No. 84-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

—against—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

A divided panel of the United States Court of Appeals for the Second Circuit affirmed orders of the United States District Court for the Southern District of New York which held Petitioners in contempt for violating a Revised Affirmative Action Program and Order (RAAPO) and an Order and Judgment (O & J); imposed substantial monetary fines on Petitioners to establish, as part of the contempt remedy, an Employment, Training, Education and Recruitment Fund to be financed by Petitioners and to be employed solely to benefit nonwhite apprentices and journeymen; adopted an Amended Affirmative Action Program and Order (AAAPO), which included a race-conscious quota of 29.23% for nonwhite membership in Local 28; and continued the office of the Administrator, which has placed Local 28 and the Joint Apprenticeship Committee ("JAC") under a judicially-imposed receivership.

The questions presented are:

1. After a general finding of discrimination against unidentified persons, may a district court order a race-conscious affirmative action program under Title VII of the Civil Rights Act to benefit nonwhites?

2. May such an affirmative action program include a mandated percentage for nonwhite membership, denominated a "goal" but enforced as an inflexible quota and coupled with a judicial threat that the percentage must be realized by a specified date?

3. Does the Constitution prohibit such reverse discrimination as a violation of the Equal Protection Clause?

4. Does the Constitutional prohibition against bills of attainder and corruption of blood invalidate such reverse discrimination?

5. Should purportedly civil contempt remedies be declared to be illegal criminal contempt remedies imposed without due process of law when they include (a) a compensatory component

without any proof of actual damage and (b) a coercive component unrelated to the contempt and without an opportunity to purge the contempt?

6. Do findings of discrimination, premised upon improper standards and statistics, followed by findings of contempt of the resulting orders also based upon improper standards and statistics, deprive petitioners of due process of law?

7. Does a district court order appointing an Administrator with day-to-day supervisory powers over the internal affairs of a labor union violate the union's right to self-governance, or exceed the court's power to appoint special masters?

PARTIES

With the exception of the Sheet Metal and Air-Conditioning Contractors' Association of New York City ("Association"), the caption of this petition contains the names of all parties in the Court of Appeals.* The Association is composed of building contractors in New York City who are engaged in sheet metal construction work. Although no claim was made that it engaged in discriminatory practices or policies, the Association was deemed an indispensible party in the original action and was joined as a defendant for purposes of granting complete relief. (A-210 n. 3). All contempt sanctions against the Association were reversed by the Court of Appeals, and it is no longer a party.

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* The contempt proceeding in the district court was also brought against 121 individual contractors. Although the district court found that all of them were guilty of contempt, it imposed no sanctions against them. They therefore did not pursue appeals.

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PETITIONERS' BRIEF ON THE MERITS

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals (A-1-52)[1] is officially reported at 753 F.2d 1172 (2d Cir. 1985) and is unofficially reported at 36 Fair Empl. Prac. Cas. (BNA) 1466 (2d Cir. 1985). Other reported decisions in this case, also included in the Appendix, are as follows: *United States v. Local 638 et al.*, 337

[1] References with the prefix (A-) are to the Appendix to the petition for certiorari. References with the prefix (JA-) are to the Joint Appendix.

F. Supp. 217 (S.D.N.Y. 1972); *United States v. Local 638 et al.*, 347 F. Supp. 164 (S.D.N.Y. 1972); *United States v. Local 638 et al.*, 347 F. Supp. 169 (S.D.N.Y. 1972); *Equal Employment Opportunity Commission v. Local 638 et al.*, 401 F. Supp. 467 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976) (Feinberg, J., concurring); *Equal Employment Opportunity Commission v. Local 638 et al.*, 421 F. Supp. 603 (S.D.N.Y. 1975); *Equal Employment Opportunity Commission v. Local 638 et al.*, 565 F.2d 31 (2d Cir. 1977) (Meskill, J., dissenting).[2]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Second Circuit was entered on January 16, 1985. The petition for a writ of certiorari was timely filed on April 16, 1985 and was granted on October 7, 1985.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions involved are art. I, §9, cl. 3, art. III, § 3, cl. 2 and the Fifth and Fourteenth Amendments to the United States Constitution.

The statutory provisions involved are as follows: §§703(c)(1) and (2), 703(d), 703(j), 706(g) and 1101 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2(c)(1) and (2), 2000e-2(d), 2000e-2(j), 2000e-5(g) and 2000h; §401(a) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401(a); and Rule 53, Fed. R. Civ. P.[3]

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[2] Earlier proceedings in the state courts are reported as follows: *State Commission For Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. N.Y. County 1964); *State Commission For Human Rights v. Farrell*, 47 Misc. 2d 244, 262 N.Y.S.2d 526 (Sup. Ct. N.Y. County 1965); *State Commission For Human Rights v. Farrell*, 47 Misc. 2d 799, 263 N.Y.S.2d 250 (Sup. Ct. N.Y. County 1965); *State Commission For Human Rights v. Farrell*, 52 Misc. 2d 936, 277 N.Y.S.2d 287 (Sup. Ct. N.Y. County), *aff'd*, 27 A.D.2d 327, 278 N.Y.S.2d 982 (1st Dep't), *aff'd*, 19 N.Y.2d 974, 228 N.E.2d 691, 281 N.Y.S. 2d 521 (1967).

[3] The texts of the constitutional provisions and statutes are set forth in the appendix hereto.

STATEMENT OF THE CASE

Summary

Since 1975, petitioners, a labor union and its joint apprenticeship committee, have been living under an elaborate race-conscious affirmative action program designed to integrate the sheet metal industry in New York. The centerpieces of the program are (1) a nonwhite membership quota of 29%, denominated a "goal", and (2) a court-appointed Administrator (*i.e.* a special master) who governs petitioners with respect to the program on a daily basis, at their expense. As a result of their failure to meet the "goal", petitioners have now been held in contempt, largely for failing to comply with ministerial provisions of the program. An expanded race-conscious affirmative action program has now been ordered in which fines and penalties will fund education, training, counseling and financial assistance exclusively for nonwhites. The Administrator continues to govern. Petitioners have been warned by the district court that if the nonwhite membership "goal" is not met by August 31, 1987, they "will face fines that will threaten their very existence" (A-123). A divided panel of the Court of Appeals distinguished and limited this Court's recent decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and affirmed, but stayed its mandate pending review by this Court.

Facts and Prior Proceedings

Sheet metal workers are skilled artisans who fabricate sheet metal into ducts and conduits to convey heating and air-conditioning through offices and homes. Local 28, founded on October 15, 1913, is a small union[4] affiliated with the Sheet Metal Workers' International Association. It is the bargaining agent for the collective bargaining unit consisting of journeymen and apprentice sheet metal workers who perform sheet metal work for contractors in New York. The JAC is an apprenticeship committee composed of labor and management representatives which

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[4] At the time of trial of the discrimination action in 1975, Local 28's membership had peaked to 3670 members (JA-301). By March 1980, it had declined to approximately 2000 persons (JA-134).

is responsible for managing the Sheet Metal Workers' Apprenticeship Training Program.

Until 1964, employment in the sheet metal trade and membership in the union was awarded largely on the basis of nepotism and personal recommendation.[5] Because this practice resulted in the total exclusion of blacks, the New York State Commission for Human Rights commenced proceedings to abolish it. Under the direction of a Justice of the New York State Supreme Court, and "unusual cooperative spirit on the part of the Commission, industry, union officials, their respective counsel and the Attorney General" (A-425), a formal plan was adopted and judicially ordered (A-411) known as the "Corrected Fifth Draft" (A-427). Since the primary entry point into the industry was, and still is, the apprentice program through which approximately 80% of new members join (A-325), the linchpin of the 1964 plan was an aptitude test affording all applicants equal opportunity, and making selections "in order of rank" (A-430), and "solely and exclusively on the point score" (A-424), after satisfying a high school prerequisite and certain other requirements (A-428-429).

In 1971, the United States commenced the present litigation against Local 28 and three other unions and their JACs.[6] In 1975, after trial, the district court found that Local 28 and the JAC had discriminated against nonwhites in violation of Title VII,

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[5] Local 28 never maintained a hiring hall. Throughout the major portion of the union's history, referral and hiring was done informally through word of mouth and contacts with other members, apprentices and contractors (JA-317). For example, in the apprenticeship class graduated immediately prior to the passage of the Civil Rights Act of 1964, approximately 80% of those indentured were related to members of Local 28. Recommendations of relatives of Local 28 members were also given weight in the appointment of apprentices (JA-304-305).

[6] The case was severed as to each of the defendant unions prior to trial and has since been separately litigated. The Equal Employment Opportunity Commission was substituted as named plaintiff for the federal government (A-210). The New York City Commission on Human Rights was granted leave to intervene in the action against Local 28 (A-394-401). The New York State Division of Human Rights, initially named as a third-party defendant, realigned itself as a plaintiff (A-6).

largely by obeying the Corrected Fifth Draft ordered by the state court. The district judge ruled that this plan discriminated because blacks did not perform as well on the uniformly administered aptitude test as whites, and performance on the test was not related to performance as a sheet metal worker (A-330-338). Similarly, taking judicial notice of the fact that a smaller percentage of blacks than whites complete high school, he enjoined adherence to the high school requirement for admission to the apprentice program which the state court had ordered, ruling that this requirement was not job related (A-338-339). After concluding that entry points to the industry other than the apprentice program were also deficient in producing minority representation, the district court engaged in a statistical analysis, both to confirm the finding of discrimination, and to fix a minority membership "goal." The court found the percentage of nonwhites in the City of New York to be 29%, and adopted that percentage as the "goal" for Local 28, despite the fact that a large part of Local 28's membership was, and is, drawn from surrounding areas (A-186, 236) which clearly have a larger proportion of whites.

On August 28, 1975, the district court entered an Order and Judgment (the "O & J") (A-300-316), the centerpiece of which was a 29% nonwhite membership quota which petitioners were "directed and ordered to achieve" by July 1, 1981 (A-305).[7] Numerous provisions of the O&J specifically required that preferences be given to nonwhites in order to achieve the "goal" (See e.g. ¶¶11, 12, 14(c), 21, 21(d), 22(b), 22(c) and 22(d)) (A-305-314). In the O&J, the court also appointed a special master, called an Administrator, with broad supervisory powers, who was to propose and implement an affirmative action plan

[7] Racial hiring pursuant to fixed and intransigent percentages has been involved in this action even before the entry of the O&J in 1975. Pursuant to an order dated April 9, 1974, Local 28 and the JAC were directed to admit six nonwhites for advanced placement in the apprenticeship program (JA-366-368). On July 2, 1974, the district court ordered the JAC to indenture and assign for employment a class of sixty apprentices, comprising forty whites and twenty nonwhites (JA-363-365). These orders were complied with.

to govern petitioners' employment practices. Petitioners were also ordered to keep extensive records.

The Administrator submitted an Affirmative Action Program and Order (AAPO) (A-230-254) which was adopted by the district court. It established interim annual goals[8] for nonwhite membership in Local 28, detailed the mechanics for the conduct of the testing and apprenticeship programs and set forth elaborate record-keeping requirements for Local 28 and the JAC. AAPO is replete with provisions ordering racial preferences. (See e.g. ¶¶7, 14, 15, 16, 17) (A-234-241).

AAPO was substantially affirmed by the Court of Appeals[9] (A-207-229), although the majority acknowledged that the goals would result in whites being "kept out of the defendant union solely on account of their race or ethnic background" (A-216).

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[8] The interim goals for achieving the 29% minority balance suggested by the Administrator and adopted by the district court were as follows:

July 1, 1976	10%
July 1, 1977	13%
July 1, 1978	16%
July 1, 1979	20%
July 1, 1980	24%

(A-232).

[9] The Court of Appeals modified AAPO to the extent it had required that one of the three union representatives to the JAC be replaced by a representative of minority descent and that three nonwhites be admitted to the apprenticeship program for every two whites admitted. It held that these remedies constituted quotas of a nature forbidden by Title VII. Judge Feinberg concurred in the result and the disapproval of the racial quotas. He wrote separately to stress the difference between racial quotas and goals, and to note his approval of the 29% figure in the district court order because it was a goal (A-227-229). In a subsequent report to the district court, the Administrator complained that given the unemployment crisis which would plague the sheet metal industry "for many years to come," the Court of Appeals' disapproval of the 3:2 nonwhite preference had denied him "the only realistic means of reaching the court approved goal" (JA-218).

Thereafter, a Revised Affirmative Action Program and Order (RAAPO) was entered in 1977 (A-182-206). RAAPO preserved the interim percentages in AAPO but revised them downward in recognition of unemployment in the industry (JA-164).[10] Various racial preferences were continued. (See e.g. ¶¶2, 13, 14, 29) (A-184-198). RAAPO also created a Board of Examiners to oversee and grade the union's "hands-on" journeyman's test (A-188) over the union's objections that such a reviewing board was an unwarranted intrusion into its internal affairs (JA-237-238).

A divided panel of the Court of Appeals affirmed RAAPO (A-160-181). Judge Meskill dissented (A-169-181) on the ground that the findings of discrimination, which had been approved by the earlier Court of Appeals decision, had been improperly derived from employment statistics which violated this Court's intervening ruling in *Hazelwood School District v. United States*, 433 U.S. 299 (1977). These statistics utilized a population base restricted to New York City (A-322, 353) as opposed to the wider geographical area from which the union actually attracted applicants, as is reflected in both AAPO and RAAPO (A-186, 236). In addition, the findings were in part based upon discriminatory practices which occurred prior to passage of the Civil Rights Act of 1964 (A-322, 325). Thus, the district court had relied upon

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[10] The revised interim goals for nonwhite membership in the union were as follows:

July 1, 1977	8%
July 1, 1978	11%
July 1, 1979	15%
July 1, 1980	19%
July 1, 1981	24%

(A-184). Again in response to the "depressed state of the sheetmetal industry" (JA-164), the July 1, 1981 deadline for achieving overall minority representation of 29% was extended in RAAPO until July 1, 1982 (A-183). Indeed, in his report recommending the adoption of RAAPO, the Administrator acknowledged the absence of meaningful employment opportunities for apprentices with the individual employers who ultimately controlled the apprentice employment but were not subject to the court's orders (JA-175-176).

the fact that total minority membership as at 1974 was 3.19%, whereas 10.06% of those entering the industry after the passage of the Act were of minority extraction (A-325-326). Judge Meskill concluded that the failure to apply the *Hazelwood* criteria "cast substantial doubt on the existence of illegal discrimination by these unions ...." (A-169).

The majority agreed that the statistics had been misused, but declined to reverse. Writing for the majority, Judge Smith stated that the use of New York City as a geographical base went more toward the establishment of the requisite minority percentage than the finding of discrimination which, he implied, was of lesser importance (A-167). The proper percentage goal has now become most relevant; petitioners have been held in contempt for failing to achieve it.

For the next several years, Local 28 and the JAC were governed by the O & J, RAAPO and the day-to-day dictates of the Administrator. In response to *sua sponte* orders of the Administrator in 1979 and 1980[11] (JA-130-132, 138-141, 148-151) requesting a report on the efforts since 1975 to achieve the 29% "goal", the union prepared a progress report (JA-88-129) which detailed "the lack of interest in becoming a local 28 member" in the prevailing economic climate. Similar reports had been submitted by the JAC in 1979 (JA-152-156) and 1980 (JA-133-137) detailing efforts to increase minority participation during a period in which only 900 journeymen and 50 apprentices were working in the entire industry, and many of these were employed on a reduced workday basis (JA-134).

Between 1976 and 1982, the Administrator was in complete control of every aspect of Local 28 and the JAC which affected

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[11] The Administrator offered no legal basis for his authority to issue *sua sponte* orders which exceeded the broad range of power afforded him in the O&J (A-305-306). Such conduct, however, typified the authoritarian manner in which the Administrator interpreted his role throughout his tenure. Indeed, shortly after the creation of his office, the Administrator suggested to the court that the O&J be modified to limit petitioners' right of appeal to the district court as apparently had been accomplished in another case where an administrator was overseeing a union's compliance with an affirmative action program (JA-217-218). This suggestion was not adopted by the district court.

minority membership. He approved each apprentice class, the major entry point into the industry. These consisted of approximately 45% persons of minority extraction (JA-96-97; A-42-43). During this period of extreme economic distress for the New York sheet metal industry (A-23-24, 46), total nonwhite membership in Local 28 increased from 6.1% to 14.9%, while total membership declined.

Despite the substantial increase in nonwhite membership, in April 1982, as the extended July 1982 deadline for reaching the quota approached, the City and State, engaging in what Judge Winter characterized as "reactive finger pointing at Local 28" (A-48), initiated contempt proceedings against the petitioners, claiming they had failed to achieve the requisite 29% "goal" (A-441-477).

The contempt proceeding was clearly premised on the failure to meet the requisite percentage of minority membership (A-455-457, 470-471). Nevertheless, after a brief hearing the district court purported to hold petitioners in civil contempt for (1) underutilization of the apprenticeship program; (2) failure to conduct the general publicity campaign ordered in RAAPO; (3) adoption of a job protection provision in the collective bargaining agreement that favored older workers during periods of unemployment (older workers' provision); (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit certain records and reports. The district court imposed a fine of $150,000 for the purpose of developing a fund to be administered by the court through the Administrator, to be used to increase minority membership in Local 28. An additional "coercive fine" was to await the recommendation of the Administrator (A-149-150).

In holding petitioners in civil contempt, the district court stated that it was "... *not* holding the defendants in contempt for their failure to attain the 29% goal ..." (emphasis in original), but "that the collective effect of these violations has been to thwart the achievement of the 29% goal of non-white membership. ..." (A-155-156).

In April 1983, the City commenced a second contempt proceeding before the Administrator, charging Local 28 and the JAC

with violating certain ministerial provisions of the O & J and RAAPO: (1) Local 28's tardy submission of various records; (2) submission of certain inaccurate data by Local 28 and the JAC,[12] and (3) Local 28's failure to serve the O & J and RAAPO on certain contractors (A-127-148). No act of racial discrimination was alleged in the second contempt proceeding.

In his report to the district court, the Administrator recommended that Local 28 and the JAC be held in contempt, and that as remedies they should pay for the development and maintenance of a computerized recordkeeping system, and that additional fines, costs and attorneys' fees should be assessed although no wilful misconduct was charged (A-142-143). The district court adopted all of the Administrator's recommendations without comment (A-125-126).

On September 1, 1983, the district court issued an order detailing its major contempt remedies (A-113-118). It established an Employment, Training, Education and Recruitment Fund ("Fund"), "for the purpose of promotion, training, education and recruitment", and providing a tutorial program, summer jobs, counselling and support services, and financial support. The order specifically states that the Fund shall be used "solely for the benefit of nonwhites" (A-114). It was to be financed by the $150,000 levied against petitioners in the first contempt proceeding, plus additional administrative expenses and a further fine of $.02 per hour for each journeyman and apprenticeship hour worked, all assessed against Local 28 and the JAC "in lieu of" the additional fines anticipated in both contempt proceedings. The Fund is to continue until the 'goal" is achieved, and the court determines it is no longer necessary (A-113-118).

By separate order (A-111-112), the district court adopted an Amended Affirmative Action Program and Order ("AAAPO") (A-53-107) which altered RAAPO in various ways, including: (1) implementing the contempt remedy requiring computerization of records; (2) extension of the plan's coverage to include merged

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[12] The sum total of the "inaccurate data" enumerated by the Administrator consisted of describing "Kaplan" as a Spanish surname and "Marquez" as a "white" surname (A-132-133).

locals and their JACs; (3) a requirement that one nonwhite apprentice be indentured for each white apprentice; (4) a requirement that contractors employ one apprentice for every four journeyman; (5) replacement of the apprenticeship testing program with a three-member selection board; and (6) additional reporting requirements imposed upon the contractors. AAAPO continues the office of Administrator. The expenses of the entire affirmative action program, including the fees of the Administrator (at $150 per hour), his office and administrative expenses, and expenses of the selection board are all to be borne by Petitioners.

AAAPO also adopted a 29.23% nonwhite membership "goal"; the slight change from 29% resulted from the merger of several unions into Local 28. In a separate memorandum and order adopting the 29.23% "goal" (A-119-124), the district court stated that if the petitioners fail to achieve the percentage by August 31, 1987, they "will face fines that will threaten their very existence" (A-123).

The Court of Appeals affirmed all findings of contempt against Local 28 and the JAC, save one. The exception was the inclusion of the older workers' provision in the collective bargaining agreement, which the court held could not form the basis for contempt because it had never been implemented. Inasmuch as the only contempt finding against the Association was occasioned by its agreement to the older workers' provision, all findings and sanctions entered against it were reversed. The court affirmed all contempt remedies against Local 28 and the JAC, including the Fund created only to benefit nonwhites. The adoption of AAAPO was affirmed with two modifications. First, AAAPO's requirement that the JAC indenture whites and nonwhites on a 1:1 ratio was reversed. Second, the court clarified selection board procedures to avoid possible confusion as to whether such procedures can be utilized before the 29.23% nonwhite membership goal is reached.

Judge Winter dissented and voted to reverse AAAPO and all findings and remedies. He found "that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry" (A-38); that the 29% "goal" was, in fact, "an inflexible racial quota" which

is illegal and unconstitutional (A-38-39); that the only allegation even remotely justifying "the extraordinary sanctions imposed" was the allegation of underutilization of the apprenticeship program over which the Administrator had total control (A-39); that the finding of underutilization was based on a statistical analysis which the entire panel and all parties agreed was erroneous (A-43); that Local 28 has improperly been effectively placed in receivership and denied its right of self-government (A-38, 45); and that the race-conscious contempt remedies are inconsistent with this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and are of "questionable constitutional validity" (A-44, 48).

The powers of the Administrator, referred to by Judge Winter, cannot be overstated. Among the numerous and diverse functions performed by the Administrator he drafted the entire affirmative action program (A-255); adjudicated back pay awards (A-307, order filed October 11, 1977); evaluated and modified petitioners' hands-on journeymen tests (order filed February 14, 1978); approved the composition of apprentice classes (A-42); reported on a motion to disqualify counsel (order filed October 25, 1977); supervised compliance with the numerous reporting requirements contained in the O&J and RAAPO (A-305-306); instituted and adjudicated numerous separate contempt proceedings, both civil and criminal, against individual contractors for failures to meet reporting requirements (orders filed October 30, November 2, 1981); ordered petitioners to conduct an economic survey of the entire sheet metal industry in 1979 and 1980 to determine why the quota had not been met (JA-130-132, 138-141, 148-151); conducted the second contempt proceeding against petitioners and made findings of fact and conclusions of law (A-127-143); and formulated the remedies for both contempt proceedings now before this Court (A-126, 156).

Petitioners continue to be charged with engaging in "pernicious discriminatory practice" (A-112). But the record of this case demonstrates that for many years they have sought to speed the process of admitting minorities, achieve the quota, and end the daily regulation and great financial burden they have been enduring. In March 1978, in order to assure the admission of

minorities, Local 28 and JAC sought permission to abandon the aptitude test and simply admit a fixed percentage of minorities to each apprentice class. Respondents initially rejected the suggestion, but later accepted it for the February 1981 apprentice class, assuring 45% minority representation in each class thereafter (JA-96-97).

After the first contempt proceeding in 1982, petitioners attempted a more radical approach. They entered into negotiations with respondents City of New York and New York State Division of Human Rights, and on December 17, 1982, reached agreement on a Modified Affirmative Action Program and Order ("MAAPO"), which was submitted to the district court for approval. MAAPO contained direct racial quotas for admission to the apprentice program and other overt preferences to minorities. Because MAAPO also ended the office of Administrator, his strong opposition to its adoption was no surprise.[13] His report correctly states that "the parties are seeking an easy way out from a complex and difficult problem by presenting to the court a method of simply moving nonwhites into the JAC to meet the 29% goal . . ." (Administrator's Objections to Proposed Modified Affirmative Action Program and Order, filed May 16, 1984, at p. 4).

By order dated April 11, 1983, (the same date on which the second contempt proceeding was filed), the district court rejected MAAPO. The court, however, specifically approved the quotas MAAPO had contained (JA-33). AAAPO, thereafter ordered by the district court, included these quotas in more simplified form, requiring that whites and nonwhites be indentured on a 1:1 ratio. The Court of Appeals struck that provision, but affirmed the quota, the Fund order and all other race-conscious provisions.

In effect, Local 28 remains in receivership, and the expenses of this long ordeal continue to mount. The district court has stated that if the membership quota is not achieved by August 31, 1987, petitioners "will face fines that will threaten their very existence" (A-123).

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[13] By February 7, 1983, the Administrator had already collected $245,803 in fees from petitioners (JA-38d). As of the end of November 1985, he has received $618,544.

SUMMARY OF ARGUMENT

The judicially-imposed racial quota and other provisions requiring petitioners to grant racial preferences to minorities, originally ordered in 1975, and enlarged by the post-contempt orders, are not permissible remedies for violations of Title VII of the Civil Rights Act of 1964. The Court has consistently ruled that make-whole relief under Title VII may be awarded only to identifiable victims of past discrimination and not to an entire racial or ethnic group.

The legislative history of Title VII evidences a uniform Congressional intent that the statute not be read to sanction racial preferences to remedy past discrimination except for actual victims. Congress intended to outlaw all discrimination in employment; not to substitute one form of discrimination for another.

The interpretation of Title VII adopted by the lower court, which sanctions judicially-mandated racial preferences in employment, violates the Equal Protection Clause of the Fourteenth Amendment, and would convert the statute into a bill of attainder working corruption of blood in violation of art. I, §9, cl. 3 and art. III, §3, cl. 2 of the Constitution.

In 1975, the district court fixed the minority membership "goal" for Local 28 at 29%. In so doing, it used a geographical area different than the area from which the union actually drew its membership. The finding of discrimination was made, in part, by comparing this percentage with total nonwhite union membership, improperly including in the latter figure the results of hiring practices engaged in prior to the enactment of the Civil Rights Act of 1964. This misuse of statistics violated fundamental rights and resulted in a baseless quota which petitioners have now been held in contempt for failing to achieve.

The fines and other penalties levied upon petitioners cannot be justified as civil contempt remedies, which may only be imposed to compensate actual victims of contemptuous acts for damages they have proved, or to coerce compliance with orders which have not yet been obeyed. The Court of Appeals found that the penalties had a coercive component because they served to induce petitioners to achieve the "goal". In so ruling, the

Court of Appeals was clearly treating the "goal" as a quota, and the contempt as having been imposed for failure to achieve it.

The office of Administrator, created in 1975 and enhanced by the post-contempt orders, is an improper intrusion upon the right of union self-government which is guaranteed by the Labor-Management Reporting and Disclosure Act of 1959 and which Congress intended not to trammel by the Civil Rights Act of 1964. The broad power granted to the Administrator is an abdication of judicial function in violation of Rule 53, F. R. Civ. P. and art. III, § 1 of the Constitution.

ARGUMENT

I

COURT-IMPOSED RACIAL QUOTAS AND RACE-CONSCIOUS REMEDIES ARE ILLEGAL UNDER TITLE VII

A. *Statute and Case Law*

Since 1975, Local 28 and its JAC have labored under a court-imposed inflexible racial quota. In addition, race-conscious preferences have been included in the O&J, the affirmative action plan in all of its forms, and now in the Fund order, under the guise of a contempt remedy.

Such judicial decrees constitute racial employment preferences, illegal under Section 703(j) of Title VII, 42 U.S.C. §2000e-2(j), which provides:

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

> classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

The Fund order and various provisions of the O&J and the affirmative action orders are also specifically proscribed by Sections 703(c)(1) and (2) and 703(d), 42 U.S.C. §§2000e-2(c)(1) and (2) and (d), which provide:

It shall be an unlawful employment practice for a labor organization —

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin . . . .
>
> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

All of these orders are beyond the scope of remedies permitted under Title VII. Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g), as pertinent herein, states:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... [or any other equitable relief as the court deems appropriate ...][14]

Since 1971, the Court has construed the above provisions of Title VII in light of the overall purpose of the Civil Rights Act of 1964 "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). *Accord: Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

Consistent with this principle, the Court has uniformly held that court-ordered Title VII remedies are restricted to make-whole relief benefiting actual identifiable victims of past discrimination. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2588-2590 (1984); 104 S. Ct. at 2593-2594 (O'Connor, J., concurring); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982); *Connecticut v. Teal*, 457 U.S. 440, 453-454 (1982); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-372 (1977); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 763-764, 769 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).[15]

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[14] The bracketed language was added by Pub. L. 92-261 §4 (a). It applies to all charges pending before the Commission on the date of its enactment [March 24, 1972], and to those filed thereafter. *Id.* §14. It does not apply to cases such as the present one which were already pending in the courts on the date of enactment. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 471 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[15] *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) is consistent. The Court emphasized that its holding was narrow and limited to voluntarily-adopted affirmative action plans: "we are not concerned with what Title VII

(footnote continued)

Accordingly, the Court has repeatedly stressed that the focus of Title VII is on relief to the individual employee and not remedies directed to racial classes. In *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978), the Court explained:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class.

Similarly, in *Connecticut v. Teal, supra*, the point was repeated:

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee.

See also Arizona Governing Committee v. Norris, 103 S. Ct. 3492 (1983), where the point was reiterated in the individual opinions. *Id.* at 3496 (Marshall, J., concurring); *Id.* at 3508 (Powell, J.); *Id.* at 3511 (O'Connor, J., concurring).

In *Albemarle Paper Co. v. Moody, supra*, the Court held that discrimination in the employment context was a legal injury of an economic character to be remedied by backpay awards, noting that the Title VII remedial provision was modelled on the backpay provision of §10(c) of the National Labor Relations Act, 29 U.S.C. §160(c). *Id.* 422 U.S. at 419-421 and 419 n. 11. *Accord: Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 769 (1976). It further indicated that courts exhausted their remedial powers under §706(g) when they enjoin the discriminatory practices and

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requires or with what a court might order to remedy a past proved violation of the Act." *Id.* 443 U.S. at 200. Chief Justice Burger dissented on the ground that even this limited result was contrary to the explicit language of Title VII, forbidding racial preferences. *Id.* 443 U.S. at 216-218. In a separate dissent, Justice Rehnquist reviewed the legislative history of Title VII to demonstrate that discriminatory preferences for any group, minority or majority, are proscribed by Title VII, and that even the narrow holding of the majority opinion did violence to the language and legislative history of the Civil Rights Act. *Id.* 443 U.S. at 219-255.

award backpay to the actual victims of past discrimination.[16] *Id.* 422 U.S. at 417-418, 423.

As the Court stated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971),

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Accord: McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-801 (1973). *See also, United Steelworkers of America v. Weber*, 443 U.S. 193, 218 (1979) (Chief Justice Burger, dissenting), 443 U.S. at 222 (Rehnquist, J., dissenting).

In short, the Court has never approved judicially-imposed remedies under Title VII unless carefully tailored to benefit actual identifiable victims of past discrimination. Even when limited to aiding such persons, remedies may not trammel the rights of the innocent. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 239-241 (1982).

The Court confirmed its earlier decisions in *Stotts*, where Justice White, joined by Chief Justice Burger, Justice Rehnquist and Justice Powell, reviewed Section 706(g) and its legislative history and held that courts could not order race-conscious remedies except to award damages to actual victims of past discrimination. *Id.* 104 S. Ct. at 2588-2590. Justice O'Connor

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[16] In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Court held that court-ordered retroactive seniority was a permissible class action remedy under Title VII, but only for individuals who had been discriminated against with respect to transfers and promotions. *Id.* 431 U.S. at 329-331. To the extent that the order also included nonapplicants who had not sought transfers, the government would be required to prove for each individual nonapplicant that he would have applied for the transfer but for the company's discriminatory practices. Thus, the incumbent nonapplicants were also identifiable victims. *Id.* 431 U.S. at 371-372.

wrote separately, 104 S. Ct. at 2593-2594, to concur on the limitations on court-imposed Title VII relief: "a court may use its remedial powers ... only to prevent future violations and to compensate identified victims of unlawful discrimination."

The court below distinguished *Stotts* on three separate grounds, none of which withstands analysis. First, the court noted that the *Stotts* affirmative action plan was in conflict with a bona fide seniority plan exempted by §703(h) of Title VII (A-30). In *Stotts*, however, the Court held that the trial court's disregard of the seniority system overstated the authority of the courts to fashion remedies under §706(g) of Title VII. *Id.* 104 S. Ct. 2588-2589. Thus, the relief ordered was in direct conflict not only with §703(h) of Title VII but also with §706(g), and the Court's holding embraced both of these provisions.[17]

Next, the Court of Appeals stated that the *Stotts* discussion of §706(g) related only to "make-whole" relief, and did not apply to prospective racial preferences such as that ordered in the present case which, it ruled, are permitted under §706(g) (A-30). However, as this Court expressely stated in *Stotts* and its earlier Title VII decisions, it is §706(g) *itself* which is limited to make-whole relief. Prospective remedial relief to nonidentified victims of past discrimination is not permitted under §706(g), and is specifically prohibited by §703(j).

Finally, the court below stated that this Court's discussion of §706(g) did not apply to petitioners because *Stotts*, involving judicial modification of a consent decree, did not present a case where findings of intentional discrimination had been made (A-31). This ignores the express language of §706(g) which premises all judicial remedial action upon a finding "that the

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[17] Even if the *Stotts* discussion of §706(g) is considered an alternative holding, its precedential value is undiminished. *D. Simon v. Kroger*, 105 S. Ct. 2155, 2157 n. 1 (1985) (White, J., dissenting from denial of certiorari); *Commonwealth of Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *Richmond Co. v. United States*, 275 U.S. 331, 340 (1928); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924); *Union Pacific R. Co. v. Mason City & Fort Dodge R. Co.*, 199 U.S. 160, 166 (1905).

respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice" in violation of Title VII.

Justice Blackmun, dissenting in *Stotts,* concluded that courts are empowered to provide race-conscious affirmative action to unidentified individuals. His view is based upon the clause of §706(g) which permits courts to order "any other equitable relief as the court deems appropriate." *Id.* 104 S. Ct. at 2605-2606. That provision, however, was added in 1972 without extensive discussion, and has no retroactive application to this case. See n. 14 *supra.* In any event, it is difficult to read that phrase so broadly as to justify quotas and preferences and thus abandon the clear purpose of the Eighty-eighth Congress which enacted Title VII. In addition, such an interpretation would effectively repeal §703(j), which forbids preferential hiring, and is thus contrary to rules of statutory construction. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 416-417 (1968).

B. *Legislative History*

The debate before the Eighty-eighth Congress on the numerous bills that ultimately became Title VII of the Civil Rights Act reflects the frequently-voiced concerns of bipartisan members of Congress, as well as members of the business and labor community, that Title VII not be utilized in a manner to enforce strict racial quotas or preferential hiring to correct prior racial imbalances in employment. It further demonstrates that §703(j) was expressly added to Title VII to allay these apprehensions.

Assurances that mathematical quotas and preferential hiring would not be ordered appear early in the House consideration of H.R. 7152, introduced by Representative Celler of New York on June 20, 1963. Representative McCullough, and others, explained the basic purpose of the bill in "Additional Views on H.R. 7152":

> It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard,

> nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.
>
> * * *
>
> Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification.

H.R. Rep. No 914, 88th Cong., 1st Sess. (1963), *reported in* 2 U.S. Code Cong. & Ad. News 2391, 2515-2516 (1964).

Representative Celler, in his opening speech, dismissed charges in a Minority Report that the legislation would require racial hiring to achieve balancing:

> [T]he charge has been made that the Equal Employment Opportunity Commission to be established by title VII of the bill would have the power to prevent a business from employing and promoting the people it wished, and that a "Federal inspector" could then order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong.
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> * * *
>
> Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous.
>
> * * *
>
> The Bill would do no more than prevent ... employers from discriminating against or in favor of workers because of their race, religion, or national origin.

> It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing "racial or religious imbalance" in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped. 110 Cong. Rec. 1518 (1964).

Representative Lindsay also supported the bill and sought to assuage opponents' fears regarding quotas or preferences:

> This Legislation ... does not, as has been suggested heretofore both on and off the floor, force acceptance of people in ... jobs ... because they are Negro. It does not impose quotas or any special privileges of seniority or acceptance. There is nothing whatever in this bill about racial balance as appears so frequently in the minority report of the Committee.
>
> What the bill does do is prohibit discrimination because of race .... 110 Cong. Rec. 1540.

He subsequently added to his earlier remarks "to emphasize ... that this bill does not require quotas, racial balance, or any of the other things that the opponents have been saying about it." 110 Cong. Rec. 15876.

Representative Goodell agreed:

> There is nothing here as a matter of legislative history that would require racial balancing. ... We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated, charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color. 110 Cong. Rec. 2558.

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum states:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But Title VII does not permit the ordering of racial quotas in business or unions and does not permit interferences with seniority rights of employees or union members. 110 Cong. Rec. 6566.

The protracted debate in the Senate also thoroughly considered and rejected challengers' contentions that the bill would impose quotas and preferential hiring on employers and unions. Senator Humphrey, a leading proponent of the Civil Rights Act, was most vocal on this point: "The bill does not require that at all. If it did, I would vote against it. There is no percentage quota." 110 Cong. Rec. 5092. The Senator further explained that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." 110 Cong. Rec. 5423. With respect to the provision that ultimately became the remedial section of Title VII, §706(g), Senator Humphrey explained:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as §706(g)] ....
>
> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing,

> or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.
>
> That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications not race or religion. 110 Cong. Rec. 6549.

In a subsequent address, Senator Humphrey reemphasized his views:

> The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. 110 Cong. Rec. 11848.
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> Senator Kuchel, also supporting passage, stated:
>
> Employers and labor organizations could not discriminate in favor of or against a person because of his race, his religion, or his national origin. In such matters ... the bill now before us ... is color-blind. 110 Cong. Rec. 6564.

Senators Clark and Case, floor managers for Title VII, issued a joint interpretative memorandum to the Senate:

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial

balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. 110 Cong. Rec. 7213.

* * *

The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section 707(e) [enacted as 706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin. 110 Cong. Rec. 7214.[18]

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[18] A Justice Department memorandum provided the Senate with its interpretation of Title VII:

> Finally, it has been asserted that title VII would impose a requirement for "racial balance." This is incorrect. There is no provision ... in title VII ... that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance.... No employer is required to maintain any ratio of Negroes to whites.... On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all. 110 Cong. Rec. 7207.

Reacting to objections raised by Senators Robertson, Smathers and Sparkman that Title VII would be interpreted to coerce employers and unions to make decisions on the basis of race, 110 Cong. Rec. at 7418-7420; 8500; 8619, Senator Williams countered:

> Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a "white only" employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. ... Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense. 110 Cong. Rec. 8921.

In direct response to these continuing charges of coercive reverse discrimination, Congress adopted the Dirksen-Mansfield amendment which included §703(j), specifically aimed at dispelling the oppositions' concerns and prohibiting preferential racial hiring to correct racial imbalance. *United Steelworkers of America v. Weber*, 443 U.S. 193, 207 n. 7 (1979); 443 U.S. 243-244 (Rehnquist, J., dissenting). *See also*, Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 450 (1966).

The court-ordered affirmative relief imposed upon Local 28 and its JAC constitute remedies beyond the scope of §706(g) and involve quotas and race-conscious remedies that Congress sought to preclude with the inclusion of 703(j) in Title VII. The promises and clear intentions of virtually every member of Congress who spoke in support of Title VII were disregarded at an early stage of the present case (A-216). Courts are limited to interpreting statutes to give effect to the Congressional intent as reflected in the statutory language and its legislative history. *United States v. Rutherford*, 442 U.S. 544, 555 (1979); *TVA v. Hill*, 437 U.S. 153, 195 (1978). *See also, United Steelworkers of*

America v. Weber, 443 U.S. 193, 218-219 (1979) (Chief Justice Burger, dissenting).

Finally, as discussed below, the construction of Title VII adopted by the majority below is at odds with the Equal Protection Clause of the Fourteenth Amendment and the prohibition against bills of attainder and corruption of blood contained in art. 1, §9, cl. 3 and art. III, §3, cl. 2 of the Constitution, and thus violates the presumption that Congress intends to enact constitutional legislation. *See, e.g., Singer Sewing Machine Co. v. Brickell*, 233 U.S. 304, 313 (1914).

II

THE FUND ORDER AND AAAPO VIOLATE THE CONSTITUTION

A. *Equal Protection of the Law*

The legislative history of Title VII evidences a clear Congressional intent not to authorize the substitution of one form of discrimination for another. The interpretation of Title VII now on review is much different, and would render the statute inconsistent with the Equal Protection Clause as it has long been understood.[19]

Although in its historical context the immediate purpose of the Fourteenth Amendment was to secure full citizenship for the newly freed slaves, even the framers of the Amendment recognized

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[19] Through the Due Process clause of the Fifth Amendment, the equal protection safeguards of the Fourteenth Amendment are applicable to actions of the federal government and its agencies, including the judicial orders before the Court, and prohibits the federal government from discriminating between individuals or groups. *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-100 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

the ecumenism of the language of the Equal Protection Clause.[20] Early in this century, the Court acknowledged the broad reach of the language. *Buchanan v. Warley*, 245 U.S. 60, 76 (1917) (although "a principal purpose of the ... Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States. This is now the settled law.")

This Court's decisions affording equal protection to citizens of diverse ethnic backgrounds demonstrate the universality of the Clause: *Regents of the University of California v. Bakke*, 438 U.S. 265, 287-320 (1978) (opinion of Powell, J.) (invalidating special admissions program for nonwhites as unconstitutional); *Hernandez v. State of Texas*, 347 U.S. 475 (1954) (holding that systematic exclusion of Mexicans from jury service violated Clause); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (striking down California law barring fishing licenses to aliens); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (applying Clause to Chinese); *Truax v. Raich*, 239 U.S. 33 (1915) (applying Clause to protect right to employment of white resident alien).

In an early interpretation, the Court explained that the Clause would reach charges of reverse discrimination by whites:

> If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding

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[20] *See* Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 132, 136-143 (1950). The genesis of the Clause was in the egalitarian philosophical discourses of Herodotus, Seneca, Milton, Diderot and Rousseau. The first use of the phrase in a Congressional Amendment introduced in 1865, indicated the universality of its application: "to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property." *Id.* at 138.

> all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.

Strauder v. West Virginia, 100 U.S. 303, 308 (1879). *Accord: Fullilove v. Klutznick*, 448 U.S. 448, 526 (1980) (Stewart, J., dissenting) ("The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is 'universal in [its] application, to all persons ... without regard to any differences of race, or color, or of nationality'." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1866)).[21]

There is a common thread connecting the cases which address statutes conferring benefits on a racial basis. Although the test has been stated differently by many Justices, this Court has not approved racial classifications unless (1) Congressional findings have been made that members of one group have suffered discrimination; (2) the legislation is tailored to benefit only the individual victims; and (3) although the statute may confer benefits unavailable to others, it does not trammel their fundamental rights. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 480-482 (1980) (opinion of Chief Justice Burger).

The post-Civil War statutes comply with these criteria. They were specific responses to the urgent needs of newly freed slaves and provided benefits only to that group. The nature of the benefits conferred, *e.g.*, food, health care, public land and education, did not deprive any other person. They functioned in the manner of present-day public disaster relief statutes.[22]

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[21] See also *De Funis v. Odegaard*, 416 U.S. 312, 336-337 (1974) (Douglas, J., dissenting):

> There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color.

[22] *See generally*, R.W. Patrick, *The Reconstruction of the Nation* (1967); K.M. Stampp, *The Era of Reconstruction, 1865-1877* (1965); J.H. Franklin, *Reconstruction: After The Civil War* (1961).

Programs that employ racial or ethnic criteria, even in a remedial context, are subject to the most searching examination. *Fullilove v. Klutznick*, 448 U.S. 448, 472, 491-492 (1980) (opinion of Chief Justice Burger); *see also* 448 U.S. at 507 (Powell, J., concurring) (racial classification involves a test "virtually impossible to satisfy"), *Regents of the University of California v. Bakke*, 438 U.S. 265, 357 (1978) (opinion of Brennan, J.); *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting) ("... classifications based upon race, alienage, and national origin, must be subjected to close judicial scrutiny, because it focuses upon generally immutable characteristics over which individuals have little or no control...."); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).[23]

The few cases where racial classifications have been approved are consistent with the foregoing analysis. In *Fullilove v. Klutznick*, *supra*, a sharply divided Court affirmed an Act of Congress allocating 10% of federal funds for public works projects to identified minority businesses. The Court stated, "Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the remedial powers of Congress." 448 U.S. at 483. *See also* 448 U.S. at 473, 448 U.S.

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[23] It has been suggested that a lesser standard of review should be employed when the white majority acts in a benign manner to discriminate in favor of minorities. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). Justice Douglas rejected this contention in his dissent in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). After first observing that Harvard's voluntary affirmative action plan was not benign to the students displaced by it, *Id.* at 333, Justice Douglas explained that discrimination is constitutionally forbidden regardless of whether it is wielded by the majority or the minority and irrespective of the motives behind it.

> If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality.

Id. at 343.

at 516 (Powell, J., concurring). In addition, the Court noted that the impact on nonparticipants would be limited to disappointed expectations of sharing in the special fund. *Id.* 448 U.S. at 484. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), involved an express Congressional mandate redistricting voting districts along racial lines; no person was deprived of his right to vote as a result of the legislation. Similarly, in *Morton v. Mancari*, 417 U.S. 535 (1974), the "preference" granted Indians seeking employment in the Bureau of National Affairs, which the Court found to be a reasonable job qualification and not a preference at all, was enacted by Congress as part of the Indian Reorganization Act.[24]

Finally, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971), in approving the use of mathematical ratios of black to white students to implement a school desegregation program, the Court underscored the flexibility of the ratio and concluded that if the quota were to be employed in an inflexible manner, the Court would reverse it as unconstitutional. Moreover, as Justice Douglas subsequently noted, the *Swann* desegregation program would not deny any child the right to attend public school and was therefore quite unlike a quota affecting careers in employment which directly infringe constitutional rights. *DeFunis v. Odegaard*, 416 U.S. 312, 336 n. 18 (1974) (Douglas, J., dissenting).

In 1915, the Court ruled that the Equal Protection Clause could not be interpreted to deny a white petitioner the right to employment:

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[24] Both *Korematsu v. United States*, 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943), which imposed discriminatory restrictions on Americans of Japanese extraction and are of questionable vitality, involved emergency legislation passed in time of war and have been distinguished on that ground. *DeFunis v. Odegaard*, 416 U.S. 312, 339 n. 20 (1974) (Douglas, J., dissenting). In addition, both cases were decided before the Court held that the Fourteenth Amendment was applicable to the actions of the federal government. *Fullilove v. Klutznick*, *supra*, 448 U.S. at 524 n. 3 (Stewart, J., dissenting).

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762; *Barbier v. Connolly*, 113 U.S. 27, 31; *Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana*, 165 U.S. 578, 589, 590; *Coppage v. Kansas*, 236 U.S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

Truax v. Raich, 239 U.S. 33, 41 (1915). *Accord: In re Griffiths*, 413 U.S. 717 (1973). The boundaries of permissible reverse discrimination have not been expanded since that time. The quotas and race conscious remedies ordered by the court below are unconstitutional.

B. *Bills of Attainder and Corruption of Blood*

"Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." *Fullilove v. Klutznick*, 448 U.S. 448, 530 n. 12 (1980) (Stewart, J., dissenting). By barring innocent white workers from union eligibility and denying them equal access to training programs, the relief affirmed below penalizes innocent white persons on the basis of other white persons' history of racial discrimination.

As a result, the construction of Title VII adopted by the Court of Appeals has the effect of making the Civil Rights Act an unconstitutional bill of attainder, visiting upon white persons the sins of past discrimination by others. This is contrary to basic principles of individual accountability, and is specifically outlawed by the prohibition against bills of attainder and corruption of blood contained in the body of the Constitution as originally written. See art. I, §9, cl. 3 and art. III, §3, cl. 2 of the Constitution.

Bills of attainder legislatively determine or presume guilt and punish either specific individuals or groups of persons, without the protections of a judicial trial. *Selective Ser. Sys. v. Minn. Public Int. Research*, 104 S. Ct. 3348, 3353 (1984); *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977); *United States v. O'Brien*, 391 U.S. 367, 383 n. 30 (1968); *United States v. Lovett*, 328 U.S. 303, 315 (1946).

Originally limited to legislation that imposed capital punishment or incarceration of identifiable persons or groups, bills of attainder were recognized by Chief Justice Marshall in 1810 to include a broad range of punitive measures: "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810). *Accord: Nixon v. Administrator of General Services*, 433 U.S. 425, 538 (1977) (Chief Justice Burger, dissenting); *United States v. Lovett*, 328 U.S. 303, 315-316 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867) (punishment under a bill of attainder includes the "deprivation of any rights, civil or political, previously enjoyed. ..."); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 286 (1827) (constitutional prohibition against bills of attainder "is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property.")

The practice of "corruption of blood," abolished by art. III, §3, cl. 2, continued the punishment to the heirs of the person attainted. This Court has repeatedly voiced its objection to such discriminatory legislation. *County of Oneida v. Oneida Indian Nation of New York*, 105 S. Ct. 1245, 1272 n. 31 (1985) (Stevens, J., dissenting) ("The Framers recognized that no one ought be condemned for his forefathers' misdeeds. ..."); *King v. Smith*, 392 U.S. 309, 336 n. 5 (1968) (Douglas, J., concurring); *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 290 (1968) (Douglas, J., dissenting); In *Korematsu v. United States*, 323 U.S. 214, 243 (1944), Justice Jackson, dissenting from the wartime restrictions imposed on Japanese-Americans, stated:

> Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.

> Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him. ... But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.

Guided by these fundamentals of our jurisprudence, the Court has declared unconstitutional legislation that abridged the rights of classes of individuals to employment. *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867). The broad orders of reverse discrimination entered in this case are unconstitutional.

III

THE DISTRICT COURT'S USE OF STATISTICAL EVIDENCE VIOLATED TITLE VII AND PETITIONERS' RIGHTS

The district court's 1975 finding that appellants violated the Civil Rights Act is the underpinning for all the proceedings which have followed. As a part of those findings, the court determined that the appropriate minority membership in Local 28 was 29%, which the court found was the percentage of minorities within the borders of the City of New York (A-353) and fixed the quota accordingly. Two years later, this Court decided *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and held that: (1) events which predated the Civil Rights Act of 1964 could not be used as evidence of the Act's violation; and (2) proof of a pattern of discrimination by statistical evidence must be logically consistent and must be drawn from relevant geographical locations. The 1975 decision violated both of these requirements. This violation was the basis of Judge Meskill's subsequent dissent and suggestion that the original findings be overturned. Inasmuch as petitioners have now been held in contempt for not achieving

the quota, the propriety of the evidence upon which it was derived is relevant.[25]

Moreover, as Judge Meskill pointed out, any hiring goal percentage must be calculated in accordance with the dictates of *Hazelwood*: "[I]f the district court fixes the proper figure for determining the existence of discrimination, then it logically follows that the same figure is the appropriate target in any affirmative action plan imposed" (A-178).

Because members and applicants for Local 28 membership are, and always have been, drawn from areas outside of New York City (A-186, 236), the percentage quota fixed by the district is and always has been, erroneous. There is no evidence in the record from which the correct percentage could be derived, but it is apparent that the statistical error is significant.[26]

The misuse of statistics was repeated in the 1982 contempt finding. Proof of the only charge which could be construed as a discriminatory practice, the underutilization of the apprentice program, was based upon statistics which all parties and the Court of Appeals agreed were misunderstood and misapplied by the district court. The issue is discussed in both opinions (A-15-16, 43).

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[25] In civil contempt, the underlying orders are also before the reviewing court and, if the orders are found to be invalid or unconstitutional, the contempt falls with the orders. *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); *Worden v. Searls*, 121 U.S. 14, 25 (1887).

[26] In the related case of *Equal Employment Opportunity Commission v. Local 14*, 553 F.2d 251 (2d Cir. 1977), the Court of Appeals found that the proper hiring goal was only 16.2% (as opposed to 29% here), reflecting a minority percentage in the same labor pool which included areas from outside New York City. 553 F.2d at 254. From 1965 until 1974, Local 28 admitted a nonwhite membership of 10.06% (A-325). Using the statistical method explained in *Castaneda v. Partida*, 430 U.S. 482, 496-497 n.17 (1977), and followed in *Hazelwood*, 433 U.S. at 311 n.17, the difference between 16.2% and 10.06% would be barely significant, even without taking into consideration the extremely depressed conditions in the construction industry in New York during the relevant period (A-175). Thus, if correct statistics had been employed by the district court in 1975, it is likely that the complaint would have been dismissed.

Misuse of statistics has permeated this case since the original findings in 1975. Statistics were used to confirm the original finding of discrimination, to fix the desired minority membership which became the quota, and finally to establish contempt. In each instance, the statistics employed were wrong. As this Court stated in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 (1977):

> We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances.

In these circumstances, the wrongful use of statistics has affected basic rights.

IV

THE SANCTIONS IMPOSED IGNORE THE DIFFERENCES BETWEEN CIVIL AND CRIMINAL CONTEMPT AND DENY DUE PROCESS TO PETITIONERS

Petitioners are before this Court seeking review of two orders of civil contempt. Both contempt proceedings were consistently characterized as civil, but the remedies imposed were punitive. Punitive contempt remedies may only be imposed in criminal contempt proceedings maintained under Rule 42, Fed. R. Crim. P., in which the defendant is afforded the due process protections applicable to criminal proceedings. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *United States v. United Mine Workers*, 330 U.S. 258, 296-297 (1947); *Nye v. United States*, 313 U.S. 33 (1941); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444-448 (1911).

Section 1101 of the Civil Rights Act of 1964 [42 U.S.C. §2000h] is a specific provision governing criminal contempt proceedings under the Act. This statute imposes the additional protection of trial by jury for criminal contempt proceedings brought under the Act. In pertinent part, it provides:

> In any proceeding for criminal contempt arising under title II, III, IV, V, VI, VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than $1,000 or imprisoned for more than six months.
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> * * *
>
> Nor shall anything herein be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

The distinction between civil and criminal contempt as set forth in this statute is consistent with the pronouncements of the Court for contempts not involving the Civil Rights Act. Judicial sanctions for civil contempt are wholly remedial and may be imposed only to compel compliance with prior orders of the court or to compensate the complaining party for actual losses proved to have been suffered. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *United States v. United Mine Workers, supra; Penfield Co. of California v. S.E.C.*, 330 U.S. 585, 590 (1947). Under the statute, civil contempt relief may only be granted for the former purpose: "to secure compliance with or prevent obstruction of ..." court orders; damages are not anticipated.

If the Court were to read the statute broadly and imply the power to award compensatory fines, the strictures for such damages would be as set forth in *United States v. United Mine Workers, supra:*

> Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

Id. 330 U.S. at 304. *See also, McCrone v. United States*, 307 U.S. 61, 64 (1939) ("the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911) ("this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant."); *Worden v. Searls*, 121 U.S. 14, 25 (1887).

Similarly, a coercive civil contempt remedy must be tailored to achieve obedience of the court's orders and nothing more, and thus the contemnors must be given an opportunity to purge the contempt. *Penfield Co. v. S.E.C.*, 330 U.S. 585, 590 (1947); *United States v. United Mine Workers*, *supra*, 330 U.S. at 331-332 (opinion of Black, J.); *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at 442.

The judicial power to punish contempt is broad, but not unlimited. In fashioning contempt remedies courts may never exercise more than "the least possible power adequate to the end proposed." *In re Michael*, 326 U.S. 224, 227 (1945); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). As stated in *Gompers*, "the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper." 221 U.S. at 451.

The district court's remedies in the present case far exceed the foregoing standards. The penalties are not compensatory because nothing is payable to any complainant or related to any actual loss. No evidence of actual loss was offered, and no findings of actual loss were made by the district court. Similarly, the punishments were not coercive because petitioners did not have it within their power to comply with any order and end their contemptuous status.

The Court of Appeals sustained the remedies by ruling that if the sanctions can be said to have compensatory or coercive "components", then the inquiry ends without even examining other aspects of the penalty which clearly have neither feature. Thus, for example, the Court of Appeals did not even mention

the requirement, as a civil contempt remedy, that petitioners computerize their records.

The purported justification for the sanctions by the Court of Appeals reflects a clear understanding that petitioners were held in contempt for failure to achieve the quota.[27] The court found that the penalties were proper because they were designed to coerce the petitioners into achieving the 29% membership goal – not to comply with the largely ministerial failures upon which the contempt was purportedly premised (A-25-26).

Similarly, the compensatory element identified by the Court of Appeals, the Fund created to raise the educational level of persons of minority extraction who might be interested in joining the sheet metal industry,[28] is unrelated to any stated contempt charge. Clearly, the Fund does not compensate any party to the proceeding, none of whom proved actual losses.

In actuality, the fines ordered below were criminal remedies. In distinguishing between civil and criminal contempt, the character and purpose of the punishment imposed is determinative. *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at 441. Where the fines do not provide any relief to a private litigant but are aimed broadly to vindicate the public interest, they are punitive, criminal contempt remedies. *Nye v. United States*, 313 U.S. 33, 43 (1941); *Penfield Co. v. S.E.C.*, 330 U.S. 585, 590 (1947); *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at 443-444.

All parties concede that petitioners were not afforded the Due Process safeguards required in criminal contempt proceedings:

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[27] In his dissent, Judge Winter reasons with compelling logic that petitioners were in reality held in contempt solely for their failure to meet the 29% racial quota (A 38-48).

[28] Judge Winter observed in his dissent that the Fund order has the effect of holding "Local 28 responsible for improving the quality of public education in New York" (A-50).

> For, norwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself.[29]
>
> * * *
>
> There was therefore a departure — a variance between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief, in the equity cause, the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in an action of "A *vs.* B for assault and battery," the judgment entered had been that defendant be confined in prison for twelve months.

Gompers v. Bucks Stove & Range Co., *supra*, 221 U.S. at 444, 449.

V

THE OFFICE OF ADMINISTRATOR IS AN IMPROPER JUDICIAL CREATION

A. *The Administrator Is An Unjustifiable Interference with the Right of Union Self-Government*

The appointment of an Administrator possessed with "broad powers ... to exercise day-to-day oversight of the union's affairs" (A-220), and the continuation of his office in AAAPO, constituted an unreasonably intrusive remedy and an unwarranted denial of the union's right to self-government. Judge Winter, in his dissent below, accurately characterized the extent of the intrusion:

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[29] In a criminal contempt proceeding under the Civil Rights Act, a defendant is also entitled to trial by jury (see pp. 37-38, *supra*).

> [The O & J and RAAPO] constitute a complex code of conduct encompassing forty-five pages of substantive and procedural detail with regard to admission to the apprenticeship program, membership in Local 28 and job referral in the sheet metal industry. The O & J and RAAPO vest direct control over these matters in the administrator, who is in effect a receiver with power, *inter alia*, to govern Local 28 so far as the recruitment and admission of minorities to the union and the referral of apprentices to jobs are concerned (A-38).

There was no basis for placing Local 28 in receivership in 1975 for there was no reason for the court to assume that Local 28 would disobey what could have been much simpler orders. By 1975, Local 28 had an established record of adherence to orders. The original civil rights violations were largely the result of Local 28's having adhered to the 1964 state court order (see pp. 4-5, *supra*). Moreover, prior to the trial of the federal action, Local 28 had obeyed an interlocutory federal court order requiring it to indenture twenty nonwhites. The union objected to the order (which seems well beyond the court's powers under Title VII or the Equal Protection Clause), but the order was obeyed (A-352).

The district court was required to fashion the least intrusive remedy to rectify past discrimination. *Dayton Board of Educ. v. Brinkman*, 433 U.S. 406, 419-420 (1977); *Hills v. Gautreaux*, 425 U.S. 284, 293-294 (1976); *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *See generally*, Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COL. L. REV. 784, 864-869 (1978). If a plan is necessary to bring a private institution into compliance, the managers of the institution must be given primary responsibility for formulating it. *See United States v. American Tobacco Co.*, 221 U.S. 106, 187-188 (1911); *cf. Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 54 (1981) (White, J., dissenting in part) ("In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed").

Judicial restraint is particularly required in cases involving labor organizations.[30] The Congress that enacted the Civil Rights Act of 1964 was concerned that the legislation might interfere with the internal operations of unions. In exchange for labor support for the Act, assurances were expressly given that the Act could not be so interpreted. *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979). A House Report thus promised that Title VII would leave "management prerogatives and union freedoms undisturbed to the greatest extent possible." "Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963), *reported in* U.S. Code Cong. & Ad. News 1964, p. 2391.

In the Senate, Senator Metcalf introduced "Some Questions and Answers on the Civil Rights Bill," an interpretative pamphlet, prepared by the Leadership Conference on Civil Rights, which contained the following catechism:

> Does the provision give the Government any control over the affairs of unions?
>
> No. It simply bars unions from denying or limiting membership to anyone or keeping them from a job because of race, color, religion, sex, or national origin. 110 Cong. Rec. 7711-7712.

Senator Humphrey's remarks on the issue of union autonomy were to the same effect. Title VII, he stated, "contains no provisions which would jeopardize union seniority systems, nor would anything in the title permit the Government to control the internal affairs of employers or labor unions." 110 Cong. Rec. 11848.[31]

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[30] The Labor Management Reporting and Disclosure Act of 1959 was enacted after Congress made specific findings that the federal government should protect the rights of employees to self government. 29 U.S.C. §401(a).

[31] Similarly, the legislative history of the Labor Management Reporting and Disclosure Act of 1959 reflects an attempt to balance legislation designed to

(footnote continued)

In the present case, the appointment of an Administrator depriving Local 28 of its autonomy was unwarranted. Moreover, the practice of making such appointments without exhausting less intrusive remedies has become quite common, particularly in cases involving labor organizations.[32] The Court should terminate the office of Administrator.

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remedy revealed abuses in union elections without departing from long-standing policy against governmental intrusion into internal union affairs:

> In acting on this bill [S. 1555] the committee followed three principles: 1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. * * * [I]n establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents. 2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. * * * 3. Remedies for the abuses should be direct. * * * [T]he legislation should provide an administrative or judicial remedy appropriate for each specific problem.

S.Rep No. 187, 86 Cong. 1st Sess., 7 *reprinted* in 1959 U.S. Code Cong & Ad. News 2318, 2323. *See also* ibid: "The bill reported by the committee, while it carries out all the major recommendations of the Senate select committee, does so within a general philosphy of legislative restraint." *See generally* Cox, *Internal Affairs of Labor Unions Under The Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960).

[32] *See, e.g., Equal Employment Opportunity Commission v. Local 14, International Union of Operating Engineers*, 553 F.2d 251, 257-258 (2d Cir. 1977); *Rios v. Enterprise Association of Steamfitters, Local 638*, 501 F.2d 622, 626 (2d Cir. 1974); *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 507 F. Supp. 1146, 1151 n. 6 (E.D. Pa. 1980), *aff'd*, 648 F.2d 923 (3d Cir. 1981), *reversed on other grounds*, 458 U.S. 375 (1982); *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, 384 F. Supp. 585, 594 (S.D.N.Y. 1974); *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); *United States v. United States Steel Corp.*, 371 F. Supp. 1045, 1057 (N.D. Ala. 1973) *modified*, 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *United States v. Bethlehem Steel Corp.*, 6 Fair Empl. Prac. Cas. (BNA) 1073 (W.D.N.Y. 1973); *United States v. Wood, Wire and Metal Lathers International Union, Local Union 46*, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *United States v. Local No. 86, International Association of Bridge, Structural, Ornamental & Reinforcing Ironworkers*, 315 F. Supp. 1202, 1247-1250 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971). *See also*, Harris, *The Title VII Administrator: A Case Study In Judicial Flexibility*, 60 CORN. L. REV. 53 (1974).

B. *The Powers Delegated to the Administrator Are Beyond Those of a Special Master And Resulted In An Abdication of Judicial Power.*

The Administrator is a special master appointed under Rule 53, Fed. R. Civ. P. An administrator with the expansive powers here exercised, however, cannot be justified. It is an abdication of the judicial function. *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927); *TPO, Inc. v. McMillan*, 460 F.2d 348 (7th Cir. 1972).

The delegation of judicial power was contrary to the teachings of *LaBuy v. Howes Leather Co., supra*, and in violation of art. III, §1 of the Constitution.[33] Only judges serving under art. III, §1 may exercise the judicial power of the United States, *Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982), and only they are empowered to determine the law. *See e.g. Glidden Co. v. Zdonak*, 370 U.S. 530, 549-552 (1962); *Crowell v. Benson*, 285 U.S.22, 51 (1932); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A special master may decide facts, but a judge must determine legal issues. *See, Crowell v. Benson, supra; Reed v. Cleveland Board of Education*, 607 F.2d 737, 747 (6th Cir. 1979); *TPO, Inc. v. McMillan*, 460 F.2d 348 (7th Cir. 1972); *Reed v. Board of Election Comm'rs*, 459 F.2d 121 (1st Cir. 1972). A special master should, therefore, be appointed only to help the court in a case in which the help is needed, and his appointment and

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[33] Article III, §1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

activities are only for the purpose of assisting the court to obtain facts and to arrive at a correct result. *See, e.g., Kimberly v. Arms*, 129 U.S. 512, 523-524 (1889).[34]

The fact that the decisions of the Administrator were "appealable" does not remedy the abdication of judicial power. Control of the litigation must be maintained by the court, and appellate review is insufficient to satisfy this requirement. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 86 n. 39 (1982); *United States v. Raddatz*, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring).

In the present case, even the factual issues referred to the Administrator were excessive. In pertinent part, Rule 53(b), Fed. R. Civ. P., provides:

> A reference to a master shall be the exception and not the rule .... in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

Here, after the initial findings had been made by the district court, *every* issue was referred to the Administrator. As the Court ruled in *LaBuy v. Howes Leather Co.*, *supra*, in which the issuance of a writ of mandamus to vacate an improper reference to a master was affirmed:

> The use of masters is "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause," Ex parte Peterson, 1920, 253 U.S. 300, 312, 40 S. Ct. 543, 547, 64 L.Ed. 919, and not to displace the court.

352 U.S. at 256.

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[34] Rule 53 comports with this principle. Its history indicates that it was written in contemplation of references of fact only. *See,* Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COL. L. REV. 452, at 455 n.18 (1958); *See also* Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1272 (citing *Ex parte Peterson*, 253 U.S. 300 (1920).

CONCLUSION

Petitioners respectfully pray that the judgment of the United States Court of Appeals for the Second Circuit be reversed; that all outstanding orders and judgments be vacated, and that the underlying proceedings be dismissed.

Dated: New York, New York
December 6, 1985

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

Article I, §9, cl. 3 of the United States Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

Article III, §3, cl. 2 of the United States Constitution provides:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No Person shall ... be deprived of life, liberty, or property, without due process of law ....

Section 1 of the Fourteenth Amendement to the United States Constitution provides in pertinent part:

> No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

Section 703(c) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(c) provides in pertinent part:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any

> way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin....

Section 703(d) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(d) provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Section 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j), provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g), provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), [or any other equitable relief as the court deems appropriate.]

Section 1101 of the Civil Rights Act of 1964, 42 U.S.C. §2000h, provides in pertinent part:

> In any proceeding for criminal contempt arising under title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than $1,000 or imprisoned for more than six months.
>
> * * *
>
> Nor shall anything herein be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

Section 401(a) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401(a) provides in pertinent part:

> The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection.

Rule 53(b), Fed. R. Civ. P., provides in pertinent part:

> Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.