or subcontractor under the Civil Rights Act, which authorizes civil suit by the Justice Department. It should be emphasized that government

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<sup>80</sup> Bethlehem Steel Corp., Bethlehem, Pa.; Timken Roller Bearing Co., Canton, Ohio; Allen-Bradley Co., Milwaukee, Wis.; B & D Motor Express Co., Pittsburgh, Pa.; Pullman, Inc., Bessemer, Ala. See 1968 CCH *Employment Practices Report* 72, July 25, 1968, p. 5.

Professor Dallas Young of Case Western Reserve University in Cleveland was appointed to a three member board to determine whether Timken Roller Bearing was in compliance with Executive Order 11246. Prof. Young indicated in a telephone interview on Sept. 25, 1968, that the hearings, which had been scheduled for August 1968, would probably not be held until the early months of 1969.

<sup>81</sup> A number of Contract Compliance Officers suggested that more "affirmative action" cases would be brought in the near future. They were unwilling to comment on the procedural posture in which the cases might arise.

assistance in any form would always be conditioned upon the good faith of aid recipients and their contractors.

### *V. Conclusion*

Although affirmative action under Executive Order 11246 has been interpreted to require contractors and subcontractors on federally assisted projects to institute vigorous programs of recruitment and training, neither the nondiscrimination sections of the Civil Rights Act nor the due process clause of the Fifth Amendment seem to be violated. Moreover, the authority for the President to order such action as a prerequisite to receiving federal aid would seem to be derivable from either Title VII of the Act or the inherent power of the chief executive.

It is unclear how far affirmative action can be extended as a prerequisite to federal construction assistance, but the three limitations discussed above suggest a broad discretion on the part of the President. The Civil Rights Act provides one limitation, for it cannot be thought to delegate power to the President to require compensatory discrimination for minority groups. However, it is doubtful that the scope of his implied power to demand affirmative action is so circumscribed that it would restrict all further expansion of affirmative action. Moreover, it is doubtful whether affirmative action in its present form can be thought to raise substantive due process problems. As in the recent Alabama case holding that affirmative desegregatory action was not constitutionally required in higher education, employment on government-aided projects is neither compulsory nor guaranteed as a matter of right. Furthermore, the right to knowledge of recruitment programs cannot be considered to be on the same plane as the right to hold specific private employment without government interference. It should be noted, however, that the due process argument provides the only basis for recovery when the government is the employer because the nondiscrimination sections of Title VII of the Civil Rights Act do not apply.

Enforcement provisions, as demonstrated by the *Weiner* case, place a disproportionate burden on small federal aid recipients and similarly situated bidders for federally aided projects. In addition, they are uneconomical and procedurally unwieldy. One solution to this problem would be the amendment of the Executive Order to allow a party to request government intervention in enforcement litigation or to require the government to share the cost of other court action caused by good faith attempts to insure compliance with government guidelines. This would be in line with the general policy of allocating the cost of enforcing executive guidelines to the federal government.