APPENDIX I

The Origin of Affirmative Action as We Know It–The Philadelphia Plan Pivot
by The Honorable Laurence H. Silberman*

I am now a senior judge and have the time and inclination to look back 30 years ago to the actions of President Nixon's first Labor Department. I had been planning to tell my version of the Philadelphia Plan story. It is interesting and poignant coincidence that John Irving provided the opportunity by asking me to speak to this gathering. John was my executive assistant as Solicitor and Undersecretary of Labor until he went off to the NLRB. He loyally and effectively supported me during a tumultuous period. Yet John, from the beginning, advised against the crucial shift in affirmative action that I pursued, so if I was misguided it was not John's fault. Of course, as a federal judge, I am not permitted to present normative views on present, or even past, policy issues, but nothing precludes me from describing historical events, nor is there any barrier to explaining in personal terms why we took the position we did.

First, the background. The Wirtz Labor Department had gotten itself into quite a tangle with the Comptroller General over its efforts in enforcing Executive Order 11,246. That order, as you well know, bars government contractors from engaging in employment discrimination and requires "affirmative action" to avoid discrimination. The Labor Department had and has the overall supervisory role in enforcing the order.

The Department's Office of Federal Contract Compliance had sought for several years to establish pre-award compliance requirements on construction contracts over a million.

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OFCC had focused on several cities and sought to oblige bidders in those cities to submit manning tables showing the number of minorities to be hired, before contracts were actually awarded. That approach was tried in Philadelphia. An inter-agency board, prompted by the OFCC, issued the original Philadelphia Plan in October 1967. Under that Plan, after the bids were to be opened, the low bidder would not be awarded the contract until compliance officials approved the number of minorities to be hired in six skilled trades. The scheme ostensibly relied on the contractors to come up with the numbers; the government did not propose to openly set forth those requirements at the pre-bid stage, or, for that matter, after the bids were opened, but some suasion and negotiation was contemplated.

The Association of General Contractors and the construction unions induced Congressmen to complain to the Comptroller General that the Plan proposed in Philadelphia (and in force in Cleveland) improperly injected uncertainty into the bidding process. On November 18, 1968–right after the presidential election–the Comptroller General issued an opinion determining that the "lack of specific detail and rigid guidelines requirements" could lead to denial of contracts to a low bidder based on "purely arbitrary and capricious decisions." The Comptroller General's insistence on clear pre-bidding standards surely was designed to put the Labor Department between a rock and a hard place. If the government promulgated numerical requirements for minority hiring it faced both political and legal problems. The Labor Department ostensibly backed down in late November 1968, quietly announcing that the Philadelphia Plan was rescinded, but its compliance officers pursued similar techniques, leading various Congressmen and Senators to again complain to the Comptroller General. At the same time, civil rights groups in Philadelphia were insisting on resurrection of the Plan.

That was the situation we inherited. I was confirmed as Solicitor of the Labor Department on May 1, 1969, the last of the assistant secretary level appointees. Art Fletcher, an African-American former professional football player and candidate for Lieutenant Governor in the State of Washington, had been appointed Assistant Secretary for Wage and Labor Standards. OFCC was placed under his wing. He, not surprisingly, was anxious to reinvigorate OFCC and particularly the construction industry plans.

But the problem was primarily a legal one, so it fell to me to see if I could fashion a solution to the conundrum. Hugh Graham's excellent book *The Civil Rights Era*, which extensively discusses the Philadelphia Plan struggle, acknowledges a gap in his account. As he put it, the available White House and Labor Department records do not reveal when and why George Shultz decided to revive the Philadelphia Plan [at 324]. He tells us in a footnote (at p. 539) that George reviewed the manuscript when Secretary of State in the mid-1980s, but said, "he could not recall with sufficient precision the timing and circumstances that led to the Labor Department's commitment to the revised Philadelphia Plan."

By that point I suppose my own involvement in the fashioning of the revised Plan had become somewhat awkward since, as many of you know, in 1977 I had written a column for *The Wall Street Journal*, in which I acknowledged that we had been wrong in pursuing the policy we did. I am afraid I was in the unfortunate position of having persuaded my boss, the Secretary of Labor, to embrace a far-reaching policy that I later renounced.

I can recall exactly the moment when the core concept of what was to be the "Revised Philadelphia Plan" was born. I was discussing the problem with Gene Mittleman, Senator Javits' minority counsel on the Senate Labor Committee. Gene was one of the most

capable congressional staffers I encountered in my years in the executive branch, and one of the few who always could be relied upon to speak for his principal. During the conversation, we came upon the notion of openly and boldly requiring all bidders to commit to meeting the percentage of minority hires in the construction trades that *we* would demand. To circumvent legal and political problems, the numbers would be expressed in terms of ranges, and contractors would be obliged only to use "good faith" to reach the numerical targets which would be described as a goal. Timetables would be included to measure progress to the goal. I thought that this approach would eventually pass legal muster because the anti-quota provision of the Civil Rights Act 703(j) applied only to the Act itself, and, in any event, we were obliging contractors to aim for goals not hard quotas. Moreover, contractors would be forbidden to discriminate in reaching their goal, a caveat which, in truth, may have been more clever than realistic. Much later, after all hell broke loose, I suggested to Gene that the goals and timetables device might have been his idea, but he insisted that it was mine.

I gained the Secretary's approval after his most searching inquiry, briefed Undersecretary Jim Hodgson, and then brought the idea to Art Fletcher. Fletcher was delighted and could hardly wait to go to Philadelphia to announce these revisions. Jim Jones, my seasoned associate solicitor for civil rights, cautioned me to get the Justice Department on board before we launched our initiative. So I did. I got a quick written opinion that our approach would pass muster from Jerris Leonard, the Assistant Attorney General for Civil Rights, and then advised Fletcher to hold a hearing in Philadelphia so that we would have something of a discrimination record to support the Plan as a remedy. By that time several courts had approved numerical obligations for future black hiring as a remedy for past discrimination, even though the future

hires were not past discriminatees. It should be noted that by treating blacks as interchangeable the courts were tacitly accepting the concept of group rights rather than individual rights. In any event, although we predicated our plan as an independent affirmative action obligation, the remedial guise would be some protection against legal attack. Unfortunately, Fletcher announced the Plan first and had the hearing afterward, which was a bit awkward.

Senator Fannin on July 1 asked the Comptroller General for an opinion on the revised Plan. My office responded with a long brief in defense of the Plan, which was publicly released on July 16. At a certain point–I think it was even before the brief was released–Senators Fannin and Curtis went to the White House and demanded that I be fired. George Shultz instructed me to prepare a one-page memo to the President justifying our position. John Irving and I stayed up much of the night trying to find the exact right words. We claimed that the substantive obligations of the executive order exceeded non-discrimination requirements–which if you read the order carefully is quite a stretch. We "discovered" the seeds of the Philadelphia Plan in the last report Vice President Nixon had sent to President Eisenhower in his capacity as chairman of a government contracting commission. As I recall, he had acknowledged the need to take affirmative steps to avoid discrimination. It was a bit hokey, but it worked.

Then on August 5 the Comptroller General, pressed by outraged Senators and Congressmen from both parties–the AFL-CIO was apoplectic–issued his second Philadelphia Plan opinion. This time he declared the revised Philadelphia Plan in violation of the Civil Rights Act's anti-quota provision. I was rather surprised; it was one thing for the Comptroller General to express a view on the legality of contracting procedures. Putting aside separation of power concerns, contracting was his business, but the Civil Rights Act was enforced by the Justice

Department and the relevant assistant attorney general had specifically opined that the Plan did not violate the Civil Rights Act.

Nevertheless, contracting officers in the departments and agencies were universally terrified of the Comptroller General. He could under certain circumstances seek to hold them personally liable for irregularities in the contracting process. Still, any action against contracting officers would have to be brought by the Justice Department. I realized that a formal opinion from the Attorney General would checkmate the Comptroller General. Accordingly, on my advice, George Shultz requested an opinion from John Mitchell. I went over to discuss the matter with Bill Rehnquist, then the Assistant Attorney General for the Office of Legal Counsel, the office that prepares such opinions. That may have been the hardest sell in the whole process, but eventually he was persuaded and the opinion arrived on September 22. The very next day the Department issued the numerical ranges to be used in the Philadelphia Plan.

Although the Comptroller General still huffed and puffed, the Attorney General's opinion had really cut off any immediate legal threat. Congressional opponents were outraged and they staged rather explosive hearings in late October before the senate subcommittee on separation of powers. The executive branch stood firm. Then in December the continued opposition of the AFL-CIO and conservative Republicans led to the dropping of a political thermonuclear bomb. The Comptroller General wrote Senator Byrd to request a rider on our appropriations bill to prevent any funds spent on Philadelphia Plan activities. Despite the Administration's fierce lobbying, Senator Javits' brilliant and impassioned defense, and President Nixon's threat to veto the whole appropriations bill, the appropriation rider passed overwhelmingly 57-32.

That was the bleakest moment in the fight. I was contemplating resignation when I received a call from a Jack McKenzie, an editorial writer for *The Washington Post*. He said, "I see you are in deep trouble," I agreed. He then said something to the effect "don't worry I am going to save you"–and he did. The next day, the day the rider was to be voted on in the House, the *Post* editorial "Quotas and Goals" exhorted the House to undo the Senate's "grievous folly." That day, for the first time in this fight, some of the national civil rights groups openly broke with the AFL-CIO and joined the Administration lobbying in the House. It was a rout: we won and the Senate subsequently receded.

Although the Contractors Association of Eastern Pennsylvania sued in Philadelphia, they lost in both the district court and in the Third Circuit; the Plan was endorsed as a broad remedial measure with little attention paid to the fact that the remedy was proposed prior to a fact-finding hearing. In those days it was virtually impossible to beat a "pro-civil rights" case in federal court.

We went on to spread construction industry city plans around the country, as I have written, much like Johnny Appleseed. Early the next year we issued Order No. 4, which extended the concept of government-imposed goals and timetables to all government contractors. I remember sitting in my office with Pete Nash, who was to be my successor as Solicitor, going over a draft of that order and adding factors that should be used in calculating a goal so that it would not appear to be *per se* racial proportional representation. When I testified later on various occasions in both Houses, as the undersecretary, I was rather open in asserting a right to impose these requirements regardless of any showing of discrimination. I insisted that the executive order's affirmative action obligation was a good deal broader than Title VII. For that reason, I

opposed successfully efforts to transfer OFCC to EEOC.

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It has been suggested by several writers describing the Philadelphia Plan's genesis that the Nixon Administration adopted the revised Plan as a cynical ploy to divide two traditional allies in the Democratic Party's coalition, the AFL-CIO and civil rights groups. I cannot speak for everyone in the Administration, but I can assure you that no one in the Labor Department, nor for that matter in the White House, with whom I dealt, ever embraced that rationale. To be sure, we were a good deal more independent of the AFL-CIO than was the Wirtz Labor Department, but it should be recalled that the Association of General Contractors were just as opposed as were the construction unions. And many–probably most–of the Republican Senators, led by Everett Dirksen, were also opposed.

George Shultz, who bore the primary responsibility for our new policy, although a formidable bureaucratic infighter, did not have a cynical bone in his body. He was genuinely concerned about black employment prospects from the first day he became Secretary of Labor. He saw his job as dealing equitably with three separate constituencies with different interests: organized labor, employers and the minority community. Moreover, as a professional labor economist he was particularly disturbed by the soaring wage rates in the construction industry, which he attributed in part to discriminatory restrictions on the supply of labor.

Art Fletcher, who was to be the spokesman for and administrator of the plan, was naturally anxious to do all that he could to better the conditions of black Americans. In this regard, although other minorities were nominally included in our affirmative action efforts, it was the plight of American blacks that drove the whole policy.

I certainly had more influence than perhaps I should have had. That was in part because I was perceived both within the Department and at the White House as a reliable Republican. Arnie Weber, the brilliant Assistant Secretary for Manpower, a long-time academic associate of George Shultz, who retired in 1994 as President of Northwestern, once said to me–our relationship was rather frosty–that George Shultz had staffed the Labor Department with an eye to talent rather than politics until he got to Solicitor–and then he had to have a real Republican.

Yet, I had always been strongly sympathetic to the civil rights movement. In fact, I had refused to support Barry Goldwater in 1964–I even signed an ad for Johnson–partly because of Goldwater's opposition to the Civil Rights Act. (Luckily for me that transgression had been overlooked when the Administration was staffed.) I had been somewhat uncomfortable with the "southern strategy" pursued by Richard Nixon in the 1968 campaign and thought an aggressive government push for minority hiring would offset that policy–giving blacks a stake in the Administration.

I was also quite troubled by the OFCC strategy of pressuring contractors to hire more blacks without ever indicating what would constitute compliance with the affirmative action obligation. It seemed lawless to me. In this regard, organizations like the NAM were telling us they would be more than willing to do whatever the government wanted; they simply needed some certainty.

Most important, having come from Hawaii and, in the aftermath of the urban riots of 1968, I fervently wanted faster "progress" in race relations. Non-discrimination seemed inadequate. I, as well as many others in the bureaucracy and in the judiciary, were seeking quick

integration of the workforce. Underlying this push for integration was an implicit assumption. In the absence of discrimination, minorities would naturally end up in job classifications–certainly manual labor jobs–roughly in proportion to their numbers in the workforce. As a corollary, it was thought that for jobs such as those in the construction industry the apprenticeship training programs, like other job qualifications, were an artificial barrier to black employment. (The same kind of thinking underlay the famous *Griggs* case in the Supreme Court.) I remember Don Slaiman, the AFL-CIO's civil rights chief, accusing me of Ivy League snobbism in my unwillingness to recognize the possibility that construction job qualifications were legitimate and therefore progress should be made by adapting apprenticeship programs rather than overriding them.

The AFL-CIO and conservative Senators from both parties were our most powerful political opponents. But others were dissenters. I have mentioned John Irving's quiet disagreement. More open in his opposition within the Department was the redoubtable Arnie Weber, who administered our apprenticeship programs as part of his Manpower Empire. I remember going to Chicago, the fall of 1969, to speak to a lawyer's group, and opening a Chicago newspaper to read of Art Fletcher's aggressive praise for the Philadelphia Plan approach two days before, followed by Weber's criticism the day after. I called George Shultz for guidance as to how I should answer press queries as to the intra-Department dispute. His response: "Weave their comments together."

But it was Thomas Sowell's criticism that caused me to begin to doubt the wisdom of our policy. Again and again he took issue with the critical assumption that underlay the whole premise: that in a perfectly non-discriminatory world jobs would be distributed roughly

in proportion by race. He maintained that cultural factors lead different ethnic and racial groups into different occupational paths, and that our policy would balkanize the country.

As my confidence ebbed, in 1971 I received a call from my old Harvard Law Professor and mentor Derek Bok, who had recently been installed as the President of Harvard. He asked if I would meet with a delegation representing the American Association of Universities who wished to complain about HEW's implementation of the executive order vis-a-vis universities. I agreed. I met with a three-man group composed of John Dunlop, the Dean of Harvard's Faculty of Arts and Sciences, another first-class labor economist who was a valued consultant to the Department; William Bowen, the President of Princeton, ironically Bok's co-author of the recent book defending affirmative action, *The Shape of the River*; and the President of Michigan, a university today much involved in affirmative action litigation. They were intensely critical of the civil rights chief at HEW, Stan Pottinger, whose aggressive (and in their view unrealistic) pursuit of faculty minority hiring goals was causing academic dyspepsia. It was claimed that he was insensitive to academic standards. I recall vividly John Dunlop's example of what he regarded as a particular absurd position HEW was taking, drawn from our construction industry experience. Pottinger had told the universities that they could not apply hiring criteria that were more restrictive than that governing the least qualified tenured professor in any department. John asked rhetorically, How could one possibly identify the least qualified member of the economics department at Harvard? I started to laugh, and John immediately broke in to say, "I know you would point to Galbraith but that is a political judgment."

At the end of the meeting I observed that it appeared the elite universities had recently and wholeheartedly adopted affirmative action for their student bodies. John brushed

that observation aside saying, "that is different and, moreover, outside your jurisdiction."

I do not recall what relief, if any, we afforded the universities, but I do remember telling one of my aides that it was probably healthy for the academic elites to experience the same pressure that employers and unions felt because, insofar as we might be misguided, they would constitute a more politically respectable opposition. Boy was I wrong.

By 1972, with my doubts increasing, I drafted President Nixon's response to a letter from the American Jewish Committee condemning quotas in language that might have suggested a retreat from our policy. I hoped to help fashion that retreat in the second term, but that was not to be. The President accepted my "resignation," and when I returned as Deputy Attorney General, after the Saturday Night Massacre, I had too many problems to tackle "affirmative action."

I did, as I mentioned, write my *mea culpa* in *The Wall Street Journal* in 1977, entitled "*The Road to Racial Quotas*." I admitted that the goal-quota distinction was an illusion and that any numbers led ineluctably to the concept of proportional representation. I was prompted to do so by the appearance of the *Bakke* case on the Supreme Court docket. The universities that had complained to me only a few years before concerning HEW's pressure on faculty hiring were defending proportional representation of their student bodies on so-called "diversity" grounds. Diversity, as I wrote in a recent opinion, could be justified indefinitely, whereas affirmative action suggested only a *temporary* remedial notion even if the remedy was national in scope. Although the Court ignored my article, it had a ricochet effort. The Fifth Circuit cited it in its *Weber* decision. It only had a brief shelf life, however, because *Weber* was in turn reversed by the Supreme Court.

After I became a judge my inconsistent positions on affirmative action were thrown up to me when my good friend Bill Brock, the Secretary of Labor, had a rooftop party at his Department. He and Ed Meese, the Attorney General, were engaged in a rather fierce intra-administrative squabble over the executive order (in which George Shultz supported Brock), and Meese was also a guest. They were continuing their argument over cocktails and both reached out to me for support. I, of course, declined to express a view. That night I regretted my reserve, but took solace in the realization that probably whatever I said would be wrong.

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As I revisit those events of long ago I cannot help wondering what would have happened if we had taken a different position, one not supporting numerical racial employment targets. I rather doubt, in that regard, that anyone else in the Department of Labor would have suggested the open embrace that I advocated. The OFCC would probably have sought to continue to impose pressure on contractors without much real bite or force except in cases of actual discrimination, in which case OFCC would probably have been transferred to EEOC.

Would many other institutions in the country like the universities have nonetheless drifted towards proportional representation? My wife thinks yes. I am not so sure. That a Republican Administration took the position it did caused a rapid undermining of resistence to that notion throughout our society. The Philadelphia Plan may well have been the crucial turning point.