

Democratic National Committee

Steve Grassman, National Chair - Governor Roy Romer, General Chair

4/16/93
Action

OFFICE OF THE CHAIRMEN

PHONE: (202)-863-8121

FAX: (202)-863-8174

EK

FAX COVER SHEET

DATE:

TIME:

TO: *Minton*

FROM: *Dave*

FAX NUMBER:

NUMBER OF PAGES: 2
INCLUDING COVER SHEET

SUBJECT: *Can you please take a look at the attached position paper & make sure its o.k. with people there. Thanks. We would like to get this out early next week.*

COMMENTS:

IF YOU HAVE TROUBLE WITH THIS TRANSMISSION PLEASE CALL (202) 863-8121

PLEASE VERIFY THE RECEIPT OF THIS DOCUMENT IMMEDIATELY

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Democratic Party Headquarters - 430 South Capitol Street, S.E. Washington, D.C. 20003 202-863-8000 Fax: 202-863-8174

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MINYON MOORE

Bruce:

Can you review
the attached
memo and
make the necessary
recommendations
1) addition
2) deletions, etc.

Thanks

Minyon 65249

P.S. early next
wk is the
deadline

AFFIRMATIVE ACTION

Democratic Position

The Democratic Party is committed to ensuring that all Americans have the opportunity to achieve the American dream. We strongly support local, state, and federal laws which promote equal opportunity for all Americans by prohibiting discrimination based on race, gender, religion, ethnicity, disability, and sexual orientation. We recognize, however, that while these laws have helped our nation make real progress toward our goal of equal opportunity, affirmative action is needed to address the systematic discrimination against women and minorities which still exists in our country today. Although it hasn't always been implemented perfectly, we are convinced that affirmative action, done right, can help us promote equal opportunity for women and minorities without infringing on the rights of others.

Democratic Accomplishments

The Democratic Party has consistently supported economic policies which increase economic opportunities for all Americans. Although Republicans quadrupled the federal deficit from \$74 billion in 1980 to \$290 billion in 1992, Democrats took an important first step toward reducing this deficit in 1993 by passing a sound, deficit-reducing budget -- without a single Republican vote. As a result, our nation's federal deficit has fallen by 77% in just four and a half years while our nation's unemployment rate has dropped to 4.8% -- the lowest in 24 years. In fact, our 1993 federal budget has helped reduce the unemployment rate among women, African-Americans, and Hispanics by 30%, 26%, and 34%, respectively, since January 1993.

The Democratic Party recognizes that systematic discrimination against women and minorities continues to plague our country -- even in our current era of economic prosperity. For this reason, we support affirmative action programs which meet the four standards of fairness which President Clinton outlined last July: (1) no quotas in theory or in practice; (2) no illegal discrimination of any kind, including reverse discrimination; (3) no preference for people who are not qualified for any job or other opportunity; and (4) as soon as a program has succeeded, it must be retired.

Democratic Goals

We challenge all Americans to increase economic opportunities for all Americans by supporting President Clinton's 1997 bipartisan budget proposal. This proposal would balance the federal budget in 2002 and make important investments in our people by:

- * extending the Medicare Trust Fund for at least a decade;
- * providing Hope Scholarship tax credits and \$10,000 higher education tax deductions;
- * offering a \$500-per-child tax credit;
- * funding health insurance for up to 5 million uninsured children; and
- * protecting our nation's strong public health and environmental standards.

We also challenge all Americans to support President Clinton's Initiative on Race. This Initiative will help build one America in the 21st century by examining the state of race relations in the United States over the next year and developing recommendations on how to promote equal opportunity for all Americans.

Republican Position

Republicans have consistently opposed Democratic efforts to promote equal opportunity for women and minorities. Although Republicans failed to eliminate all federal affirmative action programs in the U.S. Congress last year, they were successful in eliminating affirmative action in education throughout California. As a result, the number of African-American students entering law school at Berkeley and UCLA next year has declined by 80% while the number of Hispanic students entering these schools next year has fallen by 50% and 32%, respectively. Nonetheless, Republicans are trying, once again, to eliminate all federal affirmative action programs in the U.S. Congress.

adair

WHITE HOUSE STAFFING MEMORANDUM

DATE: 6-4 ACTION/CONCURRENCE/COMMENT DUE BY: _____

SUBJECT: 1. Board of Education of the Township of Piscataway v. Taxman
2. Adarand v. Pena

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input type="checkbox"/>	<input type="checkbox"/>	McCURRY	<input type="checkbox"/>	<input type="checkbox"/>
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MATHEWS	<input type="checkbox"/>	<input checked="" type="checkbox"/>	SMITH	<input type="checkbox"/>	<input type="checkbox"/>
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BAER	<input type="checkbox"/>	<input type="checkbox"/>	SOSNIK	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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EMANUEL	<input type="checkbox"/>	<input checked="" type="checkbox"/>	YELLEN	<input type="checkbox"/>	<input type="checkbox"/>
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LINDSEY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: This has been forwarded to Barnes.

RESPONSE:

THE WHITE HOUSE
WASHINGTON

June 4, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF *CRF/one*
DAWN CHIRWA *one*
BILL MARSHALL *BM/one*

CC: ERSKINE BOWLES
SYLVIA MATHEWS

SUBJECT: 1. Board of Education of the Township of Piscataway v. Taxman
2. Adarand v. Peña

I. Piscataway v. Taxman

We wanted to inform you of the Justice Department's intention to file tomorrow, Thursday, June 5, 1997, a brief as amicus curiae in the case of Piscataway v. Taxman. The current brief is being filed pursuant to a Supreme Court order, entered on January 21, 1997, requesting the views of the United States in the case.

Briefly, the case arose after the Piscataway school board decided to eliminate a position within the business department of the district's high school. Faced with two teachers who were equally qualified and similarly situated with respect to seniority -- one white and one black -- the board decided to retain the black teacher in favor of the white teacher on affirmative action grounds. The board stated that affirmative action was warranted in this case in order to preserve a racially diverse business department within the high school.

Taxman filed suit and won at the district level and the school board appealed to the Third Circuit. In 1992, at the district court level, the Justice Department joined the case on Taxman's behalf. On appeal, however, Justice sided with the school board and submitted a brief defending a school's ability to use affirmative action -- both in hiring and lay-off situations -- for purposes of promoting racial diversity. The Third Circuit dismissed Justice from the case and ruled in favor of Taxman on the merits. The court held that non-remedial affirmative action is impermissible under Title VII. The school board has petitioned for certiorari.

In the brief to be filed tomorrow, Justice argues that certiorari should not be granted because this case is not an appropriate vehicle for the Supreme Court to decide the important question of whether Title VII permits non-remedial affirmative action. Justice's rationale is that because of its inadequate record and its unique factual circumstances, the case is not suitable to

further the principles announced in our post-Adarand memorandum which sets forth Administration policy on the appropriate use of affirmative action. (Justice's brief was filed after the Office of Legal Counsel post-Adarand memorandum was finalized). Therefore, Justice's brief does not need to address the same issue it addressed before the Third Circuit; i.e. whether affirmative action is permissible in this particular case.

We believe that this brief achieves two necessary goals: (1) answering the Court's request; and (2) forestalling potential criticism that Justice has distanced itself from its position before the circuit court. It also represents a sound legal position. Because of its unique and troublesome facts, Piscataway does not invite a favorable decision on affirmative action. For this reason, it is notable that no civil rights organizations are filing briefs in support of the school board in the case.

II. Adarand Constructors, Inc. v. Pena

On Monday, the district court for the District of Colorado ruled on Adarand v. Pena which had been remanded back to the district court by the U.S. Supreme Court in order to review the Department of Transportation affirmative action program at issue under a "strict scrutiny" standard. The district court found that while there was a compelling governmental interest in this program, it was unconstitutional under the strict scrutiny standard because it was not narrowly tailored. Among other aspects of the affirmative action program which the court found troubling, the court ruled that the statutory presumption which provides that members of specified racial minorities are presumed to be socially and economically disadvantaged was not narrowly tailored.

Thus, although the court's finding that there is a compelling governmental interest in affirmative action programs is encouraging, the finding that the statutory presumption undergirding the federal government's SDB programs fails the narrow tailoring prong of strict scrutiny is extremely troubling. In addition, the court entered an injunction against the particular Transportation program at issue. However, the court left unclear how broadly the injunction applies -- i.e. whether it applies to all federal programs which contain the racially based presumption, including 8(a) and other federal SDB programs.

The Department of Justice intends to file a Motion to clarify the extent of the court's injunction. Once the motion is decided, Justice will review what further litigation steps are appropriate. We also believe that Justice's procurement reform proposal will address most, although possibly not all, of the constitutional problems found by the court.

Thursday
May 23, 1996

FEDERAL REGISTER

~~Bruce Riedel~~
Gene Sperling
Paul Weinstein

FYI: The DoJ
Affirmative Action
Procurement proposal
sites Dole for various
points on this
issue. See
p. 26052 (footnote 20)
and p. 26057 (first
full paragraph and
note 75)

Kunuki
5/31/96

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Thursday
May 23, 1996

Federal Register

Part VI

Department of
Justice

Federal Procurement; Proposed Reforms
to Affirmative Action; Notice

DEPARTMENT OF JUSTICE

Proposed Reforms to Affirmative Action in Federal Procurement

AGENCY: Department of Justice.

ACTION: Public notice and invitation for reactions and views.

SUMMARY: The proposal set forth herein to reform affirmative action in federal procurement has been designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). The proposed structure, which has been developed by the Justice Department, will form a model for amending the affirmative action provisions of the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.

DATES: Comment Date: Reactions and views on the proposed model must be submitted in writing to the address below by July 22, 1996.

ADDRESSES: Interested parties should submit written comments to Mark Gross, Office of the Assistant Attorney General for Civil Rights, P.O. Box 65808, Washington, D.C. 20035-5808, telefax (202) 307-2839.

FOR FURTHER INFORMATION CONTACT: Mark Gross, Office of the Assistant Attorney General for Civil Rights, P.O. Box 65808, Washington, D.C. 20035-5808, telefax (202) 307-2839.

Introduction

In *Adarand*, the Supreme Court extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. In procurement, this means that any use of race in the decision to award a contract is subject to strict scrutiny. Under strict scrutiny, any federal programs that make race a basis for contract decisionmaking must be narrowly tailored to serve a compelling government interest.

Through its initial authorization of the use of section 8(e) of the Small Business Act to expand opportunities for minority-owned firms and through reenactments of this and other programs designed to assist such businesses, Congress has repeatedly made the judgment that race-conscious federal procurement programs are needed to remedy the effects of discrimination that have raised artificial barriers to the formation, development and utilization of businesses owned by minorities and other socially disadvantaged individuals. In repeated legislative enactments, Congress has, among other measures, established goals and granted

authority to promote the participation of Small Disadvantaged Businesses (SDBs) in procurement for the Department of Defense, NASA and the Coast Guard. It also enacted the Surface Transportation Assistance Act of 1982, the Surface Transportation and Uniform Relocation Assistance Act of 1987 and the Intermodal Surface Transportation Efficiency Act of 1991, each of which successively authorized a goal for participation by Disadvantaged Business Enterprises. Congress also included similar provisions in the Airport and Airway Improvement Act of 1982 with respect to procurement regarding airport development and concessions. Under Section 15(g) of the Small Business Act, 15 U.S.C. 644(g), Congress has established goals for SDB participation in agency procurement. Finally, in 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which extended generally to federal agencies authority to conduct various race-conscious procurement activities. The purpose of this measure was to facilitate the achievement of goals for SDB participation established for agencies pursuant to Section 15(g) of the Small Business Act.

Based upon these congressional actions, the legislative history supporting them, and the evidence available to Congress, this congressional judgment is credible and constitutionally defensible. Indeed, the survey of currently available evidence conducted by the Justice Department since the *Adarand* decision, including the review of numerous specific studies of discrimination conducted by state and local governments throughout the nation, leads to the conclusion that, in the absence of affirmative remedial efforts, federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period. For purposes of these proposed reforms, therefore, the Justice Department takes as a constitutionally justified premise that affirmative action in federal procurement is necessary, and that the federal government has a compelling interest to act on that basis in the award of federal contracts.¹

Subject to certain statutory limitations (that are discussed below), Congress has largely left to the executive agencies the determination of how to achieve the remedial goals that it has established. The Court in *Adarand* made clear that, even when there is a constitutionally

sustainable compelling interest supporting the use of race in decisionmaking, any such programs must be narrowly tailored to meet that interest. We have focused, therefore, on ensuring that the means of serving the congressionally mandated interest in this area are narrowly tailored to meet that objective. This task must be taken very seriously. *Adarand* made clear that Congress has the authority to use race-conscious decisionmaking to remedy the effects of past and present discrimination but emphasized that such decisionmaking must be done carefully. This Administration is committed to ensuring that discriminatory barriers to the opportunity of minority-owned firms are eliminated and the maximum opportunities possible under the law are maintained. Our focus, therefore, has been on creating a structure for race-conscious procurement that will meet the congressionally determined objective in a manner that will survive constitutional scrutiny.

In giving content to the narrow tailoring prong of strict scrutiny, courts have identified six principal factors: (1) Whether the government considered race neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action; (2) the scope of the program and whether it is flexible; (3) whether race is relied upon as the sole factor in eligibility, or whether it is used as one factor in the eligibility determination; (4) whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool; (5) whether the duration of the program is limited and whether it is subject to periodic review; and (6) the extent of the burden imposed on nonbeneficiaries of the program. Not all of these factors are relevant in every circumstance and courts generally consider a strong showing with respect to most of the factors to be sufficient. This proposal, however, responds to all six factors.

The Department of Defense (DoD), which conducts a substantial majority of the federal government's procurement, was the focus of initial post-*Adarand* compliance actions by the federal government. In particular, DoD, acting pursuant to authority granted by 10 U.S.C. § 2323,² had developed through

¹ Set forth as an appendix to this notice is a preliminary survey of evidence establishing the compelling interest for affirmative action in federal procurement.

² Section 2323 establishes a five percent goal for DoD contracting with small disadvantaged businesses ("SDBs") and authorizes DoD to "enter into contracts using less than full and open competitive procedures . . . and partial set asides for [SDBs]." Section 2323 states that the cost of using such measures may not exceed fair market price by more than ten percent. It authorizes the

regulation a practice known as the "rule of two." Pursuant to the rule of two, whenever a contract officer could identify two or more SDBs that were qualified to bid on a project at a price within 10% of fair market price, the officer was required to set the contract aside for bidding exclusively by SDBs. Under section 2323, firms owned by individuals from designated racial minority groups are presumed to be SDBs.³ Others may enter the program by establishing that they are socially and economically disadvantaged. After consultation with the Department of Justice, DoD suspended use of the rule of two in October 1995.

Congress in 1994 extended the affirmative action authority granted DoD by section 2323 to all agencies of the federal government through enactment of the Federal Acquisition Streamlining Act (FASA), Public Law No. 103-355, sec. 7102, 108 Stat. 3243, 15 U.S.C. 644 note.⁴ Because of *Adarand* and the effort to review federal affirmative action programs in light of that decision, regulations to implement the affirmative action authority granted by FASA have been delayed. See 60 Fed. Reg. 44825B, 48259 (Sept. 18, 1995). This proposal provides the basis for those regulations.

The proposed structure will necessarily affect a wide range of measures that promote minority participation in government contracting through race-conscious means. Taking DoD as an example, approximately one-sixth of contracting with minority-owned firms in 1994 resulted from use of the rule of two. The majority of dollars to minority firms was awarded by DoD through other means: direct competitive awards, the Small Business Administration's (SBA) section 8(a) program, subcontracting pursuant to

section 8(d) of the Small Business Act, and a price credit applied pursuant to section 2323. With the exception of direct competitive awards (which do not take race into account), activities pursuant to all of these methods will be effected by the proposed reforms.⁵

The 8(a) program merits special mention at the outset. This program serves a purpose that is distinct from that served by general SDB programs. The 8(a) program is designed to assist the development of businesses owned by socially and economically disadvantaged individuals. To this end, the program is targeted toward concerns that are more disadvantaged economically than other SDBs (e.g. the standard for economic disadvantage for entry into 8(a) is an owner's net worth of \$250,000 compared to \$750,000 for SDB programs). Participants in the program are required to establish business development plans and are eligible for technical, financial, and practical assistance, and may compete in a sheltered market for a limited time before graduating from the program. Each of these aspects of the program is designed to assist the business in developing the technical and practical experience necessary to become viable without assistance. By contrast, the general SDB program is a procurement program, designed to assist the government in finding firms capable of providing needed services, while, at the same time, helping to address the traditional exclusion of minority-owned firms from contracting opportunities.

The operation of the 8(a) program will become subject to the overall limitations in the measures described below. In addition, the SBA is working to strengthen safeguards against fraud and to ensure that the 8(a) program serves its purpose of assisting the development of businesses owned by individuals who are socially and economically disadvantaged.

Because the proposed reforms are broad and cover a number of different subjects related to affirmative action in federal procurement, the Justice Department is seeking comments on each of the aspects of the proposal. Comments will be taken into account in

the formulation of revised procurement regulations.

Overview of Structure

The SDB reform outlined herein involves five major topics: (1) Certification and eligibility; (2) benchmark limitations; (3) mechanisms for increasing minority opportunity; (4) the interaction of benchmark limitations and mechanisms; and (5) outreach and technical assistance. The proposed structure incorporates these elements into a system that furthers the President's commitment to ensuring equal opportunity in contracting, responds to the courts' narrow tailoring requirements, and is faithful to statutory authority.

1. Eligibility and Certification

At present, while a concern must have its eligibility certified by the SBA to participate in the 8(a) program, there is no similar certification requirement for participation in SDB programs. Under current practice, firms simply check a box to identify themselves as SDB's when bidding for federal contracts or 8(d) subcontracts. Reform of this certification process is needed to assure that programs meet constitutional and statutory objectives. While the basic elements of eligibility under these programs are statutorily determined, agencies have discretion to impose significant additional controls and to establish mechanisms to assure that the statutory criteria are in fact met.

The SBA will continue as the sole agency with authority to certify firms for the 8(a) program. The following discussion, therefore, concerns only certification of SDB's that are not participants in the 8(a) program.

Each bid that an SDB submits to an agency, or to a prime contractor seeking to fulfill 8(d) subcontracting obligations, will have to be accompanied by a form certifying that the concern qualifies as a small disadvantaged business under eligibility standards that will be published by the SBA. The standards and certification form will allow 8(a) participants to qualify automatically for SDB programs. Others will be required to establish their eligibility by submitting required statements and documentation.

When a concern has been certified by an agency as eligible for SDB programs, its name will be entered into a central on-line register to be maintained by SBA. That certification will be valid for a period of up to three years during which time registered firms will have only to complete a portion of the form confirming the continued validity of that certification to participate in SDB

³ Secretary of Defense to adjust the applicable percentage "for any industry category if available information clearly indicates that disadvantaged small business concerns in such industry category are generally being denied a reasonable opportunity to compete for contracts because of the use of that percentage in the application of this paragraph."

⁴ 10 U.S.C. 2323 incorporates by explicit reference the language of section 8(d) of the Small Business Act, which states that members of designated racial or ethnic groups are presumed to be socially and economically disadvantaged. Participants in the 8(a) program are also presumed to be SDBs.

⁵ FASA states that in order to achieve goals for SDB participation in procurement negotiated with the Small Business Administration, an "agency may enter into contracts using--(A) less than full and open competition by restricting the competition for such awards to small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(C) of section 8 of the Small Business Act (15 U.S.C. 637); and (B) a price evaluation preference set in excess of 10 percent when evaluating an offer received from such a small business concern as the result of an unrestricted solicitation."

⁶ This proposal addresses only affirmative action in the federal government's own direct procurement. It does not address affirmative action in procurement and contracting that is undertaken by states and localities pursuant to programs in which such entities receive funds from federal agencies (e.g., the Disadvantaged Business Enterprise program that the Department of Transportation administers pursuant to the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, section 1003(b), 105 Stat. 1916-1922, and the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47101, et seq.).

programs at any agency. A full application will have to be submitted to an agency every three years to maintain eligibility.

A. Social and Economic Disadvantage

Members of designated minority groups seeking to participate in SDB and 8(d) programs will continue to fall within the statutorily mandated presumption of social and economic disadvantage.⁶ This presumption is rebuttable as to both forms of disadvantage. The form will ask the applicant to identify the group identification triggering a presumption of social and economic disadvantage.⁷ In addition, the form will enumerate the objective criteria constituting economic disadvantage according to SBA standards and advise the applicant that the presumption of such disadvantage is rebuttable and any challenge to the individual's SDB status will be resolved on the basis of these criteria. Challenges would be processed through existing SBA challenge mechanisms.

Individuals who do not fall within the statutory presumption will be required to establish social and economic disadvantage by answering a series of questions demonstrating such disadvantage. Questions regarding social disadvantage will be included in the standard certification form. Pursuant to current practice, individuals who do not fall within a presumption must prove their social disadvantage by clear and convincing evidence. That standard will be changed to permit proof by a preponderance of the evidence.

The SBA currently has criteria for evaluating social disadvantage. SBA will conduct training seminars designed to instruct personnel from other agencies on the procedures for making eligibility determinations. Individuals who do not fall within the statutory presumption will also be required to demonstrate that they are economically disadvantaged according to the criteria established by SBA.

Agencies will have discretion to decide which official within the agency will have authority to determine whether "non-presumed" individuals

are socially and economically disadvantaged.⁸ In most instances, the contracting officer should not have final authority to make the determination; the procedure must, however, facilitate quick decisions so that the procurement process will not be delayed and applicants will have a fair opportunity to compete. An agency may wish to assign this responsibility to its Office of Small and Disadvantaged Business Utilization. The SBA will answer inquiries regarding eligibility determinations and the procuring agency will retain the ability to refer applications to the SBA for final eligibility determinations through the protest procedures now in place. In the alternative, an agency may enter into an agreement with SBA to have SBA make all determinations, including the initial determination of eligibility.

B. Ownership and Control

In addition to submitting the form described above, every applicant will be required to submit with each bid a certification that the business is owned and controlled by the designated socially and economically disadvantaged individuals as those terms are defined by the SBA's standards for ownership and control at 13 C.F.R. 124.103 and 124.104.⁹ Such a certification must come from an SBA approved organization, a list of which will be maintained by the SBA. In order to be approved by the SBA to certify ownership and control, (1) the entity must certify ownership and control according to the standards established by the SBA for the 8(a) program (13 C.F.R. 124.103 and 124.104); (2) the entity's certifications must have been accepted by a state or local government or a major private contractor; and (3) the entity must not have been disqualified by any government authority from making certifications within the past five years. Such entities may include private organizations, the SBA (i.e. through the 8(a) program), entities that provide certifications for participation in the Department of Transportation's disadvantaged business enterprise

⁶ The form that such individuals are to complete will ask whether they previously have applied for SDB certification and been rejected or accepted. A rejected firm will not be permitted to re-apply for certification for one year after rejection, unless it can show changed circumstances.

⁷ The standard certification form will accommodate one eligibility criterion peculiar to the DoD's SDB program under 10 U.S.C. 2323—that the majority of earnings must directly accrue to the socially and economically disadvantaged individuals that own and control the concern. The standard certification form will accommodate this criterion by including a DoD-specific section requiring the concern to attest that the majority of the firm's earnings do flow in this manner.

("DBE") program, or states or localities, so long as the certification addresses the standards for ownership and control promulgated by the SBA.

This procedure is intended to take advantage of the extensive network of certifying entities already in existence. At present, firms may have to obtain several different certifications as they pursue a mix of private and public contracts. While it is clear that a control mechanism is needed to protect against fraud, it makes little sense to create a new federal bureaucracy to perform work that is already being done and to erect another hurdle that an SDB must clear before qualifying for a federal contract. The limited resources of the federal government and of SDBs make creation of such a bureaucracy counterproductive.

To police the quality of certifications, SBA will conduct periodic audits of certifying organizations. Any entity may submit information to the SBA in an effort to persuade the agency to initiate such an audit.

As a means of ensuring that the identified socially and economically disadvantaged individuals retain ownership and control of a firm, a certification of ownership and control will be valid for a maximum of three years from the date it was issued. Certified firms will be required to recertify their eligibility by submitting a full application, including an updated certification of ownership and control, every three years.

C. Challenges

Where an SDB is the apparent successful offeror on a contract, the name of that firm and of the entity that certified its ownership and control will be a matter of public record. SBA regulations currently allow any concern that submitted an offer to protest the eligibility of an SDB that receives a contract through an SDB program. The procuring agency or SBA may also protest the eligibility of an SDB. Individuals or organizations that did not submit a bid for the contract in question may submit information to the procuring agency in an effort to convince the agency to initiate a protest.¹⁰ The SBA's Division of Program Certification and Eligibility will process any protest that contains

¹⁰ The protests contemplated in the discussion here relate only to certification and eligibility. The discussion does not relate to protests in other features of the proposed reforms that might be raised through existing bid protest procedures or through actions under the Administrative Procedure Act.

⁶ Both FASA and 10 U.S.C. 2323 incorporate by explicit reference the definition of social and economic disadvantage contained in section 8(d) of the Small Business Act. Pursuant to section 8(d), members of designated groups are presumed to be both socially and economically disadvantaged; those presumptions are rebuttable. By contrast, for the 8(a) program, members of identified groups are rebuttably presumed to be socially disadvantaged, but must establish that they are economically disadvantaged.

⁷ Members of minority groups do not have to participate in the SDB program in order to bid on federal contracts.

specific, factual allegations that the concern is not eligible for the program.

Grounds for an eligibility protest may include, but are not limited to, evidence that:

- The owners of the firm are not in fact socially or economically disadvantaged;
 - The firm is not owned and controlled by the individuals who meet the definition of social and economic disadvantage;
 - The disadvantaged firm has acted, or is acting, as a front company by failing to complete required percentages of the work contracted to the concern.¹¹
- Upon receiving a protest supported by specific factual information, the SBA will make an eligibility determination by examining documentation from the SDB including, for example, personal and business financial statements, business records, ownership certifications, and other information deemed necessary to permit a determination as to the eligibility of the firm. Current regulations require the SBA to make a determination concerning the eligibility of the firm within 15 days of the filing of the challenge or notify the contracting officer of any delay.

D. Enforcement

Finally, there must be a concerted effort to enforce the law against individuals who present fraudulent information to the government. The existence of a meaningful threat of prosecution for falsely claiming SDB status, or for fraudulently using an SDB as a front in order to obtain contracts, will do much to ensure that the program benefits those for whom it is designed. To this end, there will be an enhanced effort by SBA and the Department of Justice to identify and pursue individuals fraudulently misrepresenting information in order to obtain contracts through an SDB program. Any individual may forward specific factual information suggesting such a misrepresentation to the procuring agency contracting officer or the agency's inspector general. Similarly, the Inspector General of SBA will refer evidence of misrepresentation that emerges through the challenge procedure or otherwise to the Department of Justice. In its

¹¹ The basis for such a challenge would be 48 C.F.R. 19.308, which requires completion of a minimum percentage of contract activities by the firm awarded a contract through a small business set aside or the SBA program. A clause must be inserted in such contracts that limits the amount of work that can be subcontracted. 48 C.F.R. 52.219-14. These requirements will be expanded to include contracts awarded through the reformatted SDB program as well.

enforcement, the Department of Justice will ensure that it pursues to the extent permitted by law all of the parties responsible for fraudulent or sham transactions.

Penalties for misrepresentations in this area were increased by the Business Opportunity Development and Reform Act of 1988 and include:

- (1) A fine of up to \$500,000, imprisonment of up to 10 years, or both;
- (2) Suspension and debarment from Federal contracting (48 C.F.R. pt. 9.4);
- (3) Ineligibility to participate in any program or activity conducted under the authority of the Small Business Act or the Small Business Investment Act of 1958 for a period of up to three years; and
- (4) Administrative remedies prescribed by the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812).

Knowing and willful fraudulent statements or representations may subject an individual to criminal penalties, including imprisonment for up to five years, pursuant to 18 U.S.C. 1001. In addition, knowing misrepresentations to obtain payment from the federal government may violate the False Claims Act, 31 U.S.C. 3729, and subject the claimant to civil penalties and treble damages.

II. Benchmark Limits

Although Congress has made the judgment that affirmative race-conscious measures are needed in federal contracting, the use of race must be narrowly tailored. The federal government operates under a general statutory mandate to achieve the "maximum practical opportunity" for SDB participation and that overall mandate is translated into specific agency-by-agency goals. Some specific programs operate under statutorily prescribed goals.¹² To the extent that race-conscious measures (going beyond outreach and technical assistance) are utilized to obtain these objectives, limitations must be established to comply with narrow tailoring requirements.

To this end, the proposal relies on development of a set of specific guidelines to limit, where appropriate, the use of race-conscious measures in specific areas of federal procurement. The limits, or "benchmarks," will be set for each industry for the entire government. The Department of

¹² See, e.g., 10 U.S.C. 2323 (5% goal for DoD contracting with SDBs); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 103 Stat. 1914 (10% goal for highway construction projects carried out directly by the Department of Transportation).

Commerce, in consultation with the General Services Administration (GSA) and SBA, will establish appropriate benchmark limitation figures for each industry and report them to the Office of Federal Procurement Policy (OFPP), which will publish and disseminate the final benchmark figures. Each industry benchmark limitation will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects. Benchmark limitations will provide the basis for comparison with actual minority participation in procurement in that industry (and, where appropriate, in a region).

In establishing the benchmark limitations, the first step is to define whether industries operate according to regional or national markets. In general, industries will be defined according to two-digit Standard Industrial Classification (SIC) codes. Based on the evidence, it appears that most federal contracting is conducted on a national basis. We also start from the view, reflected in a variety of federal policies, that federal contracting should encourage the development of national markets wherever feasible. Where data indicate, however, that an industry operates regionally, the benchmark limitations will be established by region.

After identifying the markets, the system will then measure, using primarily census data, the capacity of firms operating in each market that are owned by minorities. In estimating capacity, a number of factors will be examined. Most significant, of course, will be the number of minority SDBs available and qualified to perform government contracts.¹³ In general, it appears appropriate to look at the industry in question and identify the smallest firm that has won a government contract in that industry in the last three years. Firms that are significantly smaller would be presumed to be unqualified to perform government contracts in that industry. While keeping in mind that capacity is not fixed, it will also be important to look at measures such as the number of employees and amount of revenues.

In addition to calculating the capacity of existing minority firms, the proposed system will examine evidence, if any, demonstrating that minority business formation and operation in a specific industry has been suppressed by

¹³ For these purposes, the calculation of the number of minority-owned firms will not include corporations owned by federally-recognized Native American tribes and Alaskan Native villages. Bidding credits for such corporations are not subject to the Adamand strict scrutiny standard.

discrimination. This evidence may include direct evidence of discrimination in the private and public sectors in such areas as obtaining credit, surety guarantees and licenses. It may also include evidence of discrimination in pricing and contract awards. In addition, the evidence may include the results of regression analysis techniques similar to those used in state studies of discrimination in procurement. That form of analysis holds constant a variety of variables that might effect business formation so that the effect of race can be isolated.

The combination of existing minority capacity and, where applicable, the estimated effect of race in suppressing minority business activity in the industry will form the benchmark limitation. Although there is no absolutely precise way to calculate the impact of discrimination in various markets, the benchmark limitations represent a reasonable effort to establish guidelines to limit the use of race-conscious measures and to meet the requirement that such measures be narrowly tailored to accomplish the compelling interest that Congress has identified in this area.

Benchmark limitations will be adjusted every five years, as new data regarding minority firms are made available by the Census Bureau. Generally, census regions will be used in defining the scope of regional markets.

III. Mechanisms for Increasing Minority Opportunity

Under the reformed structure, the federal government will generally have authority, subject to the limitations discussed in the next section, to use several race-conscious contracting mechanisms: SBA's 8(a) program; a bidding credit for SDB prime contractors; and an evaluation credit for non-minority prime contractors that use SDBs in subcontracting. In addition, at all times, agencies must engage in a variety of outreach and technical assistance activities designed to enhance contracting opportunities for SDBs (but that are not subject to strict scrutiny). Those efforts will be expanded as described more fully below.

The 8(a) program will continue to provide for sole source contracting and sheltered competition for 8(a) firms. However, the program will be monitored; and where the benchmark limitations described more fully below warrant adjustments to the SDB program, corresponding adjustments will be made to the 8(a) program to

ensure that its operation is subject to those limitations.

A second available race-conscious measure will be a bidding credit in prime contracting for SDBs. Statutory authority for the use of such a credit exists for DoD in 10 U.S.C. 2323 and for the remainder of the government in FASA. Each statute permits use of such a credit so long as the final price does not exceed a fair market price by more than 10%.

The use of the term "credit" is not meant to restrict utilization by agencies of this mechanism to contracts where price is the primary factor in selecting the successful bidder. Where the successful bidder is selected based on other factors—such as the ability to produce a contract that provides the "best value" to the agency—agencies may build the value of increasing the participation of SDB contractors into the evaluation of offers. For some contracts, a numerical credit may be appropriate; in others, some form of nonnumerical assignment may make more sense to the agency. This proposal does not restrict such options. However, regardless how it operates, any bidding credit will be subject to the overall limitations on race-conscious mechanisms described herein.

Pursuant to 10 U.S.C. 2323 and FASA, agencies will also be permitted to use, as a third race-conscious mechanism, an evaluation credit with respect to the utilization by nonminority prime contractors of SDBs as subcontractors. Such goals would be set by the agency for each prime contract based on the availability of minority firms to perform the work. The award of evaluation credits for prime contractors that use SDBs as subcontractors will supplement the existing statutory SDB subcontracting requirements in Section 8(d) of the Small Business Act.¹⁴ In order to certify their eligibility as SDBs, subcontractors will submit the same certification form to the prime contractor that is described in the certification section of this proposal.

Such an evaluation credit can take a number of different forms, depending on the circumstances of a solicitation.¹⁵

¹⁴For certain types of procurement, Section 8(d) requires agencies to negotiate an SDB subcontracting plan with the successful bidder for the prime contract. The statute provides that each such plan shall include percentage goals for the utilization of SDB subcontractors.

¹⁵As was the case with respect to the use of the term "credit" in connection with bids from SDBs as prime contractors, the use of that term here in connection with SDB subcontracting is not intended to restrict the utilization of this mechanism to the evaluation of prime contract bids for which price is the primary factor in selecting the successful bidder.

For example, where it is practical for bidders to secure enforceable commitments from SDB subcontractors prior to the submission of bids, agencies should establish an SDB subcontracting goal for the contract, and award an evaluation credit to bidders who demonstrate that they have entered into such commitments as a means of achieving the goal. Where that is not practical, agencies can award an evaluation credit to a bidder that specifically identifies in a subcontracting plan those SDB subcontractors that it intends to use to achieve the agency's SDB subcontracting goal.¹⁶ Agencies may also award an evaluation credit based on demonstrable evidence of a bidder's past performance in using SDB subcontractors. Agencies may also grant bonus awards to prime contractors to encourage the use of SDB subcontractors.¹⁷ This proposal is not intended to limit agencies in developing or using additional mechanisms to increase SDB subcontracting, but any such mechanism will be subject to the limitations on race-conscious mechanisms described herein.

In applying these bidding and evaluation credits, race will simply be one factor that is considered in the decision to award a contract—in contrast to programs in which race is the sole factor.

IV. Interaction of Benchmark Limits and Mechanisms

In determining how benchmark limitations will be used to measure the appropriateness of various forms of race-conscious contracting, the objective has been to develop a system that can operate with a sufficient degree of clarity, consistency and simplicity over the range of federal agencies and contracting activities. Where the use of all available tools, including direct competition and race-neutral outreach and recruitment efforts, results in minority participation below the benchmark, race-based mechanisms will remain available. Their scope, however, will vary and be recalculated depending on the extent of the disparity between capacity and participation. Where participation exceeds the benchmark, and can be expected to continue to do

¹⁶In either case, a successful prime contractor should notify the contracting officer of any substitution of a non-SDB subcontractor for an SDB firm with which the prime contractor had entered into enforceable commitments or that had been specifically identified in the prime contractor's subcontracting plan.

¹⁷See e.g., Department of Transportation Incentive Subcontracting Program for Small and Socially Disadvantaged Business Concerns, 48 C.F.R. 52.219-10.

so with reduced race-conscious efforts, adjustments will be made.

At the close of each fiscal year, the Department of Commerce will review data collected by its GSA's Federal Procurement Data Center for the three preceding fiscal years to determine the percentage of contracting dollars that has been awarded to minority-owned SDBs in each two-digit SIC code. Commerce will analyze minority SDB participation for all transactions that exceed \$25,000. This review will include minority-owned SDBs participating through direct contracting (including full and open competition), the 8(a) program, and SDB prime and subcontracting programs.¹⁸ Data regarding minority participation will be reviewed annually, but will include the past three fiscal years of experience. Examining experience over three year stretches should produce a more accurate picture of minority participation, given short-term fluctuations and the fact that the process of bidding and awarding a contract may span more than a single fiscal year.

Commerce will analyze the data and, after consultation with SBA, report to OFPP regarding which mechanisms should be available in each industry and the size of the credits that can be applied. OFPP will publish and disseminate the mechanisms that can be used by the agencies in the upcoming year.

Pursuant to 15 U.S.C. 644(g), each agency now negotiates goals for SDB participation with SBA for each year. Commerce would inform SBA and agencies of the appropriate benchmark limits for the industries in which the agency contracts and of the mechanisms available.

When Commerce determines that participation by SDB's in government contracting in an industry is below the relevant benchmark limitation, it may report to OFPP that agencies should be authorized to grant credit to SDB bidders and to prime contractors for SDB subcontracting. Commerce will set a percentage cap of up to ten percent on the amount the credit can allow the

price of a contract to deviate from the fair market price. That percentage will represent the maximum credit that each agency may use in the evaluation of bids from SDBs and prime contractors who commit to subcontracting with SDBs. The size of the credit will depend, in part, on the extent of the disparity between the benchmark limitations and minority SDB participation in federal procurement and industry. It also will depend on an assessment of pricing practices within particular industries to indicate the effect of credits within that industry. Commerce's determinations would be published and disseminated by OFPP.

When the bidding and evaluation credits have been used in an industry and the percentage of dollars awarded to SDBs in that industry exceeds the benchmark limit, Commerce, in consultation with SBA, must estimate the effect of curtailing the use of race-conscious contracting mechanisms and report to OFPP. If Commerce determines that the minority participation rate would fall substantially below the benchmark limit in the absence of race-conscious measures,¹⁹ it need not require agencies to stop using such measures, but may, as described below, require agencies to adjust their use.

Agencies will report the number of contracts that were awarded using a bidding or evaluation credit as well as the amount of those credits. These figures will allow an estimate of the effect on SDB participation of adjusting or removing the credit. In the absence of that objective measure, Commerce will have to estimate and report to OFPP how much minority contracting resulted from the application of these race-conscious measures. One indication may be the success of minorities in winning contracts through direct competition in which race is not used in the decision to award a contract. It may also be useful to examine comparable experience in private industries operating without affirmative action programs.

Even when agencies are not required to terminate bidding and evaluation credits, they may be required to adjust their size in order to ensure that the credits do not lead to the award of a disproportionately large numbers of contracts to SDBs. Statutory authority

for this adjustment exists in both FASA and section 2323. Because the size of credits will affect industries differently, it is impossible to prescribe a set of specific rules to govern adjustments. Responsibility will rest with Commerce to analyze the impact of credits by industry category and make adjustments where appropriate, which would then be published and disseminated by OFPP.

In addition, in some circumstances, an agency may use less than the authorized bidding or evaluation credit where necessary to ensure that use of the credits by a specific agency does not unfairly limit the opportunities of non-SDB contractors seeking contracts from that agency. While the size of the maximum credits will be determined on an industry-wide basis and apply across all agencies, it remains important to maintain flexibility at the agency level to ensure against any undue concentrations of SDB contracting and unnecessary use of race-conscious credits. Thus, for example, where an agency has been particularly successful in reaching out to SDB contractors, it may find its use of the full credits unnecessary to achieve its goals, in which event it could, subject to approval by Commerce, depart downward from the authorized credits. The exercise of this discretion will be particularly important to avoid geographic concentrations of SDB contracting that unduly limit opportunities for non-SDBs.

When Commerce concludes that the use of race-conscious measures is not justified in a particular industry (or region), the use of the bidding credit and the evaluation credit will cease. Suspending the use of race-conscious means will not affect the continued use of race-neutral contracting measures. The limits imposed by the benchmarks also would not affect the applicability of statutorily mandated goals, but would limit the extent to which race-conscious means could be used to achieve those goals. For example, DoD would retain its five percent overall statutory goal and would continue to exhort prime contractors to achieve goals for subcontracting with SDB's. Prime contractors, however, would no longer receive credit in evaluation of their bids for signing up or identifying SDB subcontractors. Likewise, outreach and technical assistance efforts would continue and minority bidders on prime contracts would continue to seek and win competitive awards; but there would no longer be any bidding credit for minority firms.

It should be emphasized that the benchmarks are not a limit on the level

¹⁸In order to measure accurately SDB subcontracting participation, it will be necessary to have information regarding SDB subcontracting participation by two-digit SIC code. At the same time, however, it is important to minimize the amount of new record-keeping and reporting that these reforms may require. Prime contractors such as commercial vendors that report SDB participation through company-wide annual subcontracting plans will continue to be able to use this reporting method, with some modification that aims to facilitate SIC code reporting. Under one approach, prime contractors could require all subcontractors to identify their primary SIC code and then track, as most primes do now, the amount of dollars that flows to each subcontractor.

¹⁹More than three "standard deviations" will generally be viewed as "substantial" for these purposes. Under applicable Supreme Court decisions, a disparity in the range of two or three standard deviations is strong evidence of a prima facie case of discrimination in the employment context. A standard deviation is a measure of the departure from the level of activity that one would expect in the absence of discrimination.

of minority contracting in any industry that may be achieved without the use of race-conscious measures. Conversely, there is, of course, no assurance that minority participation in particular industries will reach the benchmark limitations through the available race-conscious measures. Minority participation will depend on the availability of qualified minority firms that successfully win contracts through open competition, subcontracting, the 8(a) program or through the application of price or evaluation credits. The system described herein is a good faith effort to remedy the effect of discrimination, but it is not a guarantee of any particular result.

The affirmative action structure described herein does not utilize the statutory authorization under FASA to allow federal agencies (or in the case of DoD its direct authorization under 10 U.S.C. 2323) to set contracts aside for bidding exclusively by SDBs. If federal agencies use race-conscious measures in the manner outlined above, together with concerted race-neutral efforts at outreach and technical assistance as described below, we believe the use of this additional statutory authority should be unnecessary. Following the initial two-year period of the reformed system's operation (and at regular intervals thereafter), however, Commerce, SBA and DoD will evaluate the operation of the system and determine whether this statutory power to authorize set-asides should be invoked. In making that determination, those agencies will take into account whether persistent and substantial underutilization of minority firms in particular industries or in government contracting as a whole is the result of the effects of past or present discriminatory barriers that are not being overcome by this system.

Such periodic reviews should also consider whether, based on experience, further limitation of the use of race-conscious measures is appropriate beyond those outlined herein. In that regard, it should be noted that the reformed structure is inherently and progressively self-limiting in the use of race-conscious measures. As barriers to minority contracting are removed and the use of race-neutral means of ensuring opportunity succeeds, operation of the reformed structure will automatically reduce, and eventually should eliminate, the use of race in decisionmaking. In addition, the statutory authority upon which the use of bidding and evaluation credits is based expires at the end of fiscal year 2000. Congress will determine whether

that authority should be extended. See 10 U.S.C. 2323; FASA, § 7102.

Section 8(a) Program

Contracts obtained by minority firms through the 8(a) program will count toward the calculation whether minority participation has reached or exceeded the benchmark in any industry.²⁰ The Administrator of SBA will be under an obligation to monitor the use of the 8(a) program in relation to the benchmark limits. Thus, where Commerce advises that the use of race-conscious measures must be curtailed in a specific industry on the basis of the benchmarks, the Administrator would take appropriate action to limit the use of the program through one or more of the following techniques: (1) Limiting entry into the program in that industry; (2) accelerating graduation for firms that do not need the full period of sheltered competition to satisfy the goals of the program; and (3) limiting the number of 8(a) contracts awarded in particular industries or geographic areas.

These same techniques should be used by the Administrator in carrying out existing authority to ensure that 8(a) contracting is not concentrated unduly in certain regions. Even where a market is defined as national in scope, and 8(a) is being used within applicable national benchmark limits, efforts should be made to guard against excessive use of 8(a) contracting in a limited region.

As noted earlier, the 8(a) program is distinct from the general SDB program in that it is animated by its own distinct purpose—to assist socially and economically disadvantaged individuals to overcome barriers that have suppressed business formation and development. Consistent with its unique nature, the 8(a) program has features that already reflect some of the factors that make up the narrow tailoring requirement. Unlike other SDB's, individuals seeking admission to the 8(a) program must establish economic disadvantage without the benefit of any presumption. The Small Business Act defines economically disadvantaged individuals as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." Furthermore, SBA employs objective criteria to measure whether an individual is economically

disadvantaged. In this sense, the statute and regulations are targeted toward victims of discrimination; the SBA is proposing to clarify the regulations implementing the program to emphasize this fact. In addition, individuals are admitted to the 8(a) program for a limited period—nine years—and their performance is reviewed throughout. An individual may be required to leave the program prior to the nine year graduation period if the review reveals that the individual is no longer economically disadvantaged or the firm meets other graduation criteria determined by the SBA.

SBA has under consideration additional program changes designed to ensure that the 8(a) program focuses on its central mission of assisting businesses to develop and maximize its resources on its intended beneficiaries. Those changes would further ensure that the 8(a) program is narrowly tailored to serve the compelling interest for which it was enacted by Congress.

V. Outreach and Technical Assistance

At present, agencies undertake a variety of activities designed to make minority firms aware of contracting opportunities and to help them take advantage of those opportunities. As a general proposition, these activities are not subject to strict scrutiny. The structure outlined above for the use of race-conscious measures assumes that agencies will continue such outreach and technical assistance efforts at all times, so that race-conscious measures will be used only to the minimum extent necessary to achieve legitimate objectives. Our review indicates that, while there are a variety of good programs of this nature operated by various federal agencies, there is a lack of consistency and sustained energy and direction to these efforts.

SBA operates several assistance programs that are targeted toward minority firms, but are also available to qualifying nonminority firms. Notably, pursuant to section 7(j) of the Small Business Act, SBA provides financial assistance to public and private organizations to provide technical and management assistance to qualifying individuals. 13 CFR 124.403, 404. SBA also operates a program to provide assistance to socially and economically disadvantaged businesses in preparing loan applications and obtaining pre-qualification from SBA for loans. See 13 CFR 120. SBA also operates a surety bond program pursuant to which it provides up to a 90% guarantee for bonds required of small contractors.

²⁰ As with calculation of the benchmark limitations, see n. 13, *supra*, corporations owned by federally-recognized Native American tribes and Alaska Native villages will not be included in this calculation.

The Department of Commerce, through the Minority Business Development Administration, sponsors several programs to provide information, training and research that are targeted toward minority-owned businesses. These programs include Minority Business Development Centers around the country to provide hands on assistance to minority businesses.

DoD has operated since 1990 the Mentor-Protégé Pilot Program, which provides incentive for DoD prime contractors to furnish SDB's with technical assistance. See 10 U.S.C. 2301. Mentor firms provide a variety of assistance, including progress payments, advance subcontract payments, loans, providing technical and management assistance and awards of subcontracts on a noncompetitive basis to the protégé. DoD reimburses the mentor firm for its expenses. The award of subcontracts under this program is subject to strict scrutiny, but other portions of the program are not.

The following are among the efforts that should be actively pursued:

1. A race-neutral version of the mentor-protégé program (that does not guarantee the award of subcontracts on a non-competitive basis) should be encouraged at all agencies.

2. DoD has proposed—and other agencies should follow DoD's lead—eliminating the impact of surety costs from bids. Because SDB's generally incur higher bond costs, this race-neutral change would assist SDB's and address one of the most frequently cited barriers to minority success in contracting. In this regard, agencies should also examine the use of irrevocable letters of credit in lieu of surety bonds.

3. Where agencies use mailing lists, a minimum goal should be set for inclusion of SDB's on agency mailing lists of bidders.

4. The function of the Procurement Automated Source System (PASS), currently maintained by SBA, should be continued. The system provides contracting officers with a continuously updated list of SDB firms, classified by interest and region.

5. A uniform system for publishing agency procurement forecasts on SBA Online should be established. In addition, SBA should develop a systematic means for publishing upcoming subcontracting opportunities.

6. Agencies should target outreach and technical assistance efforts, including mentor-protégé initiatives, toward industries in which SDB participation traditionally has been low. Agencies should continue to pursue strategies in which minority-owned

firms are encouraged to become part of joint ventures or form strategic alliances with non-minority enterprises.

7. The SBA should enhance its technical assistance initiatives to enhance the ability of SDBs to use the tools of electronic commerce.

8. Pursuant to Executive Order 12876, which directs agencies to seek to enter into contracts with Historically Black Colleges and Universities, agencies should attempt to increase participation by such institutions in research and development contracts as means of assisting the development of business relationships between the institutions and SDB's.

9. Each agency should review its contracting practices and its solicitations to identify and eliminate any practices that disproportionately effect opportunities for SDBs and do not serve a valid and substantial procurement purpose.

The foregoing is merely a partial list of possible measures. What is required—both as a matter of policy and constitutional necessity—is a systematic and continuing government-wide focus on encouraging minority participation through outreach and technical assistance. It is proposed in contracting, therefore, that agencies should report annually to the President on their outreach and technical assistance practices. These reports should present the actual practices and experiences of federal agencies and include recommendations as to approaches that can and should be adopted more broadly. The maximum use of such race-neutral efforts will reduce to a minimum the use of race-conscious measures under the benchmark limits described above.

Conclusion

The structure outlined above has been crafted with regard for each of the six factors that courts have identified as relevant in determining whether race-based decisionmaking is narrowly tailored to meet an identified compelling interest. While courts have identified these six factors as relevant in determining whether a measure is narrowly tailored, they have not required that race-conscious enactments satisfy each element or satisfy any particular element to any specific degree. The structure proposed herein for SDB procurement, however, measures up favorably with respect to each of the six factors.

The proposal requires that agencies at all times use race-neutral alternatives to the maximum extent possible. An annual review mechanism is established to ensure maximum use of such race-

neutral efforts. Only where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked.

The system is flexible in that race will be relied on only when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination. Moreover, the extent of any credit awarded will be adjusted annually to ensure that it is closely matched to the need for a race-based remedial effort in a particular industry.

Race will not be relied upon as the sole factor in SDB procurement decisions. The use of credits (instead of set-asides) ensures that all firms have an opportunity to compete and that in order to obtain federal contracts minority firms will have to demonstrate that they are qualified to perform the work.²¹

Application of the benchmark limits ensures that any reliance on race is closely tied to the best available analysis of the relative capacity of minority firms to perform the work in question—or what their capacity would be in the absence of discrimination.

The duration of the program is inherently limited. As minority firms are more successful in obtaining federal contracts, reliance on race-based mechanisms will decrease automatically. When the effects of discrimination have been eliminated, as demonstrated by minority success in obtaining procurement contracts, reliance on race will terminate automatically. The system as a whole will be reexamined by the executive branch at the end of two years and at regular intervals thereafter. In addition, the principal enactments that this proposal implements, FASA and the Department of Defense Authorization Act, expire at the end of the fiscal year 2000. Congress will have to examine the functioning of this system and make a determination whether to extend the authority to continue its operation.

Finally, the proposal avoids any undue burden on nonbeneficiaries of the program. As a practical matter, the overwhelming percentage of federal procurement money will continue to flow, as it does now, to nonminority businesses. Furthermore,

²¹ The SBA's 8(a) program contains a variety of elements that help to target the program on firms in need of special assistance, including a requirement that applicants affirmatively demonstrate economic disadvantage. Furthermore, the program is not limited to minority-owned firms. These features of the program ensure that race is not the sole factor in determining entry into the program.

implementation of the benchmark limitations will ensure that race-based decisionmaking cannot result in concentrations of minority contracting in particular industries or regions and will thereby limit the impact on nonminorities.

The structure of affirmative action in contracting set forth herein will not be simple to implement and will undoubtedly be improved through further refinement. Agencies will have to make judgments and observe limitations in the use of race-conscious measures, and make concentrated race-neutral efforts that are not required under current practice. The Supreme Court, however, has changed the rules governing federal affirmative action. This model responds to principles developed by the Supreme Court and lower courts in applying strict scrutiny to race-based decisionmaking. The challenge for the federal government is to satisfy, within these newly-applicable constitutional limitations, the compelling interest in remedying the effects of discrimination that Congress has identified.

Michael C. Small

Deputy Associate Attorney General

Appendix.—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey

Under the Supreme Court's ruling last year in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), strict scrutiny applies to federal affirmative action programs that provide for the use of racial or ethnic criteria as factors in procurement decisions in order to benefit members of minority groups. Such programs satisfy strict scrutiny if they serve a "compelling interest," and are "narrowly tailored" to the achievement of that interest. Strict scrutiny is the most exacting standard of constitutional review. It is the same standard that courts apply when reviewing laws that discriminate against minority groups. The Supreme Court in *Adarand* did not decide whether a compelling interest is served by the procurement program at issue in the case (or by any other federal affirmative action program), and remanded the case to the lower courts, which had not applied strict scrutiny.¹ Nevertheless, a

¹ *Adarand* involved a constitutional challenge to a Department of Transportation ("DOT") program that encourages prime contractors if they hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged" individuals. The legislation on which the DOT program is based, the Small Business Act, establishes a government-wide goal for participation of such concerns of "not less than a percent of the total value of all prime contract and

strong majority of the Court—led by Justice O'Connor, who wrote the majority opinion—admonished that even under strict scrutiny, affirmative action by the federal government is constitutional in appropriate circumstances.² Without spelling out in precise terms what those circumstances are, the Court stated that the government has a compelling interest in remedying "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." 115 S. Ct. at 2117.

At bottom, after *Adarand*, the compelling interest test centers on the nature and weight of evidence of discrimination that the government needs to marshal in order to justify race-conscious remedial action. It is clear that the mere fact that there has been generalized, historical societal discrimination in the country against minorities is an insufficient predicate for race-conscious remedial measures; the discrimination to be remedied must be identified more concretely. The federal government would have a compelling interest in taking remedial action in its procurement activities, however, if it can show with some degree of specificity just how "the persistence of both the practice and the lingering effects of racial discrimination"—to use Justice O'Connor's phrase in *Adarand*—has diminished contracting opportunities for members of racial and ethnic minority groups.³

subcontract awards for each fiscal year." 49 U.S.C. § 544(g)(1). The Act further provides that members of designated racial and ethnic minority groups are presumed to be socially and economically disadvantaged. *Id.* § 547(a)(5)(B). § 547(d)(2)(3). In *Adarand*, the Supreme Court stated that the presumption constitutes race-conscious action, thereby triggering application of strict scrutiny. 115 S. Ct. at 2103.

² *Adarand*, 115 S. Ct. at 2117. The Court emphasized that point in order to "dissipate the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* Seven of the nine Justices of the Court embraced the principle that it is possible for affirmative action by the federal government to meet strict scrutiny. This group included: (i) Justice O'Connor and two other justices in the majority, Chief Justice Rehnquist and Justice Kennedy; and (ii) the four dissenting justices (Stevens, Souter, Ginsburg, and Breyer). Only Justices Scalia and Thomas, both of whom concurred in the result in the case, advocated a position that approaches a near blanket constitutional ban on affirmative action.

³ *Adarand* did not alter the principle that the government may take race-conscious remedial action in the absence of a formal judicial or administrative determination that there has been discrimination against individual members of minorities groups (or minorities as a class). The test is whether the government has a "strong basis in evidence" for the conclusion that such action is warranted. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). *Adarand* also did not alter the

In coordinating the review of federal affirmative action programs that the President directed agencies to undertake in light of *Adarand*, the Justice Department has collected evidence that bears on that inquiry. The evidence is still being evaluated, and further information remains to be collected. As set forth below, that evidence indicates that racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets. In short, there is today a compelling interest to take remedial action in federal procurement.⁴

The purpose of this memorandum is to summarize the evidence that has been assembled to date on the compelling interest question. Part I of the memorandum provides an overview of the long legislative record that underpins the acts of Congress that authorize affirmative action measures in procurement—a record that is entitled to substantial deference from the courts, given Congress' express constitutional power to identify and redress, on a nationwide basis, racial discrimination and its effects. The remaining sections of the memorandum survey information from various sources: (1) Congressional hearings and reports that bear on the problems that discrimination poses for minority opportunity in our society, but that are not strictly related to specific legislation authorizing affirmative action in government procurement; (2) recent studies from around the country that document the effects of racial discrimination on the procurement opportunities of minority-owned businesses at the state and local level; and (3) works by social scientists, economists, and other academic researchers on the manner in which the various forms of discrimination act together to restrict business

principle that the beneficiaries of race-conscious remedial measures need not be limited to those individuals who themselves demonstrate that they have suffered some identified discrimination. See *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 462 (1986); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 257, 277-78 (1986) (plurality opinion); *id.* at 287 (O'Connor, J., concurring).

⁴ The term "federal procurement" refers to goods and services that the federal government purchases directly for its own use. This is to be distinguished from programs in which the federal government provides funds to state and local governments for use in their procurement activities. As part of those programs, Congress has authorized recipients of federal funds to take remedial action in procurement. Those programs are not the focus of this memorandum. However, much of the evidence discussed herein that supports the use of remedial measures in the federal government's own procurement also supports the use of congressionally-authorized remedial measures in state and local procurement.

opportunities for members of racial and ethnic minority groups.²

All told, the evidence that the Justice Department has collected to date is powerful and persuasive. It shows that the discriminatory barriers facing minority-owned businesses are not vague and amorphous manifestations of historical societal discrimination. Rather, they are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct.³

It is important to emphasize that, even though the government has a compelling interest in taking race-conscious remedial measures in its procurement, their use must be limited. Under the requirements of the "narrow tailoring" prong of strict scrutiny, the federal government may only employ such measures to the extent necessary to serve the compelling interest in remedying the impact of discrimination on minority contracting opportunity. The Justice Department's proposed reforms to affirmative action in federal procurement (to which this memorandum is attached) are intended to target race-conscious remedial measures to markets in which the evidence indicates that discrimination continues to impede the participation of minority firms in contracting. Thus, the proposal seeks to ensure that affirmative action in federal procurement operates in a flexible, fair, limited, and careful

manner, and hence will satisfy the requirements of narrow tailoring.

I. Survey of the Legislative Record

In evaluating the evidentiary predicate for affirmative action in federal procurement, it is highly significant that the measures have been authorized by Congress, which has the unique and express constitutional power to pass laws to ensure the fulfillment of the guarantees of racial equality in the Thirteenth and Fourteenth Amendments.⁴ These explicit constitutional commands vest Congress with the authority to remedy discrimination by private actors, as well as state and local governments.⁵ Congress may also exercise its constitutionally grounded spending and commerce powers to ensure that discrimination in our nation is not inadvertently perpetuated through government procurement practices.⁶ In exercising its remedial authority, Congress need not target only deliberate acts of discrimination. It may also strive to eliminate the effects of discrimination that continue to impair opportunity for minorities, even in the absence of ongoing, intentional acts of discrimination.⁷ Furthermore, in combatting discrimination and its effects, Congress has the latitude to develop national remedies for national problems. Congress need not make findings of discrimination with the same degree of precision as do state or local governments. Nor is it obligated to

make findings of discrimination in every industry or region that may be affected by a remedial measure.⁸

Congress has repeatedly examined the problems that racial discrimination poses for minority-owned businesses. A complete discussion of the entire record of Congress in this area is beyond the scope of this memorandum.⁹ The

¹¹ *Crown*, 488 U.S. at 490, 504; *Fullilove*, 448 U.S. at 302-03 (Powell, J., concurring).

¹² Congressional hearings on the subject from 1980 to the present include the following: *The Small Business Administration's [SBA] Minority Business Development Program: Hearing Before the Senate Comm. on Small Business*, 104th Cong., 1st Sess. (1995); *Discrimination in Surety Bonding: Hearing Before the Subcommittee on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103rd Cong., 1st Sess. (1993); *Department of Defense: Federal Programs to Promote Minority Business Development: Hearing Before the Subcommittee on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103rd Cong., 1st Sess. (1993); *SBA's Minority Business Development Program: Hearing Before the House Comm. on Small Business*, 103rd Cong., 1st Sess. (1993); *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 103rd Cong., 1st Sess. (1993); *Fiscal, Economic and Social Crisis: Confronting American Cities: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 2d Sess. (1992); *Small Disadvantaged Business Issues: Hearing Before the Investigations Subcommittee of the House Comm. on Armed Services*, 102d Cong., 1st Sess. (1991); *Federal Minority Business Programs: Hearing Before the House Comm. on Small Business*, 102d Cong., 1st Sess. (1991); *To Amend the Civil Rights Act of 1964: Permitting Minority Set-Asides: Hearing Before the Senate Comm. on Governmental Affairs*, 101st Cong., 2d Sess. (1990); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcommittee on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. (1990); *Minority Business Set-Aside Programs: Hearing Before the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1990); *Minority Construction Contracting: Hearing Before the Subcommittee on SBA, the General Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989); *Surety Bonds and Minority Contractors: Hearing Before the Subcommittee on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988); *Twenty Years After the Kerner Commission: The Need for a New Civil Rights Agenda: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcommittee on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Barriers to Full Minority Participation in Federally Funded Highway Projects: Hearings Before a Subcommittee of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988); *The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1558 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Small Business Problems: Hearings Before the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987).

² It is well-established that the factual predicate for a particular affirmative action measure is not confined to the four corners of the legislative record of the measure. See, e.g., *Concrete Works v. City and County of Denver*, 36 F.3d 1513, 1520-22 (10th Cir. 1994), cert. denied, 115 S. Ct. 1313 (1995); *Conservation Ass'n v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993); *Caral Constr. Co. v. King County*, 943 F.2d 970, 920 (9th Cir. 1991), cert. denied, 502 U.S. 1093 (1992).

³ Congress has also adopted affirmative action measures in federal procurement, as well as in programs that fund the procurement activities of state and local governments, that are intended to assist women-owned businesses. At present, such measures are subject to intermediate scrutiny, not the *Adarand* strict scrutiny standard. Therefore, they have not been the focus of the post-*Adarand* review that the Justice Department is coordinating. However, some of the evidence collected by the Justice Department bears on the constitutional justification for affirmative action programs for women in government procurement. See, e.g., *Interagency Committee on Women's Business Enterprises, Expanding Business Opportunities for Women (1996)*; *National Foundation for Women Business Owners and Dunn & Bradstreet Information Services, Women-Owned Businesses: A Report on the Progress and Achievements of Women-Owned Enterprises—Breaking the Boundaries (1995)*; *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 103d Cong., 2d Sess. (1994).

⁴ See *Crown*, 488 U.S. at 498 (plurality opinion); *Fullilove v. Klutznick*, 448 U.S. 448, 463 (1980) (plurality opinion); *id.* at 500 (Powell, J., concurring); see also *Adarand*, 115 S. Ct. at 2114; *Metro Broadcasting, Inc. v. FCC*, 407 U.S. 547, 562 (1960); *id.* at 605-06 (O'Connor, J., dissenting); cf. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1125 (1996) (affirming that broad grant of remedial power under Section 5 of the Fourteenth Amendment enables Congress to override state sovereign immunity).

⁵ See *Crown*, 488 U.S. at 490 (plurality opinion); *Fullilove*, 448 U.S. at 476-78 (plurality opinion); *id.* at 500 (Powell, J., concurring); *Rumson v. McCrary*, 427 U.S. 160, 179 (1975); see also *Adarand*, 115 S. Ct. at 2126 (Stevens, J., dissenting); *Metro Broadcasting*, 407 U.S. at 603 (O'Connor, J., dissenting).

⁶ See *Crown*, 488 U.S. at 492 (plurality opinion) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."); see also *Metro Broadcasting*, 407 U.S. at 563-64; *Fullilove*, 448 U.S. at 473-76 (plurality opinion).

⁷ See *Adarand*, 115 S. Ct. at 2117 (Congress may adopt affirmative action to remedy "both the practice and the lingering effects of discrimination"). Accord *id.* at 2133 (Souter, J., dissenting) (government may act to redress effects of discrimination "that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination").

theme that emanates from this record is unequivocal: Congress has adopted race-conscious remedial measures in procurement directly in response to its findings that "widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority-owned business to have an equal chance at developing in our economy."¹² Furthermore, Congress has recognized that expanding opportunities for minority-owned businesses in government procurement helps to bring into mainstream public contracting networks firms that otherwise would be excluded as a result of discriminatory barriers. In light of Congress' expansive remedial charter, it is a fundamental principle that courts must accord a significant degree of deference to those findings and the attendant judgment of the Congress that remedial measures in government procurement are warranted.¹⁴

Minority Business Development Act: Hearings Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. (1987): A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program: Hearings Before the Senate Comm. on Small Business, 100th Cong., 1st Sess. (1987); Minority Enterprise and General Small Business Problems: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Senate Comm. on Small Business, 99th Cong., 2d Sess. (1986); The State of Hispanic Small Business in America: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 1st Sess. (1985); Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program: Hearings Before the Senate Comm. on Small Business, 98th Cong., 1st Sess. (1983); Minority Business and Its Contribution to the United States Economy: Hearing Before the Senate Comm. on Small Business, 97th Cong., 2d Sess. (1982); Small Business and the Federal Procurement System: Hearings Before the Subcomm. on General Oversight of the House Comm. on Small Business, 97th Cong., 1st Sess. (1981); Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the House Comm. on Small Business, 97th Cong., 1st Sess. (1981); Small Business and the Federal Procurement System: Hearings Before the Subcomm. on General Oversight of the House Comm. on Small Business, 97th Cong., 1st Sess. (1981); To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearings on H.R. 5812 Before the Senate Select Comm. on Small Business, 96th Cong., 2d Sess. (1980).

¹² *Affirmative Action Review: Report to the President 55 (1985).*

¹⁴ See *Crowen*, 468 U.S. at 488-90 (plurality opinion); *Fulfillove*, 448 U.S. at 472-73 (plurality opinion); *id.* at 308-10 (Powell, J., concurring); see also *Meim Broadcasting*, 497 U.S. at 363; *id.* at 605-

The relevant congressional findings encompass a broad range of problems confronting minority-owned businesses. They include "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses."¹³

For example, in a report that led to the legislation that created what has become known as the "8(a)" program at the Small Business Administration,¹⁶ and that established goals for participation in procurement at each federal agency by firms owned and controlled by socially and economically disadvantaged individuals (SDB's),¹⁷ a congressional committee found that the difficulties facing minority-owned businesses were "not the result of random chance." Rather, the committee stated, "past discriminatory systems have resulted in present economic inequities."¹⁸ In connection with the same legislation, another committee concluded that a pattern of discrimination "continues to deprive racial and ethnic minorities * * * of the opportunity to participate fully in the free enterprise system."¹⁹ Eventually, when it adopted the 8(a) legislation, Congress found that minorities "have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," and that "it is in the national interest to expeditiously ameliorate" the effects of this discrimination through increased opportunities for minorities in government procurement.²⁰

¹⁷ (O'Connor, J. dissenting). This principle was not disturbed by the Supreme Court's ruling in *Adarand*; thus, it continues to have force, even under strict scrutiny. See *Adarand*, 115 S. Ct. at 2114; *id.* at 2126 (Sevens, J. dissenting); *id.* at 2133 (Souter, J. dissenting).

¹⁸ *Fulfillove*, 448 U.S. at 467 (plurality opinion).

¹⁹ That program targets federal procurement opportunities for small firms owned and controlled by individuals who are socially and economically disadvantaged. See 15 U.S.C. § 637(a). Members of certain minority groups are presumed to be socially disadvantaged. 13 C.F.R. Pt. 124.

²⁰ 15 U.S.C. § 644(g).

¹⁶ H.R. Rep. No. 468, 94th Cong., 1st Sess. 2 (1975).

¹⁷ S. Rep. No. 1070, 95th Cong., 2d Sess. 14 (1978). See also H.R. Rep. No. 949, 95th Cong., 2d Sess. 8 (1978).

¹⁸ Pub. L. No. 95-307, § 201, 92 Stat. 1757, 1760 (1978). See 124 Cong. Rec. 35,204 (1978) [statement of Sen. Weicker] (commenting on the introduction of the conference report on the 8(a) legislation and observing that the report recognizes the existence of a "pattern of social and economic discrimination that continues to deprive racial and ethnic

When revamping the 8(a) program in the late 1980s, Congress again found that "discrimination and the present effects of past discrimination" continued to hinder minority business development. Congress concluded that the program required bolstering so that it would better "redress the effects of discrimination on entrepreneurial endeavors."²¹

In the same vein are congressional findings that underpin legislation that sets agency-specific goals for participation by disadvantaged businesses—including minority-owned firms—in procurement and grant programs administered by those agencies. For instance, in recommending the continued use of such goals as part of programs through which the Department of Transportation provides funds to state and local governments for use in highway and

minorities of the opportunity to participate fully in the free enterprise system"). In the same year it passed the 8(a) legislation, Congress considered an additional bill that sought to target federal assistance to minority-owned firms. In introducing that measure, Senator Dole remarked that "minority businessmen can compete equally when given equal opportunity. One of the most important steps this country can take to insure equal opportunity for its Hispanic, black and other minority citizens is to involve them in the mainstream of our free enterprise system." 134 Cong. Rec. 7661 (1976).

²¹ H.R. Rep. No. 468, 100th Cong., 1st Sess. 26, 18 (1987). See 133 Cong. Rec. 27,814 (1987) [statement of Sen. Bumpers] (discussing proposed revisions to 8(a) program and commenting that minorities "continue to face discrimination in access to credit and markets"); *id.* at 33,320 [statement of Rep. Conte] (discussing proposed revisions to 8(a) program and commenting that effects of discrimination continued to be felt, and that 8(a) amendments were needed to "create a workable mechanism to finally redress past discriminatory practices"). See generally S. Rep. No. 304, 100th Cong., 2d Sess. (1988); *The Social Business Competitiveness Demonstration Program Act of 1986: Hearings on S. 1359 Before the Senate Comm. on Small Business, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings Before the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); Minority Business Development Act: Hearing Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program: Hearings Before the Senate Small Business Comm., 100th Cong., 1st Sess. (1987); Minority Enterprise and General Small Business Problems: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Senate Comm. on Small Business, 99th Cong., 2d Sess. (1986); The State of Hispanic Small Business in America: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 1st Sess. (1985).*

business projects, a congressional committee observed that it had considered extensive testimony and evidence, and determined that this action was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway industry and mass transit construction industry."²²

Congress has also established goals for SDB participation in procurement at the Defense Department, and authorized that agency to use specific forms of remedial measures to achieve the goals.²³ The Defense Department program too is predicated on findings that opportunities for minority-owned businesses had been impaired.²⁴ More fundamentally, in establishing the program, Congress recognized that fostering contracting opportunities for minority-owned businesses at the Defense Department is crucial, because that agency alone typically accounts for more than two-thirds of the federal

government's procurement activities. Therefore, affirmative action efforts at the Defense Department enable minority-owned businesses to demonstrate their capabilities to contracting officers at that important procuring agency and to the vast number of nonminority firms that provide goods and services to the Pentagon. In turn, minority-owned businesses can begin to break into the contracting networks from which they typically have been excluded.²⁵

Opportunities for minority-owned businesses to participate in Defense Department procurement increased following the introduction of the affirmative action program there in the late 1980s. However, the effects of discrimination were still felt in federal procurement generally. Based on information it obtained through a 1993 hearing, a congressional committee reported the following year that this "lack of opportunity results primarily from discriminatory or economic conditions," and that "improving access to government contracts and procurement offers a significant opportunity for business development in many industry sectors."²⁶ In the Federal Acquisition Streamlining Act of 1994, Congress saw fit to make available to all agencies the remedial tools that previously had been granted to the Defense Department, in order to "improve access to contracting opportunities for . . . minority-owned small businesses."²⁷

Through its recurring assessments of the implications of discrimination against minority-businesses, Congress has concluded that, standing alone, legislation that simply proscribes racial discrimination is an inadequate remedy.

²² See 131 Cong. Rec. 17,447 (1985) (statement of Rep. Conyers) (affirmative action needed to break down "buddy-buddy contracting" at the Defense Department, "which has the largest procurement program in the Federal Government"); *id.* (statement of Rep. Schroeder) (an "old boy's club" in Defense Department contracting excludes many minorities from business opportunities); see also Department of Defense, *Federal Programs to Promote Minority Business Development: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. 49 (1993) (statement of Rep. Roybal-Allard) ("Old attitudes and old habits die hard . . . Defense contracting has traditionally been a closed shop. Only a select few need apply. Since the passage of the minority contracting opportunity law, some progress has been made."); H.R. Rep. No. 1066, 96th Cong., 2d Sess. 190-191 (1984) (low level of participation by disadvantaged firms in Defense Department contracting indicated a need to expand procurement opportunities at that agency for such firms).

²³ H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994).

²⁴ 146 Cong. Rec. H9242 (Sept. 20, 1994) (statement of Rep. Dellums).

Congress also has attempted to redress the problems facing minority businesses through race-neutral assistance to all small businesses.²⁸ Congress has determined, however, that those remedies, by themselves, are "ineffectual in eradicating the effects of past discrimination,"²⁹ and that race-conscious measures are a necessary supplement to race-neutral ones.³⁰ Finally, based on its understanding of what happens at the state and local level when use of affirmative action is severely curtailed or suspended outright, Congress has concluded that minority participation in government procurement tends to fall dramatically in the absence of at least some kind of remedial measures, the result of which is to perpetuate the discriminatory barriers that have kept minorities out of the mainstream of public contracting.³¹

²⁸ Beginning with the Small Business Act of 1953, Congress has authorized numerous programs to "aid, counsel, assist, and protect . . . the interests of small-business concerns" and "insure that a fair proportion of the total purchases and contracts for supplies and services for the government be placed with small-business enterprises." Pub. L. No. 163, § 202, 67 Stat. 232 (1953). After recognizing in the 1960s the specific problems facing minority-owned businesses, Congress attempted to address them through race-neutral measures. For example, in 1971, Congress amended the Small Business Investment Act to create a surety bond guarantee program to assist small businesses that have trouble obtaining traditional bonding. In 1972, Congress created a new class of small business investment companies to provide debt and equity capital to small businesses owned by socially and economically disadvantaged individuals. And over the years, Congress has continuously reviewed and strengthened programs to assist all small businesses through the Small Business Act. See e.g. Pub. L. No. 90-366, 88 Stat. 742 (1974); Pub. L. No. 94-305, 90 Stat. 963 (1976); Pub. L. No. 95-89, 91 Stat. 553 (1977).

²⁹ *Crowson*, 488 U.S. at 350 (Marshall, J., dissenting); *Accord Fullilove*, 448 U.S. at 467 (plurality opinion); *id.* at 511 (Powell, J., concurring); see also *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 48 (1990) (statement of Ray Marshall); H.R. Rep. No. 468, 94th Cong., 1st Sess. 32 (1975).

³⁰ It bears emphasizing that race-neutral programs for small businesses are important and necessary components of an overall congressional strategy to enhance opportunity for small businesses owned by minorities. For example, Congress has authorized contracting set asides for small businesses generally—minority and nonminority alike—as well as a host of bonding, lending, and technical assistance programs that are open to all small businesses. See 15 U.S.C. § 631 *et seq.*

³¹ *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J.A. Croson: Hearing Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. 57, 62-60 (1990); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 39-44 (1990) (statement of Andrew Brummer).

²² S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). The DOT goals were initially established in the Surface Transportation Assistance Act of 1962, Pub. L. No. 87-424, § 103(f), 96 Stat. 2047 (1982). They were continued in the Surface Transportation and Uniform Relocation Assistance Act of 1997 ("STURAA"), Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 382, 145 (1987). Congress held further hearings on the subject after passage of STURAA. See *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the Central Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988). Congress subsequently reaffirmed the goals in the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 102(b), 105 Stat. 1914, 1919 (1991). See 137 Cong. Rec. S7371 (June 12, 1991) (statement of Sen. Stupak) (expressing support for continuation of disadvantaged business program at Transportation Department).

Congress has established comparable initiatives to encourage disadvantaged business participation in grant programs administered by the Environmental Protection Agency (EPA). For example, recipients of grants awarded by EPA under the Clean Air Act are required to set disadvantaged business goals. See 42 U.S.C. § 7601 *et seq.*; see also 42 U.S.C. § 4370d (establishing an SDB goal for recipients of EPA funds used in support of certain environmental-related projects); E.R. Rep. No. 226, 101 Cong., 1st Sess. 48 (1991).

²³ 16 U.S.C. § 1312.

²⁴ See H.R. Rep. No. 332, 90th Cong., 1st Sess. 129-90 (1965) (if disadvantaged firms had been able to participate in the early development of major defense systems, they would have had an opportunity to gain the expertise required to bid on such contracts); see also H.R. Rep. No. 480, 90th Cong., 1st Sess. 179 (1965); 131 Cong. Rec. 17,445-47,448 (1985); H.R. Rep. No. 1066, 96th Cong., 2d Sess. 190-91 (1984).

The foregoing is just a sampling from the legislative record of congressionally-authorized affirmative action in government procurement. The remainder of the memorandum surveys evidence from other sources regarding the impact of discrimination on the ability of minority-owned businesses to compete equally in contracting markets. This evidence confirms Congress' determination that race-conscious remedial action is needed to correct that problem.

II. Discriminatory Barriers to Minority Contracting Opportunities

Developing a business that can successfully compete for government contracts depends on many factors. To begin with, technical or professional experience, which is typically attained through employment and trade union opportunities, is an important prerequisite to establishing any business. Second, obtaining financing is necessary to the formation of most businesses. The inability to secure the twin building blocks of experience and financing may prevent a business from ever getting off the ground. Some individuals overcome these initial obstacles and are able to form businesses. However, they subsequently may be shut out from important contracting and supplier networks, which can hinder their ability to compete effectively for contract opportunities. And further barriers may be encountered when a business tries to secure bonding and purchase supplies for projects—critical requirements for many major government contracts.

While almost all new or small businesses find it difficult to overcome these barriers and become successful, these problems are substantially greater for minority-owned businesses. Empirical studies and reports issued by congressional committees, executive branch commissions, academic researchers, and state and local governments document the widespread and systematic impact of discrimination on the ability of minorities to carry out each of the steps that are required for participation in government contracting. This evidence of discrimination can be grouped into two categories:

- (i) evidence showing that discrimination works to preclude minorities from obtaining the experience and capital needed to form and develop a business, which encompasses discrimination by trade unions and employers and discrimination by lenders;
- (ii) evidence showing that discriminatory barriers deprive existing minority firms of full and fair

contracting opportunities, which encompasses discrimination by private sector customers and prime contractors, discrimination by business networks, and discrimination by suppliers and bonding providers.

The following provides an overview of both categories of evidence.

A. Effects of Discrimination on the Formation and Development of Minority Businesses

A primary objective of affirmative action in procurement is to encourage and support the formation and development of minority-owned firms as a remedy to the "racism and other barriers to the free enterprise system that have placed a heavier burden on the development and maturity of minority businesses."³² That these efforts are necessary is evident from the recent findings by the U.S. Commission on Minority Business Development, appointed by President Bush. The Commission amassed a large amount of evidence demonstrating the marginal position that minority-owned businesses hold in our society:

- Minorities make up more than 20 percent of the population; yet, minority-owned businesses are only 9 percent of all U.S. businesses and receive less than 4 percent of all business receipts.³³

- Minority firms have, on average, gross receipts that are only 34% of that of nonminority firms.³⁴

- The average payroll for minority firms with employees is less than half that of nonminority firms with employees.³⁵

President Bush's Commission undertook an extensive analysis of the barriers that face minority-owned business formation and development. It concluded that "minorities are not underrepresented in business because of choice or chance. Discrimination and benign neglect is the reason why our economy has been denied access to this vital resource."³⁶ Further evidence of

³² *Small and Minority Business in the Decade of the 1990's (Part I), Hearings Before the House Comm. on Small Business, 97th Cong., 1st Sess. 4 (1981). See also H.R. Rep. No. 870, 103d Cong., 2d Sess. 3 (1994).*

³³ United States Commission on Minority Business Development, *Final Report* 2-6 (1992). These statistics are based on 1987 census data, the most recent full data available regarding the status of minority-owned businesses. Preliminary reports from 1992 census data reveal that the status of minority firms has not significantly improved. For instance, African Americans are 12 percent of the population but, in 1992, owned only 3.8% of all businesses (up from 3.1% in 1987) and received just 1 percent of all U.S. business receipts (which is the same level as in 1987).

³⁴ *Id.* at 3.

³⁵ *Id.* at 4.

³⁶ *Id.* at 60.

the effect of discrimination on minority business development is revealed in recent studies showing that minorities are significantly less likely than whites to form their own business—even after controlling for income level, wealth, education level, work experience, age and marital status.³⁷ These findings strongly indicate that minorities "face barriers to business entry that nonminorities do not face."³⁸

Since the inception of federal affirmative action initiatives in procurement, policy makers have recognized that there are two principal barriers to the formation and development of minority-owned businesses: limited technical experience and limited financial resources. President Nixon's Advisory Council on Minority Business Enterprise identified these barriers in 1973 when it reported that "a characteristic lack of financial and managerial resources has impaired any willingness to undertake enterprise and its inherent risk."³⁹ Two decades later, a congressional committee found that minorities continue to have "fewer opportunities to develop business skills and attitudes, to obtain necessary resources, and to gain experience, which is necessary for the success of small businesses in a competitive environment."⁴⁰ Discrimination in two sectors of the national economy accounts, at least in part, for the diminished opportunity: discrimination by trade unions and employers, which has prevented minorities from garnering crucial technical skills; and discrimination by lenders, which has prevented minorities from garnering needed capital.

1. Discrimination by Trade Unions and Employers

President Nixon's Advisory Council on Minority Business Enterprise determined that "the lack of opportunity to participate in managerial technical training has severely restricted the supply of [minority] entrepreneurs.

³⁷ See Division of Minority and Women's Business Development, *Opportunity Denied: A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State*, Appendix D, 53-75 (1992) (finding that minorities in New York were 20% less likely to enter self-employment than similarly situated whites); Timothy Bates, *Self-employment Entry Across Industry Groups*, *Journal of Business Venturing*, Vol. 10, at 143-56 (1995).

³⁸ Timothy Bates, *Self-employment Entry Across Industry Groups*, *Journal of Business Venturing*, Vol. 10, 149 (1995).

³⁹ Samuel Doctors & Anne Huff, *Minority Enterprise and the President's Council* 4-6 (1973) (quoted in Tuchfarber et al., *City of Cincinnati: Crown Study* 130 (1992)).

⁴⁰ H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994).

managers and technicians." 41 A history of discrimination by unions and employers helps to explain this unfortunate phenomenon.

Prior to the civil rights accomplishments of the 1960s, labor unions and employers were virtually free to practice overt racial discrimination. Minorities were segregated into menial, low wage positions, leaving no minority managers or white collar workers in most sectors of our economy. Trade unions, which controlled training and job placement in many skilled trades, commonly barred minorities from membership. As a result, "whole industries and categories of employment were, in effect, all-white, all-male." 42 These practices left minorities unable to gain the experience needed to operate all but the smallest businesses, primarily consisting of small "mom and pop" stores with no employees, minimal revenue, located in segregated neighborhoods, and serving an exclusively minority clientele. 43

Discrimination by unions has been recognized as a major factor in preventing minorities from obtaining employment opportunities in the skilled trades. Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination) was passed, in part, in response to Congress's desire to halt "the persistent problems of racial and religious discrimination or segregation . . . by labor unions and professional, business, and trade associations." 44 Even after Title VII went on the books, however, unions precluded minorities from membership through a host of discriminatory policies, including the use of "tests and admissions criteria which [have] no relation to on-the-job skills and which [have] a differential impact" on minorities; 45 discriminating

in the application of admission criteria; 46 and imposing admission conditions, such as requiring that new members have a family relationship with an existing member, that locked minorities out of membership opportunities. 47 As a result, unions remained virtually all-white for some time after the enactment of Title VII:

• In 1965, the President's Commission on Equal Opportunity found that out of 3,969 persons selected for skilled trade union apprenticeships in 30 southern cities, only 26 were black. 48

• In 1967, blacks made up less than 1 percent of the nation's mechanical union members (i.e. sheet metal workers, boilermakers, plumbers, electricians, ironworkers and elevator constructors). 49

• In 1969, only 1.6 percent of Philadelphia construction union members were minorities. 50

Even when minorities were admitted to unions, discriminatory hiring practices and seniority systems often were used to foreclose job opportunities to them. 51 These actions were the

subject of numerous civil rights suits, leading the Supreme Court to declare in 1979 that "judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." 52 Well into the 1980s, courts, committees of Congress, and administrative agencies continued to identify the "inability of many minority workers to obtain jobs" through unions because of "slavish adherence to traditional preference practices (and) also from overt discrimination." 53

The discriminatory conduct that was the subject of the Supreme Court's decision in *Local 28, Sheet Metal Workers v. EEOC*, 54 is illustrative of the pattern of racial exclusion by trade unions and its consequences for minorities. The union local operated an apprenticeship training program designed to teach sheet metal skills. Apprentices enrolled in the program received class-room training, as well as on-the-job work experience. As the Supreme Court described it, successful completion of the program was the principal means of attaining union membership. But by excluding minorities from the apprenticeship program through "pervasive and egregious discrimination," 55 the local effectively excluded minorities from the

(1973). See also *Homeed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980) (selection criteria, including aptitude test, and the requirement of a high school diploma as a condition of eligibility were discriminatory).

41 *United States v. Iron Workers Local 86*, 443 F.2d 544, 548 (9th Cir.) (differential application and admissions requirements between whites and blacks; spurious reasons given for rejections of blacks) cert. denied, 404 U.S. 984 (1971); *Sims v. Sheet Metal Workers Int'l Ass'n*, 489 F.2d 1023 (8th Cir. 1972) (union waived requirements for white applicants).

42 *United States v. United Bhd. of Carpenters and Joiners of America*, 457 F.2d 210, 215 (7th Cir.) cert. denied, 409 U.S. 851 (1972) (family selection requirement excluded minorities from Carpenters trade); *United States v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 438 F.2d 878, 886 (7th Cir.) (requiring family relationships between new and existing members "effectively precluded non-white membership") cert. denied, 404 U.S. 830 (1971); *Arbestor Workers, Local 33 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (rule restricting membership to sons or close relatives of current members perpetuated the effect of past exclusion of minorities).

43 *Jayma Associates, Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 24 (1989) (citing findings of President's Commission on Equal Opportunity).

44 *Steve Askin & Edmund Newton, Blood, Sweat and Steel, Black Enterprise*, Vol. 14, at 42 (1984).

45 Department of Labor Memorandum from Arthur Fletcher to All Agency Heads (1989) (cited in *Affirmative Action Review: Report to the President* 11 (1993)) (introducing the "Philadelphia Plan" requiring the use of affirmative action goals and timetables in construction. Secretary Fletcher noted that "equal employment opportunity in these trades in the Philadelphia area is still far from a reality. . . . We find, therefore, that special measures are required to provide equal opportunity in these seven trades").

46 See *Pennsylvania v. Operating Eng'rs, Local 542*, 466 F. Supp. 329, 339 (E.D. Pa. 1978) (unions

held liable for racial discrimination in employee referral procedures and practices); *Waldinger & Bailey, The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction, Politics and Society*, Vol. 10, No. 3, at 299 (1991) ("Despite rules and formal procedures, informal relationships still dominate the union sector's employment processes."); *Edmund Newton, Steel, The Union Fiefdom, Black Enterprise*, Vol. 14, at 40 (1984) (discrimination in operation of hiring halls "operated as impenetrable barriers" to minority workers); See generally *Barbara Lindeman Schlier & Paul Grossman, Employment Discrimination Law* 519-26 (1983).

47 *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n. 1 (1979).

48 *Taylor v. United States Dept. of Labor*, 552 F. Supp. 728, 734 (E.D. Pa. 1982). See *Minority Business Participation in Department of Transportation Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 203 (1980) (testimony of James Haughton) (minority contractors continue to "suffer" heavily because they have been victims to the discrimination as practiced by the unions"); *Division of Minority and Women's Business Development, Opportunity Denied: A Study of Racial and Sex Discrimination Related to Government Contracting in New York State* 23 (1992) ("At least seven reports were issued by federal, state and city commissions and agencies between 1963 and 1982 documenting the pattern of racial exclusion from New York's skilled trade unions by constitution and by law provisions, member sponsorship rules, subject to interview tests and other techniques, as well as the complicity of construction contractors and the acquiescence of government agencies in those practices").

49 478 U.S. 423 (1986).
50 *Id.* at 476.

41 Samuel Doctors & Anne Huff, *Minority Enterprise and the President's Council* 4-6 (1973) (quoted in *Tuchfarber et al., City of Cincinnati: Census Study* 156 (1982)).

42 *Affirmative Action Review: Report to the President* 7 (1993).

43 See, e.g., Joseph Pivon, *Negro Business and Business Education* (1947); Andrew Brimmer, *The Economic Potential of Black Capitalism*, Public Policy Vol. 19, No. 2, at 289-308 (1971); Kent Gibreath, *Red Capitalism: An Analysis of the Navajo Economy* (1973).

44 S. Rep. No. 872, 85th Cong., 1st Sess. 1 (1964). See, e.g., Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. VII, 11-47 (1990) (In 1963, minorities were prohibited from joining Atlanta unions representing plumbers, electricians, steel workers and bricklayers); TEM Associates, *Minority/Women Business Study: Revised Final Report, Phase I, Volume 1* 3-13 ("In 1963, not one of the 1,300 persons in apprenticeship training in DeDe County was Black, and the Miami Sheet Metal Workers local, like most other trade unions, was all white").

45 *United States v. Iron Workers Local 86*, 443 F.2d 544, 548 (9th Cir.) cert. denied, 404 U.S. 984

union for decades. Such exclusion continued notwithstanding the passage of Title VII and a series of administrative and judicial findings in the 60s and 70s that the local had engaged in blatant discrimination in shutting minorities out of the program. Indeed, even into the 80s, the local persisted in violating court orders to open up the program to minorities.⁵⁴

More recently, a Yale University economist prepared a report documenting the history of discrimination by New Haven unions that "confirms the nationwide pattern of discrimination."⁵⁵ Prior to the passage of the Civil Rights Act of 1964, New Haven's unions prohibited minority membership, and minority workers were almost completely segregated into jobs that whites would not take because they required working under conditions of extreme heat or discomfort.⁵⁶ After passage of the Civil Rights Act, minorities were prevented from entering unions by a rule requiring that at least three current members sponsor the application of any new member.⁵⁷ Although the policy was race-neutral on its face, "it was almost impossible to find three members who would nominate a minority [and] stand up for him in a closed meeting when other members would undoubtedly attack the candidate and his sponsors."⁵⁸ This and other discriminatory policies prevented all but five African Americans from joining the 1,216 white members of the highest paid skilled trade unions in 1967, and throughout the mid-70s, unions and apprenticeship programs remained virtually all-white.⁵⁹ The report concluded that the history of "blocked access to the skilled trades is the most important explanation of the low numbers of minority and women construction contractors today."⁶⁰

⁵⁴ *Id.* at 433-34.

⁵⁵ *Jaynes Associates, Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 25-26 (1989).

⁵⁶ *Id.* at 26-27.

⁵⁷ *Id.* at 28.

⁵⁸ *Id.* at 28.

⁵⁹ *Id.* at 33; New Haven Board of Aldermen, *Minority and Women Business Participation in the New Haven Construction Industry: Committee Report* 7 (1990).

⁶⁰ *Jaynes Associates, Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 34 (1989). Comparable conclusions about the impact of trade union discrimination have been reached in studies from other jurisdictions around the country. See, e.g., D.J. Miller & Associates, et al., *The Disparity Study for Memphis Shelby County Intergovernmental Consortium* 11-46 (Oct. 1994) ("in Memphis, trade unions have historically discriminated against African Americans."); *Report of the Blue Ribbon Panel to the Honorable Richard M. Daley, Mayor of the City of Chicago* 43 (March

There is no doubt that trade unions have put much of the discriminatory past behind them, and they now provide an important source of opportunity for minorities. Some barriers to full opportunity remain, however.⁶¹

A parallel history of discriminatory treatment by employers has prevented minorities from rising into the private sector management positions that are most likely to lead to self-employment. In 1972, Congress found that only 3.5 percent of minorities held managerial positions compared to 11.4 percent of white employees.⁶² Congress attributed this underrepresentation to continued discriminatory conduct by "employers, labor organizations, employment agencies and joint labor-management committees."⁶³ Evidence derived from caselaw and academic studies shows a variety of discriminatory employment practices, including promoting white employees over more qualified minority employees;⁶⁴ relying on word-of-mouth recruiting practices that exclude minorities from vacancy announcements;⁶⁵ and creating

1990) ("The Task Force specifically notes the exclusion of minorities and women from the building trades."); National Economic Research Associates, et al., *Availability and Utilization of Minority and Women-Owned Business Enterprises at the Massachusetts Water Resources Authority* 72 (Nov. 1990) ("A number of M/WBE owners complain that problems caused by unions are exacerbated by state bidding requirements that make it difficult or impossible for non-union firms to bid."); Coopers & Lybrand, et al., *State of Maryland Minority Business Utilization Study* 8 (Feb. 1990) (discussing discriminatory union practices).

⁶¹ See EPA Economics, et al., *M/WBE Disparity Study of the City of San Jose 1-46* (1988) ("When trying to join unions, minorities may face testing and experience requirements that are waived in the case of relatives of current union members."); Waldinger & Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction, Politics and Society*, Vol. 19, No. 2, at 296-97 (1991) ("In 1987, blacks averaged less than 90 percent of parity for all skilled trades with even lower levels of representation in the most highly paid crafts like electricians and plumbers."); *The Meaning and Significance for Minority Business of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and National Security Subcomm. of the Comm. on Government Operations*, 101st Cong., 2d Sess. 111-15 (1990).

⁶² H.R. Rep. No. 238, 92d Cong., 2d Sess. 3 (1972).

⁶³ *Id.* at 7.

⁶⁴ See, e.g., *Winbush v. Iowa*, 69 FEP Cases 1348 (8th Cir. 1993) (evidence was "overwhelming" that employer had engaged in disparate treatment with respect to promotion of black employees); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (90 percent white management structure caused, in part, by promoting lesser qualified white employees over more qualified minorities).

⁶⁵ See, e.g., *KEOC v. Detroit Edison Co.*, 515 F.2d 301, 313 (6th Cir. 1975), vacated and remanded on other grounds, 431 U.S. 651 (1977) (bidding discrimination in "the practice of relying on referrals by a predominantly white work force"); *Long v. Sapp*, 562 F.2d 34, 41 (5th Cir. 1974) (word-of-mouth recruitment serves to perpetuate all-white

promotion systems that lock minorities into inferior positions.⁶⁶

A study published earlier this year surveyed a broad range of current labor market evidence and concluded that employment discrimination is "not a thing of the past."⁶⁷ Rather, race still matters when it comes to determining access to the best employment opportunities.⁶⁸ Progress has been made, of course. Yet, "more than three decades after the passage of the Civil Rights Act, segregation by race and sex continues to be the rule rather than the exception in the American workplace, and discrimination still reduces the pay and prospects of workers who are not white or male."⁶⁹ The exclusionary conduct frequently is not deliberate, and the people on top—who are mostly white and male—often believe that they are behaving fairly. But old habits die hard: reliance on outmoded stereotypes and group reputations, and the persistence of "invisible biases" work to perpetuate a system that creates disadvantages in employment for minorities today.⁷⁰

The results of recent "testing" studies—in which equally matched

work force); *Thomas v. Washington County Sch. Bd.*, 915 F.2d 612 (4th Cir. 1990) See also *Ortiz v. Mass. Barriers to the Employment and Work-Force Advancement of Latinos: A Report to the Glass Ceiling Commission* 52 (Aug. 1994) (word-of-mouth recruiting methods that rely on social networks are a significant "exclusionary barrier" to employment opportunities for minorities); Roosevelt Thomas, et al., *The Impact of Recruitment, Selection, Promotion and Compensation Policies and Practices on the Glass Ceiling*, submitted to U.S. Department of Labor Glass Ceiling Commission, 14 (April 1994) (noting that "recruitment practices primarily consisting of word-of-mouth and employee referral networking . . . promote the filling of vacancies almost exclusively from within. If the environment is already homogeneous, which many are, it maintains this same 'home-grown' environment"); *Cerrudo Escorsky, Racism and Justice: The Case for Affirmative Action* 14-16 (1991); U.S. Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* 6 (1981); Barbara Lindaman Schei & Paul Grossman, *Employment Discrimination Law* 571 (1983).

⁶⁶ See, e.g., *Faxton v. Union National Bank*, 686 F.2d 352, 363-366 (8th Cir. 1982), cert. denied, 458 U.S. 1083 (1983); *Searv v. Bennett*, 645 F.2d 1365 (10th Cir. 1981) (system requiring that persons, all of whom were black, forfeit seniority when changing jobs designed to prevent promotion of black employees), cert. denied, 458 U.S. 964 (1982); *Terrill v. U.S. Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981) (seniority system created for clearly discriminatory purposes), vacated on other grounds, 456 U.S. 955 (1982). See also *Ella Bel; & Stella Nkomo, Barriers to Workplace Advancement Experienced by African Americans* 3 (1994) ("African Americans . . . are functionally segregated into jobs less likely to be on the path to the top levels of management.").

⁶⁷ Barbara Bergmann, *In Defense of Affirmative Action* 31-31 (1995).

⁶⁸ *Id.* at 33.

⁶⁹ *Id.* at 62.

⁷⁰ *Id.* at 63-62.

minorities and nonminorities seek the same job—are but one source of evidence supporting this conclusion. These studies show, for instance, that white males receive 50 percent more job offers than minorities with the same characteristics applying for the same jobs.⁷³ As Justice Ginsburg described them, the testing studies make it abundantly clear that “[j]ob applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race.”⁷⁴

Even when minorities are hired today, a “glass ceiling” tends to keep them in lower-level positions. This problem was recognized by Senator Dole who, in 1991, introduced the Glass Ceiling Act on the basis of evidence “confirming . . . the existence of invisible, artificial barriers blocking women and minorities from advancing up the corporate ladder to management and executive level positions.”⁷⁵ That Act created the Federal Glass Ceiling Commission, which subsequently completed an extensive study of the opportunities available to minorities and women in private sector employment, and concluded that “at the highest levels of business, there is indeed a barrier only rarely penetrated by women or persons of color.”⁷⁶ Evidence released by the Commission paints the following picture:

- 97 percent of the senior level managers in the nation’s largest companies are white.⁷⁷
- Black and Hispanic men are half as likely as white men to be managers or professionals.⁷⁸
- In the private sector, most minority managers and professionals are tracked into areas of the company—personnel, communications, affirmative action, public relations—that are not likely to lead to advancement to the highest levels of experience.⁷⁹
- Because private sector opportunities are so limited, most minority professionals and managers work in the public sector.⁸⁰

⁷³ Cross et al., *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers* (1990); Turner et al., *Opportunities Denied, Opportunities Diminished: Discrimination in Hiring* (1991).

⁷⁴ *Admitted*, 115 S. Ct. at 2135 (Ginsburg, J., dissenting).

⁷⁵ Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation’s Human Capital* (1995) (citing 1991 statement by Senator Dole regarding 1991 Department of Labor Report on the Glass Ceiling Initiative).

⁷⁶ *Id.* at iii.

⁷⁷ *Id.* at 9.

⁷⁸ *Id.* at 10-11.

⁷⁹ *Id.* at 15-16.

⁸⁰ *Id.* at 13.

In light of the evidence that it considered, the Commission concluded that, “in the private sector, equally qualified and similarly situated citizens are being denied equal access to advancement on the basis of gender, race, or ethnicity.”⁸¹

In sum, there are two central means to gaining the experience needed to operate a business. One is to be taught by a parent, passing on a family-owned business. But the long history of discrimination and exclusion by unions and employers means there are very few minority parents with any such business to pass on.⁸² The second avenue is to learn the skills needed through private employment. But the effects of employment and trade union discrimination have posed a constant barrier to that entryway into the business world.⁸³

2. Discrimination by Lenders

Without financing, a business cannot start or develop. There are two main methods for a new business to raise capital. One is to solicit investments from the public by selling stock in the company (public credit); the other is to solicit investments from banks or other lenders (private credit). Congress has heard evidence that “since small businesses have very limited or no access to public credit markets, it is critically important that these entities, especially minority-owned small businesses, have adequate access to bank credit on reasonable terms and

⁸¹ *Id.* at 10-11.

⁸² See, e.g., *The Meaning and Significance for Minority Business of the Supreme Court Decision in the City of Richmond v. J.A. Croson: Hearing Before the Legislative and National Security Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 111 (1990) (statement of Manuel Rodriguez) (“[New minorities] today have families from whom they can inherit” a business); H.R. Rep. No. 870, 103d Cong., 2d Sess. 15 n. 36 (1994) (“[T]he construction industry is . . . family dominated. Many firms are in their second or third generation operating structures.”); New Haven Board of Aldermen, *Minority and Women Business Participation in the New Haven Construction Industry* 10 (1990) (“The exclusion of minorities from construction trades employment before the 1970s resulted in an absence of a parent or family member owning a construction business.”).

⁸³ National Economic Research Associates, et al., *The Utilization of Minority and Women-Owned Businesses Enterprises by Alameda County* 176-77 (June 1992) (“A number of witnesses identified historic union discrimination as a major limitation to the formation and success of minority firms.”); Jaynes Associates, *Minority and Women’s Participation in the New Haven Construction Industry: A Report to the City of New Haven* 34 (1989) (discrimination has prevented minorities from “gaining experience and skills” necessary to operate a business and therefore has “kept the pool of potential minority . . . contractors artificially small”).

conditions.”⁸⁴ The rub is that small businesses owned by minorities find it much more difficult than small firms owned by nonminorities to secure capital. Indeed, this is often cited as the single largest factor suppressing the formation and development of minority-owned businesses.⁸⁵ The sad fact is that, through countless hearings, Congress has learned that lending discrimination plays a major role in this regard.⁸⁶

Over and over again, studies show that minority applicants for business loans are more likely to be rejected and,

⁸⁴ *Availability of Credit to Minority and Women-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking*, 103d Cong., 2d Sess. 6 (1990) (statement of Andrew Ross). One reason that minorities starting small businesses are especially reliant on bank lending is because they traditionally lack personal wealth or access to other sources of private credit, such as loans from family or friends. See generally Oliver & Shapiro, *Black Wealth/White Wealth* (1993).

⁸⁵ See *The Wall Street Journal Reports: Black Entrepreneurship* R.1 (1992) (Roper Organization poll of 472 minority business owners listed access to capital as the primary barrier to their business development); United States Commission on Minority Business Development, *Final Report* 17 (1992) (“One of the most formidable stumbling blocks to the formation and development of minority businesses is the lack of access to capital.”).

⁸⁶ See *Availability of Credit to Minority and Women-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking*, 103d Cong., 2d Sess. 27 (1994) (statement of Wayne Smith) (while perhaps more subtle than discrimination in mortgage lending, discrimination in business lending exists); H.R. Rep. No. 870, 103d Cong., 2d Sess. 7 (1994) (“There is a widespread reluctance on the part of the commercial banking . . . and capital markets to take the same risks with a [minority] entrepreneur that they would readily do with a white one.”); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. 20 (1988) (statement of Joann Payne) (“[B]ecause of the ethnic and sex discrimination practiced by lending institutions, it was very difficult for minorities and women to secure bank loans.”); *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 363 (1985) (statement of James Laducer) (North Dakota banks “refuse to lend monies to minority businesses from nearby Indian communities”); see also *Fiscal, Economic and Social Crises Confronting American Cities: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 2d Sess. (1992); *Federal Minority Business Programs: Hearing Before the House Comm. on Small Business*, 102d Cong., 1st Sess. (1991); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. (1990); *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101 Cong., 1st Sess. (1989).

when accepted, receive smaller loan amounts than nonminority applicants with identical collateral and borrowing credentials:

- The typical white-owned business receives three times as many loan dollars as the typical black-owned business with the same amount of equity capital.⁸⁷ In construction, white-owned firms receive fifty times as many loan dollars as black-owned firms with identical equity.⁸⁸

- Minorities are approximately 20 percent less likely to receive venture capital financing than white firm owners with the same borrowing credentials.⁸⁹

- All other factors being equal, a black business owner is approximately 15 percent less likely to receive a business loan than a white owner.⁹⁰

- The average loan to a black-owned construction firm is \$49,000 less than the average loan to an equally matched nonminority construction firm.⁹¹

A comparable pattern of disparity appears in the most recent study on lending to minority firms, which was released earlier this year. That study surveyed 407 business owners in the Denver area. It found that African Americans were 3 times more likely to be rejected for business loans than whites.⁹² The denial rate for Hispanic owners was 1.5 times as high as white owners.⁹³ Disparities in the denial rate remained significant even after controlling for other factors that may affect the lending rate, such as the size

and net worth of the business.⁹⁴ The study concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample (Black, Hispanic and Anglo) were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial."⁹⁵

In sum, capital is a key to operating a business. Without financing, no business can form. Once formed, restricted access to capital impedes investments necessary for business development. Minority-owned firms face troubles on both fronts. And in large part, those troubles stem from lending discrimination.⁹⁶ As President Bush's Commission on Minority Business Development explained, the result is a self-fulfilling prophecy:

Our nation's history has created a "cycle of negativity" that reinforces prejudice through its very practice; restraints on capital availability lead to failures, in turn, reinforces a prejudicial perception of minority firms as inherently high-risks, thereby reducing access to even more capital and further increasing the risk of failure.⁹⁷

B. Discrimination in Access to Contracting Markets

Even when minorities are able to form and develop businesses, discrimination by private sector customers, prime contractors, business networks,

suppliers, and bonding companies raises the costs for minority firms, which are then passed on to their customers. This restricts the competitiveness of minority firms, thereby impeding their ability to gain access to public contracting markets.

1. Discrimination by Prime Contractors and Private Sector Customers

In the private sector, minority business owners face discrimination that limits their opportunities to work for prime contractors and private sector customers. All too often, contracting remains a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work.⁹⁸ Because minority owned firms are new entrants to most markets, the existence and proliferation of these relationships locks them out of subcontracting opportunities. As a result, minority-owned firms are seldom or never invited to bid for subcontracts on projects that do not contain affirmative action requirements.⁹⁹ In addition, when

⁸⁷ See New Haven Board of Aldermen, *Minority and Women Business Participation in the New Haven Construction Industry 10* (1990) ("The construction industry in New Haven remains to a large extent a closed network of established contractors and subcontractors who have close long-term relationships and are highly resistant to doing business with 'outsiders.'"); Brimmon & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. II, 61 (1993) (member of trade association testified that "contractors develop good working relationships with certain subcontractors and tend to use them repeatedly, even in a few cases when their prices are just a little bit higher than other subcontractors").

⁸⁸ See National Economic Research Associates, *The State of Texas Disparity Study: A Report to the Texas Legislature as Authorized by H.B. 2626, 73rd Legislature 140* (1994) ("African American owner . . . told by an employee of a prime contractor that the contractor prefers to work with [nonminority-owned firms] and works with [minority-owned firms] only when required to do so."); D.J. Miller & Associates, *Disparity Study for Memphis/Shelby County Intergovernmental Consortium VII-10* (1994) ("Majority companies will not do business with [minority-owned businesses] because they lack confidence in [them] and are not willing to go beyond those businesses with whom they have a 10 to 15 year relationship."); Brown, Boitz & Coddington, *Disparity Study: City of Phoenix VII-10* (July 1993) ("From the responses of a number of MBE/WBEs, another form of marketplace discrimination that severely hampers their access to the marketplace is denial of the opportunity to bid. This may occur in a variety of ways, including, but not limited to, the use of non-competitive procurement and selection procedures, as well as intentional acts of rejection."); National Economic Research Associates, *The Utilization of Minority and Women-Owned Businesses by Contra Costa County: Final Report ix, xiii* (1992) (70 percent of minority-owned firms reported seldom or never being used for contracts that do not contain affirmative action requirements); National Economic Research Associates, *The Availability and Utilization of Minority-Owned Business Enterprises at the*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ There is also evidence that minorities face discrimination in mortgage lending. See Minnelli et al., *Mortgage Lending in Boston: Interpreting the HMDA Data*, 26 *Am. Econ. Rev.* 23 (1996) (finding that minority applicants were 80 percent more likely to be rejected for a mortgage loan than white ones with identical characteristics, including age, income, wealth, and education). This serves to aggravate the problems that minorities face in seeking business loans, because an important source of collateral for such loans to a new firm is the home of the owner of the firm. Thus, mortgage discrimination that impedes the ability of minorities to obtain loans to purchase homes (or drives them to purchase less valuable homes than they otherwise would) diminishes their ability to pose collateral for business loans.

⁹² United States Commission on Minority Business Development, *Final Report 6* (1992). While the nation has made great strides in overcoming racial bias, the Commission's apt characterization of the debilitating effects of lending discrimination mirrors the description of the problem in a landmark monograph written over one-half century ago:

The Negro businessman encounters greater difficulties than whites in securing credit. This is partially due to the marginal position of negro business. It is also partially due to prejudicial opinions among whites concerning business ability and personal reliability of Negroes. In either case a vicious circle is in operation keeping Negro business down.

Gunnar Myrdal, *An American Dilemma: The Negro and Modern Democracy* 306 (6th ed. 1944).

⁸⁷ Timothy Bates, *Commercial Bank Financing of White and Black Owned Small Business Start-ups*, Quarterly Review of Economics and Business, Vol. 31, No. 1, at 79 (1991) ("The findings indicate that black businesses are receiving smaller bank loans than whites—not because they are riskier, but, rather, because they are black-owned businesses.").

⁸⁸ Crown & Bates, *Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies*, Journal of Urban Affairs, Vol. 14, No. 1, at 24 (1992).

⁸⁹ Bradford & Bates, *Factors Affecting New Firms Success and their Use in Venture Capital Financing*, Journal of Small Business Finance, Vol. 2, No. 1, at 23 (1992) ("The venture capital market . . . differentially restricts minority entrepreneurs from obtaining venture capital.").

⁹⁰ Fuchs Ando, *Capital Issues and the Minority-Owned Business: The Review of Black Political Economy*, Vol. 16, No. 4, at 97 (1988).

⁹¹ Crown & Bates, *Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies*, Journal of Urban Affairs, Vol. 14, No. 1, at 34 (1992).

⁹² The Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver v. (1996)*. See Michael Salz, *Race-Linked Gap is Wide in Business Loan Rejection*, Wall St. J., May 6, 1996, at B2.

⁹³ The Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver v. (1996)*.

minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. This sort of exclusion is often achieved by white firms refusing to accept low minority bids or by sharing low minority bids with another subcontractor in order to allow that business to beat the bid (a practice known as "bid shopping").¹⁰⁰ These exclusionary practices have been the subject of extensive testimony in congressional hearings.¹⁰¹

Massachusetts Water Resources Authority 74 (1992) (55 percent of minority-owned construction firms reported that prime contractors that use their firms on contracts with affirmative action requirements seldom or never used their firms on projects that do not contain such requirements); *A Study to Identify Discriminatory Practices in the Milwaukee Construction Marketplace* 123 (Feb. 1990) ("Only 16% of black contractors currently have private sector contracts with primes with which they have worked on public sector contracts with MBE requirements."); see also *Conrad Concr. Co. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (noting reports that nonminority firms in the county refused to work with minority firms); *Cone Corp. v. Hillsborough County*, 908 F.2d 906, 916 (11th Cir.), cert. denied, 496 U.S. 963 (1990) (noting reports that when minority contractors in the county "approached prime contractors, some prime contractors either were unavailable or would refuse to speak to [the minority contractors]");

See *Associated Gen. Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1416 (9th Cir. 1991), cert. denied, 503 U.S. 963 (1992) (noting reports that local minority firms were "decided contracts despite being the low bidder," and "refused work even after they were awarded the contracts as low bidder"); *Cone Corp. v. Hillsborough County*, 908 F.2d 906, 916 (11th Cir.), cert. denied, 496 U.S. 963 (1990) ("Contrary to their practices with non-minority subcontractors, local prime contractors would take minority subcontractors' bids 'around to various non-minority subcontractors until they could find a non-minority to underbid [the minority firm]"); BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas IX-12* (1992) (low bidding Hispanic contractor told that he was not given subcontract because the prime contractor "did not know him" and that the prime "had problems with minority subs in the past"); BPA Economics, MBE/WBE Disparity Study for the City of San Jose (Vol. 1) (B-1) (1990) (describing practices contributing to low utilization in construction contracts as including "bid shopping, insufficient distribution of notices of contracts [and] insufficient lead time to prepare bids"); BBC Research and Consulting, *The City of Tucson Disparity Study IX-6-IX-11* (June 1994) (same).

See, e.g., *New State and Local Governments Will Meet the Crown Standard: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 54 (1989) (statement of Marc Bendick) ("[I]f the same prime contractor who will use a minority subcontractor on a city contract and will be terribly satisfied with the firm's performance, will simply not use that minority subcontractor on a private contract where the prime contractor is not forced to use a minority firm."); *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and National Security Subcomm. of the Comm. on Government Operations*, 101st Cong., 2d Sess. 87 (1990) (statement of Gloria Meloni); *id.* at 106-107 (statement of E.R. Mitchell); *id.* at 113 (statement of Manuel Rodriguez); *A Bill to Reform the Capital*

An Atlanta study revealed evidence of the effect of discrimination by private sector customers and prime contractors on minority contracting opportunities. The study found that 93 percent of the revenue received by minority-owned firms came from the public sector and only 7 percent from the private sector. In sharp contrast, the study found that nonminority firms receive only 20 percent of their revenue from the public sector and 80 percent from the private sector.¹⁰² In addition, the study reported that nearly half of the black-owned firms worked primarily for minority customers, and minority firms rarely worked in a joint venture with a white-owned firm.¹⁰³

Customer prejudices are sometimes graphically expressed. African American business owners have reported arriving at job sites to find signs saying "No Niggers Allowed,"¹⁰⁴ and "Nigger get out of here."¹⁰⁵ Other potential customers have simply refused to work with a business after discovering that its owner is a minority. In a recent encounter, a black business owner arriving at a home-site was told to leave by a white customer, who commented "you didn't tell me you were black and you don't sound black."¹⁰⁶

2. Discrimination by Business Networks

Contrary to the common perception, contracting is not a "meritocracy" where the low bidder always wins. "(B)eneath the complicated regulations and proliferation of collective bargaining contracts lies a different reality, one dominated mainly by personal contacts and informal

Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. 393 (1987) (statement of Edward Irons); *Small Disadvantaged Business Issues: Hearings Before the Investigations Subcommittee of the House Comm. on Armed Services*, 100th Cong., 1st Sess. 19-23 (1991) (statement of Parson Mitchell).

See Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. I, 9-10 (1990). See also D.J. Miller & Associates, *City of Dayton: Disparity Study* 183 (1991) ("A small percentage of black firms' revenue came from private sector projects").

See Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. III, 25, 34 (1990).

See New Haven Board of Aldermen, *Minority and Women Participation in the New Haven Construction Industry* 10 (1990).

See National Economic Research Associates, *The Utilization of Minority and Women-Owned Businesses by the City of Hayward* 6-23 (1993).

See BBC Research and Consulting, *City of Tucson Disparity Study IX-21* (1994).

networks."¹⁰⁷ These networks can yield competitive advantages, because they serve as conduits of information about upcoming job opportunities and facilitate access to the decisionmakers (e.g., contracting officers, prime contractors, lenders, bonding agents and suppliers). Simply put, in contracting, access to information is a ticket to success; lack of information can be a passport to failure. Networks and contacts can help a business find the best price on supplies, facilitate a quick loan, foster a relationship with a prime contractor, or yield information about an upcoming contract for which the firm can prepare—all of which serve to make the firm more competitive.

What transforms the mere existence of established networks into barriers for minority-owned businesses is the extent to which they operate to the exclusion of minority membership. It has been recognized in Congress that private sector business networks frequently are off-limits to minorities: "institutional wall(s)," and "old-boy network(s)" make it exceedingly difficult for minority firms to break into the private commercial sector."¹⁰⁸ Parallel descriptions appear in numerous state and local studies.¹⁰⁹ Ultimately,

See Bailey & Waldinger, *The Continuing Significance of Race: Social Conflict and Racial Discrimination in Construction, Politics and Society*, Vol. 10, No. 3, 208 (1991); See Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. II, 35 (1990) ("[M]ost job seekers find their jobs through informal channels. So too it is with construction markets, especially in the private sector.");

See *Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. 127 (1988) (statement of Parson Mitchell). See H.R. Rep. No. 870, 103rd Cong., 2d Sess. 15 n.36 ("The construction industry is close-knit; it is family dominated [and reflects an] old buddy network. Minorities and women, unless they are part of construction families, have been and will continue to be excluded whenever possible."); *Minorities and Franchising: Hearings Before the House Comm. on Small Business*, 102d Cong., 1st Sess. 54 (1991) (statement of Rep. LaFalce) (discussing "problems relating to exclusion of minorities or groups of minorities from franchise systems"); 101 Cong. Rec. 17,447 (1995) (statement of Rep. Schroeder) (an "old boy's club" excludes many minorities from business opportunities).

See, e.g., *Associated Gen. Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (1991) (municipal study showed that there "continued to operate an 'old boy network' in awarding contracts, thereby disadvantaging [minority firms]"); cert. denied, 503 U.S. 963 (1992); BBC Research & Consulting, *The City of Tucson Disparity Study* 202 (1994) (citing "numerous detailed examples of the exclusionary operation of good old boy networks"); National Economic Research Associates, *The Utilization of Minority and Women Owned Business Enterprises by the Southeastern Pennsylvania Transportation Authority* 107 (1993) (exclusion from 'old-boy'

Continued

exclusion from business networks "isolate[s] minorities] from the 'web of information' which flows around opportunities" thereby putting them at a distinct disadvantage relative to nonminority firms.¹¹⁰ In government contracting, this disadvantage can be fatal: "(government) vendors who do get contracts, experts agree, have obtained vital bits of information their competitors either ignored or couldn't find. * * * [O]nly the well connected survive."¹¹¹

Restricted access to business networks can particularly disadvantage minorities in the planning stages of government procurement. In designing contracts for public bidding, agencies commonly consult businesses to make sure that specifications match available services. Only bidders who meet the specifications may compete for the contract and the exclusion of minority-owned businesses from planning and consultations can lead to specifications that are written so narrowly as to exclude minority bidders.¹¹² In addition, the failure to consult minority-

networks "was the most frequently cited problem" of minority and women-owned firms; National Economic Research Associates, *The Utilization of Minority and Women-Owned Business Enterprises by the City of Hayward 6-14* (1993) ("75 percent of the witnesses cited problems breaking into established 'old-boy' networks").

¹¹⁰ *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) (finding that district court's "failure to order (word-of-mouth recruitment practices) to be supplemented by affirmative action * * * was clearly an abuse of power"). See National Economic Research Associates, *Availability and Utilization of Minority and Women Owned Business Enterprises of the Massachusetts Water Resources Authority 74* (1990) (finding that minorities "need to spend much more time and money on marketing because they do not have established networks and reputations"); Minority Business Enterprise Legal Defense and Education Fund, *An Examination of Marketplace Discrimination in Durham County 18* (1991) (citing "numerous allegations that black contractors learned of bid opportunities much later than their white competitors that are tied into the 'good old boy' network").

¹¹¹ Kevin Thompson, *Taking the Headache Out of Government Contracts*, *Black Enterprise* 219 (1993).

¹¹² This is accomplished by, for example, specifying that bidders must use certain brand-name products available only to several companies, specifying a depth of contract experience that minority-owned firms can rarely provide, and bundling projects into large contracts that small minority-owned companies cannot perform. See, e.g., H.R. Rep. No. 870, 103d Cong., 2d Sess. 14 (1994) (citing recommendation that agencies separate "contracts into smaller parts, so that MAWUB's would be able to participate in those opportunities"); Mason Tillman Associates, *Sacramento Municipal Utility District: MWBE Disparity Study 146* (1992) (noting that, in many instances, contract specifications are written so narrowly that there are only a few firms that can do the job); Tuchfarber et al., *City of Cincinnati: Crown Study 153* (1992) ("Products specified in the Request for Proposals were so narrow that only one company that had exclusive distribution of the product specified could satisfy the contract.");

owned businesses during the planning stages of procurement prevents them from mobilizing resources for the upcoming competition. As a committee of Congress recently reported, "[m]inorities and women are always left out in any kind of design or planning phase for these projects, and that is why when (they) first know about them * * * it is traditionally 100 late to get (their) forces and resources together to react."¹¹³

3. Discrimination in Bonding and By Suppliers

The competitiveness of bids on public and private contracts is not determined solely by the bidder's resources. Rather, competitiveness often hinges on the ability of the bidding company to obtain quality services from bonding companies and suppliers at a fair price. Here too, discrimination places minority firms at a disadvantage.

All contractors on federal construction, maintenance, and repair contracts valued at over \$100,000 are required to secure a surety bond guaranteeing the performance of the contract.¹¹⁴ To obtain bonding, most surety companies require that a firm present a record of experience to substantiate its ability to perform the job. This mandate often lands minorities in the middle of a vicious circle. Since a history of discrimination has prevented many minority companies from gaining experience in contracting, they cannot get bonding, they cannot get experience. As Congress has recognized, this dilemma "serves to preclude equitable minority business participation in federal construction contracts."¹¹⁵

Congress also has realized that minorities are disadvantaged by their exclusion from business networks that facilitate bonding, because "firms tend to give performance and payment bonds to people they already know and not to

the new business person, especially if the small business owner is a woman or of a racial or ethnic minority."¹¹⁶ Furthermore, Congress has considered evidence indicating that bonding agents, like lenders, inject racial biases into the bonding process.¹¹⁷ Evidence of discrimination in bonding also has been accumulated in a number of state and local studies.¹¹⁸ These problems have made minority businesses significantly less able to secure bonding on equal terms with white-owned firms with the same experience and credentials. For example:

- A Louisiana study found that minority firms were nearly twice as likely to be rejected for bonding, three times more likely to be rejected for bonding for over \$1 million, and on average were charged higher rates for the same bonding policies than white firms with the same experience level.¹¹⁹
- An Atlanta study found that 66 percent of minority-owned construction

¹¹⁴ H.R. Rep. No. 870, 103d Cong., 2d Sess. 75 (1994).

¹¹⁵ See *Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 2d Sess. 2 (1993) (statement by Rep. Kweisi M. Muni) ("[S]imilarities between a banker's ability to make arbitrary credit decisions and a surety producer or an underwriter's capability of injecting personal prejudice into the bonding process are compelling indeed."); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 102d Cong., 2d Sess. 40 (1990) (statement of Andrew Brimmer); id. at 195-66 (statement of Edward Bowen); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the Subcomm. on Procurement, Acquisition and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. 107 (1988) (statement of Marjorie Herick) ("[D]iscrimination against women and minorities in the bonding market is quite prevalent").

¹¹⁶ See Division of Minority and Women's Business Development, *Opportunity Denied: A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State*, Executive Summary 57 (1992) (noting that 47 witnesses reported "specific incidents of racial discrimination * * * in attempting to secure performance bonds"); National Economic Research Associates, *The Utilization of Minority and Women-Owned Business Enterprises by Alameda County*, 202, 212 (June 1992) (nearly 50 percent of minority businesses reported experiencing bonding discrimination); National Economic Research Associates, *The Utilization of Minority and Women-Owned Businesses Enterprises by Costa County*, 231, 241 (May 1992) (noting evidence of bonding discrimination); Board of Education of the City of Chicago, *Report Concerning Consideration of the Revised Plan for Minority and Women Business Enterprise Economic Participation 116* (1992) ("Bonding is selectively and capriciously granted or denied with the decision being 85 percent subjective."); Mason Tillman Associates, *Sacramento Municipal Utility District: MWBE Disparity Study 119*, 135-41 (1990) (noting evidence of bonding discrimination).

¹¹⁷ D.J. Miller & Associates, *State of Michigan Disparity Study Vol. 2*, pp. 35-37 (1992).

¹¹³ H.R. Rep. No. 870, 103d Cong., 2d Sess. 13 (1994).

¹¹⁴ 40 U.S.C. §§ 270a-270e.

¹¹⁵ United States Congress, *Federal Compliance to Minority Set-Asides: Report to the Speaker, U.S. House of Representatives, by the Congressional Task Force on Minority Set-Asides 28* (1988). See also H.R. Rep. No. 870, 103d Cong., 2d Sess. 14 (1994) ("Inability to obtain bonding is one of the top three reasons that new minority small businesses have difficulty procuring U.S. Government contracts."); *Minority Business Participation in Department of Transportation Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 159 (1985) (statement of Sherman Brown) ("Virtually everyone connected with the minority contracting industry * * * apparently agrees that surety bonding is one of the biggest obstacles in the development of minority firms.");

firms had been rejected for a bond in the last three years, 73 percent of those firms limited themselves exclusively to contracts that did not require bonding, and none of them had unlimited bonding capacity. By contrast, less than 20 percent of nonminority firms had unlimited bonding capacity.¹²⁰

Another factor restricting the ability of minority-owned businesses to compete in both private and public contracting is discrimination allowing "non-minority subcontractors and contractors [to get] special prices and discounts from suppliers which [are] not available to [minority] purchasers."¹²¹ This drives up anticipated costs, and therefore the bid, for minority-owned businesses. A recent survey reported that 56 percent of black business owners, 30 percent of Hispanic owners, and 11 percent of Asian business owners had experienced known instances of discrimination in the form of higher quotes from suppliers.¹²² Numerous other state and local studies have reported similar findings.¹²³

¹²⁰ Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. III, 131-32 (1990).

¹²¹ *Case One v. Hillsborough County*, 908 F.2d 988, 998 (7th Cir.) cert. denied, 498 U.S. 983 (1991). Evidence of pricing discrimination outside the contracting setting indicates that the problem cuts across the economy. For example, a recent testing study of automobile purchases showed that, on average, black men were charged nearly \$1,000 more for cars than white men. See Ayres, *Fair Pricing: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991).

¹²² National Economic Research Associates, *The Utilization of Minority and Women-Owned Businesses by the Regional Transportation District (Denver, Colorado): Final Report* 16-23 (1992).

¹²³ See National Economic Research Associates, *The State of Texas Disparity Study: A Report to the Texas Legislature as Authorized by H.B. 2626*, 73rd Legislature 148 (1994) (Hispanic business owner denied credit by supplier who told him that "we can't sell on a cash basis to people of your kind"); D.J. Miller & Associates, *Disparity Study for Metropolitan Shelby County Intergovernmental Consortium* 117 (1994) ("Other frequent complaints pertaining to inferential barriers included being completely stopped by suppliers' discriminatory practices"; BBC Research Associates, *Disparity Study for the City of Fort Worth IX-20* (1993) (citing evidence that suppliers discriminate against minorities by "reluctant to sell or willing at higher prices than for whites"; Division of Minority and Woman's Business Development, *Opportunity Denied? A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State, Executive Summary*, 53 (1992) (63 witnesses reported "specific incidents of racial discrimination" "where materials or equipment suppliers would not extend the same payment terms and discounts to them as they knew were being made available to white male owned contractors with the same financial histories"); National Economic Research Associates, *The Utilization of Minority and Women-Owned Business Enterprises by Alameda County* 187 (1992) (41% of minority-owned business respondents reported experiencing discrimination in quotes from

In one glaring case, a firm in Georgia began sending white employees to purchase supplies posing as owners of a white-owned company. The "white-front" routinely received quotes on supplies that were two thirds lower than those quoted to the minority-owned parent company.¹²⁴ Another firm entered into a joint venture with a white firm and each obtained quotes from the same supplier for the same project. When the two firms compared the quotes, they discovered that those given to the minority-owned firm were so much higher than those given to his white joint venture partner that they would have added 40 percent to the final contract price.¹²⁵

C. Evidence of the Impact of Discriminatory Barriers on Minority Opportunity in Contracting Markets: State and Local Disparity Studies

In recent years, many state and local governments have undertaken formal studies to determine whether there is evidence of racial discrimination in their relevant contracting markets that would justify the use of race-conscious remedial measures in their procurement activities. These studies—many of which have been cited in the previous sections of this memorandum—typically contain extensive statistical analyses that have revealed gross disparities between the availability of minority-owned businesses and the utilization of such businesses in state and local government procurement. Under the rules established by the Supreme Court in its 1989 *Croson* decision, which held that affirmative action at the state and local level is subject to strict scrutiny, such disparities can give rise to an inference of discrimination that can serve as the foundation of race-conscious remedial measures in procurement.¹²⁶ The studies also

suppliers); City of Dayton, *Disparity Study* 101 (1991) (citing evidence of discriminatory pricing); D.J. Miller & Associates, *City of St. Petersburg Disparity Study* 39-40 (1990) ("Discrimination by suppliers has also prevented minority-owned businesses from entering successful bids."); Mason Tillman Associates, *Sacramento Municipal Utility District, M/WBE Disparity Study* 135-43 (1990).

¹²⁴ Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia* Pt. II, 75 (1990).

¹²⁵ BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas IX-20* (1992).

¹²⁶ In describing what it takes for the government to establish a remedial predicate in procurement, the Court in *Croson* said that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 809.

generally contain anecdotal evidence and expert opinion, developed in hearings, surveys, and reports, that bring the statistical evidence to life and vividly illustrate the effects of discrimination on procurement opportunities for minorities.

The federal government obviously purchases some goods and services that state and local governments do not (e.g. space shuttles, naval warships). For the most part, though, the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question whether the federal government has a compelling interest to take remedial action in its own procurement activities.¹²⁷ Accordingly, the Justice Department asked the Urban Institute (UI) to analyze the statistical findings in the studies. On the strength of the findings in 39 studies that it considered, UI has reached the following conclusions:¹²⁸

- The studies show underutilization by state and local governments of African American, Latino, Asian and Native American-owned businesses. The pattern of disparity across industries varies with racial and ethnic groups. However, the median disparity figures calculated by UI demonstrate disparities for all ethnic groups in every industry.¹²⁹

- Minority-owned businesses receive an average only 59 cents of state and local expenditures that those firms

¹²⁷ The studies are also of particular relevance in assessing the compelling interest for congressionally-authorized affirmative action measures in programs that provide federal funds to state and local governments for use in their procurement.

¹²⁸ To date, UI has evaluated 56 of the studies. Ultimately, UI excluded 17 of the 56 studies from its analysis, on the grounds that those studies do not present disparity ratios; do not present tests of statistical significance or number of contracts; do not present separate results by industry; or do not present disparity ratios based on government contracting.

¹²⁹ UI's findings of underutilization are predicated on two different measures: the median disparity ratio across all studies and the percent of studies reporting substantial underutilization (defined as a disparity ratio of less than 0.8). A disparity ratio is the proportion of government contracting received by minority-owned firms to the proportion of available firms that are minority-owned. Thus, a disparity ratio of 0.8 indicates that businesses owned by members of a minority group received only 80 cents of every dollar expected to be allocated to them based on their availability. UI's findings of disparity do not change substantially when analysis is limited to studies with either a large number of contracts or high availability. In fact, in most instances, the disparity between availability and utilization was greater in studies that involve large numbers of contracts.

would be expected to receive, based on their availability. The median disparities vary from 39 cents on the dollar for firms owned by Native Americans to 60 cents on the dollar for firms owned by Asian-Americans.

* Minority firms are underutilized by state and local governments in all of the industry groups examined: construction, construction subcontracting, goods, professional services and other services. The largest disparity between availability and utilization was seen in the category of "other services," where minority firms receive 51 cents for every dollar they were expected to receive. The smallest disparity was in the category of construction subcontracting, where minority firms still receive only 87 cents for every dollar they would be expected to receive.

An important corollary to UI's findings is the experience following the Supreme Court's 1989 ruling in *Croson*. In the immediate aftermath of that case, state and local governments scaled back or eliminated altogether affirmative action programs that had been adopted precisely to overcome discriminatory barriers to minority opportunity and to correct for chronic underutilization of minority firms. As a result of this retreat from affirmative action, minority participation in state and local procurement plummeted quickly. To cite just a few examples:

* After the court of appeals decision in *Croson* invalidating the City of Richmond's minority business program in 1989, minority participation in municipal construction contracts dropped by 93 percent.¹³⁰

* In Philadelphia, public works subcontracts awarded to minority and women-owned firms declined by 97 percent in the first full month after the city's program was suspended in 1990.¹³¹

* Awards to minority-owned businesses in Hillsborough County, Florida, fell by 99 percent after its program was struck down by a court.¹³²

* After Tampa suspended its program, participation in city contracting decreased by 99 percent for African American-owned businesses and 50 percent for Hispanic-owned firms.¹³³

* The suspension of San Jose's program in 1989 resulted in a drop of over 80 percent in minority

participation in the city's prime contracts.¹³⁴

Together, the information in the state and local studies, and the impact of the cut-back in affirmative action at the state and local level after *Croson*, provide strong evidence that further demonstrates the compelling interest for affirmative action measures in federal procurement. The information documents that the private discrimination discussed previously in part II of this memorandum—discrimination by trade unions, employers, lenders, suppliers, prime contractors, and bonding providers—substantially impedes the ability of minorities to compete on an equal footing in public contracting markets. And it shows these discriminatory barriers that impair minority opportunity in federal procurement. The information also indicates that, without affirmative action, minorities would tend to remain locked out of contracting markets.

The information also helps to illuminate what it is that Congress is seeking to redress—and hence what interests are served—through remedial action in federal procurement. First, Congress has a compelling interest in exercising its constitutional power to remedy the impact of private discrimination on the ability of minority businesses to compete in contracting markets that is reflected in the studies. Second, Congress has a compelling interest in exercising its constitutional power to redress the statistical disparities reflected in the studies that give rise to an inference of discrimination by state and local governments, or at minimum suggest that those governments are compounding the impact of private discrimination through ostensibly neutral procurement practices that perpetuate barriers to minority contracting opportunity.¹³⁵ Finally,

¹³⁰ BPA Economics, et al., *MBE/WBE Disparity Study for the City of San Jose*, Vol. III, 118-19 (1990).

¹³¹ The role of state and local governments in impeding contracting opportunities for minority firms is most directly addressed through federal programs that authorize recipients of federal funds to take affirmative action in their procurement activities. These programs plainly are examples of the exercise of Congress' power under the Fourteenth Amendment to remedy discrimination by state and local governments. See *Adarand*, 115 S. Ct. at 2126 n.9 (Stevens, J., dissenting). Since that same state and local conduct constitutes an impediment to minority opportunity in contracting markets in which the federal government does business, it also serves as a basis for affirmative action measures in the federal government's own procurement. Therefore, those measures too entail an exercise of Congress' authority under the Fourteenth Amendment. See *id.* at 2132 n.1 (Souter, J., dissenting) (for purposes of exercise of Congress'

Congress has a compelling interest in ensuring that expenditures by the federal government do not inadvertently subsidize the discrimination by private and public actors that is reflected in the studies.¹³⁶ Were that to occur, the federal government would itself become a participant in that discrimination through procurement practices that serve to sustain impediments to minority opportunity in national contracting markets.

III. Conclusion

As a nation, we have made substantial progress in fulfilling the promise of racial equality. In contracting markets throughout the country, minorities now have opportunities from which they were wholly sealed off only a generation ago. Affirmative action measures have played an important part in this story. However, the information compiled by the Justice Department to date demonstrates that racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets.

The evidence shows that the federal government has a compelling interest in eradicating the effects of two kinds of discriminatory barriers: first, discrimination by employers, unions, and lenders that has hindered the ability of members of racial minority groups to form and develop businesses as an initial matter; second, discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies that raises the costs of doing business for minority firms once they are formed, and prevents them from competing on an equal playing field with nonminority businesses. This discrimination has been, in many instances, deliberate and overt. But it also can take a more subtle form that is inadvertent and unconscious. Either way, the discrimination reflects practices that work to maintain barriers to equal opportunity.

The tangible effects of the discriminatory barriers are documented in scores of studies that reveal stark disparities between minority availability and minority utilization in state and local procurement. In turn, the disparities show that state and local governments themselves are tangled in this web through ostensibly neutral procurement actions that perpetuate the

power under the Fourteenth Amendment, there is no difference between programs in which "the national government makes a construction contract directly" and programs in which "it funnels construction money through the states."

¹³⁶ See *Croson*, 488 U.S. at 492.

¹³⁰ United States Commission on Minority Business Development, *Final Report 99* (1992).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

discriminatory barriers. The very same discriminatory barriers that block contracting opportunities for minority-owned businesses at the state and local levels also operate at the federal level. Without affirmative action in its procurement, the federal government might well become a participant in a cycle of discrimination.

Affirmative action in federal procurement is not the cure-all that will

eliminate all the obstacles that racial discrimination presents for minority businesses. No one remedial tool can completely address the full dimension of this problem. Laws proscribing discrimination and general race-neutral assistance to small businesses are critical to the achievement of these ends. But the evidence demonstrates that such measures cannot pierce the

many layers of discrimination and its effects that hinder the ability of minorities to compete in our nation's contracting markets. Thus, there remains today a compelling interest for race-conscious affirmative action in federal procurement.

[FR Doc. 96-13123 Filed 5-22-96; 8:45 am]

BILLING CODE 415-01-P

THE WHITE HOUSE
WASHINGTON

DATE: 3/8/96

TO: Affirmative Action Meeting Attendees
Monday 3/11 @ 4:00 p.m.

FROM: White House Counsel Marvin Krislov
Room 130, OEOB, x6-7903

- FYI Additional background/
reading material for
- Appropriate Action Monday's
- Let's Discuss meeting.
- Per Our Conversation
- Per Your Request
- Please Return
- Other

03/06/96 14:31

PROPOSED REFORM OF AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT

- This document summarizes a proposal for reform of race-based affirmative action measures in federal procurement that target assistance to minority-owned businesses through programs that aid small firms that are owned by socially and economically disadvantaged individuals ("SDB's"). The proposal is designed to ensure that such programs comport with the Supreme Court's ruling last June in Adarand Constructors, Inc. v. Peña, which held that federal race-based affirmative action programs are subject to the constitutional standard of strict scrutiny.
- The Justice Department has reviewed the SBA's 8(a) program, pursuant to which, some federal contracts are reserved for disadvantaged businesses that are participants in that program. The Department currently is defending the 8(a) program in litigation under the Adarand standards. The proposed reforms do not directly address possible modifications to the 8(a) program. However, through application of the "benchmark" limitations discussed below, the proposal would affect agency use of 8(a).

I. CERTIFICATION AND ELIGIBILITY

- SDB programs assist small firms owned by individuals that are disadvantaged socially (subjected to racial or cultural bias), and economically (that bias has led to decreased economic opportunities compared to others). Applicants to these programs will be required to submit a form to the procuring agency verifying their eligibility.
- Members of designated racial and national origin groups presently are presumed by statute to be socially and economically disadvantaged. The proposal does not affect those presumptions. Under the proposal, nonminority applicants may establish by a preponderance of evidence -- instead of the current clear and convincing standard -- that they are socially and economically disadvantaged. This change will open SDB participation to more women and nonminorities.
- All applicants to SDB programs will be required to submit a certification from an SBA approved organization verifying that the individuals claiming disadvantage own and control the company as defined by SBA regulations.

II. RACE-NEUTRAL MECHANISMS

- Agencies will be required to maximize the use of technical assistance, outreach, and other race neutral means to increase minority opportunity and participation in federal procurement, thereby decreasing reliance on race-based mechanisms.

03/08/96 14:8

III. ESTABLISHMENT OF BENCHMARK LIMITATIONS

- In order to ensure that race-conscious procurement is not used unnecessarily, benchmarks will be developed for each industry in which the government contracts. Benchmarks will seek to measure the level of minority contracting that would exist absent the effects of discrimination.
- Benchmarks will be calculated by combining the availability of minority firms in the industry (using census figures) with an adjustment for the amount that discrimination has suppressed that availability (using a regression analysis similar to that used in employment discrimination cases).

IV. APPLICATION OF BENCHMARK LIMITATIONS

- Where minority participation falls below the benchmark, a price or evaluation credit will be authorized for the evaluation of bids by SDBs and prime contractors who commit to subcontract with SDBs.
- When SDB participation exceeds the benchmark, the Office of Federal Procurement Policy will lower or suspend the use of the credit. When that occurs, the SBA concurrently will limit the use of the 8(a) program in that industry by limiting entry, speeding graduation, or limiting the number of 8(a) awards in the industry.
- The proposal would establish a three-year moratorium on the use of existing statutory authority to set-aside contracts for SDB's, other than through the 8(a) program. Thereafter, SDB set-asides may only be employed in agency procurement in an industry if particular conditions are found to exist in that industry.

THE WHITE HOUSE
WASHINGTON

DATE: 3/8/96

~~DRAFT/CLOSE HOLD~~

TO: Attendees
Affirmative Action-Meeting 3/11/96
4:00 p.m.

FROM: White House Counsel
Room 130, OEGB, x6-7903
Krislov, Gibson, Hayes

- FYI Attached are draft materials prepared by
- Appropriate Action DOJ. Please review prior to meeting on Monday 3/11.
- Let's Discuss
- Per Our Conversation Thanks
- Per Your Request
- Please Return
- Other



U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

FAX

DRAFT

TO:

Marvin Kerslow

FAX #:

456-1647

FROM:

Sean Flynn

PHONE:

(202) 514-6015

FAX:

(202) 307-2839

COMMENTS:

Enclosed are two sets of affirmative action talking points. The 1st set is a broad response to Canady/Dole. The second set specifically deals with the compelling interest supporting a.a. in procurement.

Call with any questions.

-Sean

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WE STILL NEED AFFIRMATIVE ACTION

The President supports affirmative action that is fair, balanced and effective. In *Adarand*, 7 of the nine justices supported the continued use of affirmative action. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Dole/Canady goes far beyond even this conservative court to endorse a ban on any use of flexible, fair, and needed affirmative actions regardless of how or why they are used.

DISCRIMINATION CONTINUES TO INVADE DECISIONMAKING

- ▶ In testing studies conducted by the Urban Institute in 1990 and 1991, White males generated 50 percent more job offers than minorities with the same characteristics applying for the same jobs.
- ▶ The Urban Institute's Housing Discrimination Study (1991) found that Black and Hispanic testers posing as renters and purchasers experienced discrimination in over 40 percent of their transactions.
- ▶ A recent study of mortgage lending by the Federal Reserve Bank of Boston concluded that minority applicants were 60 percent more likely to be rejected for a loan than white males with identical characteristics (age, income, wealth, education, etc.).
- ▶ A white business owner in the construction industry receives over fifty times as many loan/dollars per dollar of equity capital as Black owners with identical borrowing characteristics (education level, age, business history, equity, etc.).
- ▶ Last year, the EEOC received over 90,000 complaints of employment discrimination, 64,423 complaints were filed in state and local commissions.

ANTI-DISCRIMINATION LAWS ALONE DID NOT REMOVE BARRIERS TO INTEGRATION

- ▶ We declared discrimination illegal in the 1960s but that move alone did not open the many doors to opportunity and integration in our workplaces, schools and neighborhoods.
 - For example, when the University of Maryland lifted its admission policies banning the admission of blacks, the reputation of the school's history of discrimination dissuaded black students from applying and led to a student body that was less than 1% black for over 10 years.
- ▶ Affirmative action marks a middle ground between settling for segregation and imposing draconian penalties on employers and others who fail to meet arbitrary and often unachievable quotas.

MINORITY/WOMEN-OWNED BUSINESSES REMAIN DISADVANTAGED

- In 1987, the average gross receipts for minority firms were 34% of that of male-owned firms.
- According to 1992 Census data (only available for black-owned firms) the number of businesses owned by Black Americans increased as a share of all businesses from 3.1% (1987) to 3.6% (1992) but their share of all business revenues remained at just 1% of total revenues (same as in 1987).
- The average annual sales for Black-owned firms in 1992 were just 26.6% of that of nonminority firms.
- Women own nearly 20 percent of all businesses with employees and a third of all small businesses but receive less than 3 percent of federal contract dollars.
- Women-owned firms face barriers to accessing credit -- 30 percent of such firms use personal savings to finance business growth and 42 percent use credit cards for short term financing.

POLICIES AND PRACTICES CONTINUE TO PERPETUATE SEGREGATION

- ▶ Word-of-mouth recruiting and preferences for members of social networks, current employees or alumni of substantially and historically all-white institutions disadvantage minorities.
- ▶ One fifth of Harvard's students are admitted with admissions preferences based on alumni affiliation. The children of Harvard alumni are twice as likely to be admitted as any beneficiary of an "affirmative action" program.

OUR SOCIETY REMAINS DIVIDED BY INCOME

- ▶ On average, women with masters degrees earn the same amount as men with associate degrees.
- ▶ The average income for Hispanic women with college degrees is less than the average for white men with high school degrees.
- ▶ Asian and Pacific Islander Americans earn less than whites in comparable circumstances when all other circumstances, including occupation, English fluency, age and education are controlled for.
- ▶ African Americans with professional degrees earn only 79 percent of the amount White males earn with the same degrees in the same job categories.

BY OCCUPATION LEVEL

- ▶ 97 percent of senior managers in Fortune 1000 industrial and Fortune 500 companies are White.
- ▶ The unemployment rate for African Americans is more than twice that of whites.
- ▶ Black and Hispanic men are half as likely as white men to be managers or professionals.
- ▶ Women hold 3 to 5 percent of senior level management positions - there are only two women CEOs in Fortune 1000 companies.

AND IN EDUCATION

- ▶ 22% of whites have college degrees compared to only 12% of African Americans and 9% of Hispanics.
- ▶ Two thirds of all black youngsters attend segregated schools (i.e. schools that are a majority black).

AFFIRMATIVE ACTION IMPROVES ORGANIZATIONS

- ▶ 94 percent of CEOs stated that affirmative action improves their ability to find qualified applicants. (Organization Resource Counselors)
- ▶ 89 percent of the country's mayors report that affirmative action aids them in identifying relevant qualifications for jobs and 52 percent state that it has helped improve public perception of the quality of services provided. (U.S. Conference of Mayors).
- ▶ Police forces report that an integrated force is essential to serving a diverse community. Diversity helps forces build better trust and relations with all segments of the community, which leads to information being shared with the police and more effective law enforcement.
- ▶ Universities use affirmative action because diversity brings a greater range of perspectives to the table, helps foster a more robust exchange of ideas, and prepares our future leaders to interact in a world full of people from different backgrounds.

**EXECUTIVE SUMMARY:
DISADVANTAGED BUSINESS PROGRAMS ARE STILL NEEDED**

Disadvantaged business programs were enacted in response to specific findings that discrimination has impeded, and continues to impede, the ability of minority-owned and other disadvantaged firms from developing in our economy. The need remains.

**MINORITY-OWNED BUSINESSES ARE DISADVANTAGED RELATIVE TO
NONMINORITY-OWNED FIRMS**

- In 1987, minority firms received gross receipts that were 34% of the average earnings of nonminority male-owned firms.
- According to 1992 Census data (only available for black-owned firms) the number of businesses owned by Black Americans increased as a share of all businesses from 3.1% (1987) to 3.6% (1992) but their share of all business revenues remained at just 1% of total revenues (same as in 1987).
- On average, Black-owned firms in 1992 had annual sales totaling just 26.6% of nonminority firms.

DISADVANTAGES CAN BE DIRECTLY LINKED TO CURRENT UNDERUTILIZATION

- In 1995, only 6.5 percent of the federal government's purchasing was conducted with disadvantaged businesses even with the use of affirmative action programs.
- At DoD, where 67% of contract dollars are spent, only 1.9% of procurement dollars were directed to disadvantaged businesses without the use of an affirmative action program.

AND CURRENT DISCRIMINATION

- White business owners are 15 percent more likely to get a loan as an equally matched Black business owner. In construction, white business owners generate, on average, fifty times as many loan dollars per dollar of equity capital than is generated by Black owners with identical borrowing characteristics.
- Numerous studies and first hand accounts have documented the fact that discrimination by employers, trade unions, suppliers, prime contractors and state and local governments have greatly impeded the ability of minority-owned firms to form, develop and compete in our economy.
- Such discrimination has led to minorities being approximately 20 percent less likely to successfully enter self-employment than white males with the same income, wealth, education level, work experience, marital status, age, etc.

HISTORY

- In 1967, Commission on Civil Disorders ("Kerner Commission") reported that discriminatory barriers had locked minorities out of the American free enterprise system and therefore recommended federal initiatives to combat this problem.
- In response to the Kerner Commission report, Presidents Johnson and Nixon authorized the SBA to use section 8(a) of the Small Business Act to contract with disadvantaged businesses.
- In 1976, minority-owned businesses comprised only 4% of the nation's total number of businesses and accounted for less than 1% of total business receipts.
- Congress concluded that there existed a "pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system."
S. Rep. No. 1070, 95th Cong., 2d Sess., at 14 (1978).
- In response to these findings, Congress amended section 8(a) to specifically authorize its use to provide technical and developmental assistance to small disadvantaged businesses ("SDBs") and allow them to compete for a limited time in a sheltered market.
S. Rep. No. 1070, 95th Cong., 2d Sess., at 15 (1978).
- Chief Justice Burger summarized the congressional findings confronting minority businesses as "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government officers to disfavor minority businesses."
Fullilove v. Klutznick, 448 U.S. 448, at 467.
- Similar findings that discrimination was impeding minority business development and participation in federal contracting accompanied passage of disadvantaged business programs for the DoD and DoT.

MINORITY BUSINESSES REMAIN DISADVANTAGED

1987 CENSUS DATA

- African-Americans were 12.1% of the population -- but owned 3.1% of businesses and accounted for 1% of business receipts.
- Hispanic Americans were 9.0% of the general population -- but owned 3.1% of businesses and accounted for 1.2% of business receipts.
- Asian or Pacific Islanders were 2.9% and owned 2.6% of businesses but accounted for only 1.7% of business receipts.
- The average payroll among minority firms with employees in 1987 was less than half that of white firms.
- Minority firms received, on average, gross receipts that are 34% of the average earnings of nonminority male-owned firms.

1992 CENSUS DATA - ONLY AVAILABLE FOR BLACK-OWNED FIRMS:

- Although the number of businesses owned by Black Americans increased from 3.1% of all businesses in 1987 to 3.6% in 1992, their share of all business revenues remained at just 1% of total revenues -- the same level as 1987.
- The average Black-owned firm in 1992 had annual sales totaling 26.6% of that received by an average nonminority firm -- compared to 25.0% in 1987.

DISADVANTAGES ARE LINKED TO DISCRIMINATION

- A recent study found that minority business formation rates remain suppressed compared to Whites even after controlling for the effects of income, wealth, education level, work experience, marital status, and age.¹
- A similar study compared the business formation rates of people with the same characteristics and found that the overall availability of minority-owned businesses in New York state would be approximately 20 percent higher absent the effects of discrimination.²

¹ Bates, Tim. "Self-employment entry across industry groups." *Journal of Business Venturing* (1995).

² Opportunity Denied: A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State, Appendix D (1992).

DISPARITIES IN FEDERAL CONTRACTING

- The Federal government has consistently failed to utilize minority firms commensurate with their availability -- even with the use of affirmative action programs such as 8(a).

<u>Year</u>	<u>Minority Bus. Availability</u>	<u>"Disadvantaged" Bus. Utilization</u>
1979	4% ³	1.7%
1980	4%	2.2%
1981	4%	2.5%
1982	6% ⁴	2.3%
1983	6%	2.3%
1984	6%	2.8%
1985	6%	2.4%
1986	6%	2.7%
1987	7% ⁵	3.1%
1988	7%	3.5%
1989	7%	3.7%
1990	7%	3.8%
1991	7%	4.0%
1992	8% ⁶	4.8%
1993	8%	5.6%
1994	8%	6.0%
1995	8%	6.5%

- At DoD (where 67% of federal contract dollars are spent) only 1.9 percent of total contract dollars were directed to disadvantaged businesses without the assistance of an affirmative action program.

³ Percent of all businesses. See 124 Cong. Rec. 29,642 (1978).

⁴ Percent of all businesses as of 1982. State of Small Business: Report to the President (1987).

⁵ Percent of all businesses with employees as of 1987 census. Survey of Minority-Owned Business Enterprises U.S. Bureau of the Census (1987).

⁶ Estimate based on 1992 Census data for Black-owned firms (only data available). The availability of such firms increased by 15 percent relative to the entire business population. A parallel increase among all minority businesses would yield the estimated 8% availability.

ACCESS TO CREDIT

"Our nation's history has created a 'cycle of negativity' that reinforces prejudice through its very practice; restraints on capital availability lead to failures, in turn, reinforce a prejudicial perception of minority firms as inherently high-risks, thereby reducing access to even more capital and further increasing the risk of failure."

U.S. Commission on Minority Business, Final Report (1992).

- White business owners generate, on average, three times as many loan dollars per dollar of equity capital than is generated by Black owners.
- In construction, White business owners generate, on average, fifty times as many loan dollars per dollar of equity capital than is generated by Black owners.
- Black business owners with identical borrowing traits (education level, age, business history, equity, etc.) are approximately 15 percent less likely to receive business loans than White owners.
- Minorities (Hispanic, Asians and Blacks) are approximately 20 percent less likely to receive venture capital financing than White owned firms with identical borrowing traits.
- A recent study of mortgage lending by the Federal Reserve Bank of Boston concluded that minority applicants were 60 percent more likely to be rejected for a loan than white males with identical characteristics (age, income, wealth, education, etc.).

ACCESS TO BONDING

"In order to secure a bond, a contractor needs a satisfactory "track record" of performance. However, it is impossible to establish a track record of performance without first having access to bonding. This dilemma serves to preclude equitable minority business participation in federal construction contracts."⁷

- Although all new small businesses are disadvantaged by bonding requirements, minorities are hit especially hard because of the presence of discrimination in bonding markets. "This is because bonding firms owned by several generations of the same families seem to predominate; and such firms tend to give performance and payment bonds to people they already know and not to the new business person, especially if the small business owner is a woman or of a racial or ethnic minority."⁸
- 50 percent of minority-owned firms contracting with Louisiana state had never been bonded compared to 28 percent for White-owned firms with the same experience.⁹
- 60 percent of Louisiana White-owned firms were charged less than 2 percent interest on bonding while 60 percent of similarly situated minority-owned firms were charged over 2 percent interest.¹⁰
- A study of firms in Atlanta found that 19 percent of nonminority firms in Atlanta had unlimited bonding capacity while no minority-owned firms, regardless of size or experience, had obtained a similar arrangement.¹¹

⁷ U.S. Congress, Report of the Congressional Task Force on Minority Set-Asides (1988)

⁸ Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, Problems Facing Minority and Women Owned Small Businesses Including 8(a) Firms in Procuring U.S. Government Contracts: An Interim Report., H.R. Rep. 103-870, 103d Cong. 2nd Sess. 14 (1994)

⁹ State of Louisiana Disparity Study. Vol. 2, pp. 35 - 57. (June 1991)

¹⁰ Id.

¹¹ Atlanta disparity study.

DISCRIMINATORY PRICING

- Minority businesses are often prevented from competing on a level field by discrimination that forces them to pay higher costs for capital and supplies.
- In a survey of minority business owners in Denver, 56 percent of Black business owners, 30 percent of Hispanic owners, and 11 percent of Asian business owners reported experiencing discrimination in the form of higher quotes from suppliers.¹²
- A California minority-owned firm testified that he was quoted prices for supplies that were from 10 to 15 percent higher prices than quotes given by the same dealer to a majority owned company with which he was working.¹³
- A Las Vegas black-owned construction firm reported that the same supplier gave him a quote on supplies that was over 40 percent higher than given to his nonminority partner.¹⁴

¹² National Economic Research Associates The Utilization of Minority and Woman-Owned Businesses by the Regional Transportation District (Denver Colorado): Final Report (1992).

¹³ National Economic Research Associates, et. al. The Utilization of Minority and Woman-owned Business Enterprises by Alameda County, p. 178 (1992)

¹⁴ Regional Disparity Study: City of Las Vegas, p.IX-20 (1992)

EXCLUSIONARY PRACTICES

Discrimination, exclusionary practices and the effect of "old boy" business networks have greatly suppressed private contracting opportunities for minority-owned businesses.

- Nearly 60 percent of the minority-owned firms responding to a survey reported that prime contractors seldom or never use their firms for private contracts that do not have goals.¹⁵
- For construction firms the disparity is even more pronounced -- 90 percent of Black owners, 80 percent of Asian-owners, and 62 percent of Hispanic owners testified that primes in construction seldom or never use their firms for contracts that did not have goals.¹⁶
- A Hispanic contractor in Las Vegas testified that when he asked why he was not awarded the subcontract for which he was the low bidder, the prime contractor told him that he "did not know him" and that he "had problems with minority subs in the past."¹⁷
- A minority-owned company testified that most majority firms, even those that regularly do business with his firm on government contracts, refuse to include his firm on bidding invitation lists for private sector contracts that do not include minority participation goals or incentives.¹⁸
- A Black-owned business who was rejected for a subcontract later found out that he was the low bidder but the prime had called a firm owned by one of the prime's former employees and offered it the subcontract if he could beat the Black-owned firm's price.¹⁹

¹⁵ National Economic Research Associates The Utilization of Minority and Woman-Owned Businesses by Contra Costa County: Final Report at ix, xiii (May, 1992).

¹⁶ Id.

¹⁷ Regional Disparity Study: City of Las Vegas, p.IX-12 (1992)

¹⁸ The Meaning and Significance . . . of City of Richmond v. J.A. Croson Co. . . Hearing Before the Leg. and Nat. Security Subcomm. of the Comm. on Government Operations. . ., 101st Cong., 2d Sess. (1990)

¹⁹ BBC Research and Consulting. Regional Disparity Study: City of Las Vegas, p.IX-12 (1992)

DISCRIMINATION IN EMPLOYMENT AND BY TRADE UNIONS

In order to successfully start and operate a business, it is necessary to have technical and management experience in that industry. Discrimination in hiring, promotion, and in trade unions has served as a significant impediment to minorities gaining such experience.

EMPLOYMENT DISCRIMINATION

- In testing studies completed by the Urban Institute in 1990 and 1991, White males generated 50 percent more job offers than minorities with the same characteristics applying for the same jobs.
- The average income for Hispanic women with college degrees is less than the average for White men with high school degrees.
- The Federal Glass Ceiling Commission reported that African Americans with professional degrees earn only 79 percent of White males with the same degrees in the same job categories.
- 97 percent of senior managers in Fortune 1000 industrial and Fortune 500 companies are White.

TRADE UNIONS

- Membership and participation in a union is often a necessary prerequisite to gaining experience and work in many skilled industries -- discrimination in this area, therefore, prevents minorities from forming and developing businesses.
- Overwhelming evidence of discrimination by unions prompted the Supreme Court to declare in 1979 that "judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n. 1 (1979).

DISCRIMINATION/EXCLUSION BY STATE AND LOCAL GOVERNMENTS

- An analysis of 22 such disparity studies from across the nation found that, on average, minority owned businesses received only 68 cents of every dollar that would be expected to be allocated to them based on their availability.²⁰
- Although disparities in state and local contracting can often be attributed in part to policies and practices that perpetuate the existence of discrimination by the private sector (relying on bonding requirements, allowing the proliferation of networks that exclude minority-owners, etc.), evidence of discrimination by state and local actors has also been reported.
- A Hispanic architect that had been designing schools for nearly 40 years was told by one city contract officer that he was "not qualified" to bid on a contract to design one of their schools because "you got an accent and on top of that you are Hispanic . . . we don't need that."²¹

EXPERIENCES AFTER CROSON

- In Philadelphia, there was a 97% decline in minority business participation in the first full month after its program was suspended in 1992.
- After Tampa suspended its program, minority-business participation decreased by 99% for African American-owned businesses and 50% for Hispanics.
- San Jose's suspension resulted in minority participation falling from 6 percent to 1 percent in prime construction contracts.

²⁰ Analysis was completed by the Urban Institute for the Department of Justice (1996).

²¹ The Utilization of Minority and Woman-owned Firms: Final Report, Denver, Colorado (1992)

BIPARTISAN SUPPORT

[M]embers of minority groups traditionally have aspired to own their own businesses and thereby to participate in our free enterprise system . . . [but] through no fault of their own have been denied the full opportunity to achieve these aspirations.

President Nixon, Executive Order 11518 (1970)

[Minority Business] programs were enacted as a response to specific executive and congressional findings that widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority owned businesses to have an equal chance at developing in our economy."

Affirmative Action Review: Report to the President (1995).

One of the most important steps this country can take to insure equal opportunity for its Hispanic, Black and other minority citizens is to involve them in the mainstream of our free enterprise system.

Senator Bob Dole, 124 Cong. Rec. 7681 (1978)

[We] do not view our nation's history as one that is so racially benign, or our present circumstances as one so liberated from invidious discrimination that remedial measures to overcome the anti-competitive effects of ethnic prejudice are rendered unnecessary.

U.S. Commission on Minority Business Development
(Appointed by President George Bush) , Final Report at 33 (1992).

AFFIRMATIVE ACTION IN PROCUREMENT

The attached summarizes a proposal for reform of federal procurement programs designed to ensure that such programs will comply with strict judicial scrutiny, as required by Adarand Constructors, Inc. v. Peña.

I. CERTIFICATION AND ELIGIBILITY

- Small and disadvantaged business ("SDB") programs assist small firms owned by individuals that are disadvantaged socially (subjected to racial or cultural bias) and economically (that bias has led to decreased economic opportunities compared to others). Applicants will be required to submit a form to the procuring agency verifying their eligibility.
- Members of designated racial and national origin groups are presumed (by statute) to be socially and economically disadvantaged. Other applicants will have to establish, by a preponderance of evidence instead of the current clear and convincing standard, that they are socially disadvantaged. This change in standard will open SDB participation to more women and other disadvantaged individuals. Such individuals must certify that their income, assets and net worth fall below thresholds set by SBA.
- Each applicant will be required to submit a certification from an SBA approved organization verifying that the individuals claiming disadvantage own and control the company as defined by SBA regulations.

II. BENCHMARKS

- In order to ensure that race-conscious procurement is not used unnecessarily, benchmarks will be developed for each industry in which government contracts. Benchmarks will measure the level of SDB contracting that would exist absent the effects of discrimination.
- Benchmarks will be calculated by combining the availability of minority firms in the industry (using census figures) with an adjustment for the amount that discrimination has suppressed that availability (using a regression analysis similar to that used in employment discrimination cases).

III. RACE-CONSCIOUS MECHANISMS

- Where SDB participation falls below the benchmark, a price or evaluation credit will be authorized for the evaluation of bids by SDBs and prime contractors who commit to subcontract with SDBs.
- When SDB participation exceeds the benchmark, the Office of Federal Procurement Policy ("OFPP") will lower or suspend the use of the credit. Concurrently, the SBA will limit the use of the 8(a) program in that industry by limiting entry, speeding graduation or limiting the number of 8(a) awards in the industry.

IV. RACE-NEUTRAL MECHANISMS

- Agencies will be required to maximize the use of race neutral means to increase participation and decrease reliance on race-conscious measures.

QUESTIONS AND ANSWERS REGARDING PROCUREMENT REFORM

Why do we need minority business programs? Do they really serve a "compelling interest?"

- o In Adarand, the Supreme Court made clear that government may use programs that consider race in order to remedy the past and present effects of discrimination. Congress enacted minority business programs in response to widespread evidence that minorities have faced discrimination in obtaining credit and capital, employment, membership in trade unions, pricing of supplies, and by private business and government contractors with whom they do business. Each of these factors has suppressed the formation, development and utilization of minority businesses. Numerous state and local disparity studies and the 1992 report of the U.S. Commission on Minority Business Development, appointed by President Bush, have confirmed that discrimination and its effects persist today. For example:

- African Americans account for 12 percent of the population but only 3 percent of businesses and 1 percent of business receipts.
- Hispanic Americans account for 9 percent of the population, 3 percent of U.S. businesses and 1 percent of all receipts.
- In 1987, 93 percent of minority owned firms were individual proprietorships, 80 percent had no paid employees, 79 percent had gross receipts under \$50,000 per year.
- The average payroll among minority firms with employees is less than half that of white firms.
- In the largest study of mortgage lending ever performed, the Boston Fed found that minorities were rejected for loans 56 percent more often than identically situated whites.

Hasn't the use of SDB programs restricted the opportunities for non-disadvantaged firms?

- o No. The great majority of the government's business, over 94 percent, goes to non-SDB firms. The President's review of affirmative action programs did find that the use of set asides had created some concentrations of SDB awards in some industries and regions. A major accomplishment of the reforms in this proposal will be to ensure that concentrations no longer restrict competition in such areas. By relying on benchmarks to limit the use of race-conscious measures and adjusting those measures when and where necessary, the federal government will ensure that non-

minority firms do not suffer undue burdens as a result of race-conscious procurement.

Do SDB programs create benefits for unqualified firms?

- o No. Every firm is required to meet all quality and performance standards in order to be selected for any contract.

Are SDB programs restricted to minorities?

- o No. Any business owned by a socially and economically disadvantaged individual may participate in the program. Although certain racial and ethnic minorities are presumed by judgment of Congress to be disadvantaged, Congress has stated its intention to include others -- "for example, a poor Appalachian white person who has never had a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged." (H. Conf. Rep. No. 95-1714 (1978))

The proposed reforms would make it easier for people who do not benefit from a presumption to establish that they are socially and economically disadvantaged by lowering the standard of proof from clear and convincing evidence to a preponderance of the evidence.

Does this proposal affect programs designed to expand opportunities for women-owned businesses?

- o This proposal increases opportunities for women by lowering the standard of proof that they must meet in establishing that they are socially and economically disadvantaged, thereby making it easier for them to qualify as SDBs. Women-owned business may be certified as small disadvantaged businesses and participate in the reformed SDB program if they meet the social and economic disadvantage criteria for eligibility. In the past, they have had to show by clear and convincing evidence that they met these standards. Under this proposal, they will need to produce only a preponderance of evidence showing their social and economic disadvantage.

This proposal does not alter the current 5 percent government-wide goal for the inclusion of women in federal contracting nor does it alter the Department of Transportation's Disadvantaged Business Enterprise program, which includes women in its procurement goals. Neither of these programs uses bidding credits or sheltered competition. In addition, under Supreme Court precedent, strict scrutiny does not apply to classifications based on gender. Adarand, therefore, does not require the application of strict scrutiny to these programs.

Are goals such as the DoD 5% goal for SDBs really quotas?

- o No. That goal is not a numerical straight-jacket -- it reflects an aspiration that 5 percent of contracting will be with disadvantaged firms, not a guarantee that it will happen. Indeed for many years (until 1993) the goal was not achieved. The only consequence of failure to meet the goal is that an agency will be expected to continue to make good faith efforts.

Similarly, the 5% goal is not a cap. If an agency does more than 5% of its business with SDBs, that is not a problem.

Are the Benchmarks Quotas?

- o No. A quota is a fixed number that must be achieved in disregard of the availability of qualified individuals. It lacks flexibility and disregards merit. The affirmative action benchmarks in the procurement proposal are precisely the opposite. The benchmarks impose limitations on the use of race-conscious measures and will be developed through reference to qualified available minority firms.
- o A benchmark is not a number that the government must achieve in awarding contracts to minorities. Rather, it is a figure that determines when government may no longer -- consistent with the narrow tailoring requirement of Adarand -- take race into account in awarding government contracts.
- o The benchmarks provide a means to measure success in providing opportunities for minorities. They affect the race-conscious measures that may be taken to increase opportunities, but they do not set a level of minority contracting that must be achieved. If the permitted measures do not produce a level of minority contracting that matches the benchmark, there are no penalties.
- o At no time is an agency ever required to award a contract to an unqualified firm. In general, a minority firm can only win a contract by competing successfully with all other firms seeking to perform the contract.
- o Benchmarks limit the use of race-conscious measures, but they do not limit the award of contracts to minority firms through race-neutral means. Thus, benchmarks set neither a floor nor a ceiling on minority contracting. They are simply a means of measuring the success of SDBs.

Does the Proposal Represent a Reduction in Minority Contracting?

- o The proposal creates a system that will implement the new authority extended to agencies by FASA to promote opportunities for SDBs, including the use of the race-conscious measures described in the proposal. Previously, only DoD and a handful of smaller agencies had this authority. Given the emphasis on enhanced use of race-neutral measures and the increased availability of race-conscious measures when race-neutral measures fail and the fact that we believe this system can survive constitutional

scrutiny, it should prove favorable for SDBs. Given the suspension of DoD's "Rule of 2" set-aside, this proposal is certainly a step forward for minority companies.

When can this system be up and running?

- o We hope that benchmarks can be established and mechanisms established for use in the next fiscal year.

Will the system require complicated new bureaucracies and resources?

- o The Supreme Court's requirement that race-based decisionmaking be narrowly tailored to accomplish a compelling government interest requires extra work if we are to ensure that barriers that exclude SDBs are to be overcome. We have developed this system, however, to minimize bureaucracy and cost. To the extent possible, we have structured the system to rely on data that are now collected. While some new calculations based on those data will be required, the calculations regarding mechanisms will be made only once a year and the benchmarks will be recalculated only every 5 years as new census data become available.

Who will be responsible for the new calculations?

- o Ultimately OFPP will issue the final calculations, based on recommendations made by GSA (which collects data on all federal procurement), SBA (which tracks the progress of disadvantaged businesses) and Commerce (which administers the census).

What makes this system narrowly tailored?

- o The structure has been crafted with due regard for each of the six factors that courts have identified as relevant in determining whether race-based decisionmaking is narrowly tailored.

First, the proposal requires that agencies at all times use race-neutral alternatives to the maximum extent possible. Only where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked.

The system is flexible in that race will only be relied on when annual analysis of actual experience in procurement shows that minority businesses have been disadvantaged. Moreover, the extent of any credit awarded will be adjusted annually to ensure that it is closely matched to the need for a race-based remedial effort in a particular industry.

Race will not be relied upon as the sole factor in SDB procurement decisions. The use of credits instead of set-asides ensures that all firms have an opportunity to compete and that in order to obtain federal contracts minority firms

will have to demonstrate that they are qualified to perform the work.

Reliance on benchmarks ensures that any reliance on race is closely tied to analysis of the availability of minority firms to perform the work in question.

The duration of the program is inherently limited. The principal statutes that this proposal implements, FASA and the Department of Defense Authorization Act, expire at the end of the fiscal year 2000. Congress will have to examine the functioning of this system and make a determination whether to extend the authority to continue operating it. Moreover, as minority firms are more successful in obtaining federal contracts, reliance on race-based mechanisms will decrease. When the effects of discrimination have been eliminated, as demonstrated by minority success in obtaining procurement contracts, reliance on race will terminate automatically.

Finally, the proposal will not unduly burden nonbeneficiaries of the program. As a practical matter, the overwhelming percentage of federal procurement money will continue to flow, as it does now, to nonminority businesses. Furthermore, reliance on the benchmarks will ensure that race-based decisionmaking cannot result in concentrations of minority contracting in particular industries or regions and will thereby limit the impact on nonminorities. Under this structure, minority firms cannot receive a credit based on race in an industry in which their participation consistently exceeds minority availability, adjusted to take into account the effect of discrimination in suppressing minority business formation.

What does the proposal do to combat fraud?

- o The proposal requires for the first time that firms present a certification from an entity approved by SBA that the identified socially and economically disadvantaged individuals in fact own and control the company. In addition, the Department of Justice and SBA are committing themselves to identifying and prosecuting to the full extent of the law individuals who misrepresent SDB status.

What does this proposal do to the 8(a) program?

- o SBA has developed reforms to the 8(a) program. This proposal would only affect the 8(a) program to the extent that 8(a) contracts would count in calculating the level of minority participation in a procurement in a particular industry; where that participation exceeded the relevant benchmark, SBA would have to take steps to limit 8(a) activity in the industry through one or more of the following means: 1) limiting the entry of new firms into that industry; 2) graduating firms early that do not need the full term in the program; or 3) restricting the award of 8(a) contracts in an industry.

BENCHMARKS ARE NOT QUOTAS

- o Quotas have been rejected by the President and the Supreme Court.
- o A quota is a fixed number that must be achieved in disregard of the availability of qualified individuals. It lacks flexibility and disregards merit.
- o According to the procurement proposal, a benchmark will be set in each industry to represent the amount of minority participation in contracting that one would expect to occur absent the effects of discrimination.
- o The benchmarks will be used to measure the success of the government's efforts to eliminate barriers to minority participation in Federal contracting. They do not set any minimum level of participation.
- o Where actual participation compared to the benchmarks reveals that minority participation has reached a level that one would expect absent the effects of discrimination, the proposal mandates that race-conscious measures be curtailed.
- o The affirmative action benchmarks in the procurement proposal are not quotas. Rather they are precisely the opposite. The benchmarks impose limitations on the use of race-conscious measures.
- o A benchmark is not a number that the government must achieve in awarding contracts to minorities. Rather, it is a figure that determines when government may no longer - consistent with narrow tailoring -- take race into account in awarding government contracts.
- o Where actual participation compared to the benchmarks reveals that barriers to minority participation continue to suppress minority contracting, the proposal authorizes the use of flexible price or evaluation credits as long as the price of the contract never exceeds 10 percent of the fair market value.
- o Through such credits, race is used as one factor in deciding to which company to award a contract and is evaluated along with all other factors including, e.g., price, technical expertise and past performance on government contracts.
- o With the use of price and evaluation credits, race will never be used as the sole factor in awarding a contract. Every contractor must be qualified to perform the contract at a fair price and win a competition considering all the relevant evaluation factors.
- o At no time is an agency ever required to award a contract to an unqualified firm simply to reach a benchmark.
- o In addition, the ban on awarding any contract at more than 10 percent above the fair market value ensures that no firm will receive a contract if it is not competitive with other firms in the same industry.
- o Benchmarks limit the use of race-conscious measures, but they do not limit the award of contracts to minority firms through race-neutral means. Thus, benchmarks set neither a floor nor a ceiling on minority contracting. They are simply guideposts.

From Preferences to Empowerment: A New Bargain on Affirmative Action

Will Marshall

Affirmative action faces triple jeopardy: a skeptical Supreme Court, a hostile Republican Congress, and the possibility of a first-ever popular vote next year in California, where opinion is running heavily against preferences based on race and gender. With many whites losing patience with preferences and many blacks afraid of losing hard-won ground, there's a growing risk of a convulsive "either or" debate that rends society along racial lines. What's needed is a third way that honors our moral commitment to equal opportunity without further depleting our civic reserves of interracial trust and goodwill.

Although affirmative action also affects women and other ethnic groups, it divides Americans most dramatically along racial lines. In *The Scar of Race*, Paul Sniderman and Thomas Piazza write that: "The new race-conscious agenda has provoked broad outrage and resentment. Affirmative action is so intensely disliked that it has led some whites to dislike blacks—an ironic example of a policy meant to put the divide of race behind us in fact further widening it."¹

The Supreme Court touched these raw racial nerves in a series of decisions in June that tightened rules for federal set-asides, school desegregation, and racial gerrymandering. As conservatives gleefully forecast the beginning of the end for the "racial spoils system," defenders of affirmative action were apoplectic. Jesse Jackson even likened the high court to the Ku Klux Klan: "While we react to those wearing white sheets, those wearing black robes are killing our dreams and our justice."²

Left-right hyperbole aside, for many black Americans affirmative action remains a potent symbol of the nation's enduring commitment to racial equality. Opposition to race-conscious policies, many suspect, is really a form of racial denial—of wishing away a deep and persistent racism woven into the fabric of American life. Having been shortchanged for centuries, many black Americans are reluctant to give up set-asides or hiring preferences without getting something tangible in return. And they are understandably outraged by conservative attempts to make "reverse discrimination" the overriding civil rights issue of the day.

¹Sniderman, Paul and Thomas Piazza. 1993. *The Scar of Race*. Cambridge, MA: Belknap Press, p. 109.

²National Rainbow Coalition News Release, June 12, 1995, p. 1.

Unfortunately, the symbolism is equally powerful in a negative way for most white Americans, women as well as men. Wary of race-conscious policies from the start, their skepticism has hardened as remedies originally justified as limited and temporary have congealed into a permanent, creeping regime of group classifications and favoritism. Cast as the villains in the affirmative action morality play, white working men naturally enough resent the prospect of being denied a job, a promotion, or a slot in college simply because they're white. (Many Asian-Americans likewise fear that affirmative action imposes an artificial ceiling on their ambitions.)

But their more fundamental objection has to do with the essential fairness of the American system of competitive enterprise. Put simply, they think that success or failure should reflect individual merit, not group membership or attempts by governing elites to dispense privileges on the basis of ethnic politics.

Are we, then, careening toward an irreconcilable conflict between racially distinct conceptions of justice? Not necessarily. Opinion surveys suggest that many Americans seem uncomfortable with the all-or-nothing choice being foisted upon them by liberals who believe that pulling on any loose thread will unravel the entire fabric of civil rights and by conservatives who imagine that their belated embrace of the principle of color-blindness can somehow wipe the historical slate clean of hundreds of years of racial oppression.

While racial and ethnic demagogues on all sides insist there is no middle ground on affirmative action, that's where most Americans instinctively repair. A July 1995 CNN/USA Today poll gave respondents three options: "basically fine the way it is"; "good in principle but needs to be reformed"; and "fundamentally flawed and needs to be eliminated." Sixty-one percent said they would reform affirmative action policies; 22 percent would scrap them; and only 8 percent favored leaving existing policies intact.³

Key political leaders likewise are groping for a third way in the affirmative action debate. House Speaker Newt Gingrich, while adamantly opposed to race and gender preferences, has eschewed the purely negative stance adopted by many Republicans. "I'd rather talk about how do we replace group affirmative action with effective help for individuals, rather than just talk about wiping out affirmative action by itself," he said in April.⁴

³See also Morin, Richard and Sharon Warden. "Americans Vent Anger at Affirmative Action." *The Washington Post*, March 24, 1995, p. A1. The poll also posed three choices: leave affirmative action policies as they are, change them, or do away with them entirely. Forty-seven percent said they would change affirmative action policies; 28 percent would scrap them; and only 23 percent favored leaving existing policies intact.

⁴Kahlenberg, Richard D. "Equal Opportunity Critics." *The New Republic*, July 17, 1995, p. 20.

In a major address on affirmative action in July, President Clinton largely reaffirmed the status quo, although he did concede that some changes are necessary, if only to bring federal policies into line with new Supreme Court guidelines.⁵ The speech won unanimous praise from liberal elites but failed to address the public's doubts about the basic fairness of race-conscious policies. By failing to draw a distinction between the morally unimpeachable end of racial equality and the morally dubious means of race preferences, the President also missed an opportunity to challenge conservatives to join in the search for alternative ways to promote equal opportunity.

Conventional wisdom has it that the Republicans have everything to gain and nothing to lose by using affirmative action as a wedge to split Democrats' biracial coalition. Yet not all Republicans are ready to replace their portraits of Abraham Lincoln with pictures of Jesse Helms: Jack Kemp and Bill Bennett, for example, have warned GOP presidential hopefuls that they could gravely harm the party by whipping up racial passions to win elections. Many Republicans swear they support equal opportunity as fervently as they oppose quotas; now is the time to find out what they're willing to do to make that commitment tangible. By refusing to countenance necessary changes in affirmative action, however, liberals let conservatives off the hook and risk losing everything.

The affirmative action debate touches on two urgent public questions—one about our country's past, the other about its future. The first concerns the perennial American dilemma of race, or how to pay an historical debt to black Americans without generating fresh racial grievances in the process. The second question looks ahead to America's future as a multiethnic democracy, or how to accommodate the nation's growing diversity without validating an ethnocentric politics that threatens to fracture society.

As these questions suggest, what's missing from the debate is a civic perspective that rises above race or other group identity to consider the interests of society as a whole. Such a view grants neither side a moral monopoly; rather, it acknowledges the tensions inherent in affirmative action and rejects the all-or-nothing choice posed by absolutists in either camp. The search for a third way, however, doesn't entail split-the-difference compromises. It starts by reaffirming the basic tenets of U.S. liberalism: that civil rights inhere in individuals, not in classes or groups; that all citizens are entitled to no more or less than the equal protection of the laws; and that government has a responsibility to promote equality as Americans have traditionally understood it—as equality of opportunity rather than equality of result.⁶

⁵Remarks by the President on Affirmative Action." The White House, Office of the Press Secretary, July 19, 1995, p. 9.

⁶Lipset, Seymour Martin. "Equality and the American Creed: Understanding the Affirmative Action Debate." Progressive Policy Institute, June, 1991, p. 1.

Seen through the lens of shared principles rather than group rivalry, affirmative action appears to go too far in some directions and not far enough in others. The emphasis on numerically driven preferences, for example, ineluctably contradicts the principle of equal protection. On the other hand, few dispute that affirmative action as we know it fails to lift the minority poor, whose moral claim on society is strongest.

These twin defects suggest an opportunity to strike a new bargain on racial equality and opportunity. It requires that each side make a key stipulation: Critics of affirmative action should acknowledge that the legacy and lingering presence of racial bias remain significant obstacles to black progress, especially the poorest African-Americans stranded in inner cities. Defenders of affirmative action should concede that preferences cannot be the answer because their reach is too limited and because they make it more rather than less difficult to transcend racial difference.

Reducing the significance of race, looking beyond the color of our skin to our common humanity—this, after all, was the essence of Dr. Martin Luther King's celebrated dream. He invoked the liberal spirit of the Declaration of Independence and demanded that Americans live up to their beliefs in individual liberty and equality before the law. Dr. King's moral vision, not the current push for race-conscious preferences and group entitlements, remains the surest lodestar for a society still struggling to overcome the traumatic legacy of racial subjugation.

In that spirit, this essay proposes a new bargain on equal opportunity that trades group preferences for individual empowerment. Such a bargain entails three steps:

- ▶ First, phase out mandatory preferences in government and reinforce voluntary affirmative action by private employers.

However benign the intention behind them, today's race-conscious preferences or "positive discrimination" contradict the principle of equal protection and therefore can be justified only as temporary, narrowly tailored remedies to past discrimination. Moreover, they put government in the business of institutionalizing racial distinctions, hardly a good idea for a democracy held together only by common civic ideals that transcend group identity. Congress and the President should restore affirmative action's transitional and remedial character by setting termination dates for all federal contract set-asides and other numerically driven goals in procurement and government employment. It's also time to repeal Lyndon Johnson's 1965 executive order requiring federal contractors to adopt minority hiring "goals and timetables." In practice, guidelines encourage employers to hire women and minorities on a rigidly proportional basis.

Alternatively, we should bolster voluntary affirmative action in the private sector, where most jobs and opportunities lie and where the battle for equal opportunity must ultimately be won. A new bargain must include the resources necessary to ferret out discrimination in employment and housing and enforce anti-bias laws. Fortunately, most

major U.S. employers actively recruit minorities and women because they see diversity as a competitive advantage in an increasingly multiethnic society. "Diversity management" is well-entrenched in corporate culture. Such voluntary action, backed by strong anti-discrimination laws, avoids the inflexibility of bureaucratic mandates that lead to *de facto* quotas.

- ▶ Second, replace government preferences with new policies intended to empower poor individuals and communities.

The legacy of racial discrimination today is most starkly reflected in the fact that black Americans are disproportionately poor, more likely to be jobless, dependent on welfare, trapped in decaying and dangerous public housing, and condemned to lousy public schools. Unequal resources and opportunities for the minority poor rather than preferences that mainly benefit middle-class minorities and women should top the civil rights agenda in the 1990s. Indeed, affirmative action is a relatively cheap and ineffective substitute for a broad-scale agenda of economic empowerment aimed especially at the urban poor. Such an agenda should begin by radically lifting the quality of inner-city schools and creating a more effective occupational learning system that links schools to private employers.

New public investments are also required to help low-income families save and build personal assets, start businesses, and become homeowners. At a time of fiscal retrenchment, will the public be willing to redirect resources for these purposes? No one knows, but a majority of people polled consistently say government has an obligation to help compensate the minority poor. This much is certain: The debate over affirmative action stands in the way of building a new public consensus behind a course of economic empowerment.

- ▶ Third, base affirmative action in college admissions on need as well as race, and lift students rather than lower standards.

Notwithstanding the University of California's recent decision to end all ethnic and gender preferences, the case for continuing affirmative action is strongest in college admissions. One reason is that too many minority kids come from broken families and are handicapped by the abysmal quality of inner-city schools. Another is continuing racial and ethnic disparities in standardized test scores and grades, which only partially predict performance but wield decisive influence in determining who gets to go where. But the most important reason is education's democratizing mission. It is the incubator of civic equality, exposing people from different backgrounds to one another and giving them a chance to compete on a roughly equal footing. This is especially true now, as a college degree has become a minimal credential for competing in a new, knowledge-intensive economy.

Graduating from Yale probably opens more doors than graduating from State U. In general, however, colleges prepare people to compete; they don't predetermine the outcome of market competition. Nor has entrance traditionally been based on ruthlessly meritocratic standards; on the contrary, colleges have traditionally given preferences to the children of alumni or faculty, to applicants from other parts of the country or world, to athletes, musicians, and others. Under such circumstances, it's difficult to argue with the Supreme Court's Bakke ruling in 1978 that race can be a factor but not the main factor in deciding who is admitted to college.

Still, two reforms are necessary here as well. First, affirmative action in admissions should be based on need as well as race; that is, targeted to people from low-income families or to students who are the first in their family to attend college. There's no reason for blacks or women from middle-class families to get a preference over a poor white or Asian student. Second, instead of simply lowering standards to meet diversity goals, colleges should take extra steps to lift affirmative action students to the standards they must meet to succeed. Otherwise, affirmative action merely sets up minority students for failure and may also compromise academic standards.

The Changing Politics of Race

Nowhere is affirmative action more embattled than in California, where the University of California's Board of Regents voted in July to end all ethnic and gender preferences in admissions. The proposed California Civil Rights Initiative (CCRI), whose backers are trying to place it on a statewide ballot in November, would go farther, banning preferences in state contracts and hiring as well as college admissions. Polls show solid majorities (including among women) in favor of CCRI.⁷ Such findings are consistent with national surveys, which since the late 1970s have consistently reflected public ambivalence on affirmative action: majority support for efforts to compensate *individuals* for the effects of discrimination, but deep misgivings about *group* preferences, and outright hostility to quotas.

Differing perceptions about how much racial progress we have made in the last three decades also exert a powerful influence on attitudes toward affirmative action. Here, whites tend to be optimistic and blacks pessimistic. In a sense, they are both right: While overt, legally sanctioned racism has virtually disappeared, covert or unconscious discrimination continues in many settings, like a surreptitious thumb tipping the scales of opportunity against blacks.

Experiments by the Urban Institute using equally qualified pairs of black and white applicants for jobs and housing demonstrate that the former still face unequal

⁷Knight-Ridder Service. "60% in California Would Repeal Affirmative Action, Poll Finds." *The Boston Globe*, March 8, 1995, p. 73.

treatment. In one such employment "audit" in 1990, for example, the Urban Institute found that white seekers of entry-level jobs advanced farther in the hiring process 20 percent of the time, while black applicants went farther only seven percent of the time. Researchers concluded that old-fashioned bias against blacks was three times more likely than "reverse discrimination" against whites.⁸

Such evidence suggests we are still far from the color-blind society frequently invoked by critics of affirmative action. On the other hand, some defenders of race-conscious policies undermine their own credibility by refusing to acknowledge that a sea-change has occurred over the past 30 years in America's racial mores. The politics of race, note authors Sniderman and Piazza, has changed dramatically since the 1940s and 1950s. Then, the overriding issue was race itself: whether blacks should enjoy the same rights as white citizens. That issue was settled in the 1960s, and there are now a number of distinct racial issues on which the public lines up in different ways. "Prejudice has not disappeared, and in particular circumstances and segments of the society it still has a major impact," they write. "But race prejudice no longer organizes and dominates the reactions of whites; it no longer leads large numbers of them to oppose public policies to assist blacks across-the-board. It is . . . simply wrong to suppose that the primary factor driving the contemporary arguments over the politics of race is white racism."⁹

It's also difficult to square images of racial oppression with the tremendous economic and social strides black Americans have made since the mid-1960s. Regrettably, such progress has often been obscured by unbalanced media portrayals that dwell on the pathologies of the urban underclass rather than the achievements of an expanding black professional and middle class. The economic gap between whites and blacks is closing: In 1992, the median income of black married couples with children was one percent below the average for all American families. Family structure, rather than race, is the key determinant of family income.¹⁰

Such gains, of course, inevitably chip away at the historical rationale for affirmative action: It's hard to see an entire class of people as victims when many of them are better off financially than you are. It's also true that affirmative action increasingly resembles traditional special-interest politics, replete with organized constituencies (such as minority contractor associations) that work closely with congressional allies to ward off threats to programs that directly benefit them. And while

⁸Turner, Margery Austin et al. 1991. *Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring*. Washington, DC: The Urban Institute, p. 2.

⁹Sniderman et al., p. 5.

¹⁰Themstrom, Abigail, and Stephan Themstrom. "The Promise of Racial Equality" in *The New Promise of American Life*, Lamar Alexander and Chester E. Finn Jr., eds. (The Hudson Institute, 1995) p. 91.

the evidence suggests that these programs have made at best a modest contribution to blacks' progress, their political and moral costs are indisputably high.

The quest for racial preferences has dissipated the moral authority of the civil rights movement. For much of the public, the once-broad crusade for racial justice seems to have degenerated into narrow demands for racial entitlement. Civil rights groups which in the 1960s had a biracial, ecumenical cast now act more like ethnic lobbies. The conflating of civil rights and race preferences, meanwhile, has allowed conservatives to posture as the champions of color-blind justice.

Finally, there is growing unease about affirmative action's steady drift towards proportionalism, the notion that the number of women and minorities in virtually every setting must reflect their percentage of the nearby population. In addition to erasing any real distinction between quotas and affirmative action, this trend reinforces what has been variously described as the "new racialism" or "identity politics" that views public questions mainly through the prism of race, gender, and ethnicity.

Second Thoughts on Diversity

From a civic perspective, the push to extend group preferences in the name of diversity is troubling.

As a social aspiration—as an expression of American tolerance and openness—diversity is unquestionably a worthy goal. The jostling and mixing of peoples from different places and cultures gives our society a unique vibrancy. U.S. businesses, competing in an increasingly multiethnic environment, have learned that a diversified workforce is a competitive asset if not a necessity.

As a government mandate, however, diversity assumes a less benign character. It weakens the civic ethic of self-reliance by encouraging citizens to recast themselves as victims to secure government favors. In the hands of bureaucrats, the quest for diversity quickly turns into a numbers game. Since no one knows how much diversity is the right amount, the safest course is to strive for the proportional representation of each protected group. The bean-counting logic of bureaucracy and the ideology of group rights thus combine to push us toward quotas.

Defenders of preferences frequently note that white males still predominate in the upper reaches of society. This is true, but it more accurately reflects discrimination 20 to 30 years ago, when today's top executives began their climb up the corporate ladder, than present conditions. In any event, the affirmative action debate can't be reduced to a pure struggle for power among different races, sexes, or ethnic groups. For most Americans, vital principles also are at stake. As sociologist Seymour Martin Lipset has pointed out, group preferences and entitlements run against the grain of an "American creed" that emphasizes individual rights and achievement, meritocratic values, and

equality defined as a chance to compete on fair terms, not a guarantee of equality of result.

The civil rights movement triumphed not by challenging but invoking these underlying beliefs—by forcing white Americans to confront the contradiction between their ideals and the ugly realities of segregation. Race-conscious policies now have a tenuous hold precisely because they seem to contradict the ideal of equal, color-blind citizenship. Americans, ever pragmatic, may tolerate temporary deviations from their liberal, individualistic creed to pay an historical debt. But they are unlikely to accept its overthrow by a new ideology of group rights, that, in its most extreme form, indicts the creed itself as the cause of racism rather than its cure.

From the treatment of Native Americans to slavery, from Jim Crow to the internment of Japanese-Americans during World War II, U.S. history abounds with cautionary tales of people lumped into groups and deprived of their civil rights. Having at last recognized and tried to rectify these injustices, it seems odd and dangerous to put government back into the business of classifying citizens according to race, gender, and ethnicity. This was originally justified as a temporary measure to remedy the effects of discrimination. Now, however, the goal of some affirmative action supporters seems to be the non-remedial purpose of promoting diversity for its own sake.

The new assumption is that government should not merely set fair rules of competition but apportion equal outcomes by group in the struggles of life. Even if this were within government's grasp, government could do so only by restricting some citizens' freedom and opportunity. Why should a poor white kid in Kentucky struggle to get ahead if his government decrees that whites as a group already hold too many of the best jobs? Government cannot ordain perfect justice but it can, through an unthinking embrace of group-think, give official sanction to a crude determinism that sees character and values as shaped chiefly by skin color or gender.

The Clinton Administration unfortunately has endorsed diversity as a pretext for racial preferences. In a case before the U.S. Court of Appeals, the Justice Department reversed a previous decision to back a white school teacher laid off by the Piscataway, NJ, school board to promote faculty diversity. In arguing that the board acted legally, the Clinton Justice Department has crossed a line carefully drawn by the Supreme Court to prevent layoffs or firings purely on the basis of race.

The facts of the Piscataway case are these: The school board hired one black and one white business education teacher on the same day in 1980. Eight years later, budgetary pressures forced the board to lay off one of the equally qualified teachers. Instead of flipping a coin—the method previously used for resolving similar dilemmas—the board chose to keep the black teacher on grounds that she was the only black in the 10-member business department. District-wide, however, blacks made up 10 percent of teachers, compared to six percent in the county's available labor pool.

The Supreme Court has previously rejected (in *Wygant v. Jackson Board of Education*) a similar plan to protect minorities against layoffs either to remedy "societal discrimination" or to provide minority "role models." If the Courts uphold the Piscataway layoff policy, however, the effect will be to dramatically lower the bar for justifying discrimination against white workers. Such a ruling would sever the increasingly tenuous link between race-conscious remedies and specific acts of discrimination and wipe out the distinction between preferences and quotas.

Beyond Black and White

The rise of ethnic pluralism in America is another reason for reassessing group preferences.

In the 1960s, civil rights was largely a matter of black and white. Since then, Asian-Americans have grown from roughly one million to 8.5 million; Latinos from 3.5 million to 23 million.¹¹ Groups classified as minorities now make up one-third of the population; add women and about two-thirds of the U.S. population is eligible for preferences.

There is something inherently absurd in classifying a majority of the country as victims and lumping them in such hopelessly broad categories as "Hispanic" or "Asian." A majority of Hispanics describe themselves as white, while immigrants from Korea or Japan have little in common with those from the Philippines or the Indian Subcontinent. Yet more groups are rushing to get into the victimization act: Some Arab-Americans want the government to designate a new minority—people of Middle Eastern background.

The more claimants for protected status, the more the zero-sum logic of preferential treatment multiplies opportunities for group conflict. In Los Angeles, for example, Latino advocacy groups have challenged what they regard as the overrepresentation of blacks in local government. Asians have long complained of *de facto* quotas that limit their numbers in California's most prestigious universities, despite their high grades and test scores. In fact, polls show majorities of Latinos and Asians, as well as women, favoring CCRI. The successful legal challenge to the University of Maryland's minority scholarship program came not from an "angry white male" but from an Hispanic student excluded from the blacks-only program.

As America becomes more diverse, it's more important than ever that government be as neutral as possible with respect to race, gender, and ethnicity. The alternative is stepped-up competition among ethnic groups for political power and government favors—a formula for an American version of the communal strife that has wracked

¹¹Lauter, David. "Where to Draw the Lines?" *The Los Angeles Times*, March 28, 1995, p. A1.

India and other countries that recognize group rights. Already, identity politics is roiling U.S. campuses, where oppression studies have mushroomed, where minority students re-segregate themselves in ethnic dorms, and where an excruciating sensitivity to race and gender protocol has sparked a backlash against "political correctness."

Like any other set of public policies, affirmative action must be adjusted periodically to evolving realities. The starting point is to reject the stark up-or-down choice posed by left and right—either reflexive defense of the status quo or a rush to dismantle all group-conscious policies. Next, we should take three steps toward a new bargain on equal justice and opportunity.

Step 1: Phase Out Mandatory Preferences

The President and Congress should start refocusing affirmative action by phasing out mandatory preferences in contract set-asides, public jobs, and hiring by private firms that do business with the government.

According to the Congressional Research Service, the federal government operates 160 race and gender preference programs.¹² The largest category is set-asides, in which agencies typically allot 10 percent or more of federal contracts to businesses owned by minorities or women. The Supreme Court's recent *Adarand* decision dramatically raised the hurdle for justifying all racial and ethnic classifications and policies. Henceforth, set-asides and other numerically targeted preferences must be narrow in scope, limited in duration, pegged to specific findings of past discrimination, and diffuse in the burden they place on non-protected groups. It is doubtful that many federal preferences can survive the Court's new standard of "strict scrutiny." President Clinton also has called for tightening up on abuses in set-asides, such as white contractors who suddenly discover they have Native American ancestors or give their wives title to the business in order to qualify as a minority-owned enterprise.

Like welfare or other government transfer programs, set-asides are essentially redistributive. They steer public resources to minority businesses but do little to develop the skills that would allow those concerns to prosper independent of government. A study by the General Accounting Office shows that the longer companies stay in Small Business Administration's Section 8 (a) set-aside program, which is the model for most federal set-asides, the less likely they are to develop outside business that would sustain them when they no longer get non-competitive government contracts.¹³

¹²Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preference Based on Race, Gender, or Ethnicity." Congressional Research Service, Feb. 17, 1995.

¹³England-Joseph, Judy. "Status of SBA's 8(a) Minority Business Development Program." General Accounting Office, March 6, 1995, p. 2.

Instead of rigging the competition for public contracts, affirmative action should help minority businesses compete on even terms. In the wake of the Supreme Court's 1989 decision striking down a Richmond, VA set-aside program, Birmingham, AL has jettisoned its contract set-asides and is working instead with the business community to nurture minority-owned enterprises. This voluntary model builds the capacities that allow minority businesses to stand on their own in market competition rather than using public resources to shield them from that competition.¹⁴

It's also time for Congress to end the bidding discounts, tax credits, and set-asides the Federal Communications Commission uses to encourage minority- and female-owned businesses in telecommunications. There's little evidence that such preferences have achieved their stated purpose of promoting "minority views" in broadcasting; the content of broadcasting is determined by what people want to see or hear, not by the complexion or sex of company owners. And as Jeff Rosen points out in *The New Republic*, even large and successful minority businesses are eligible for set-asides for cellular licenses.¹⁵ Why do they need a boost from government?

Census figures show that minority- and female-owned enterprises are growing rapidly.¹⁶ In keeping with the principle that group preferences should be limited and transitional, we should begin phasing out set-asides over, say, a five- to 10-year period. During that period, we should begin phasing in new empowerment initiatives of the kind discussed below.

In addition, President Clinton should repeal Lyndon Johnson's 1965 Executive Order 11,246, which requires federal contractors to file written plans with the government specifying hiring goals and timetables. This is the federal government's largest affirmative action program. Studies by Jonathan Leonard of the University of California and others show that the executive order has only modestly increased black employment and income, while having little effect on women. Even where gains are posted, they often stem from a shift in employment from firms with no government business to federal contractors. Although the law bans formal quotas, government guidelines push employers to hire by the numbers to avoid the inference of discrimination.

Steady progress by minorities and women in public employment also suggest that we can safely dispense with hiring preferences in government. Blacks are actually

¹⁴Barrett, Paul M. "Birmingham's Plan to Help Black-Owned Firms May Be Alternative to Racial Set-Aside Programs." *The Wall Street Journal*, Feb. 27, 1995, p. A14.

¹⁵Rosen, Jeffrey. "Affirmative Action: A Solution." *The New Republic*, May 8, 1995, p. 23.

¹⁶Mehta, Stephanie N. "Affirmative Action Supporters Face Divisive Problem." *The Wall Street Journal*, June 2, 1995, p. B2.

overrepresented in federal government (17 percent of the workforce compared to 10 percent of the private workforce) and many big-city governments as well; women are at 40 percent of the federal workforce and growing.¹⁷

At a time when governments everywhere are in the throes of reinvention and downsizing, it makes little sense to steer women and minorities toward public employment or contracting. Writing in *The New Democrat*, Joel Kotkin notes that in California, affirmative action tends to channel minorities and women to relatively stagnant sectors of the economy—to government and large corporate bureaucracies instead of to dynamic small- and mid-sized firms that are generating most innovation and job growth in the state.

Voluntary Affirmative Action

Since most jobs and lucrative opportunities are found in the private economy, voluntary affirmative action by employers clearly will do more to equalize opportunities for minorities and women than government set-asides and preferences. Most large companies actively seek to diversify their workforce and small employers are under social and legal pressure to do the same. In addition to barring outright discrimination, the Civil Rights Act of 1964 (in Title VII) permits companies to be sued when they *unintentionally* discriminate—when their hiring and layoff policies result in a "disparate impact" on women and minorities. (The Civil Rights Act of 1991 restored the burden of proof on employers to justify such practices on the basis of business necessity.) This "rebuttable presumption" acts as a safeguard against unconscious discrimination but, unlike government's numerical goals and timetables, does not induce employers to hire or fire by the numbers.

As part of any effort to reform affirmative action, President Clinton should challenge Congress to give the Equal Employment Opportunity Commission (EEOC) the resources it needs to sift frivolous from serious bias claims and to detect patterns of job discrimination. At the same time, however, Congress should direct the EEOC to avoid actions—such as using computer models to fix the supposedly "exact" percentages of qualified women and minorities available to employers in a given location—that compel companies to adopt race or gender proportionalism to avoid official harassment.¹⁸

Since anti-discrimination litigation is time-consuming and costly, it makes sense to explore alternatives for reinforcing voluntary affirmative action. A useful tool is the "employment and housing audit" pioneered by the Urban Institute, as described earlier. Increasing their frequency—say, by giving government grants to community groups—would aid in detecting discrimination, but the increased prospect of being

¹⁷"Central Personnel Data File." United States Office of Personnel Management. September 1993.

¹⁸Bovard, James. "The Latest EEOC Quota Mandate." *The Wall Street Journal*, April 27, 1995, A14.

audited would also act as a deterrent to employers and landlords. Consumer boycotts and other forms of public suasion have also proved effective at encouraging laggard firms to hire minorities.

Step one in reforming affirmative action, then, is to shift from mandatory preferences to voluntary action by employers, with anti-discrimination laws and public scrutiny as an insurance policy against backsliding. By itself, this step won't quell the controversy over race and gender preferences; it won't console whites who believe they've lost a job or promotion or a slot in medical school because of affirmative action. But it will get the government out of the business of group classification and preferences, halting a trend that promises heightened ethnic conflict.

Dubbing this approach "the separation of race and state," the weekly *Economist* recently pinned the key point:

"It is true, of course, that race distinctions will not disappear from society simply because governments decline to recognize them. But it is equally true, and even more important, that race distinctions cannot disappear so long as governments not merely recognize but enforce them."¹⁹

Step 2: Replace Preferences With Empowerment

If race and gender preferences commit government to a divisive and ultimately futile quest for equal results, the answer is not simply to jettison them but to get serious about making equal opportunity a reality for America's minority poor. Step two in the new bargain is therefore to replace government preferences for groups with new public policies that empower individuals to get ahead regardless of race, gender, or ethnicity.

Most studies confirm that the impact of preferences on minority or female employment and income is exceedingly modest. For example, a report on black economic gains prepared for the U.S. Labor Department reached this conclusion:

"The general pattern is that the racial wage gap narrowed as rapidly in the 20 years prior to 1960 (and before affirmative action) as during the 20 years afterward. This suggests that the slowly evolving historical forces we have emphasized in this report—education and migration—were the primary determinants of the long-term black economic improvement. At best, affirmative action has marginally altered black wage gains about this long-term trend."²⁰

¹⁹"A Question of Colour." *The Economist*, April 15, 1995, p. 13.

²⁰Smith, James P. and Finis R. Welch. "Closing the Gap: Forty Years of Economic Progress for Blacks." The RAND Corp., February 1986, p. 99.

Moreover, as sociologist William J. Wilson has pointed out, affirmative action policies exhibit a class bias that favors middle-class professionals and entrepreneurs while offering little to people stuck in poverty.

In a seminal article titled "The Competitive Advantage of the Inner City," Michael Porter of the Harvard Business School argues for shifting public resources from transfer payments, subsidies, and race and ethnic preferences to efforts to create businesses in the inner city. Preferences, he notes, rarely benefit companies located in low-income neighborhoods:

"In addition to directing resources away from the inner city, such race-based or gender-based distinctions reinforce inappropriate stereotypes and attitudes, breed resentment, and increase the risk that programs will be manipulated to serve unintended populations."²¹

What's tragic about the current impasse on affirmative action is that it blocks attempts to build a new biracial consensus behind a comprehensive attack on inner-city poverty. For blacks trapped at the bottom of the economic pyramid, the main obstacle is not vestigial discrimination but the breakdown of critical social and public institutions, chiefly the family and schools. Can anyone doubt that dramatically lifting their academic and occupational skills would have a greater impact on their life prospects than maintaining preferences that mostly benefit middle-class blacks, Hispanics, and women?

Empowerment is a broad agenda that encompasses everything from welfare reform to national service, youth apprenticeship, and other ideas for expanding access to education and job training. But it would be especially fitting to focus immediately on the *economic* legacy of discrimination—on the profound and lasting impact on minority citizens of their systematic exclusion from full participation in the free enterprise system. This legacy includes lower rates of business formation, of asset accumulation and inheritance, and especially of home ownership.

- ▶ **Asset-building strategies.** According to the Census Bureau, the distribution of personal assets (property, savings, and investments) by race is even more skewed than the distribution of income: Whites possess 92 percent of Americans' total net worth while blacks have only 3.1 percent.

When it comes to building personal assets, middle-class Americans already benefit from "affirmative action" in the form of the mortgage interest deduction and tax breaks for private pensions and savings accounts. Yet our social policies, especially welfare, promote consumption rather than asset accumulation. An empowerment strategy should

²¹Porter, Michael. "The Competitive Advantage of the Inner City." *Harvard Business Review*, May 1995, p. 55.

offer poor families similar incentives to save and build personal assets. Michael Sherraden of St. Louis University has proposed an asset accumulation system open to all Americans, but with special incentives for the poor. It would create Individual Development Accounts (IDAs), tax-free savings vehicles for low-income families whose deposits could be matched by government, businesses, churches, and charities. The Corporation for Enterprise Development has designed a National IDA Demonstration that would create 100,000 IDAs for low-income families at a cost to the federal government of \$100 million.

- ▶ **Home ownership.** Our homes are the most important asset most of us will ever own. Stable communities, moreover, are rooted in high rates of home ownership. While 67 percent of whites own their own homes, only 45 percent of blacks do.²² Instead of dismantling the U.S. Department of Housing and Urban Development (HUD), as some Republicans propose, why not reorganize it around the goal of lifting home-ownership rates among the poor generally—a shift that would disproportionately benefit the minority poor? HUD can promote home ownership by shifting dollars now spent on rental subsidies (the total exceeds \$10 billion) toward grants to local governments to clear sites for construction of low-cost housing and cut mortgage interest rates for owner-occupant buyers in poor neighborhoods.²³ Localities should also revise building and housing codes to make it easier to build low-cost housing.

- ▶ **Public education.** Finally, no public task is more urgent than dramatically lifting the quality of inner-city schools. More money may be necessary but it will be insufficient: Big city school districts typically spend well above the national average. More important is to change the bureaucratic organization and culture of our standardized public school system.

The first step is for the states: They should withdraw the local school districts' monopoly on owning and operating public schools, freeing teachers and other civic entrepreneurs to create innovative public schools. Now operating in 12 states, such "charter" schools expand choices for parents and children while exerting real competitive pressure on traditional schools, who risk losing students (and public funding for them) if they fail to improve. Unlike conservative proposals to privatize public schools through vouchers, charter schools operate under license to public authorities without the stifling rules and procedures of central school districts and unions. The federal government can help boost these efforts by letting the states use federal education dollars to experiment with models and help capitalize new schools.

²²Statistical Abstract of the United States, 1994. Washington, DC: GPO, Table 1216, p. 735.

²³Husock, Howard. "Up From Public Housing." *The New Democrat*, January/February 1995, p. 50.

These initiatives are modest in cost if not in scope. But they are only the beginning. Ultimately, the only way out of the quagmire of group-conscious policies is to redouble the nation's commitment to equal opportunity for all. This requires not only vigilance in combatting residual discrimination, but also positive steps to lift the prospects of poor people packed into decaying urban neighborhoods. Conservative critics of preferences have ignored both these moral imperatives and the public costs they imply. No wonder their calls for a color-blind Constitution and society ring hollow to Americans for whom discrimination is not an abstraction but a painful reality.

In pursuing a third way on affirmative action, we must be clear on this point: redeeming America's historical obligation to the victims of slavery and segregation is not a cost-free proposition. A serious agenda for equal opportunity and individual empowerment will require financial sacrifice from society as a whole.

Step 3: Reform Affirmative Action in College Admissions

The third step involves college admissions, where the abysmal quality of many inner-city schools, continuing racial and ethnic disparities in standardized test scores, and the special role Americans have traditionally assigned to education in equalizing opportunities combine to justify some form of affirmative action. Nonetheless, two reforms are essential: 1) we must lift students rather than lowering standards; and, 2) we must target students by need as well as race.

U.S. colleges compete for promising minority students almost as furiously as for star athletes. The dearth of candidates with high test scores creates pressure to lower official standards to meet affirmative action goals. On scholastic aptitude tests (SATs), for example, blacks score on average (combined math and verbal) nearly 200 points below whites. This has prompted protests and lawsuits from white and Asian students denied entry despite higher grade point averages and SAT scores.

Such measures, while useful, are not comprehensive or infallible predictors of future performance. Moreover, few colleges base admissions solely on meritocratic standards. Many take non-academic activities into account: participation in sports, clubs, student government, or civic work. Others give preferences to the children of alumni or faculty, limit local enrollment to leave space for students from other parts of the country, and offer special scholarships for students from low-income families. Under such circumstances, it is difficult to argue that colleges may consider any factor *except* race, ethnicity, and gender. The right standard is still set by the Supreme Court in its 1978 Bakke decision: Race should be a factor but not the decisive factor in college admissions.

Too often, however, accepting ill-prepared students under affirmative action plans sets them up for failure and reinforces stereotypes of intellectual deficiency not only held by whites but also internalized by minorities. Studies show that only one-third of black students who enter college graduate within six years, compared with 57 percent for

whites.²⁴ It's not just students who suffer: Institutions that allow the quest for diversity to compromise academic excellence risk repeating the descent of New York City's College, once the "Harvard of the proletariat" and now a venue for ethnic politics.

Given the disparity in test scores, how can colleges lift students rather than lower standards? One way is to adopt the military model of affirmative action that sociologist Charles Moskos says has made the army the most successfully integrated institution in America. This model combines goals (but not timetables) for minority promotion with rigorous training to ensure a sufficient pool of qualified candidates for promotion. Some colleges already are trying similar approaches: Boston College enrolls affirmative action students in a six-week summer training course and requires that they sign a contract pledging to make every effort to graduate. The results are impressive: 95 percent of these students graduate in four years, compared to 88 percent for the entire student body.²⁵ An alternative is to guarantee all high school students a slot in community colleges to prepare them for entry into more demanding four-year schools.

Colleges should also work more closely with high schools to create preparatory programs for minority students. In California, for example, officials estimate that only five percent of black and four percent of Latino public high school students complete the course and grade requirements necessary for admission to the University of California. But eligibility for both groups swells to over 40 percent when students are enrolled in preparatory courses.²⁶

University officials worry, however, that the proposed CCRI would prohibit such programs because they do not meet its standard of pure color-blind neutrality. Nor, of course, would race-conscious recruiting of promising minority students—and indeed the architects of the initiative admit that it would lead to a dramatic drop in minority enrollment in top-ranked schools.

The second problem posed by affirmative action in college admissions is that it ignores wide income variations among members of a group. It's hard to defend giving an advantage to Bill Cosby's kids, to an engineer who recently emigrated from Peru or India, or to an affluent white woman over the son of a proverbial white coal-miner or a recent Russian immigrant. Some argue that the purpose of affirmative action is not just to widen opportunities but to indemnify people for historic wrongs. Since college slots are not unlimited, however, it makes sense to target preferences to people who really

²⁴McGrory, Brian. "Pathways to College - Affirmative Action: an American Dilemma." *The Boston Globe*, May 23, 1995, p. 12.

²⁵*Ibid.*, p. 12.

²⁶Rogers, Kenneth. "Don't Lower the Bar - Elevate the Students." *The Los Angeles Times*, March 10, 1995, p. B7.

need them—to kids who are the first in their family to go on to higher education, for example, or to those from poor or working poor families.

Simply substituting class for race as the basis for affirmative action runs afoul of the test-score gap; the likely result would be to make poor whites and Asians the main beneficiaries. The better solution is to combine the two as a means of targeting affirmative action to truly needy members of minority groups. Since colleges already collect lots of financial information from students seeking loans, grants, or scholarships, tempering affirmative action with a means test shouldn't be hard.

All this raises an obvious question: If preferences are wrong in public contracting, why are they permissible in college admissions? One answer is that colleges have a broader public mission than career preparation and meritocratic sorting. Americans have always believed that education is the key not only to opportunity but to an enlightened citizenry capable of self-government. Since World War II, we've invested heavily in college opportunity because we see it as integral to both economic growth and equality. This is even more true today, as the global information economy puts a premium on knowledge and mental agility.

Affirmative action in college is not a guaranteed outcome but an opportunity to develop civic capacities and compete successfully in the economic arena. Like other race-conscious preferences, it should be viewed as a temporary expedient until representation of minorities in colleges is roughly equivalent to that of whites. In the meantime, it should be done in ways that don't compromise academic standards or confer benefits on people who are not needy.

Conclusion

At the heart of the affirmative action debate are conflicting interests and visions of justice that divide largely on racial lines. There is, however, a third option—a civic perspective that works to synthesize these visions into a new bargain on racial justice and equal opportunity. The moral underpinning of such a bargain is Dr. King's vision of a society that judges individuals by "the content of their character" rather than the color of their skin.

A recent series of articles in *The New Democrat* provides thematic building blocks for the third way: Start phasing out mandatory group preferences; wherever practical, target affirmative action by need, not by race alone; shift efforts to combat inequality from the courts and federal bureaucracies to the economic arena; don't lower standards but lift people up to common standards instead; don't bestow group entitlements, but instead use public resources to build individual capacity.

Finally, as author Jim Sleeper argues, our political leaders should have more faith in civil society.²⁷ Rather than base affirmative action on the insulting premise that government must perpetually compel citizens to do the right thing, it's time to acknowledge incomplete yet incontrovertible progress and move on to the next phase of the struggle for racial justice. And instead of waving the bloody shirt of racism to suppress dissent, it's time now to air public doubts and trust in the power of democratic deliberation to move us closer to common ground.

Will Marshall is president of the Progressive Policy Institute.

Acknowledgements

Michael Solomon of the Progressive Policy Institute provided invaluable research for this essay.

I also wish to acknowledge the generous assistance and insights of many colleagues, especially Chuck Alston, Bill Galston, Ed Kilgore, Al From, Doug Ross, and Lee Lockwood. I am particularly indebted as well to Randall Kennedy, Jack Bunzel, and Glen Loury for their thoughtful comments and criticisms.

²⁷Sleeper, Jim. "Leap of Faith." *The New Democrat*, May/June, 1995, p. 23.

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Affirmative Action

DAILY POINTS

PRESIDENT SUPPORTS AFFIRMATIVE ACTION DONE THE RIGHT WAY

July 19, 1995



"Affirmative action has been good for America. But that does not mean it has always been perfect. That does not mean that it should go on forever. Affirmative action should be retired when its job is done -- and I am resolved that that day will come. But the job is not done."

President Clinton, Wednesday, July 19, 1995

Our Central Challenge. As we approach the 21st century, the President believes we must restore the American Dream of opportunity; find Common Ground amid our great diversity of opinion and experience; and strengthen the American commitment to Equal Opportunity for all, special treatment for none.

Presidential Directive to Ensure Affirmative Action is Fair. Affirmative action must be consistent with our ideals of personal responsibility and merit. Today, the President directs all federal agencies to comply quickly with the Supreme Court's decision in Adarand and to apply four standards to make sure that all affirmative action programs are fair:

- No quotas.
- No reverse discrimination.
- No preferences for unqualified individuals.
- No continuation of programs that have met their goals.

Any program that does not meet any of these four principles must be eliminated or changed.

"Set-Asides" Need Reform. In some cases, "set-asides" have been misapplied, misused or even intentionally abused. Therefore, the President Clinton has ordered that we:

- **Crack Down on "Set-Aside" Fraud and Abuse.** Make sure set-asides go to businesses that need them most. No permanent set-asides for any company.
- **Comply with the Supreme Court's Adarand decision.** Limit set-asides to areas where serious discrimination remains.
- **Do More to Help Disadvantaged People and Distressed Communities.** The President has directed the Vice President to develop new ways to use government contracting to help businesses locate in distressed areas and hire workers from those areas.

Done Right, Affirmative Action Works. President Clinton ordered a review of the government's affirmative action programs. That review concluded affirmative action is still an effective tool to expand economic and educational opportunity:

- The military's approach, ensuring it has a wide pool of qualified candidates for every promotion, has given us the world's most diverse and best qualified military leadership.
- Education Department programs targeted at minorities do a lot of good with a small investment -- about 40 cents of every \$1,000 in student aid.
- The goals and timetables first instituted by President Nixon for large federal contractors have prevented discrimination and fostered fairness-- without quotas or mandated outcomes.
- "Set-asides" have helped build up firms owned by minorities and women who were historically excluded from the "old boy" network. They have helped a new generation of entrepreneurs to flourish, fostering self-reliance and economic growth.

We Have Made Progress Toward the Ideal of Equal Opportunity: We have passed major milestones: Emancipation, women's suffrage, civil rights, voting rights and equal rights. That progress, won by hard work and countless acts of conscience, has allowed millions of Americans, once on the fringe, to contribute to our democracy and prosperity:

- A true black middle class is emerging.
- Women are now major earners.
- Higher education is now more open to women, racial and ethnic minorities.
- Police departments across the country reflect diversity of their communities.

We Cannot Retreat While Discrimination Continues. We must not become the first generation of Americans since the end of Reconstruction to narrow the reach of equal opportunity. We must continue the struggle toward equal opportunity for all and special treatment for none. America cannot afford to waste a single person as we confront new challenges. Affirmative action has closed many gaps in economic opportunity, but we still have a long way to go:

- Unemployment rate for African-Americans remains about twice that of whites.
- Women still make only 72 percent as much as men.
- Average income for a Hispanic woman with a college degree is less than that of a white man with a high school degree.
- The recent Glass Ceiling Report found that women in the nation's largest companies hold less than 5 percent of senior management posts. The number is lower for African-Americans, Hispanic and Asians, who hold less than 1 percent each of those positions.
- In 1994, federal government received more than 90,000 complaints of employment discrimination based on race, ethnicity and gender.
- Hate crimes and violence are still ugly realities in the lives of many Americans.

Those Who Would Divide Us Threaten America's Future. Those who prey on our worst instincts and sow division cannot succeed. America will survive and prosper as a society if we are confident and united. Today in America, 150 racial and ethnic groups co-exist in harmony -- an achievement unmatched in human history. President Clinton believes we have a responsibility to renew and strengthen the ideals that fostered that unity.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20502-0001

LRM NO: 1667

FILE NO: 1004

6/14/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 28

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OMB CONTACT: Ingrid SCHROEDER 395-3883
Legislative Assistant's line (for simple responses): 395-3454
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DEADLINE: 5:00 TODAY Wednesday, June 14, 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will effect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Please note the discussion on page 2 of the Supreme Court's June 12th decision in the Adarand case. *

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ACTION**

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**RESPONSE TO
LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 1887
FILE NO: 1004**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

TO: Ingrid SCHROEDER 395-3883
Office of Management and Budget
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Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)
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SUBJECT: LABOR Proposed Testimony on Affirmative Action - Office of Federal Contract Compliance

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
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DRAFT

STATEMENT OF SHIRLEY J. WILCHER
DEPUTY ASSISTANT SECRETARY FOR FEDERAL CONTRACT COMPLIANCE
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

June 13, 1995

Honorable Chair and Members of the Committee:

My name is Shirley J. Wilcher, and I am the Deputy Assistant Secretary for Federal Contract Compliance, Employment Standards Administration, U.S. Department of Labor. I appreciate the opportunity to appear before the Committee to discuss the Office of Federal Contract Compliance Programs (OFCCP), its mission and its efforts to promote equal employment opportunity in the American workplace. In particular, I would like to thank the Chair, Senator Kassebaum, with whom we had an opportunity to meet earlier this year and who I know has a keen interest in and understanding of our program. I would also like to thank Senator Kennedy, the Ranking Minority Member for inviting me to address the Committee. I request that my written statement be entered into the record of these proceedings and I will briefly summarize my remarks.

As you are all aware, President Clinton has asked for a comprehensive review of Federal affirmative action policies. The reasons for this review are: (a) to examine current Federal laws and regulations regarding affirmative action policies; (b) to analyze their effectiveness and relevance to the current economic climate; and (c) to recommend changes as appropriate. This review is ongoing, and I am advised that the President has drawn

no conclusions and made no decisions about the enforcement of affirmative action policies. Until such time as the President's review has been completed, I can only respond to questions that pertain to the OFCCP and the enforcement of its nondiscrimination and affirmative action mandate under the laws we administer.

I do note, of course, that on June 12 the Supreme Court handed down its decision in Adarand Constructors, Inc. v. Peña. The decision has significant implications for Federal programs that accord minority preferences; however, the decision should not undermine or limit the Department's enforcement of the affirmative action provisions of Executive Order 11246. The numerical goals approach, which implements the affirmative action provision of Executive Order 11246, is not based on racial or gender preferences, or quotas. Rather, it is a mechanism designed to measure the success of contractors' good faith efforts at broadening the pool of qualified candidates for entry level or promotional opportunities. Quotas are expressly prohibited by OFCCP's regulations, and selections for employment or promotion must be made without regard to race or gender, consistent with Title VII of the Civil Rights Act. Accordingly, the decision Adarand should not have an effect on affirmative action as it is implemented under Executive Order 11246.

While I cannot, in this forum, engage in a general debate about the nation's affirmative action policies, I am pleased to discuss the OFCCP, our mission and our methods of administering the laws that have been entrusted to the agency. Additionally, I

would like to discuss how we are also working to update our procedures, streamline our operations and improve our ability to respond to contractor and constituent needs.

Over the past few months there has been an extended national debate over our nation's affirmative action programs. At times, the debate has been characterized by historical inaccuracies, factual errors, and a complete misuse of the terms that describe these important public policies. Even worse, at times the discussion has degenerated to the point that reasonable voices could not be heard.

I would like to thank the Senate Labor and Human Resources Committee for the opportunity to have a calm, reasoned, and informed discussion about affirmative action as enforced by the OFCCP.

OFCCP is responsible for the administration of three equal employment opportunity programs that apply to Government contractors and subcontractors: Executive Order 11246 as amended, Section 503 of the Rehabilitation Act of 1973 and the affirmative action provisions of the Vietnam Era Veteran's Readjustment Assistance Act of 1974. Taken together, these laws ban discrimination and require federal contractors, and subcontractors, as a condition of their Government contracts, to take affirmative action to ensure that minorities, women, individuals with disabilities, special disabled and Vietnam era veterans have an equal opportunity to compete for employment.

Approximately 22 percent of the labor force (about 26

million workers) is employed by federal contractors or subcontractors subject to the laws administered by OFCCP. In Fiscal Year 1993, OFCCP's covered Federal contractors included 92,500 non-construction establishments and an estimated 100,000 construction establishments. The Federal Government awarded more than \$161 billion dollars involving 176,000 prime contracts in Fiscal Year 1993.

The requirement that government contracts contain a clause prohibiting the contractor from discriminating in employment on the basis of race, color, creed, and national origin has been an established part of Federal contracting policy since 1941, when President Roosevelt signed Executive Order 8802 outlawing discrimination in the Federal Government and in the war industries. It has been maintained by Executive Orders of five successive presidents -- Presidents Roosevelt, Truman, Eisenhower, Kennedy and Johnson.

The early Executive Orders prohibited discrimination alone. Experience, however, indicated that something more than mere non-discrimination was needed to overcome the lingering effects of past discrimination and the continuing barriers that prevented minorities from being hired and promoted on the basis of merit. In its final report to President Eisenhower, the Committee on Government Contracts, headed by Vice President Richard M. Nixon, concluded:

Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color, or

national origin is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.

In response, President Kennedy incorporated the concept of "affirmative action," when he issued Executive Order 10925 in 1961. Affirmative action was not contingent upon a finding of discrimination. Rather, Executive Order 10925 imposed on all covered contractors a general obligation requiring positive steps designed to overcome obstacles to equal employment opportunity.

AND WHAT IS AFFIRMATIVE ACTION?

Affirmative action is the tool that employers use to promote equal employment opportunity. Affirmative action under Executive Order 11246 refers to a process that requires a government contractor to examine and evaluate the total scope of its personnel practices for the purpose of identifying and correcting any barriers to equal employment opportunity. Where problems are identified, the contractor is required to develop a program that is precisely tailored to correct the deficiencies. Where appropriate, the contractor is required to establish reasonable "goals and timetables" to measure success toward achieving that result.

A non-construction contractor or subcontractor with a Federal contract of \$50,000 or more, and 50 or more employees, is required to develop a written affirmative action program for each

of its establishments. A written affirmative action program helps the contractor identify and analyze potential problems in the participation and utilization of women and minorities, Vietnam era veterans and the disabled in the contractor's workforce.

The "goals and timetables" component of affirmative action planning sometimes gives rise to the erroneous claim that the Executive Order 11246 is a "preference" or "quota" program. It is critical that we attempt to correct the public's misconceptions and clarify the essential characteristics of the affirmative action requirements of Executive Order 11246 imposed upon employers that contract with the Federal government.

ARE GOALS A SUBSTITUTE FOR QUOTAS?

No. The numerical goals component of the affirmative action programs under the Executive Order has never been designed to be, nor may it properly or lawfully be, interpreted as employment quotas or preferential treatment with respect to persons of any color, race, religion, sex or national origin. The Executive Order regulations are explicit on that point: "goals may not be rigid and inflexible quotas which must be met, but must be targets, reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work." (41 CFR 60-2.12(e))

In addition to the prohibition regarding quotas contained in the regulations, OFCCP (then OFCC) was one of the signatories to a 1973 Memorandum that distinguished between goals and quotas.

The Memorandum, which also was signed by the Department of Justice, the then Civil Service Commission and the Equal Employment Opportunity Commission, was one of the earliest and most comprehensive policy statements on the subject. The Memorandum described goals to be a numerical objective realistically established based on the availability of qualified applicants in the job market and expected vacancies. Quota systems, on the other hand, were described as "any system which requires that considerations of relative abilities and qualifications be subordinated to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc. in order to achieve a certain numerical position...." The numerical goals utilized by the Executive Order program meet the definition of goals as described in the 1973 Memorandum and not the quota systems the Memorandum also defined.

ARE GOALS INTENDED TO ACHIEVE PROPORTIONAL REPRESENTATION OR EQUAL RESULTS?

Not at all. Numerical goals do not create guarantees for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. Moreover, the numerical benchmarks are realistically established based on the availability of qualified applicants in the job market or

qualified candidates in the employer's work force.

DOES AFFIRMATIVE ACTION UNDER EXECUTIVE ORDER 11246 REQUIRE EMPLOYERS TO HIRE OR PROMOTE WOMEN OR MINORITIES ON THE BASIS OF RACE OR SEX?

Absolutely not. No requirement exists that any specific position be filled by a person of a particular race, gender or ethnicity, even where the phenomena of jobs, traditionally segregated by race or sex, remain intact. Instead, the requirement is to engage in outreach and other efforts to broaden the pool of qualified candidates to include groups previously excluded. The selection decision -- to hire, promote or lay off -- is to be made on a non-discriminatory basis.

DOESN'T AFFIRMATIVE ACTION UNDER EXECUTIVE ORDER 11246 CONFLICT WITH THE PRINCIPLES OF MERIT?

No. In seeking to achieve its goals, an employer is never required to hire a person who does not have the qualifications needed to perform the job successfully; hire an unqualified person in preference to another applicant who is qualified; or hire a less qualified person in preference to a more qualified one. Thus, unlike quotas, numerical goals allow persons to be judged on individual ability, and are, therefore, entirely consistent with the principles of merit. Moreover, employers who select unqualified individuals on the bases of race or gender or who pass over others with demonstrably better qualifications may be in violation of the Executive Order and Title VII of the Civil Rights Act of 1964. It is noteworthy that during a random survey

of conciliation agreements obtained by the field in FY'93 and FY'94, OFCCP found an example of an OFCCP regional office requiring corrective action by a contractor who had created a "preference" or rendered an employment decision based on gender or race. In a review completed by OFCCP's Southern New Jersey District Office, a contractor was found to have an employment practice that discriminated against males, both whites and minorities. The office cited the contractor and required it to enter into an agreement providing relief to both white and minority victims.

SHOULD GOALS BE TREATED AS A CEILING OR A FLOOR?

Not at all. The Executive Order does not require that contractors treat goals as either a ceiling or a floor for the employment of particular groups. Goals establish neither a minimum nor a maximum number of individuals of any group that must be employed. Moreover, using numerical goals as a minimum or a maximum would be an impermissible quota and in violation of the Executive Order.

WHAT IS THE STANDARD FOR COMPLIANCE UNDER THE EXECUTIVE

ORDER?

The standard is and has always been "good faith effort." Good faith is measured by the extent to which the contractor has taken steps to overcome real and artificial barriers to nondiscriminatory employment. These steps include expanded recruitment of minorities and women, modification of unrelated selection criteria, expansion of training and educational

opportunities and reduction of subjective evaluation tools. Compliance is never measured solely by whether the goals are met. Failure to meet the goals, for example, simply raises the question of whether good faith efforts were undertaken to achieve the goals, and to make the overall affirmative action program work. Failure to meet the goals by itself is not a violation of the Executive Order; and no contractor should ever be sanctioned on merely numerical grounds. A recent random review of conciliation (settlement) agreements signed between OFCCP and Federal contractors has shown that this agency has not required quotas or insisted on the attainment of a goal.

IS AFFIRMATIVE ACTION UNDER EXECUTIVE ORDER 11246 SIMPLY A "RACIAL SPOILS SYSTEM"?

Unquestionably no. Critics of affirmative action have argued that affirmative action is a system of preferences for unqualified African Americans or Hispanics, and is intended to benefit only these groups. As indicated above, affirmative action is not nor has it ever been intended to require preferences. Moreover, affirmative action at OFCCP is not merely a race issue, it is a gender issue, a disability issue and a veterans' issue. Not only does OFCCP enforce Executive Order 11246, amended to include gender in 1967, it also enforces Section 503 of the Rehabilitation Act of 1973 and Section 4212 of the Vietnam Era Veterans Readjustment Assistance Act of 1974. Both statutes, enacted by a Republican president, require affirmative action. Thus, using affirmative action as a racial

"wedge issue" misrepresents its scope as well as its intent.

SHOULD AFFIRMATIVE ACTION AS IMPLEMENTED UNDER EXECUTIVE ORDER 11246 BE ABOLISHED BECAUSE IT STIGMATIZES ITS BENEFICIARIES?

Finally, no. Those who understand the intent of the architects of affirmative action under Executive Order 11246 know that what affirmative action essentially requires is that employers "cast a wider net;" that they make additional efforts to seek and recruit persons who may not ordinarily be considered for opportunities for positions in a corporation. Affirmative action requires employers who underutilize qualified women and minorities to extend beyond their usual networks in which they would be likely to find others resembling themselves and locate qualified women, minorities, persons with disabilities or disabled veterans for consideration. Once identified, these persons should be allowed to compete with their counterparts without any diminution in standards or expectations. Beneficiaries of affirmative action have nothing to be ashamed of.

HOW DOES OFCCP ADMINISTER THE CONTRACT COMPLIANCE PROGRAM?

OFCCP enforces the nondiscrimination and affirmative action requirements by conducting compliance reviews of contractors and subcontractors. In Fiscal Year 1994, the program completed more than 4,000 reviews. Consistent with the dual mandate of Executive Order 11246 -- nondiscrimination and affirmative action -- a compliance review is a bifurcated process, consisting of an

examination of the contractor's affirmative action program and a determination of the possible discriminatory effects of a contractor's employment policies and practices. In conducting the review, the compliance officer examines its personnel, payroll, and other employment records; and interviews of employees and company officials. The review focuses on both the possible existence of discrimination and the contractor's good faith steps that have been taken to increase the utilization of minorities and females, if required. OFCCP utilizes principles developed in Title VII case law to identify areas of potential discrimination for further analysis.

OFCCP also responds to discrimination complaints. In 1994, more than 800 complaints of discrimination were investigated. OFCCP investigates primarily those Executive Order complaints involving a class of individuals or indicating a pattern of potential discrimination. Complaints involving only one individual are normally referred to the EEOC pursuant to a Memorandum of Understanding between the two agencies. OFCCP also investigates complaints filed under section 503 of the Rehabilitation Act of 1973, alleging discrimination on the basis of disability, or the Vietnam Era Veterans' Readjustment Assistance Act, in which discriminatory actions against disabled and Vietnam era veterans may be alleged.

Where problems are found, OFCCP attempts to work with the contractor, often entering into a conciliation agreement or a letter of commitment to resolve minor problems. A conciliation

agreement may involve back pay, job offers, seniority credit, promotions or other forms of make-whole remedies to those who have been discriminated against. Where a contractor appears to be underutilizing members of the covered groups and has not made good faith efforts, the conciliation agreement may also involve new training programs, special recruitment efforts, or other affirmative action measures. If conciliation efforts prove unsuccessful, OFCCP refers the case to the Department's Solicitor of Labor for administrative enforcement proceedings under which a contractor is entitled to a hearing before an administrative law judge. Where a settlement is not reached before or after a hearing, the Secretary of Labor, upon the recommendation of the administrative law judge, may impose sanctions on the contractor, including loss of its government contract or debarment from future contracts. However, contractors are provided with full due process rights in the administrative process and may appeal the Secretary's order in Federal court.

**HAS THE OFCCP HAD MUCH SUCCESS IN REDUCING EMPLOYMENT
DISCRIMINATION?**

Yes, progress has been made; but there is more work to be done. Research studies conducted in the 1980s documented that affirmative action had been effective in raising the occupational status of minority and female workers. (Leonard, Jonathan S., Employment and Occupational Advance Under Affirmative Action, August 1984). A similar conclusion was reached in a study of

OFCCP-reviewed and unreviewed contractor establishments, with reviewed establishments showing a greater utilization of women and minorities in the higher-skilled and white collar jobs. (Crump, Griffin, Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980: a Report of the office of Federal Contract Compliance Programs, June 1984.)

In spite of this progress, we know discrimination still exists. Both the Glass Ceiling Commission and the Working Women Count! studies have provided evidence of continuing discrimination. Additionally, OFCCP's enforcement statistics also provide a testament to the continuing problem of discrimination in America: money damages worth nearly \$40 million, including back pay, for 11,000 victims of discrimination were obtained in settlements in 1994 alone. During FY 1994, five debarments were also ordered for contractors who had violated conciliation agreements that had been previously entered to resolve violations of E.O. 11246.

The cases in which OFCCP is finding discrimination are at the entry level as well as in the executive suite. From Boston to San Diego, Atlanta to Seattle, companies continue to deny access to women, minorities, veterans and the disabled. In banking, engineering, construction, computers, higher education, the hotel industry, manufacturing, utilities, and hospitals, OFCCP continues to find discrimination; no industry has been without discrimination.

One egregious example of discrimination is an investigation of discrimination at an Alabama bank, in which our compliance officers recently found that the personnel officer, in interviewing potential hires, had interview notes that revealed statements pertaining to race, the color of one's eyes, hair and other physical attributes. This bank official wrote:

"Candidate A was attractive white female, blond hair, blue eyes teller type appearance..." "Candidate B [however was described as] very large lips and hips, overweight, dark skin, black girl. Her hair is longer than most. Appearance is not good enough to meet the meet the public."

These are not the interview notes of a bank official in 1965: these are the perceptions, stereotypes and biases of a person working for a Federal contractor in 1995. And this is not an isolated case.

Other examples include, a large manufacturer of business machines in California that agreed to a back pay settlement to thirty qualified individuals who were denied jobs. This was in response to charges of gender and racial discrimination. The Washington, D.C. headquarters of an internationally known hotel and restaurant chain agreed to back pay and salary adjustments to forty top-level women and minorities who were paid less than their white male peers. In addition, the firm agreed to review its compensation practices to prevent a recurrence of the wage disparity.

A suburban Washington, D.C. hospital was found to have engaged in gender salary discrimination. Back pay was offered to 52 women in the top six grades at the hospital. More than 100 minority applicants for part-time meter reader positions benefitted when an Ohio utility agreed to a financial settlement to resolve charges of racial discrimination.

A nationally known poultry processor in Texas agreed to back pay in response to 82 qualified individuals with disabilities who were denied employment. There are dozens of African-American women in Southern California who benefitted when a Southern California hotel agreed to provide back pay to resolve charges of race and sex discrimination in hiring. The hotel also agreed to consider them for job openings as they occur. In the state of Washington, veterans who were discriminated against by a utility, benefitted from the OFCCP's settlement in which the contractor agreed to provide back pay, training and hire a specialist to address veterans issues. And in resolving a case that is more than 18 years old, more than 6,000 women who were victims of gender discrimination were eligible to share in a multimillion dollar settlement.

To those who think that discrimination is no longer a problem, I submit that this nation has not reached the point of being a colorblind society and that the color of one's skin, or one's gender, continues to be considered in an assessment of one's ability to perform a job. As long as OFCCP continues to find discrimination at the entry level as well as in the

executive suite; as long as the workplace fails to reflect the qualified and available women, minorities, disabled and veterans that are in the workforce and deserve a chance to prove their worth, then affirmative action is still necessary. And OFCCP must and will utilize affirmative action to ensure that actual and likely victims of discrimination receive a fair opportunity to compete in employment with government contractors and subcontractors.

These enforcement cases are an important aspect of the contract compliance program. However, we not only enforce the law, we also see out opportunities to discuss the underlying principles of the law and assist contractors in complying with the law.

Managerial Reforms

Madam Chair, I recognize that OFCCP can do a better job in serving its customers -- both contractors and individuals who are denied employment opportunities on the basis of their race, color, religion, sex, national origin, disability or veterans status. And I am committed to making sure that it does. Since I became head of the OFCCP on February 14, 1994, we have embarked on an exciting and exhaustive program of self-assessment, streamlining and self-improvement with a primary focus on serving our customers better. Much has happened that I am very proud of and which I believe is good not only for OFCCP, but more importantly for Federal contractors and individuals who rely on us for employment protection.

We are considering ways to reduce paperwork requirements, eliminate unnecessary regulations, and simplify and clarify the regulations while improving the efficiency and effectiveness of our programs. This is not only in response to Vice-President Gore's initiative to Reinvent Government -- but also in response to feedback we received from Federal contractors and complainants to our 1994 customer survey.

As a result of our regulatory review, which consisted in part of meetings with the public and our front line staff, we have begun the process for proposing regulatory changes that I believe will help transform OFCCP into a more customer service oriented organization. OFCCP is considering revisions to its affirmative action procedures in three primary areas: revision of the structure and format of the Affirmative Action Program (AAP); implementing the requirement for the annual summary report; and revising the compliance review process. The changes we have under consideration in our E.O. 11246 regulations would:

- streamline the requirements by deleting duplicative and unnecessary provisions, thereby reducing regulatory burdens on Federal contractors; and
- foster voluntary compliance by implementing an affirmative action program summary format.

These two changes are expected to reduce paperwork burdens on contractors by 10 percent. In addition, the OFCCP propose to revise its compliance review process so that only Federal

contractors who need the agency's assistance or intervention should be reviewed. Those who do not need extensive OFCCP attention, should not be scheduled for a full-scale compliance review. Currently under the regulations, once the program schedules a contractor for a compliance review, the process is not ended until a full on-site is completed -- which may take several days, weeks, or months, depending upon the complexity of the case and the size of the contractor's facility. OFCCP is proposing to institute a multi-tiered review process, using the affirmative action program summary to select contractors for reviews that may range from minor, informational inquiries to desk audit-only reviews, to the full on-site compliance review. Where a compliance officer is satisfied with the responses received from the contractor, the review could be terminated at that stage of the process. This proposal has received positive responses from both contractors and compliance officers alike because it will save scarce resources as well as valuable time.

This is the essence of our "Three-Pronged Approach" to fair and effective enforcement. Our overall goals are to reduce the paperwork, reduce the time it takes to prepare an AAP, devise reporting requirements that make sense and are tailored to the contractor's organization and to focus on substantive issues, rather than boilerplate text. The revised review process will also allow OFCCP to better tailor and focus its limited compliance review resources. This should shorten the compliance review process in many instances. It also has the benefit of

allowing OFCCP to concentrate its compliance efforts on contractors with the most significant employment problems.

In addition to reducing the paperwork requirements associated with the written affirmative action program, OFCCP has proposed eliminating certain reporting and certification requirements. OFCCP is proposing to eliminate the requirement that, prior to the award of contract, a contractor submit a certification that it does not maintain segregated facilities. Additionally, OFCCP has proposed the elimination of the Utilization Report that covered contractors are required to submit each month. These changes will significantly reduce compliance burdens on contractors.

We also plan to issue final rules under Section 503 in order to conform them with EEOC's regulations implementing Title I of the ADA and to issue proposed regulatory revisions to our veterans' program regulations to conform them with the section 503 regulations where appropriate.

In order to insure that OFCCP has procedures and regulations that make sense and are reasonable, we will continue to have consultation meetings and regularly seek input from the contractor and constituent communities. Before finally implementing these revised review procedures, OFCCP will also engage in substantial pilot testing, in order to gauge the relative burden and impact of the changes on both the contractor community and the agency.

Working with the major contracting agencies, OFCCP is

creating partnerships with contractors, community groups, and labor unions, to monitor the mega-construction projects, focusing on good faith efforts for recruiting women and minorities. We will provide technical assistance and consult on affirmative action from the preaward stage through the completion of mega-construction projects. Finally, in an effort to ensure that our policies and procedures are well-grounded, we are testing several different strategies on a regional level.

Partnerships and Outreach

OFCCP continuously engages in efforts to foster partnerships between the Federal government, state and local governments, organized labor, employers including higher education institutions, public interest organizations and the contracting agencies, with the ultimate goal to ensure that equal employment opportunities are available to minorities, women, individuals with disabilities and covered veterans. In 1994, well over 17,000 customers received nearly 48,000 hours of compliance assistance.

For the first time, we are now drafting a "how to" manual--a technical assistance guide which will be used by compliance officers during workshops and seminars. This manual will also be provided to contractors and the public upon request, and an electronic data network is being established to allow prompt responses to requests for information from customers. We are also providing first-time contractors with individualized assistance in developing their first affirmative action program.

This one-on-one service is, we believe, a critical step in developing a partnership with the contractor.

OFCCP also plans to implement a customer service improvement plan which was developed based on data and comments received from surveys of construction and supply and service contractors. In the fourth quarter of FY 1994, we established a complaint appeals task force which successfully eliminated our entire backlog of discrimination complaint appeals in five weeks and developed procedures that are now used to avoid having future backlogs. We also meet regularly with other civil rights enforcement agencies to share information and to better coordinate our actions so as to avoid duplicating efforts and wasting limited resources.

Recognition and Awards

The Department of Labor believes that it is important to recognize exemplary efforts contractors have taken to ensure equal employment opportunity. The Secretary's Opportunity 2000 and our Exemplary Voluntary Efforts (EVE) annual awards programs recognize private employers who have worked effectively to support the creation of innovative and successful efforts to advance equal employment opportunity. The awards also recognize the significant investment that these employers are making to advance equal employment. In 1994, recipients of the Opportunity 2000 and EVE awards included Proctor and Gamble (Cincinnati, Ohio), Hyman/Manhattan Joint Venture (Fort Sam Houston, Texas), Rohm and Haas (Philadelphia, Pennsylvania), Union Bank (San

Francisco, California) and Marshall University (West Virginia). Previous recipients include Hallmark of Kansas; Motorola of Illinois; Digital Equipment of Massachusetts; United Technologies of Connecticut; Saturn Corporation of Tennessee; and Dow Corning of Michigan.

Recipients of our first annual Exemplary Public Interest Contribution (EPIC) Awards included Women Employed (Chicago, Illinois), for its critical role in combating discrimination in the workplace; Crispus Attucks Association (York, Pennsylvania), for its efforts to provide jobs and training for low income and minority residents; and the Council for Tribal Employment Rights and Cheyenne River Sioux Tribe (South Dakota and Washington) for providing exceptional training and employment for Native Americans on reservations.

CONCLUSION

Honorable Chair and Members of this Committee, I believe that non-discrimination and affirmative action as enforced by the OFCCP are useful, and indeed vital, tools in preventing and combating employment discrimination by government contractors. I also believe that we can, and must, eliminate unnecessary regulation and paperwork imposed on contractors. Additionally, I am committed to ensuring that we are as efficient as possible in our agency's efforts to ensure equal opportunity in the workplace. Much remains to be done to achieve the Nation's goal of equal employment opportunity. Outreach and recruitment to

expand the pool of qualified applicants and goals to measure progress are reasonable and useful elements of our program to ensure equal employment opportunity. With the changes we are implementing, I believe you will see OFCCP move much closer than ever to fulfilling this commitment.

As to the question of affirmative action as administered by OFCCP, I believe that Edwin L. Artzt, Chairman and Chief Executive Officer of Procter and Gamble, said it best earlier this year when he said:

Affirmative action has been a positive force in our Company. What's more, we have always thought of affirmative action as a starting point. We have never limited our standards for providing opportunities to women and minorities to levels mandated by law. We've always set our goals higher, and we have achieved them. Regardless of what government may do, we believe we have a moral contract with all of the women and minorities in our Company -- a moral contract to provide equal opportunity for employment, equal opportunity for advancement, and equal opportunity for financial reward -- and no change in law or regulation would cause us to turn back the clock.... Government can simplify the bureaucracy, and it should, but Government can also still preserve the principle that compliance mechanisms must exist, and it should do that, too.

This concludes my prepared testimony. I would be pleased to answer any questions. THANK YOU.

* FOR WED. 3/8 DAC
MEETING

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

March 3, 1995

PRESS CONFERENCE BY THE PRESIDENT

Room 450
Old Executive Office Building

1:00 P.M. EST

EXCERPTS ON AFFIRMATIVE ACTION

(page 3)

(1)

Q: Thank you, sir. I'd like to ask you a question, if I might, about affirmative action. I know your administration is now

MORE

(page 4)

reviewing all of those affirmative action regulations, but there's some concern that this might be the prelude to a backing off of those policies. In fact, Jesse Jackson earlier this week expressed the opinion that maybe if you did, he might even run against you. But my question, really, on that issue is, what about the many Americans who really feel that they have been punished by affirmative action? And I'd like to get your comments on that.

THE PRESIDENT: Let me tell you about the review I've ordered and comment on the affirmative action thing. First of all, our administration is against quotas and guaranteed results, and I have been throughout my public career. I have always been for trying to help people develop their capacities so they could fully participate. And I have supported things -- when I was a governor. I supported, for example, minority scholarship programs -- in my public life, I have done that.

MORE

(PAGE 11 cont.)

I want to make a couple of comments here. First, I have asked for a review of all the federal government's so-called affirmative action programs because I think it's important that we analyze, number one, what they do and what -- a lot of times people mean different things when they use affirmative action. For example, I take it there is virtually no opposition to the affirmative action programs that are the most successful in our country, which are the ones adopted by the United States military, which have not resulted in people of inferior quality or ability getting preferential treatment, but have resulted in the intense effort to develop the capacities of everybody who joins the military so they can fully participate and contribute as much as possible, and has resulted in the most integrated institution in our society.

So I want to know what these programs are, exactly. I want to know whether they are working. I want to know whether there is some other way we can reach any objective without giving a preference by race or gender in some of these programs. Those are the three questions we need to ask.

And let me make a general observation. I asked myself when this debate started, what have we done since I've been President that has most helped minorities. And I think that -- I would say that the things we have done that have most helped are things that have benefitted all people who needed them -- expanding the Head Start program; expanding the college loan program; expanding the earned income tax credit, the working families tax credit which has given an average tax cut of \$1,000 to families with incomes under \$25,000; the empowerment zones. And one of them -- one of the empowerment zones went to an all-white area in Kentucky. But the disproportionate impact was on people who'd been left behind in our cities.

So -- and one thing that the reconciliation package would take away, the community development banks -- which I think would be a terrible mistake, which is designed to empower people through the free enterprise system to make the most of their own lives.

So I would say to you, where we can move ahead based on need we ought to move forward, and we shouldn't move backward. There's still a lot of people who aren't living up to their capacity in this country, and it's hurting the rest of us. And so, I want this analysis to finish. I will then make a decision in a prompt way, and I'll tell the American people what I think, and I will proceed to act in the context of the government.

Meanwhile, I urge all of you to read the history, in light of the other -- the political comments you made -- to read the history of how these affirmative action programs got started and who was on what side when they began. It's very interesting to go back through the last 25 years and see all the twists and turns.

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The American people want an end to discrimination. They want discrimination, where it exists, to be punished. They don't want people to have an unfair break that is unwarranted. We can work this out, and I'm determined to do it.

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Q Just another question on affirmative action, Mr. President. When you announced your review you said, we have to stop defending things that are not defensible. Do you think that rules that mandate a certain percentage of federal contracts be set aside for minority firms -- are those still necessary and isn't that guaranteeing results, the kind of thing you say your now opposed to?

THE PRESIDENT: Well, I want to look at how they're implemented. For one thing, if you look at the rules and what they mean, it's difficult to draw a conclusion about whether they even do what they were supposed to do in the first place. But I want -- I will make comments. I am almost done with this review and I will make comments when I finish about what I think we should do, and then I will do whatever it is that I can do within my executive authority to go forward.

I do not -- I want to continue to fight discrimination where it exists. I want to continue to give people a chance to develop their capacities where they need help. I want us to emphasize need-based programs where we can because they work better and have a bigger impact and generate broader support. But let me finish what we're doing here, and then I will try to answer all the details.

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(3.)

Q Mr. President, forgive me for pressing you on this, but if I'm not mistaken, you've always been in favor of affirmative action, and in fact, you have practiced it. Why now the hesitation?

THE PRESIDENT: I have always -- that's right. I'm glad you asked. I have always practiced it. But let's look at how I practiced it. Look at my appointments to the federal bench, ones for which, I might add, I've been regularly and roundly attacked for trying to achieve diversity here in this community. I read something in the paper about once a month, people jumping on me because I've appointed more women and more minorities to the federal bench than my predecessors combined at this point in our terms -- my last three predecessors combined. And, oh, by the way, they sometimes say, his appointees also have the highest rating from the American Bar Association of the last three Presidents.

I have practiced affirmative action here the way that I perceive the United States military has practiced it. I have made an extra effort to look for qualified candidates who could serve with distinction and make a contribution to this country and make the federal bench reflective of the American population. I have not done it with any quota system in mind, and I have not guaranteed anybody a job. I have made an extra effort to do that.

The military starts before that. They have made an extra effort to develop the capacities of people who come to them with great raw ability, but maybe a disadvantaged background. Is that wrong? I don't think it is. And I'm not backing off of that.

The question is -- here is the narrow question -- the question is: If we're not for quotas in results, and we are for developing everybody's capacities, what do we do with all those rules and regulations and laws that really are in a gray area, that are really in a gray area where there is, let's say, a minority scholarship or a contracting set-aside that Maura asked about, that really is often got around because of the way they are written?

I want to review those. I do not want to see us stop trying to develop the abilities of all Americans. I do not want to see us move away from trying to concentrate our resources in the areas of greatest need.

But I would say again, I think most minorities have been helped most by the programs in this country that have been targeted toward broad-based needs. And, ironically, if you go back to the beginning of this whole affirmative action debate, it started in the late '60s and many civil rights leaders at the time argued against

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affirmative action programs because they thought we'd wind up in the debate we are now having 23 years later.

I think we need to look at the programs, look at the facts, and ask the questions I just asked: How does this work? Is it fair? Is it necessary? Is there an alternative way to achieve the objective? But in terms of taking aggressive initiatives to develop the capacities of people, should we keep doing that? You bet we should. How should we do it in the law? That's the question.