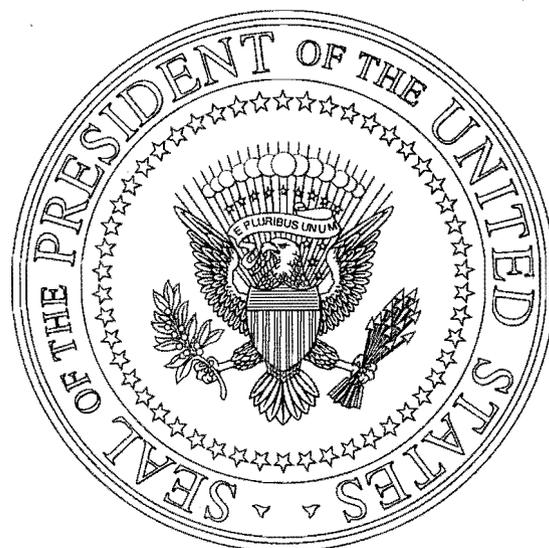


# AFFIRMATIVE ACTION REVIEW

*Report to the President*



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**AFFIRMATIVE ACTION REVIEW  
OUTLINE OF THE REPORT**

- 1. INTRODUCTION**
  - 1.1 Purposes of the Review
  - 1.2 Analytical Framework
  - 1.3 The *Adarand* Review
  
- 2. AFFIRMATIVE ACTION: HISTORY AND RATIONALE**
  - 2.1 Background
  - 2.2 Fair Employment -- The Executive Order
  - 2.3 Fair Employment -- The Enforcement of Title VII
  - 2.4 Education
  
- 3. EMPIRICAL RESEARCH ON AFFIRMATIVE ACTION AND ANTI-DISCRIMINATION**
  - 3.1 Review of the Empirical Literature, in Summary
  - 3.2 Effect on Earnings
  - 3.3 Effect on Employment
  
- 4. THE JUSTIFICATION FOR AFFIRMATIVE ACTION:  
THE CONTINUING NEED TO COMBAT DISCRIMINATION  
AND PROMOTE INCLUSION**
  - 4.1 Evidence of Continuing Discrimination
  - 4.2 Results from Random Testing
  - 4.3 Continuing Disparities in Economic Status
  
- 5. REVIEW OF THE PROGRAMS**
  
- 6. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS**
  - 6.1 Concepts & Principles
  - 6.2 Policies & Practices
  - 6.3 Performance & Effects
  - 6.4 A Note on OFCCP Law Enforcement Functions
  - 6.5 Conclusions and Recommendations
  
- 7. AFFIRMATIVE ACTION IN THE MILITARY**
  - 7.1 Concepts & Principles
  - 7.2 Policies & Practices
  - 7.3 Performance & Effects
  - 7.4 Implications
  - 7.5 Conclusions and Recommendations

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**8. FEDERAL CIVILIAN EMPLOYMENT AFFIRMATIVE ACTION**

- 8.1 History and Results
- 8.2 Summary Profiles for Selected Agencies
- 8.3 Affirmative Action for a Shrinking Federal Workforce
- 8.4 Conclusions and Recommendations

**9. FEDERAL PROCUREMENT POLICIES & PRACTICES**

- 9.1 Overview
- 9.2 Policies & Practices
- 9.3 Performance & Effects
- 9.4 Evaluations & Proposed Reforms
- 9.5 Conclusions and Recommendations

**10. EDUCATION AND HHS POLICIES & PRACTICES**

- 10.1 Overview
- 10.2 Policies & Practices
- 10.3 Performance & Effects
- 10.4 Concerns & Complaints
- 10.5 A Note on Minority-Targeted Scholarships
- 10.6 Conclusions and Recommendations

**11. SELECTED OTHER FEDERAL POLICIES:**

**THE FCC AND THE DEPARTMENTS OF TREASURY AND AGRICULTURE**

- 11.1 FCC Preferences and Targeting
- 11.2 The Treasury: Minority Bank Deposits
- 11.3 Agriculture Programs
- 11.4 Conclusions and Recommendations

**APPENDIX A: Presidential Directive of July 19, 1995**

**APPENDIX B: Justice Department Office of Legal Counsel Memorandum**

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THE WHITE HOUSE

WASHINGTON

July 19, 1995

TO THE PRESIDENT:

We are pleased to submit this report on the Review of Federal Affirmative Action Programs. When you requested this analysis four months ago, you stated your belief that a candid and balanced description of these programs, including a discussion of what is known about their strengths and weaknesses, would provide a valuable starting point for a national conversation on the challenges of creating truly equal opportunity. In that spirit, dozens of Administration officials have studied the details of various programs together with analyses from many sources. This Report summarizes that evidence and, where appropriate, offers preliminary conclusions of fact based on that evidence. In addition, we have taken the policy principles you provided at the beginning of our effort and applied those in a preliminary fashion to the key programs. The result is a set of policy recommendations for your consideration.

Several of our conclusions and recommendations, however, must be considered tentative and provisional because the intervening Supreme Court decision in *Adarand Constructors, Inc. v. Peña* now requires that many such judgments be based on the much more detailed empirical analysis entailed by the constitutional standard of "strict scrutiny." Nevertheless, we believe our preliminary views are responsive to your request, and will be a useful starting point for the Attorney General and the agencies as they work to ensure full compliance with *Adarand*.

We want to note the special contributions of Peter Yu, Susan Liss and Michael Waldman in preparing this Report, together with the diligent and thoughtful participation of the subcabinet and senior officials who worked with us in conducting the review itself. We and the Steering Committee were supported by an outstanding team of policy analysts and attorneys drawn from several agencies, who conducted the basic research.

Finally, we want to express our appreciation to you for this opportunity and challenge. We hope this Report will serve well in the ongoing debate over affirmative action.

George Stephanopoulos  
Senior Adviser to the President  
for Policy and Strategy

Christopher Edley, Jr.  
Special Counsel to the President

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## 1. INTRODUCTION

### 1.1 Purposes of the Review

On March 7, 1995, President Clinton directed that a review be conducted of the Federal government's affirmative action programs. The President asked the following questions:

- **Descriptions.** What kinds of Federal programs and initiatives are now in place, and how are they designed?
- **Performance.** What is known about their effects -- benefits and costs, direct and indirect, intended and unintended -- both to the specified beneficiaries and to others? In short, how are they run? Do they work? Are they fair?

In preparing this report, we analyzed federal programs that might be categorized as affirmative action.<sup>1</sup> These programs range from outreach efforts that encourage grantmakers to seek out members of disadvantaged groups, to procurement regulations that set aside particular contracts for competitive bidding limited largely to minority-owned, economically disadvantaged small businesses.

The report first sets forth the framework we used to analyze these programs. It then describes the evolution of affirmative action, as policymakers sought to make real the promise of the civil rights legal breakthroughs. It then summarizes the evidence of discrimination and exclusion today, followed by a brief review of the overall effectiveness of affirmative action and anti-

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<sup>1</sup> "Affirmative action" enjoys no clear and widely shared definition. This contributes to the confusion and miscommunication surrounding the issue. We begin therefore with a definition:

*For purposes of this review, "affirmative action" is any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration. Measures adopted in court orders or consent decrees, however, were outside the scope of the Review.*

For economy of language, in this document the use of the word "race" (e.g., "race-targeted scholarship") also refers to membership in an ethnic group that is disadvantaged because of prejudice and discrimination

discrimination measures. All of this provides the context for considering current affirmative action programs in more detail. Several sections describe the government's major affirmative action programs, and applies to those programs the policy test set forth by the President.

We conclude that these programs have worked to advance equal opportunity by helping redress problems of discrimination and by fostering the inclusion needed to strengthen critical institutions, professions and the economy. In addition, we have examined concerns about fairness. The evidence shows that, on the whole, the federal programs are fair and do not unduly burden nonbeneficiaries. Finally, we conclude that some reforms would make the programs work better and guarantee their fairness.

The discussion of these programs is necessarily a preliminary analysis. The Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*<sup>2</sup> changed the standard of legal analysis required to determine the constitutionality of affirmative action programs that apply to race and ethnicity. The first and most fundamental question in any policy test must concern the constitutionality of the program. Accordingly, on June 28, 1995 the Department of Justice issued guidance to federal agencies for use in reviewing existing programs under the new, stricter *Adarand* standards<sup>3</sup>. This document is not intended to bear on the legal determination of whether any particular program satisfies the constitutional standard advanced in *Adarand*.

## 1.2. Analytical Framework

Affirmative action produces deep feelings on all sides. A clearheaded analysis of this subject must begin with basic questions: What is the purpose of affirmative action? Is it the same in all circumstances? How does that purpose intersect with other goals of our governmental and legal system? This section outlines the framework for analyzing affirmative action that was followed in the course of this review. The framework provides a basis for analyzing the success and fairness of the government's existing programs -- and for concluding whether a particular program should be retained, reformed or replaced.

### 1.2.1. Basic premise: equal opportunity

The tests that we apply are based on a fundamental premise: the goal of any affirmative action program must be to promote equal opportunity. Offering every American a fair chance to achieve success is a central tenet of our constitutional and political system, and is a bedrock value in our culture. It is the fundamental goal of the civil rights statutes -- and of affirmative action as well. More particularly, affirmative action is only one of several tools used in the

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<sup>2</sup> 115 S. Ct. 2097 (1995).

<sup>3</sup> See Appendix B of this report.

public and private sectors to move us away from a world of lingering biases and the poisons of prejudice, toward one in which opportunity is equal. Affirmative action measures recognize that existing patterns of discrimination, disadvantage and exclusion may require race- or gender-conscious measures to achieve that equality of opportunity.

Because our ultimate goal is to perfect and realize this American ideal of opportunity, affirmative action ~~cannot supersede the concept of merit -- because to do so would unfairly deprive others of opportunity that is their due.~~ In other words, we believe it is wrong if an unqualified person receives a preference and is thereby, chosen for a job, a scholarship, or a federal contract over a qualified person in the name of affirmative action. However, the review of federal programs and broader practices demonstrates that affirmative action, when used properly, is consistent with merit. It also demonstrates that "merit" must be properly defined in terms of the needs of each organization, and not in arbitrary ways that are, in their effect, exclusionary. A demonstrated or predicted ability to get the job done *is* a merit test; "old-boy" connections and cronyism are not.

### *1.2.2 The First Test: Does It Work?*

More specifically, the President's first charge was to determine whether the federal government's affirmative action programs work.

Whether a program "works" depends on what goal it seeks to achieve. Above all else, the overriding goal of affirmative action must be to provide equal opportunity for all citizens. In pursuit of that goal, affirmative action has two general justifications -- remediation of discrimination and promoting inclusion -- both of which are consistent with the traditional American values of opportunity, merit and fairness.

Expanding opportunity by fighting and preventing discrimination. The primary justification for the use of race- and gender-conscious measures is to eradicate discrimination, root and branch. Affirmative action, therefore, is used first and foremost to remedy specific past and current discrimination or the lingering effects of past discrimination -- used sometimes by court order or settlement, but more often used *voluntarily* by private parties or by governments. Affirmative action is also used to prevent future discrimination or exclusion from occurring. It does so by ensuring that organizations and decisionmakers end and avoid hiring or other practices that effectively erect barriers. In undertaking such efforts, however, two wrongs don't make a right. Illegal discrimination includes reverse discrimination; reverse discrimination is discrimination, and it is wrong. Affirmative action, when done right, is not reverse discrimination.

Expanding opportunity through inclusion. Vigorous prosecution of proven instances of discrimination will not by itself close the opportunity gap; bias and prejudice have proven too varied and subtle for that. Therefore, to genuinely extend opportunity to all, we must take affirmative steps to bring underrepresented minorities and women into the economic mainstream. The consequences of years of officially sanctioned exclusion and deprivation are powerfully evident in the social and economic ills we observe today. In some circumstances, therefore, race-

and gender-conscious measures can also be justified by the compelling importance of inclusion. Affirmative action is sometimes used simply to open institutions and opportunities because doing so will move minorities and women into the economic mainstream, with benefits to them, to those institutions, and to our society as a whole. For example:

- Virtually all educators acknowledge that a college is a better academic enterprise if the student body and faculty are diverse.
- A police department will be more effective in protecting and serving its community if its officers are somewhat reflective of that community.
- The military recognized years ago that sharp imbalances in the representation of minorities and women in the leadership grades of enlisted and commissioned personnel undermined the cohesion and effectiveness of military units, and effectively deprived the armed forces of full use of a portion of our nation's pool of talent. Most major corporations recognize this same challenge.
- Judges and government policymakers must be able to reflect the concerns, aspirations and experiences of the public they serve in order to do their jobs well and enjoy legitimacy.

Ultimately, therefore, the test of whether an affirmative action program works is whether it hastens the eradication of discrimination, and promotes inclusion of everyone in the opportunities America promises us all. As a general matter, increases in the numbers of employees, or students or entrepreneurs from historically underrepresented groups are a measure of increased opportunity. It is very difficult, however, to separate the contribution of affirmative action from the contribution of antidiscrimination enforcement, decreasing prejudice, rising incomes and other forces. At the same time, the fact that we observe so much continuing socioeconomic division and inequality of opportunity does not imply that affirmative action is a failure. It is merely one tool among many that must play a part in creating opportunity.

### ***1.2.3. The Second Test: Is the Program Fair?***

For each federal program, at the President's direction, the Review team asked the agency head to apply the following test of essential fairness, stated here with regard to race:

- (1) **Not quotas.** Quotas are intrinsically rigid, and intrinsically relegate qualifications and other factors to secondary status. Does the program effectively avoid quotas for inclusion of racial minorities ?
- (2) **Race-Neutral Options.** In a program's design or reconsideration, have options for using various *race-neutral decision factors* been analyzed? Were options reasonably rejected,

given the available information and experience, because those alternatives are unlikely to be acceptably effective in advancing the program objectives?

- (3) **Flexible.** If race-neutral measures will not work, is the measure applied in a flexible manner, and were *less extensive or intrusive uses of race* analyzed and rejected based on a determination that they would not have been acceptably effective?
- (4) **Transitional.** Is the measure *limited in duration*, and does the administering agency periodically review the continuing need for the measure?
- (5) **Balanced.** Is the *effect on nonbeneficiaries* sufficiently small and diffuse so as not to unduly burden their opportunities? In other words, are other jobs or other similar benefits available, or is the result of the program to close off an irreplaceable benefit?

#### ***1.2.4. Affirmative Action: The Right Way and The Wrong Way***

In short, we believe that there is a right way to do affirmative action, and a wrong way. This review conducts a preliminary policy analysis of many of the existing programs to assess whether they represent the "right way." This means two things: they must actually work to effectuate the goals of fighting discrimination and encouraging inclusion; and they must be fair -- i.e., no unqualified person can be preferred over another qualified person in the name of affirmative action, decisions will not be made on the basis of race or gender except when there is a special justification for doing so, and these measures will be transitional. Only by applying these principles can we *aggressively and simultaneously* pursue remedies to discrimination, the inclusion we need in order to strengthen our institutions and our economy, *and essential fairness* to all.

### **1.3 The Adarand review**

On June 12, 1995, in the case of *Adarand Constructors, Inc. v. Peña*, the United States Supreme Court held that many federal affirmative action programs, under the equal protection component of the Fifth Amendment's Due Process Clause, must be reviewed by the courts using "strict scrutiny." To surmount this hurdle, the program must be shown to meet a "compelling governmental interest," and must be "narrowly tailored to meet that interest." This is a more demanding legal test than had previously been applied to federal affirmative action programs, and as a practical matter it will require a searching analysis of many federal programs. The specific dimensions of that inquiry, as best can be discerned from federal caselaw, are described in Appendix B to this Report, which is the memorandum to agency general counsels from Assistant Attorney General Walter Dellinger, Office of Legal Counsel, Department of Justice.

The Court's decision concerned what is constitutionally permissible, which is a necessary but not sufficient consideration in judging whether a measure is wise public policy. We have recommended, therefore, that the President, issue a directive to agency heads which not only instructs them to conduct the thorough analysis required by *Adarand* as a matter of constitutional law, but also instructs them to apply a set of basic policy principles. Specifically, after emphasizing the President's commitment to affirmative action, the President instructs agency heads:

In all programs for which you are responsible that use race, ethnicity or gender as a consideration in order to expand opportunity or provide benefits to members of groups that have suffered discrimination, I ask you to take steps to ensure adherence to the following policy principles. Any program must be eliminated or reformed if it:

- creates a quota;
- creates preferences for unqualified individuals;
- creates reverse discrimination; or
- continues even after its purposes have been achieved.

## 2. AFFIRMATIVE ACTION: HISTORY AND RATIONALE

Neither this review nor the current debate over affirmative action occur in a historical vacuum. This and the following two sections provide the context for this review, and, indeed, for federal affirmative action programs. First, we examine the history of the creation of modern affirmative action programs. Then, in section 3, we review the general evidence on the effectiveness of affirmative action. Finally, section 4 examines the extent to which discrimination and exclusion persist today, suggesting that it is too soon to abandon the affirmative action tool.

### 2.1 Background

The current scope of affirmative action programs is best understood as an outgrowth and continuation of our national effort to remedy subjugation of racial and ethnic minorities and of women -- subjugation in place at our nation's founding and still the law of the land within the lifetime of "baby-boomers." Some affirmative action efforts began before the great burst of civil rights statutes in the 1950s and 1960s. But affirmative efforts did not truly take hold until it became clear that anti-discrimination statutes alone were not enough to break longstanding patterns of discrimination.

For much of this century, racial and ethnic minorities and women have confronted legal and social exclusion. African Americans and Hispanic Americans were segregated into low wage jobs, usually agricultural. Asian Americans, who were forbidden by law from owning land, worked fields to which they could not hold title. Women were barred by laws in many states from entering entire occupations, such as mining, fire fighting, bartending, law, and medicine.

The first significant wave of progress in enhancing employment opportunities for African Americans and women came during the labor shortages of World War II and immediately afterwards, before the use of affirmative action. Nonetheless, racial separation continued, and African Americans were still segregated for the most part into low wage jobs into the 1960s. For Hispanic Americans, employment opportunity remained seriously restricted into the 1970s. Whole industries and categories of employment were, in effect, all-white, all-male. In thousands of towns and cities, police departments and fire departments remained all white and male; Women and minorities were forbidden to even apply. In grocery and department stores, clerks were white and janitors and elevator operators were black. Generations of African Americans swept the floors in factories while denied the opportunity to become higher paid operatives on the machines. In businesses such as the canning industry, Asian Americans were not only precluded from becoming managers, but were housed in physically segregated living quarters. Stereotypical assumptions that women would be only part-time or temporary workers resulted in their exclusion from a full range of job opportunities. Newspaper job listings were segregated

by gender. Women also confronted other barriers to full inclusion: lower pay and fewer benefits than men, even when performing similar jobs; losing their jobs if they married or became pregnant; and sexual harassment on the job.

African Americans, even if they were college-educated, worked as bellboys, porters and domestics, unless they could manage to get a scarce teaching position in the all-black school -- which was usually the only alternative to preaching, or perhaps working in the post office. In higher education most African Americans attended predominantly black colleges, many established by states as segregated institutions. Most concentrated on teacher training to the exclusion of professional education. Students who were interested in business had to take business education instead of administration. A few went to predominantly white institutions, in which by 1954, about one percent of entering freshman were black.

Asian Americans and Hispanic Americans, were legally barred from attending some public schools. And women were systematically excluded from some private and state funded colleges, universities, and professional schools well into the 1970s. In general, it is clear that separation of the races and relegation of women to the sidelines remained the norm for most of this century.

The civil rights movement had its dramatic victories -- *Brown v. Board of Education* and the other cases striking down segregation, the Civil Rights Act of 1964, the Voting Rights Act of 1965 -- which helped advance the Constitution's promise of equal opportunity to all minorities and women. Even after passage of the civil rights laws beginning in the 1960s, however, the road to equal opportunity for minorities and women was difficult, and programs often very slow. These judicial and legislative victories were not enough to overcome long-entrenched discrimination, for several reasons. In part, these measures frequently focused only on issues of formal rights (such as the right to vote) that were particularly susceptible to judicial or statutory resolution. In part, the difficulty was that formal litigation-related strategies are inevitably resource-intensive and often dependent upon clear "smoking gun" evidence of overt bias or bigotry, whereas prejudice can take on myriad subtle, yet effective, forms. Thus, private and public institutions alike too often seemed impervious to the winds of change, remaining all-white or all-male long after court decisions or statutes formally ended discrimination.

As a result, both the courts and Republican and Democratic administrations turned to race- and gender-conscious remedies as a way to end entrenched discrimination. These remedies were developed after periods of experimentation had shown that other means too often failed to correct the problems. here are some typical examples:

- In July 1970, a federal district court enjoined the State of Alabama from continuing to discriminate against blacks in the hiring of state troopers. The court found that "in the thirty-seven year history of the patrol there has never been a black trooper." The order included detailed, non-numerical provisions for assuring an end to discrimination, such as stringent controls on the civil service certification procedure and an extensive program of recruitment of minority job applicants. Eighteen months later, not a single black had been hired as a state

trooper or into a civilian position connected with the troopers. The district court then entered a further order requiring the hiring of one *qualified* black trooper or support person applicant for each white hired until 25 percent of the force was comprised of blacks. By the time the case reached the Court of Appeals in 1974, 25 black troopers and 80 black support personnel had been hired.<sup>4</sup> The U.S. Supreme Court ultimately affirmed the orders.

- In 1979, women represented only 4 percent of the entry-level officers in the San Francisco police department. By 1985, under an affirmative action plan ordered in a case in which the DOJ sued the City for discrimination, the number of women in the entry class had risen to 175, or 14.5 percent.
- Similarly, a federal district court review of the San Francisco Fire Department in 1987 led to a consent decree which increased the number of blacks in officer positions from 7 to 31, Hispanics from 12 to 55, and Asians from 0 to 10; women were admitted as firefighters for the very first time.
- In 1975, a federal district court found that Local 28 of the Sheet Metal Workers' International Association had discriminated against non-white workers in recruitment, training and admission to the union. The court found that the union had (1) adopted discriminatory admission criteria, (2) restricted the size of its membership to deny access to minorities, (3) selectively organized shops with few minority workers and (4) discriminated in favor of white applicants seeking to transfer from sister locals. The court found that the record was replete with instances of bad faith efforts to prevent or delay the admission of minorities. The court established a 29 percent membership goal, reflecting the percentage of minorities in the relevant labor pool. The Supreme Court affirmed the relief.
- Prior to 1974, Kaiser Aluminum hired only persons with prior craft experience as craft workers at its Gramercy, Louisiana plant. Because blacks traditionally had been excluded from the craft unions, only 5 of 273 skilled craft workers at the plant were black. In response, Kaiser together with the union, established its own training program to fill craft jobs with the proviso that 50 percent of new trainees were to be black until the percentage of black craft workers in the plant matched the percentage of blacks in the local labor pool. The Supreme Court held this program to be lawful.
- On March 23, 1973, the Nixon administration's Department of Justice, Department of Labor, Equal Employment Opportunity Commission and the Civil Service Commission issued a joint memorandum titled "State and Local Employment Practices Guide." The guide points out that the Nixon Administration... since September of 1969, recognized that goals and timetables... are a proper means for helping to implement the nation's commitment to equal employment opportunity." The memorandum stressed that strict quotas are unacceptable but

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<sup>4</sup> *NAACP v. Allen*, 493 F.2d 614, 621 (1974).

that goals and timetables' are entirely different and reasonable tools. (Attorney General John Mitchell led the legal defense of the distinction between goals and quotas.) In July of 1986, Justice O'Connor referred to this document, and the merits of fair and effective affirmative action goals, in the concurring portion of her opinion in *Local 28, Sheet Metal Workers v. EEOC*. In doing so, she joined the Court majority's support for numerical guidelines in affirmative action programs.

## **2.2 Fair Employment -- The Executive Order**

The longest-standing federal affirmative action program has its roots in World War II. The Executive Order barring discrimination in the federal government and by war industries was issued by President Franklin Roosevelt. The action was taken to forestall a planned march on Washington organized by A. Philip Randolph, the President of the Brotherhood of Sleeping Car Porters. Roosevelt's order barred discrimination against blacks by defense contractors, and established the first Fair Employment Practices Committee. However, federal compliance programs were routinely understaffed, underfunded and lacked enforcement authority.

After World War II, gains that had been made by women and blacks receded as returning GIs reclaimed their jobs. By 1960, the 10 million workers on the payrolls of the 100 largest defense contractors included few blacks. The \$7.5 billion in federal grants-in-aid to the states and cities for highway, school, airport, school and public housing construction went almost exclusively to whites. The U.S. Employment Service, which provided funds for state-operated employment bureaus, encouraged skilled blacks to register for unskilled jobs, accepted requests from white employers and made no efforts to get employers to accept African American workers. The President's Committee on Government Contracts, chaired by Vice-President Nixon in 1959, blamed "the indifference of employers to establishing a positive policy of nondiscrimination," stated that such indifference was more prevalent than over discrimination, and called for remedial steps.

In response to the civil rights movement, President John F. Kennedy created a Committee on Equal Employment Opportunity in 1961 and issued Executive Order 10925, which used the term "affirmative action" to refer to measures designed to achieve non-discrimination. In 1965, President Johnson issued Executive Order 11246 requiring federal contractors to take affirmative action to ensure equality of employment opportunity without regard to race, religion and national origin. In 1968, gender was added to the protected categories.

In the Johnson Administration, the Labor Department Office of Federal Contract Compliance (OFCCP) started pre-award compliance for federal contracts over \$1 million. The Office began with construction contractors, who were required to set goals and timetables under a regulation issued to implement the Order in 1968. However, under pressure from unions and the General Accounting Office, which found the process too vague, OFCCP discontinued the effort.

But in the most far-reaching federal expansion of affirmative action, the "goals and timetables" plan was revived by President Nixon and Labor Secretary George Shultz in 1969. In issuing the so-called "Philadelphia Order," Assistant Secretary Arthur Fletcher said:

Equal employment opportunity in these [construction] trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these seven trades.<sup>5</sup>

President Nixon later remembered, "A good job is as basic and important a civil right as a good education . . . I felt that the plan Shultz devised, which would require such [affirmative] action by law, was both necessary and right. We would not impose quotas, but would require federal contractors to show affirmative action' to meet the goals of increasing minority employment."<sup>6</sup>

Order No. 4 in 1970 extended the plan to non-construction federal contractors.

### **2.3 Fair Employment -- Enforcement of Title VII**

In July, 1963, in the midst of the civil rights campaign in Birmingham, Alabama, President John F. Kennedy appeared on national television to propose a civil rights bill. The measure proposed outlawing discrimination in public accommodations, permitting a cut-off of federal funds from discriminating institutions, and expanding the equal employment opportunity committee he had established. After President Kennedy's assassination, Title VII was enacted as part of the Civil Rights Act of 1964, seeking to end discrimination by large private employers whether or not they had government contracts. The Equal Employment Opportunity Commission, established by the Act, is charged with enforcing the anti-discrimination laws through prevention of employment discrimination and resolution of complaints. The Act is designed to make employees whole for illegal discrimination and to encourage employers to end discrimination. Title VII was substantially strengthened in 1972 amendments, signed by President Nixon. As Supreme Court holdings concluded, the legislative history to the 1972 amendments made clear that Congress approved of race- and gender-conscious remedies that had been developed by the courts in enforcing the 1964 Act.

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<sup>5</sup> DOL memo from Arthur Fletcher to All Agency Heads discussing the revised Philadelphia Plan, 6/27/69.

<sup>6</sup> Richard Nixon, *RN: The Memoirs of Richard Nixon* 437 (Grosset and Dunlap: 1978).

Court-ordered affirmative action to remedy violations of Title VII developed on a parallel track with the Executive Order program, as another remedial effort to stop existing discrimination and prevent its recurrence. The Supreme Court's most comprehensive review of affirmative action has occurred in the employment area.

## 2.4 Education

Discrimination in education was the target of the original breakthrough civil rights cases. Indeed, because education is the gateway to opportunity, education has consistently been a central focus of civil rights efforts. But for nearly two decades following the original court decisions, educational institutions -- particularly colleges and graduate schools -- remained predominantly white and male. In 1955, only 4.9 percent of college students ages 18-24 were black. This figure rose to 6.5 percent during the next five years, but by 1965 had slumped back to 4.9 percent. Only in the wake of affirmative action measures in the late 1960s and early 1970s did the percentage of black college students begin to climb steadily (in 1970, 7.8 percent of college students were black; in 1980, 9.1 percent; and in 1990, 11.3 percent).

The 1978 *Bakke* case set the parameters of educational affirmative action<sup>7</sup>. The University of California at Davis medical school had reserved 16 available places for qualified minorities. In a splintered decision, with Justice Powell casting the deciding vote, the Supreme Court essentially decided that setting aside a specific number of places in the absence of proof of past discrimination was illegal, but that minority status could be used as a factor in admissions. The desire to obtain a "diverse" student body was found to be a compelling goal in the educational context in Justice Powell's controlling opinion.

Increased educational opportunity has, in fact, revolutionized education, although some gaps persist. While the enrollment of women in higher education has risen steadily, with women now earning nearly fifty percent of all bachelor's and masters degrees, they earn only one third of doctorate and first professional degrees, and continue to lag in math, engineering, and the physical sciences at both the undergraduate and the doctoral levels.

Through the availability of student aid programs and aggressive recruitment and retention programs, the college-going rate for blacks and whites who graduated from high school was about equal by 1977. Since 1977, however, the proportion of black 18-24 year old high school graduates enrolled in college has not kept pace with that of white students. While the percentage of black students who have graduated from high school has increased approximately 20 percent

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<sup>7</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265(1978).

in the past 25 years, the portion of black high school student graduates attending college is now 25 percent less than that of white students.<sup>8</sup>

The story is similar for the Hispanic enrollment rate. In 1976, the college-going rate for 16-24 year old Hispanics who had recently graduated from high school (53 percent) actually exceeded the white rate (49 percent). Since then, the Hispanic college-going rate has stagnated while the white rate has increased significantly. By 1994, the white college-going rate had risen to 64 percent, whereas the Hispanic rate had fallen to 49 percent.<sup>9</sup>

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<sup>8</sup> *Chronicle of Higher Education*: April 28, 1995.

<sup>9</sup> National Center for Education Statistics, *Digest of Education Statistics 1994*, NCES 94-115, Table 179.

### 3. EMPIRICAL RESEARCH ON AFFIRMATIVE ACTION AND ANTI-DISCRIMINATION

Modern affirmative action, then, was established as policymakers groped for a way to address continuing problems of discrimination. Has it worked to help eradicate or prevent such discrimination? In a fundamental sense the question must be posed for the broader society-wide effort of which federal programs are only an element and, ideally, a model.

#### 3.1 Review of the Empirical Literature, in Summary

Over the past three decades, minorities and women have made real, undisputable economic progress. Before the Civil Rights Act of 1964, the median black male worker earned only about 60 percent as much as the median white male worker,<sup>10</sup> by 1993, the median black male earned 74 percent as much as the median white male.<sup>11</sup> The male-female wage gap has also narrowed since the 1960s: median female earnings relative to median male earnings rose from about 60 percent during the 1960s to 72 percent in 1993.<sup>12</sup>

This section of the Report addresses three issues: (1) Why has there been an earnings gap between black and white workers, and what role did anti-discrimination legislation and affirmative action play in the reduction of that gap? (Earnings gaps for Hispanics and Asians also exist which have been linked to discrimination. The wage gaps for African Americans and women are examined here in detail in order to illustrate the relationship between the problems and historic solutions.) (2) Why has there also been an earnings gap between men and women, and what role did government policies play in the reduction of that gap? (3) Is there any evidence that affirmative action boosted minority or female employment?

#### 3.2 Effect on Earnings

##### 3.2.1 *Anti-Discrimination Policy, the Minority-White Earnings Gap*

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<sup>10</sup> Bureau of Labor Statistics, Current Population Survey.

<sup>11</sup> Bureau of Labor Statistics, Current Population Survey.

<sup>12</sup> Bureau of Labor Statistics, Current Population Survey.

- The ratio of the average black workers' earnings to the average white workers' earnings increased significantly in the 1940s, increased slightly if at all in the 1950s, increased significantly between 1960 and the mid 1970s, and declined somewhat since the late 1970s.<sup>13</sup>
- Hispanic men earn 81 percent of the wages earned by white men at the same education level. Hispanic women earn less than 65 percent of the income earned by white men with the same education level.<sup>14</sup>
- There has not been an improvement in the employment-population rate of black workers relative to whites since the 1960s. If anything, there has been a deterioration in the relative employment-population rate.<sup>15</sup>
- Education and work experience are the two most reliable predictors of a worker's earnings. Black workers historically have had much lower education than white workers. Adjusting for racial differences in education and work experience can account for about half of the wage gap between black men and white men, and about one-third of the gap between black women and white women. Additionally, holding constant differences in individuals' test scores leads to a further reduction in the black-white earnings gap. For example, in one study, in 1991, black males earned 29 percent less than white males without any adjustments, 15 percent less after adjusting for education and experience, and 9 percent less after additionally adjusting for test scores. For women, the gap declines from 14 percent to almost zero after making these adjustments.<sup>16</sup> There is some controversy as to how to interpret the black-white wage gap after holding constant differences in education, test scores, and other variables. In particular, differences in education or test scores may themselves represent the discrimination. Thus, the reduction in the racial gap after controlling for these factors may

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<sup>13</sup> Bureau of Labor Statistics, Current Population Survey. For a time-series discussion of black/white earnings ratios, see Donohue, John and James Heckman, 1991. "Continuous versus Episodic Change: The Impact of Federal Civil Rights Policy on the Economic Status of Blacks," *Journal of Economic Literature*, 29:1603-43. See also, Bound, John and Richard Freeman, 1989, "Black Economic Progress: Erosion of Black Americans" in *The Question of Discrimination*.

<sup>14</sup> EEOC, Office of Communication, *The Status of Equal Opportunity in the American Workforce* (1995). For a discussion of empirical evidence on earnings gaps and discrimination for Hispanics, see Gregory DeFreitas, *Inequality at Work: Hispanics in the U.S. Labor Force* (New York: Oxford Press, 1991).

<sup>15</sup> Bureau of Labor Statistics, Current Population Survey.

<sup>16</sup> Rogers, Bill, 1994, "What Does the AFQT Really Measure: Race, Wages, Schooling and the AFQT Score," mimeo., William and Mary. The figures cited here adjust for racial geographic differences.

not mean that discrimination is any less, but it may mean that attention should also focus on discrimination prior to entry into the labor market.

- Historically there have been great differences in the quality of education between black and white students. In South Carolina in 1920, for example, black students attended schools with class sizes twice those of white schools. Partly as a result of the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965, and the *Green* decision, schools became increasingly integrated in the late 1960s. The improvement in the quality and quantity of education of black workers since the 1960s accounts for about 20 percent of the gain in black workers' relative earnings.<sup>17</sup>
- There is near-unanimous consensus among economists that the government anti-discrimination programs beginning in 1964 contributed to the improved income of African Americans. Nevertheless, it is difficult to draw conclusions about which specific anti-discrimination programs were most effective. And it may well be that the programs collectively helped even though no single program was overwhelmingly effective.<sup>18</sup>

### 3.2.2 *Anti-Discrimination Policy and the Male-Female Earnings Gap*

- The female-to-male ratio of earnings of full-time, year-round workers was roughly stable at around 60 percent from the early 1900s until the mid 1970s. In 1993, earnings of women who worked full-time, year-round had risen to 72 percent as much as men. After adjusting for differences in education, experience, and other factors, the wage gap is reduced by about half (i.e., the adjusted ratio is approximately 85 percent).<sup>19</sup>
- An increase in women's work experience and a shift into higher-wage occupations are the major causes of their improved economic position relative to men. The decline in higher-paying manufacturing jobs, which is partly responsible for the decline in the earnings of less-

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<sup>17</sup> See Card, David and Alan Krueger, 1992, "School Quality and Black-White Relative Earnings: A Direct Assessment." *The Quarterly Journal of Economics*, p.151-200.

<sup>18</sup> An important study that points out the near unanimous opinion among economists of the positive impact of government anti-discrimination programs on improved income of African-Americans is Donohue, John and James Heckman, 1991, "Continuous versus Episodic Change: The Impact of Federal Civil Rights Policy on the Economic Status of Blacks," *Journal of Economic Literature*, 29:1603-43. Freeman, Richard, 1973, "Changes in the Labor Market for Black Americans, 1948-72," *Brookings Papers on Economic Activity*, vol. 1 was among the first to identify government anti-discrimination programs as a source of progress.

<sup>19</sup> See Blau, Francine and Marianne Ferber, 1992. *The Economics of Women, Men and Work*, Englewood Cliffs: Prentice Hall, p.129.

skilled men, has also contributed to the narrowing of the male-female wage gap. Nevertheless, a substantial part of the improved earnings of women cannot be explained by these factors, and probably reflects a decline in discrimination.<sup>20</sup>

- The relative roles in this story of anti-discrimination laws and affirmative action, in education and the workplace, are unclear. The major equal opportunity laws covering women were passed in the mid-1960s, and the most rapid growth in women's earnings and occupational status did not begin for another decade. The lag between the change in law and the increase in earnings may be due to time it took for women to acquire education and training for traditionally male-dominated occupations. The rapid growth in the number of female graduates from professional schools coincided with increased anti-discrimination efforts.<sup>21</sup>

### 3.3 Effect on Employment

- The Labor Department's Office of Federal Contract Compliance Programs (OFCCP) administers Executive Order 11246, which imposes nondiscrimination and affirmative action obligations on most firms that contract to do business with the Federal government. According to five academic studies, active enforcement by OFCCP during the 1970s caused government contractors to moderately increase their hiring of minority workers.<sup>22</sup> According to one study, for example, the employment share of black males in contractor firms increased from 5.8 percent in 1974 to 6.7 percent in 1980. In non-contractor firms, the black male share increased more modestly, from 5.3 percent to 5.9 percent. For white males, the

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<sup>20</sup> See Blau, Francine, and Lawrence Kahn, 1994, "Rising Wage Inequality and the U.S. Gender Gap." *American Economic Review* 84:23-28, for a discussion of the large decline in male-female wage differentials that occurred from the mid 1970s to the late 1980s.

<sup>21</sup> Department of Education, National Center of Education Statistics.

<sup>22</sup> The five studies are: (1) Leonard, Jonathan, 1984, "The Impact of Affirmative Action on Employment," *Journal of Labor Economics*, 2:439-463; (2) Leonard, Jonathan, 1984, "Employment and Occupational Advance Under Affirmative Action," *The Review of Economics and Statistics*; (3) Ashenfelter, Orley and James Heckman, 1976, "Measuring the Effect of an Anti-discrimination Program, in *Estimating the Labor Market Effects of Social Programs*, Eds: Orley Ashenfelter and James Blum. Princeton NJ: pp.46-89; (4) Heckman, James and Kenneth Wolpin, 1976, "Does the Contract Compliance Program Work? An Analysis of Chicago Data," *Industrial and Labor Relations Review* 29:544-64; (5) Goldstein, Morris and Robert Smith, 1976, "The Estimated Impact of Anti-discrimination Laws Aimed at Federal Contractors," *Industrial and Labor Relations Review*.

employment share fell from 58.3 percent to 53.3 percent in contractor firms, and from 44.8 percent to 41.3 percent in non-contractor firms.<sup>23</sup>

- The literature also finds that contractor establishments that underwent an OFCCP review in the 1970s subsequently had faster rates of white female and of black employment growth than contracting firms that did not have a review.<sup>24</sup>
- Other than studies comparing employment records of government contractors with non-government contractors, it is hard to separate the effects of affirmative action from broader civil rights enforcement. Non-government contractors often took active steps to ensure diversity and compliance with equal opportunity laws, even though they were not covered by the OFCCP. Some, or perhaps much, of this behavior may be attributable to government anti-discrimination efforts. Also, the recruitment efforts of both contractors *and* non-contractors may have bid up the wages of minorities and women, reducing wage disparities regardless of the effect on occupational disparities.
- OFCCP enforcement was greatly scaled back during the 1980s. For example, the real budget and staffing for affirmative action programs was reduced after 1980. Over the same period, fewer administrative complaints were filed and back-pay awards were phased out. Perhaps not surprisingly, available evidence suggests that OFCCP did not have a noticeable impact on the hiring of minority workers by contractor firms in the early and mid 1980s.<sup>25</sup>
- Although the literature clearly shows that, when actively enforced, affirmative action can lead to an increase in minority employment in contractor firms, some have questioned whether this employment represents a net gain or merely a shift of minority employees from non-contractors to contractors.
- The extent to which affirmative action has expanded minority employment in skilled positions is unclear. The academic literature suggests that before 1974, minority employment growth in contractor firms was predominately in unskilled positions. Since 1974, there is evidence

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<sup>23</sup> Leonard, Jonathan, 1984, "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment," *Journal of Economic Perspectives*, 4:47-64.

<sup>24</sup> See above studies plus Donohue and Heckman, *Continuous versus Episodic*, 29, *Journal of Economic Literature*, p.1631.

<sup>25</sup> For a full discussion of the impact of weakened affirmative action enforcement during the 1980s, see Leonard, Jonathan, 1990, "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment," *Journal of Economic Perspectives*, 4:47-64.

of modest occupational advance in contractor firms. But some researchers think this may be the result of biased reporting.<sup>26</sup>

- There is no systematic qualitative evidence that productivity is lower in contracting firms as a result of OFCCP. The one systematic study found that contractors do not appear to have lower productivity, suggesting that OFCCP has not caused firms to hire or promote less qualified workers.<sup>27</sup>

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<sup>26</sup> For a discussion of the impact of affirmative action on minority employment in skilled positions, see Leonard 1990, *The Impact of Affirmative . . . .*," 4 J. of Econ. Perspectives 47.

<sup>27</sup> See Leonard, Jonathan, 1984, "Anti-discrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII and Affirmative Action on Productivity," *Journal of Human Resources*, vol. 19, No.2, pp.145-74.

#### 4. THE JUSTIFICATIONS FOR AFFIRMATIVE ACTION: THE CONTINUING NEED TO COMBAT DISCRIMINATION AND PROMOTE INCLUSION

Affirmative action was established as part of society's efforts to address continuing problems of discrimination; the empirical evidence presented in the preceding chapter indicates that it has had some positive impact on remedying the effects of discrimination. Whether such discrimination lingers today is a central element of an analysis of affirmative action. The conclusion is clear: discrimination and exclusion remain all too common.

##### 4.1. Evidence of Continuing Discrimination

There has been undeniable progress in many areas. Nevertheless, the evidence is overwhelming that the problems affirmative action seeks to address -- widespread discrimination and exclusion and their ripple effects -- continue to exist.

- Minorities and women remain economically disadvantaged: the black unemployment rate remains over twice the white unemployment rate; 97 percent of senior managers in Fortune 1000 corporations are white males;<sup>28</sup> in 1992, 33.3 percent of blacks and 29.3 percent of Hispanics lived in poverty, compared to 11.6 percent of whites.<sup>29</sup> In 1993, Hispanic men were half as likely as white men to be managers or professionals;<sup>30</sup> only 0.4 percent of senior management positions in Fortune 1000 industrial and Fortune 500 service industries are Hispanic.<sup>31</sup>
- Blatant discrimination is a continuing problem in the labor market. Perhaps the most convincing evidence comes from "audit" studies, in which white and minority (or male and female) job seekers are given similar resumes and sent to the same set of firms to

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<sup>28</sup> "Good for Business: Making Full Use of the Nation's Human Capital", A Fact-Finding Report of the Federal Glass Ceiling Commission, March 1995.

<sup>29</sup> Bureau of the Census, Current Population Survey, "Income, Poverty and Valuation of Noncash Benefits 1993."

<sup>30</sup> Bureau of Labor Statistics, *1994 Fact Sheet*.

<sup>31</sup> Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* (March 1995).

apply for a job. These studies often find that employers are less likely to interview or offer a job to minority applicants and to female applicants.<sup>32</sup>

- Less direct evidence on discrimination comes from comparisons of earnings of blacks and whites, or males and females.<sup>33</sup> Even after adjusting for characteristics that affect earnings (such as years of education and work experience), these studies typically find that blacks and women are paid less than their white male counterparts. The average income for Hispanic women with college degrees is less than the average for white men with high school degrees.<sup>34</sup>
- Last year alone, the Federal government received over 90,000 complaints of employment discrimination. Moreover 64,423 complaints were filed with state and local Fair Employment Practices Commissions, bringing the total last year to over 154,000. Thousands of other individuals filed complaints alleging racially motivated violence and discrimination in housing, voting, and public accommodations, to name just a few.

#### 4.2 Results from Random Testing

The marked differences in economic status between blacks and whites, and between men and women, clearly have social and economic causes in addition to discrimination. One respected method to isolate the prevalence of discrimination is to use random testing, in which individuals compete for the same job, apartment, or other goal. For example, the Fair Employment Council of Greater Washington, Inc., conducted a series of tests between 1990 and 1992. The tests revealed that blacks were treated significantly worse than equally qualified whites 24 percent of the time and Latinos were treated worse than whites 22 percent of the time. Some examples document the disparities:

- Two pairs of male testers visited the offices of a nationally-franchised employment agency on two different days. The black tester in each pair received no job referrals. In contrast, the white testers who appeared minutes later were interviewed by the agency, coached on interviewing techniques, and referred to and offered jobs as switchboard operators.
- A black female tester applied for employment at a major hotel chain in Virginia where she was told that she would be called if they wished to pursue her application. Although she

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<sup>32</sup> See, e.g., Neumark, David and Roy Blank and Kyle Van Nort, 1995, "Sex Discrimination in Restaurant Hiring: An Audit Study," *NBER Working Paper No. 5024*.

<sup>33</sup> Bureau of Labor Statistics, Current Population Survey.

<sup>34</sup> EEOC, Office of Communications, *The Status of Equal Opportunity in the American Workforce* (1995).

# Affirmative Action: Opportunity v. Results Framework

Opportunity ----- Results

Opportunity ----- Results

	<b>Opportunity Enhancing Assistance</b>	<b>Advantages &amp; Flexible Preferences</b>	<b>Set-asides</b>	<b>Quotas</b>
<b>Education</b>	Compensatory ed; Outreach & recruiting; HBCUs	Multifactor admissions policies: e.g., UC-Berkeley	Group-based programs: e.g., <b>Banneker</b> ; <b>NIH Minority Fellowship</b> ; <b>San Bernardino's Bridge Program</b>	Two-track (i.e., pre-Bakke) admissions
<b>Employment</b>	Outreach & recruiting; Apprenticeships; Second look programs: e.g., <b>the military</b>	Multifactor hiring: e.g., <b>judicial selection</b> ; <b>the Chicago police dept.</b>	Exclusive job listings: e.g., <b>Ill.State Univ.</b> ; <b>anecdotes from academe</b>	Race-normed tests to ensure proportional representation
<b>Contracting &amp; Procurement</b>	Technical assistance; Mentoring; Bonding assistance	10% bid preference; "Subcontractor Compensation program": e.g., <b>the Adarand case</b>	8(a) program; flexible Rule-of-two set-asides	[NONE]

PHOTOCOPY PRESERVATION

# Federal Affirmative Action Efforts:

## Methods, Spheres of Activity, and Illustrative Programs

	<b>Outreach &amp; Hortatory Efforts</b>	<b>Affirmative Action Plans</b>	<b>Disclosure of Data</b>	<b>Targeted Training &amp; Investment</b>	<b>Goals &amp; Timetables</b>	<b>Preferences</b>	<b>Set-asides</b>
<b>Federal employment</b>	Military recruitment	Encouraged by EEOC when appropriate	EEOC reporting requirements	Foreign Service Minority Internships	Used by agencies when appropriate		
<b>Federally-administered benefits</b>	Regulations encouraging federal use of minority banks	Conditions on certain federal grants (e.g., DOD, DOI)	CRA; SBA 7(a) disclosure of lending data	Selected HHS and Education scholarship and related programs	SBA 7(a) district-level goals set by Administrator	FCC distress sale and tax incentives; PCS bid preference	
<b>Federal procurement practices</b>	OSDBU offices; 8(a) program outreach		SBA reporting on procurement goals	Special Small Business Investment Cos. (SSBICs); SBA's 7(j) program	Government-wide procurement goals	10% bid preference for minority firms	"Rule of two" sheltered competition for minority firms; 8(a) sole-source contracting
<b>Federal contractor practices</b>	Exemplary Voluntary Efforts (EVE) awards	Required by EO 11246 when appropriate		Mentor-protége programs	Required by EO 11246 when appropriate	Incentives for use of minority subcontractors	

PHOTOCOPY PRESERVATION

never received a call, her equally qualified white counterpart appeared a few minutes later, was told about a vacancy for a front desk clerk, later interviewed, and offered the job.

- A black male tester asked about an ad for a sales position at a Maryland car dealership. He was told that the way to enter the business would be to start by washing cars. However, his white counterpart, with identical credentials, was immediately interviewed for the sales job.
- A suburban Maryland company advertised for a typist/receptionist. When a black tester applied for the position, she was interviewed but heard nothing further. When an identically qualified white tester was interviewed, the employer offered her a better position that paid more than the receptionist job and that provided tuition assistance. Follow up calls by the black tester elicited no response even though the white tester refused the offer.
- A GAO audit study uncovered significant discrimination against Hispanic testers. Hispanic testers received 25 percent fewer job interviews, and 34 percent fewer job offers than other testers. In one glaring example of discrimination, a Hispanic tester was told that a "counter help" job at a lunch service company had been filled. Two hours later, an Anglo tester was offered the job.<sup>35</sup>

The Urban Institute's Employment and Housing Discrimination Studies (1991) matched *equally qualified* white and black testers who applied for the same jobs or visited the same real estate agents. Twenty percent of the time, white applicants advanced further in the hiring process than equally qualified blacks. In one in eight tests, the white received a job offer when the black did not. *In housing, both black and Hispanic testers faced discrimination in about half their dealings with rental agents.*

Similarly, researchers with the National Bureau of Economic Research sent comparably matched resumes of men and women to restaurants in Philadelphia. In high priced eateries, men were more than twice as likely to receive an interview and five times as likely to receive a job offer than the women testers.<sup>36</sup>

The Justice Department has conducted similar testing to uncover housing discrimination. Those tests also have revealed that whites are more likely than blacks to be shown apartment units, while blacks with equal credentials are told nothing is available. Since the testing began, the Justice Department has brought over 20 federal suits resulting in settlements totaling more than

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<sup>35</sup> U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, Report to the Congress, GAO/GGD-90-62, March 1990, p. 48.

<sup>36</sup> David Neumark, et. al. *Sex Discrimination in Restaurant Hiring: An Audit Study*, Working Paper No. 5024, National Bureau of Economic Research, Inc. (February 1995).

\$1.5 million. A particularly graphic case of discrimination occurred during a fair housing test performed by the Civil Rights Division in Wisconsin, which sought to establish whether discrimination existed against the relatively large East-Asian population there. When the Asian tester approached the apartment building, the rental agent stood between the tester and the door to the rental office and refused to allow the tester to enter the building. The tester was told that there were no apartments available and there would not be any available for two months. When the white tester approached two hours later, the individual was immediately shown an apartment and was told he could move in that same day.

#### **4.3 Exclusion from Mainstream Opportunities: Continuing Disparities in Economic Status**

Apart from the remediation of and bullwark against discrimination, a second justification offered for continuing affirmative action in education, employment and contracting is the need to repair the mechanisms for including all Americans in the economic mainstream. There is ample evidence to conclude that the problems to which affirmative action was initially addressed remain serious, both for members of disadvantaged groups and for America as a whole.

- A recent study by the Glass Ceiling Commission, a body established under President Bush and legislatively sponsored by Senator Dole<sup>37</sup>, recently reported that:
  - White males continue to hold 97 percent of senior management positions in Fortune 1000 industrial and Fortune 500 service industries. Only 0.6 percent of senior management are African American, 0.3 percent are Asian and 0.4 percent are Hispanic.
  - African Americans hold only 2.5 percent of top jobs in the private sector and African American men with professional degrees earn only 79 percent of the amount earned by their white counterparts. Comparably situated African American women earn only 60 percent of the amount earned by white males.
  - Women hold 3 to 5 percent of senior level management positions -- there are only two women CEOs in Fortune 1000 companies.
  - The fears and prejudices of lower-rung white male executives were listed as a principal barrier to the advancement of women and minorities. The report also found that, across the board, men advance more rapidly than women.

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<sup>37</sup> Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* (March 1995).

- The unemployment rate for African Americans was more than twice that of whites in 1994. The median income for black males working full-time, full year in 1992 was 30 percent less than white males. Hispanics fared only modestly better in each category. In 1993, black and Hispanic men were half as likely as white men to be managers or professionals.<sup>38</sup>
- In 1992, over 50 percent of African American children under 6 and 44 percent of Hispanic children lived under the poverty level, while only 14.4 percent of white children did so. The overall poverty rates were 33.3 percent for African Americans, 29.3 percent for Hispanics and 11.6 percent for whites.
- Black employment remains fragile -- in an economic downturn, black unemployment leads the downward spiral. For example, in the 1981-82 recession, black employment dropped by 9.1 percent while white employment fell by 1.6 percent. Hispanic unemployment is also much more cyclical than unemployment for white Americans.<sup>39</sup> Hispanic family income remains much lower, and increases at a slower rate, than white family income.<sup>40</sup>
- Unequal access to education plays an important role in creating and perpetuating economic disparities. In 1993, less than 3 percent of college graduates were unemployed; but whereas 22.6 percent of whites had college degrees, only 12.2 percent of African Americans and 9.0 percent of Hispanics did.
- The 1990 census reflected that 2.4 percent of the nation's businesses are owned by blacks. Almost 85 percent of those black owned businesses have no employees.<sup>41</sup>
- Even within educational categories, the economic status of minorities and women fall short. The average woman with a masters degree earns the same amount as the average man with an associate degree.<sup>42</sup> While college educated black women have reached earnings parity with college educated white women, college educated black men earn 76 percent of the earnings

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<sup>38</sup> Bureau of Labor Statistics, *1994 Fact Sheet*.

<sup>39</sup> Gregory DeFreitas, *Inequality at Work: Hispanics in the U.S. Labor Forces* (New York: Oxford University Press, 1991), Chapter 4.

<sup>40</sup> *A Report of the Study Group on Affirmative Action to the House Committee on Education and Labor* (1987).

<sup>41</sup> Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* Ballantine Books (1992).

<sup>42</sup> 1990 Census data as compiled by the Office of Federal Contract Compliance Programs (1995).

of their white male counterparts.<sup>43</sup> Hispanic women earn less than 65 percent of the income earned by white men with the same educational level. Hispanic men earn 81 percent of the wages earned by white men at the same educational level. The average income for Hispanic women with college degrees is less than the average for white men with high school degrees.<sup>44</sup>

A study of the graduating classes of the University of Michigan Law School from 1972-1975 revealed significant wage differentials between men and women lawyers after 15 years of practice. While women earned 93.5 percent of male salaries during the first year after school, that number dropped to 61 percent after 15 years of practice. *Controlling for grades, hours of work, family responsibilities, labor market experience, and choice of careers (large firms versus small firms, academia, public interest, etc.), men are left with an unexplained 13 percent earnings advantage over women.*<sup>45</sup>

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<sup>43</sup> U.S. Bureau of the Census, *The Black Population in the United States: March 1994 and 1993* (1995); U.S. Bureau of the Census, *Characteristics of the Black Population* (1995).

<sup>44</sup> EEOC, Office of Communications, *The Status of Equal Opportunity in the American Workforce* (1995) (Data supplied by the National Committee on Pay Equity).

<sup>45</sup> Robert Wood, Mary Corcoran and Paul Courant, "Pay Differentials Among the Highly Paid: The Male-Female Earnings Gap in Lawyer's Salaries," *Journal of Labor Economics* (July, 1993).

## 5. THE VARIETIES OF FEDERAL PROGRAMS

This report examines most of the federal programs that would be considered to be affirmative action. It may be useful, therefore, to consider one or more taxonomies of those efforts. Figures 1 and 2 offer two possible matrices. In Figure 1, the horizontal dimension arrays various policy devices from the most flexible to the most pointed, while the vertical dimension arrays different spheres of activity--from those most closely to those less closely related to the federal government.<sup>46</sup> In this array, examples of the eight categories of policies include:

### *Outreach & Hortatory Efforts:*

- Various statutes *encourage* recipients of Federal funds to use minority-owned and women-owned banks.
- DOL's Office of Federal Contract Compliance Programs (OFCCP), for example, offers a periodic award for contractors with superior affirmative-action practices, such as innovative recruitment or training strategies.

### *Disclosure of Data:*

- The Small Business Act (§502) requires SBA to monitor and report on agency contracting with small disadvantaged businesses (SDBs). This reporting serves hortatory purposes and creates a competitive dynamic among agencies.
- Last year, the Administration announced plans to publish the rates at which financial institutions made federally guaranteed loans to women- and minority-owned firms. This reporting can leverage public and intra-industry pressures to expand such lending.

### *Affirmative Action Plan Requirements:*

- E.O. 11246 requires Federal contractors to maintain affirmative action plans; since the Nixon Administration, such plans must in certain circumstances contain flexible goals and timetables.
- The Community Reinvestment Act (CRA) requires certain chartered financial institutions to conduct and record efforts to reach out to undeserved communities.

### *Targeted Training & Investment Efforts:*

- The Foreign Service maintains a minority internship program designed to increase minority participation in the Foreign Service.

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<sup>46</sup> This taxonomy is not intended to suggest which programs may warrant strict scrutiny pursuant to *Adarand*.

- EPA maintains a Mentor/Protege program to encourage prime contractors to develop relationships with small and disadvantaged businesses (SDBs).

**Goals:**

- The Small Business Act requires each agency to set goals for contracting with small businesses and SDBs; the SBA coordinates the effort. Additionally, Congress has, in several instances, legislated specific goals for certain agencies. (As described in section 9 of this Report, these goals are all flexible -- they are not quotas or numerical straight jackets.)
- In response to dramatic imbalances in the numbers of women and minority entrepreneurs participating in its programs, SBA now sets management goals to increase diverse participation in its core §7(a) loan guarantee program.

**Market Advantages:**

- In upcoming FCC auctions of certain licenses for personal communication services and interactive video, the Commission had planned to offer a 25 percent discount for women- and minority-owned businesses; this effort was temporarily suspended by the Commission in light of *Adarand*.
- Under its "§1207" authority, the Defense Department is permitted to provide a 10 percent bid price preference, and to employ reduced-competition systems as a means of meeting its SDB contracting goals. Last year's procurement reform legislation extended this authority to non-DOD agencies as well.
- The Surface Transportation Assistance Act, and now the Intermodal Surface Transportation Efficiency Act (ISTEA), authorizes use of "subcontractor compensation" bonuses to prime contractors who use SDBs; The payment is intended as rough compensation for the prime contractor's expense in mentoring and technical assistance.

**"Soft" Set-Asides:**

- ISTEA requires that 10 percent of contracts be allocated to disadvantaged business enterprises (DBEs), *except to the extent that the Secretary determines otherwise*.
- The Airport & Airway Improvement Act requires the same.

**"Hard" Set-Asides:**

- The Omnibus Diplomatic Security & Antiterrorism Act requires that a minimum of 10 percent of funds appropriated for diplomatic security projects be allocated to minority business enterprises.
- Certain small education grant programs target minorities in graduate education.<sup>47</sup>

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<sup>47</sup> Such "hard" set-asides have included the Patricia Roberts Harris Fellowship (20 U.S.C. 1134D-G) and the Women and Minorities in Graduate Education (20 U.S.C. 1134A).

Obviously, there is no single best way to think about these efforts. For example, in Figure 2, one could categorize efforts based on their programmatic objectives, perhaps distinguishing programs focused on education and training (as more "investment-oriented"), from programs focused on employment and contracting (as more "income-oriented"), from programs focused on the assignment of scarce assets, such as bank charters and spectrum licenses (as more "result" or "reward-oriented"). There are obviously elements of "opportunity" and "result" present across the board, but the scale has some heuristic appeal.

## 6. THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (DOL)

This Part offers a summary of the Department of Labor's program to promote equal employment opportunity practices by private firms who have contracts with the federal government.

### 6.1 Concepts & Principles

OFCCP's primary responsibility is to implement and enforce an Executive Order and several statutes banning discrimination and establishing affirmative action requirements for federal contractors and subcontractors. While these policies have roots in the 1940s, the seminal requirements are contained in E.O. 11246, signed by President Johnson, and in regulations promulgated pursuant to that order in 1970 under President Nixon, which introduced the concept of goals and timetables. Specifically, OFCCP may require goals for hiring and promoting women and minorities as part of the affirmative action program (AAP) which contractors are required to develop and/or implement; however, race- or gender-based hiring and promotion are not required, and quotas are prohibited.

### 6.2 Policies & Practices

- *Coverage:* With certain exceptions, E.O. 11246 applies to Federal contractors and subcontractors with contracts of more than \$10,000 per year. In FY 1993, some **92,500** nonconstruction establishments and **100,000** construction establishments were covered. These establishments employed approximately **26 million** people and received contracts of more than **\$160 billion**.
- *Affirmative Action Requirements:* OFCCP regulations impose different requirements on construction and nonconstruction firms.
  - Nonconstruction firms with 50 or more employees or contracts of more than \$50,000 must develop and maintain a **written affirmative action program (AAP)**. The contractor keeps the AAP on file and carries it out; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review. As part of its AAP, the contractor must conduct a workforce analysis of each job title, determine workforce availability of women and minorities for each job group, and conduct a utilization analysis to determine whether women or minority group persons are "underutilized" in any job group. Based on these analyses, the contractor establishes goals to overcome the "underutilization," and makes a good faith effort to achieve those goals.

- Construction firms are not required to maintain written AAPs, but must make **good faith efforts to meet demographic goals** informed by place-specific census data for minorities and a nation-wide goal for women.
- *OFCCP regulations expressly prohibit discrimination and the use of goals as quotas.*<sup>48</sup>
- **Goals & Timetables:** The numerical goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. Numerical benchmarks are established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force. The regulations specifically prohibit quotas and preferential hiring and promotions under the guise of affirmative action numerical goals. *Numerical goals do not create quotas* for specific groups, nor are they designed to achieve proportional representation or equal results.
- **Enforcement Procedures:** A contractor's failure to attain its goals is not, in and of itself, a violation of the Executive Order; failure to make good faith efforts is. OFCCP undertakes **compliance reviews** for certain contractors flagged by a computer program as having below average participation rates for minorities or women. OFCCP also conducts reviews of contractors selected randomly and identified through complaints.<sup>49</sup> In FY 1994, OFCCP conducted more than 4,000 reviews, roughly 3.26 percent of its supply-and-service contractor universe, and 1.55 percent of its construction contractors. If a firm is found to violate affirmative action requirements (or antidiscrimination requirements) OFCCP attempts to conciliate with the contractor; in a very small percentage of cases, no agreement is reached and the case is referred for formal administrative enforcement.
- **Incentives:** OFCCP gives Exemplary Voluntary Efforts (EVE) and Opportunity 2000 awards to those companies who demonstrate significant achievement in equal opportunity and affirmative action.
- **Sanctions:** A contractor in violation of E.O. 11246 may have its contracts terminated or suspended, or be debarred. Such administrative actions are rare, and there is ample due process accorded the contractor before hand.

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<sup>48</sup> 15 U.S.C. sec. 637 (a)(1),(4).

<sup>49</sup>Roughly 80 percent of reviews are "triggered by" computer- based selection system.

### 6.3 Performance & Effects

#### ■ *Performance Generally:*

As noted in Part 3 of this document, OFCCP programs have been studied in some detail. During the 1970s, when enforcement was quite strong, the programs were found to increase modestly the employment of minorities. (During the 1980s, enforcement -- and the effectiveness of the policies -- declined.) Most studies have found that OFCCP has had a less significant impact on hiring of minorities in skilled crafts and trades. However, some limitations on the validity of the OFCCP evaluation studies have been raised. The available evidence indicates that productivity at contracting firms is unaffected by OFCCP. This suggests that OFCCP has not caused contracting firms to hire less qualified workers. Further, a recent study finds that exemplary affirmative action programs help a company's stock market values.

The OFCCP national office conducted a random survey of 247 conciliation agreements obtained by the field in FY 1993 and FY 1994, and did not find any situations where the agency sought and obtained remedies outside the scope of OFCCP's authority. Moreover, during the review of the conciliation agreements OFCCP found an example of an OFCCP regional office requiring corrective action by a contractor who had engaged in an employment practice that discriminated against males, both whites and minorities. OFCCP cited the contractor with a violation of Executive Order 11246 and required it to enter into an agreement providing relief to both white and minority victims.

Several studies were critical of the administrative aspects of the programs, such as the mechanisms for selection of contractors for review and the paperwork burdens on smaller contractors. Some groups have been critical of the length and detail of the AAPs. In response to this latter criticism, OFCCP plans to (i) significantly reduce the AAP paperwork requirements and (ii) initiate a summary AAP format that will help target reviews.

Finally, some have raised a concern that although AAPs as a formal matter are framed in terms of flexible goals, and although rigid quotas violate both OFCCP regulations and Title VII, in some cases employers implement the goal with a rigidity making it tantamount to a quota. OFCCP has little data directly addressing this concern, but notes that reverse discrimination complaints, including objections to *de facto* quotas, are very rare in their administrative mechanism or at the EEOC. The absence of litigation is not, of course, a complete answer, in as much as subtle discrimination -- reverse or otherwise -- can be difficult to detect and even more difficult to challenge. Therefore, the DOL conducted further analysis for this Review:

- analysis of a recent report by an association of 300 Federal contractors, and interviews with attorneys who represent contractors on OFCCP matters;
- analysis of OFCCP's 1994 customer satisfaction sample survey of contractors; and

- detailed interviews with OFCCP regional directors.

The conclusion of this further analysis is that, while there are some issues of regulatory burden and enforcement consistency, and while there are a small number of firms who feel that the effect of goals is to make them "hire by the numbers," the weight of the evidence refutes the claim that the Executive Order program leads to widespread abuses.

The following subsections review this material in more detail.

■ *Views of the Contractors' Trade Association and Attorneys*

On March 17, 1995, the Equal Employment Advisory Council (EEAC), an association of 300 federal contractors (including companies such as Marriott, Martin-Marietta, and Bausch & Lomb), issued a report "to clarify the nature of affirmative action planning" as well as "to explain the point that Executive Order 11246 does not require contractors to grant preferential treatment to any employee or applicant on the basis of race, gender, or ethnic background." DOL played no role in soliciting the EEAC to prepare and issue its report, but believes it is entitled to considerable weight because EEAC exists to promote the interests of federal contractors.

Emphasizing that OFCCP's regulations explicitly prohibit the use of goals as "inflexible quotas,"<sup>50</sup> the Report notes that "rancorous debate" often ensues between employers and OFCCP over how many women and minorities are "available" in the work force because solid empirical data do not exist.

The Report also noted that goals and timetables in the past (*i.e.*, during the 1970s and 1980s) worked as quotas. Under OFCCP regulations, numerical affirmative action steps are not required unless "underutilization" exists. OFCCP's previous approach required three types of goals for each underutilized group: an *annual placement rate goal* (expressed as a percentage, and generally set at a rate above "availability"); an *annual numerical goal* (determined by multiplying the annual placement rate goal by the number of anticipated placements); and an *ultimate goal* (expressed as a percentage and equal to availability, coupled with a timetable for reaching that goal). Contractors complained that by setting the placement rate above availability, they were pressured "into extending preferences to fulfill goals." Also during prior periods, failure to implement an acceptable affirmative action goal could be remedied by "catch-up goals." This would have the effect of having goals function like quotas and bore "no relationship to true current availability." In the early 1980s OFCCP abandoned these "preferential tactics." In 1987, a majority staff report of the Committee on Education and Labor, U.S. House of Representatives, specifically recommended reinstating (1) ultimate goals; (2) multi-year timetables; (3) goals set above availability; and (4) numerical goals (to add to percentage placement rate goals). The

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<sup>50</sup> 41 C.F.R. § 60-2.12(e).

EEAC concludes that OFCCP did **not** adopt these recommendations and "*the goal-setting process today clearly does not impose preferences or quota-like requirements.*"

DOL also contacted several lawyers who work with contractors on OFCCP matters. These attorneys consistently stated that employers' major concerns about the administration of Executive Order 11246 have very little to do with goals operating as quotas. Major complaints include inconsistent enforcement among regions, irrelevance of some factors OFCCP requires to be considered in the workforce availability analysis, length and paperwork burden associated with preparing the affirmative action plan, and compliance officers' emphasis on minor or technical requirements. They attribute some of these problems to lack of training of compliance officers and poor quality control.

■ ***Customer Satisfaction Survey***

In its 1994 customer satisfaction surveys of nonconstruction and construction contractors, OFCCP selected randomly from contractors that had been reviewed during the past year. The response rate for each group was approximately 80 percent -- responses from 278 construction and 363 service and supply contractors were tabulated.

One question, designed to elicit respondents' overall opinion of the compliance review, asked respondents to indicate their agreement with five statements using a ten point scale. Overall, the survey results were relatively positive. Regarding perceptions of enforcement consistency, 15.2 percent of the construction and 29.3 percent of the service and supply contractors responded that OFCCP had not been very consistent among reviews by the same compliance officer or by staff members from the same office. More than 70 percent agreed that the compliance review was a thorough assessment of compliance with OFCCP's regulations, that OFCCP provided responsive technical assistance, and that the company's position was considered during the conciliation process. Most respondents (more than 80 percent) agreed that the compliance officer was professional during the review and that oral and written communications from OFCCP were professional and courteous.

More broadly, two survey questions ("If you could change or improve any part of the review process, what would it be?" and "Are there any additional comments that you would care to include?") invited respondents to add narrative comments. Of the 278 construction and 363 nonconstruction responses, one-quarter and one-third of the firms, respectively, commented. *Only 10 construction firms and four nonconstruction firms chose to address quotas or reverse discrimination.* The following are examples of these comments:

Allow businesses to conduct their business for the betterment of customers and employees and not to satisfy some minority quota requirement. [nonconstruction contractor]

Believe program has gone overboard. It is not flexible considering the different factors that effect the hiring process. It has become a numbers game, even though it will not be admitted to. [nonconstruction]

I can see no way to improve the review due to its basis in the code which stresses quotas and quality with little or no emphasis on productivity, work ethic or quantity and quality of work which ultimately makes us competitive nationally and internationally. [construction]

Greater consideration for employer showing good faith. If skills necessary are not available in area in minority and female applicants, they cannot be hired. Do not want to hire unqualified applicants just because they are minorities or females; want to hire best qualified applicant regardless of race or sex. [nonconstruction]

There were also isolated comments about unrealistic goals:

Our women goals, we can't even come close to obtaining. Add to this, the fact that there is currently high levels of unemployment at the union local. What's the reality of these goals? How can we comply when there isn't enough work, and there aren't enough women and minorities in the trade? When will someone take an honest look at this situation and develop realistic goals and procedures to follow? [construction]

The fact that so very few contractors addressed the quota issue is consistent with OFCCP's random survey of conciliation agreements obtained by the field in FY 1993 and FY 1994. OFCCP did not find any instances of contractors being cited for not meeting their goals, use of the word "quota," or obtaining remedies outside the scope of OFCCP's authority.

Other comments from contractors addressed the length of time that it took to prepare for and conduct the compliance review; inconvenient scheduling of the review; inconsistency among compliance officers; and compliance officers' lack of familiarity with the particular industry. Approximately 11 percent of the construction contractors comments and approximately 14 percent of the service and supply contractor comments addressed paperwork burdens. Many of the comments indicated that OFCCP devoted too much time to the on-site review and took an inordinately long time to complete the entire review. Contractors also commented that they sometimes were given the impression during the on-site review that the review had gone well, but the formal closing correspondence was much more negative.

■ *Interviews with OFCCP Regional Directors*

The complaints of contractors conveyed by the regional directors were similar to those revealed in the customer satisfaction survey, such as inconsistency and frustration over technical infractions. Also:

- The Region III Director believes that some contractors today allow goals and timetables to limit unnecessarily opportunities for women and minorities in that the contractors consider the goal to be a ceiling. For example, they hire only 20 percent women because that is the affirmative action program, but there are 60 percent women in the applicant pool for a particular job. (Such a situation could lead OFCCP to investigate whether the contractor is engaging in unlawful discrimination, and a quota would be unlawful.)
- According to the Director from Region II, some contractors often set their own hiring and promotion goals and treat those as quotas because "it is smart for their company" and to "keep the government off their backs." When they "hire by the numbers," the word spreads that numbers are driving hiring and promotion decisions -- leaving it unclear as to whose "numbers" are driving the process. Where a contractor engages in such action, the OFCCP is charged with conducting an investigation. Such conduct would violate the executive order.
- Neither Director from Region VIII or IX believes their federal contractors have treated their goals as quotas. The Directors from Regions III, IV, VIII, and IX cannot recall reverse discrimination complaints. The Region V Director reports only one reverse discrimination complaint.
- The Region I Director noted that contractors can perpetuate the false notion that contractors are being driven by "quotas." Contractors will sometimes tell disappointed male applicants that the individual who got the job or promotion got it because he or she was a woman or minority, even though that was not the reason.
- *OFCCP Response and Reforms*

As part of the ongoing National Performance Review process led by the Vice President, OFCCP is eliminating unnecessary paperwork requirements associated with the written affirmative action plan and has designed a summary format for the affirmative action plan that will greatly assist OFCCP in targeting its limited resources, while saving contractors approximately 4.5 million (out of 15 million) hours in the annual preparation of their plans and recordkeeping. Several other streamlining and burden-reduction measures are also underway.

OFCCP currently attempts to address the problem of inconsistencies with policy guidance by reemphasizing relevant portions of the Federal Contract Compliance Manual, the agency's operating manual, and with its continuing program of training for its compliance officers. Other mechanisms are more ad hoc. According to the Director from Region III, for example, the region has moved forward with suggestions from Scott Paper Company that (1) the Regional Office communicate/negotiate with the contractor before sending a formal letter of noncompliance, and (2) the compliance officer focus on substantive issues in the review (e.g. good faith) and not technical issues (e.g. formatting of the plan documents).

## 6.4 A Note on OFCCP Law Enforcement Functions

In addition to enforcing the government's affirmative action requirements, the OFCCP performs a related but distinct function: enforcement of the antidiscrimination provisions of Executive Order 11246 (based on the principles of Title VII of the Civil Rights Act). The courts and Congress have permitted the use of statistical evidence showing a disparate impact, or manifest imbalance, to establish a *prima facie* case of unlawful discrimination. Such evidence then shifts to the employer the burden of producing an explanation or other evidence showing that the disparity is not the result of discrimination.

Understandably, these two independent concerns are sometimes confusing to contractors when they are faced with corrective actions. For example, contractors occasionally claim they are being "forced" to hire a woman or minority when OFCCP, is in fact requiring them to remedy discrimination by providing job offers, back pay or other relief to identified victims. In contrast, OFCCP polices the affirmative action requirement of E.O. 11246 by "auditing" for "good faith efforts," not for whether any specific numerical goal has been met.

## 6.5 Conclusions and Recommendations

Does the federal government's affirmative action programs relating to fair employment meet the President's tests: Do they work? Are they fair?

### 6.5.1 Conclusions

*Do they work?*

With respect to antidiscrimination enforcement, the OFCCP process is designed to provide dispute resolution, adjudication and remediation for identified acts of unlawful discrimination. The key issue in this Review, however, concerns the use of affirmative action programs. Under the Executive Order program, affirmative action in employment is intended to:

- promote inclusion of underrepresented minorities and women, in recognition that the lingering effects of past discrimination and exclusionary practices have denied opportunity to qualified people;
- prevent future discrimination by encouraging employers to be inclusive in their hiring and promotion practices;
- provide a practical means, through use of flexible goals and timetables, for employers to gauge their progress; This mirrors the universal conclusion that successful organizations pursue their objectives by adopting measurable goals, and plans to achieve them.

The empirical literature indicates that affirmative action generally, and specifically the OFCCP Executive Order program, does create opportunity. According to five academic studies, active enforcement by OFCCP during the 1970s caused government contractors to increase moderately their hiring of minority workers.<sup>51</sup> According to one study, for example, the employment share of black males in contractor firms increased from 5.8 percent in 1974 to 6.7 percent in 1980. In non-contractor firms, the black male share increased more modestly, from 5.3 percent to 5.9 percent. For white males, the employment share fell from 58.3 percent to 53.3 percent in contractor firms, and from 44.8 percent to 41.3 percent in non-contractor firms.<sup>52</sup> The literature also finds that contractor establishments that underwent an OFCCP review in the 1970s subsequently had faster rates of white female and of black employment growth than contracting firms that did not have a review.<sup>53</sup> OFCCP enforcement was scaled back during the 1980s. Nonetheless, there is reason to believe that it continues to have a positive and significant impact on remedying discrimination in the workplace.

*Is it fair?*

### (1) Not Quotas

The available evidence, from court and administrative litigation, refutes the charge, based on anecdote, that equal employment opportunity goals have led to widespread quotas through sloppy implementation or otherwise. Quotas are illegal under current law, and can be used only as remedies in extremely limited court-supervised settings involving recalcitrant defendants found to have engaged in illegal discrimination. EEOC and court records simply do not bear out the claim that white males or any other group have suffered widespread "reverse discrimination."

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<sup>51</sup> The five studies are: (1) Leonard, Jonathan, 1984, "The Impact of Affirmative Action on Employment," *Journal of Labor Economics*, 2:439-463; (2) Leonard, Jonathan, 1984, "Employment and Occupational Advance Under Affirmative Action," *The Review of Economics and Statistics*; (3) Ashenfelter, Orley and James Heckman, 1976, "Measuring the Effect of an Anti-discrimination Program, in *Estimating the Labor Market Effects of Social Programs*, Eds: Orley Ashenfelter and James Blum. Princeton NJ: pp.46-89; (4) Heckman, James and Kenneth Wolpin, 1976, "Does the Contract Compliance Program Work? An Analysis of Chicago Data," *Industrial and Labor Relations Review* 29:544-64; (5) Goldstein, Morris and Robert Smith, 1976, "The Estimated Impact of Anti-discrimination Laws Aimed at Federal Contractors," *Industrial and Labor Relations Review*.

<sup>52</sup> Leonard, Jonathan, 1984, "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment," *Journal of Economic Perspectives*, 4:47-64.

<sup>53</sup> See above studies plus Donohue and Heckman, *Continuous versus Episodic*, 29, *Journal of Economic Literature*, p.1631.

Undeniably, however, there is anecdotal evidence of certain managers taking impermissible shortcuts -- hiring and promoting "by the numbers" rather than by using affirmative action in a flexible way to broaden the pool and then ensure that the effort to be inclusive does not compromise legitimate merit principles. (See recommendation below.) These anecdotes, if true, may in fact be stories about illegal discrimination, and are grounds for more attention to enforcement and education. Nevertheless, the balance of the *evidence*, based on complaints and litigation, indicates the problem is not widespread.

## **(2) Race-Neutral Alternatives**

Nothing in the Executive Order requires race-based hiring or promotion, although equal opportunity *results* are measured. Thus, employers are free to adopt outreach, recruiting and hiring strategies as they choose, consistent with antidiscrimination law. While employers must analyze workforce and labor market data to identify manifest imbalances, the Executive Order only requires good faith efforts, and "good faith effort" is the basis upon which OFCCP reviews contractor performance. In that sense, therefore, as both a logical and practical matter, employers are perfectly free to adopt race-neutral strategies to achieve their EEO goals, provided they make a good faith calculation that such strategies will be effective.

## **(3) Flexible and Minimally Intrusive**

There has been criticism of the Executive Order program as inflexible and intrusive, but the actual structure and working of the program demonstrate otherwise. First, there is the fact that the affirmative action programs emphasize goals and good faith, while leaving employers wide latitude to select means. Second, employers develop goals following analyses of their workforce and of the relevant labor pool, and there is no requirement of strict proportionality in the setting of a goal. Third, OFCCP is preparing a very significant reformulation of the guidelines for labor market analysis in order to simplify greatly the paperwork and research burden on firms preparing affirmative action programs. Finally, OFCCP is also streamlining the compliance review process so that its audits are less burdensome and disruptive. In these respects, some legitimate concerns about administration of the Executive Order are being addressed by the agency.

There continue to be concerns about the flat nationwide goal that women occupy 6.9 percent of construction jobs. That goal was established on April 8, 1978 as part of DoL regulations (41 C.F.R.60-4.6), and has not been revisited. The Secretary of Labor should consider whether such a review is called for. Experience may suggest adjusting the goal.

## **(4) Transitional**

The transitional nature of affirmative action is implicit in the structure of the Executive Order, in as much as action is triggered by manifest underrepresentation of minorities and women, and when a workforce is fully inclusive, no further action is called for.

There is a broader issue, however. To the extent that a contractor is doing a good job of inclusion -- as demonstrated quantitatively by the numbers or qualitatively by the good faith efforts, then the compliance burdens of the Executive Order should be reduced and no regulations should require the continuation of elements of an affirmative action plan that are unneeded. OFCCP is considering taking steps in this direction.

**(5) Balanced**

Finally, affirmative action done the *right* way is balanced in that, even where it is necessary to have goals and timetables to correct manifest underrepresentation, those goals must be designed with reference to the relevant pool of applicants, and actual employment decisions cannot in the name of affirmative action give benefits to unqualified over qualified individuals. Moreover, caselaw makes clear that the interests of third parties -- of bystanders -- must be weighed in the balance. All of this is reflected in OFCCP's administration of the Executive Order program.

**6.5.2. Recommendations:**

Our conclusion is that the pragmatic use of affirmative action to promote equal opportunity in employment by government contractors has been and continues to be valuable, effective, and fair. The leadership provided by the federal government and its contractors has been a critical factor in causing private and public organizations to challenge and change their own personnel practices, using affirmative action as one tool to open up opportunity to qualified minorities and women who might otherwise have been left outside. We recommend that the President:

- Direct the Secretary of Labor to underscore and reinforce current law and policy regarding nondiscrimination, the illegality of quotas, the enforcement focus on "good faith efforts," and the relationship of equal opportunity to legitimate qualifications, by instituting appropriate changes in the administrative guidelines for the Executive Order program and in the technical assistance provided to employers by the Office of Federal Contract Compliance Programs.
- Instruct the Department of Labor to finalize and implement plans to reduce the employer paperwork burden associated with the Executive Order Program, and reward successful companies by targeting enforcement on problem firms. Currently, OFCCP is working to achieve a 30 percent reduction in private sector paperwork burdens. These steps include a streamlining of the written plan required to be prepared by contractors, targeting audits to firms where there is evidence of a problem, and limiting audits to areas of specific concern. In addition, OFCCP will eliminate duplicative or unnecessary forms now required from contractors.
- Direct the Secretary of Labor to explore means of collaborating with private sector leaders in more vigorous private sector-led efforts to promote best practices in providing equal employment opportunity. Other Cabinet officers and Administration officials should participate as appropriate.

## 7. AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY IN THE MILITARY

### 7.1 Concepts & Principles

Today's military leadership is fully committed to equal opportunity.<sup>54</sup> This commitment has produced considerable progress, although more remains to be done, particularly for women. Historically, the Army has been the most successful of all the services at racial integration-- a record, one official explained, built on "necessity, control and commitment." More specifically:

*First*, the current leadership views complete racial integration as a military necessity -- that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenges of diversity is critical to national security. Experience during the 1960s and 1970s with racial conflict in the ranks was an effective lesson in the importance of inclusion and equal opportunity. As a senior Pentagon official told us, "Doing affirmative action the right way is deadly serious for us -- people's lives depend on it."

*Second*, doing it "the right way" means ensuring that people are qualified for their jobs; promotion is based on well-established performance criteria which are not abandoned in pursuit of affirmative action goals.

*Third*, the equal opportunity mission is aggressively integrated into the management systems -- from intensive efforts at training to formal incorporation of EO performance into the appraisals used by promotion boards.

*Fourth*, the military has made very substantial efforts and investments in outreach, retention and training. These tools help build diverse pools of qualified individuals for assignment and promotion.

*Fifth*, despite the formality of the military system, the details vary somewhat across services. Different officials expressed slightly different perceptions about subtle aspects of how the system operates.

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<sup>54</sup> The Pentagon tends not to use "diversity" and rarely uses "affirmative action." The preferred term is "equal opportunity." Insofar as bias and prejudice persist, effective equal opportunity strategies will often entail affirmative action.

## 7.2 Policies & Practices

Because minorities are overrepresented in the enlisted ranks and underrepresented in the officer corps (compare Exhibits 3 & 4), the armed forces have focused recently on the officer "pipeline." The services employ a number of tools:

- **Goals & Timetables:** The Navy and the Marine Corps, historically less successful than the other services in this arena, have responded in recent months by setting *explicit goals* to increase minority representation in the officer corps. Both services seek to ensure that, in terms of race and ethnicity, the group of officers commissioned in the year 2000 roughly reflects the overall population: 12 percent African American, 12 percent Hispanic, and 5 percent Asian. Department of the Navy officials point out that this represents a significantly more aggressive goal than had been the case, when the focus for comparison had been on college graduates; the more aggressive goal implies vigorous outreach and other efforts (see below). Moreover, the Navy and the Marine Corps have set specific year-by-year targets for meeting the 12/12/5 goal.
- **Outreach, Recruiting, & Training:** All of the services target outreach and recruiting activities through ROTC, the service academies, and other channels. Also, the services have made *special, race-conscious (though not racially exclusive) efforts to recruit officer candidates*. For example, the Army operates a very successful "preparatory school" for students nominated to West Point whose academic readiness is thought to be marginal; the enrollees are disproportionately but non exclusively minority.
- **Selection Procedures:** All of the services emphasize racial and gender diversity in their promotion procedures. The Army, for example:
  - instructs officer promotion boards to "be alert to the possibility of past personal or institutional discrimination -- either intentional or inadvertent";
  - sets as a *goal that promotion rates for each minority and gender group at least equal promotion rates for the overall eligible population*; if, for example, a selection board has a general guideline that 44 percent of eligible lieutenant colonels be promoted to colonel, the flexible goal is that promotions of minorities and women be at that same rate;
  - establishes a "*second look*" process under which the files for candidates from underrepresented groups who are not selected upon initial consideration are reconsidered with an eye toward identifying any past discrimination; and
  - instructs members of a promotion board carefully so that the process does not force promotion boards to use quotas. Indeed, as Exhibits 5-7 illustrate, *the minority and women promotion rates often diverge considerably from the goal*.

- **Management Tools:** These include performance standards, reporting requirements, and training and analytic capacity.
  - Personnel evaluations include matters related to effectiveness in EO matters.
  - DoD maintains the Defense Equal Opportunity Management Institute, which trains EO personnel, advises DoD on EO policy, and conducts related research.
  - DoD conducts various surveys and studies to monitor equal opportunity initiatives and the views of personnel.
  - Most important, DoD requires each service to maintain and review affirmative action plans and to complete an annual "Military Equal Opportunity Assessment" (MEOA). The MEOA reports whether various equal opportunity objectives were met and identifies problems such as harassment and discrimination.

The MEOA includes both data and narrative assessments of progress in 10 areas. One of these is recruitment and accessions (*i.e.*, commissioning of officers). Other areas include officer and enlisted promotion results, completion of officer and enlisted professional military education (*e.g.*, the war colleges and noncommissioned officer academies), augmentation of officers into the Regular component, assignment to billets that are Service defined as career-enhancing and to commanding officer and deputy commanding officer billets, and over- and under-representation of minorities or women in any military occupational category. In addition to these formal efforts, the Services support the efforts of non-profit service organizations, such as the Air Force Cadet Officer Mentor Action Program, that strengthen professional and leadership development through mentorship, assist in the transition to military life, and support the establishing of networks.

### 7.3 Performance & Effects

In quantitative terms, the military has significantly increased opportunities for minorities. As Exhibit 9 illustrates, in 1949, 0.9 percent of all officers were African American; today, that proportion is 7.5 percent; in 1975, only five percent of active duty officers across all services were minorities, and today that proportion is 13 percent. At senior levels, over the past two decades there has been a fairly steady increase in, for example, the numbers of African Americans at the colonel/Navy captain rank; General and flag officer representation increased until roughly 1982, and has been essentially steady since then.

It is important to note, however, that equal opportunity has not meant total racial harmony or universal respect for the system. A congressional task force that interviewed 2,000 military personnel reported continued perceptions of discrimination, some perceptions of reverse discrimination, and a need to strengthen equal opportunity training. For example, the task

force reported that *at one installation*, on a scale of 1 to 5 (with 1 = poor, 5 = excellent), minority enlisted personnel rated the equal opportunity climate at 1.9, while majority enlisted personnel rated the climate at 4.1. This and other data suggest continuing sharp differences in perceptions. The Services conduct regular Military Equal Opportunity Climate Surveys. Generally, the races and sexes diverge when asked whether the unit's command structure is committed to equal opportunity. The greater divergence tends to occur between minority women officers and majority male officers, who respectively rate that commitment as "below average" and "good."

Finally, as noted earlier, there are significant variations in diversity across the services, and across specialties and missions within each service. For example, the Navy and Marines have lagged generally, and all the services report comparatively less success in integrating the ranks of technical specialties and of certain "technical" career tracks. For women, progress slowed by restrictions on the categories of jobs available to them. This should be eased as more women move into combat-related positions available since April 1993.

The Department of Defense reports that minorities constitute less than 2 percent of the Air Force enlisted missile maintenance personnel, and 17 percent of the enlisted Electronic Warfare/Intercept Maintenance personnel in the Army, while more than 24 percent and 41 percent of the enlisted personnel in the Air Force and the Army, respectively, are minorities. In the case of officers, only 6 percent of the Navy physical scientists, and 7 percent of the officers of the Marine Corps Electronic Maintenance officers are minorities.<sup>55</sup>

#### 7.4 Implications

Several tentative inferences can be drawn from DoD's experience.

- **Goals and related policies play a critical role in military promotions.** DoD and Service officials are unanimous in stating that merit is not sacrificed in the effort to meet goals for equal opportunity and diversity. The Services reconcile this emphasis on merit with their commitment to correcting underrepresentation of minorities and women by using the tools of goal-setting, outreach and training. The key appears to be management vigilance, motivated by a clear sense of the relationship of diversity issues to the military mission.
- **The military is unique.** In significant respects, the policies and practices of the military may not be portable to other realms. The military is unlike other public and private entities in several relevant dimensions:

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<sup>55</sup> Distribution of Active Duty Forces Report, DMDC 3035, March 1995.

- *A closed system:* There are virtually no lateral hires in the military, thus competition for promotions are among a closed group. Moreover, under the general "up-or-out" policy, underperforming personnel tend to leave the service.
- *A controlled system:* The military has tremendous discretion to assign, train, and promote its personnel. This provides a degree of control not available elsewhere.
- *A disciplined system:* Individuals who are unhappy with the management priorities, including the attention to diversity, are likely to keep their objections to themselves or exit the service. While EO measures are subject to continual evaluation, internal protest against such a high priority initiative would be frowned upon.
- **But some lessons may be transferrable.** Nevertheless, certain elements in the military success may be applicable more broadly, including in the corporate sector:
  - *Top-down priority:* There is no confusion in the ranks about the importance of the equal opportunity agenda. Private sector experts on affirmative action stress the importance of similar commitment flowing from the Board Room to the line supervisors.
  - *Thorough implementation:* Relatedly, the goals are pursued with a range of tools, from management information systems, to equal opportunity training, to performance appraisals of managers based on their EO efforts.
  - *Emphasize merit and have patience, but measure results:* The long-term support for the program has depended upon the firm belief that merit principles are indispensable. The payoff has required both patience and investments. Patience, however, can degenerate into flagging commitment unless progress is carefully measured, tracked and related to goals.
  - *Investments for a quality pool:* The organization works to recruit, retain and upgrade the skills of women and minorities to ensure that they, like their white male colleagues, can compete effectively in the promotion pool.
- **Overall, the military has made significant progress.** In part because of the closed and controlled nature of the system, the military has made significant progress. Interestingly, to the extent that side-effects of aggressive equal opportunity policy may exist -- such as resentment by white males -- they are probably subdued by the high level of discipline in the services.

It is worth noting, however, that President Truman's actions in 1948 to provide equality of treatment and opportunity in the armed forces took *several decades* to bear fruit, as

measured by the increasing representation of minorities in the flag and general officer ranks.

## 7.5 Conclusions and Recommendations

Do the military's affirmative action programs meet the President's tests: Do they work? Are they fair?

### 7.5.1 Conclusions

*Does it work?*

For years, segregation in the military was a widely-debated national issue. Even after the military was desegregated, however, the effects of discrimination were deeply ingrained. Racial conflict within the military during the Vietnam era was a blaring wakeup call to the fact that equal opportunity is absolutely indispensable to unit cohesion, and therefore critical to military effectiveness and our national security. Then, with the move to an All Volunteer Force, the military's need to include all Americans in the pool of potential recruits took on added urgency. Today, discussions with both uniformed and civilian leaders at the Pentagon make clear that the justification for aggressive, affirmative efforts to create equal opportunity is understood by commanders and translated into a broad program of outreach, recruitment, training, retention, and management strategies.

The uneven pattern of progress across the services reflects both different choices of strategy and differences in top-level commitment over the years. Many observers, for example, credit the Army's leading effort to the unswerving drive of a few general officers and certain subcabinet officers during the 1970s. Of special importance were the efforts of Carter-era Army Secretary Clifford Alexander, the first African-American service secretary. While much remains to be done, (the pipeline has not yet led to senior ranks diverse enough to declare victory), the trend and the commitment are positive.

*Is it fair?*

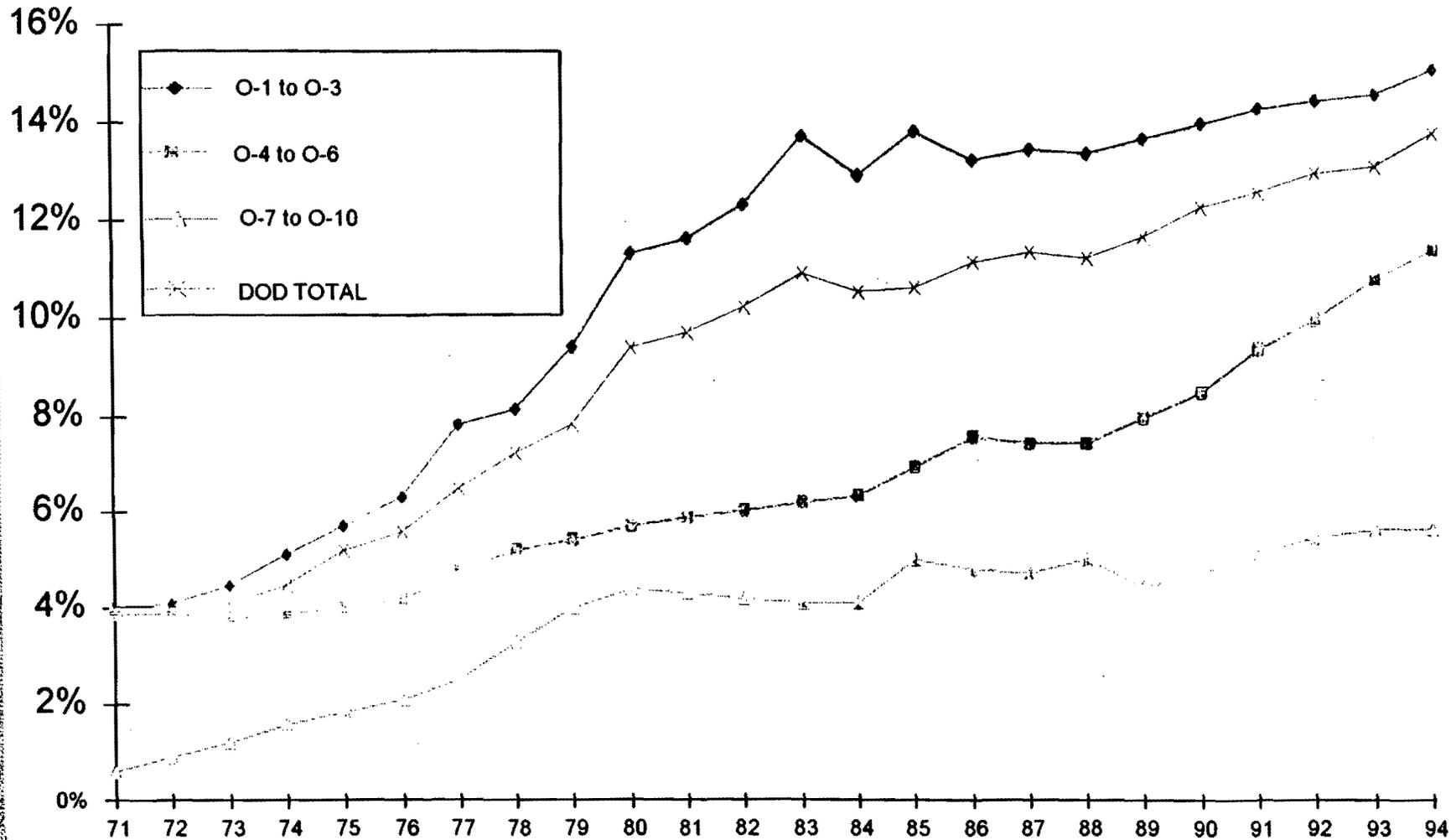
The military has always had a different role and different requirements. For example, actions taken by the Department of Defense since April 1993 have resulted in the eligibility of women for assignment to some 260,000 additional military positions, many of which involve combat. However, women may not be assigned to units that engage in direct ground combat. The military is exempt from the statues prohibiting discrimination in employment. Nevertheless, its affirmative action efforts prohibit quotas. The core of their strategy is to *build the pool* so that there are minorities and women fully qualified to enlist, succeed, and rise.

### **7.5.2 Recommendations:**

We recommend that the President:

- Meet with senior military and civilian leadership of the Armed Services to underscore personally the importance of continued progress in ensuring equal opportunity to women and minorities. Of special concern are: the "pipeline" difficulties at the flag and general officer ranks; the importance of successful implementation of recent initiatives to correct the lagging performance of the Navy and Marine Corps; and improvement in certain career tracks in all of the Forces, such as "technical" specialties, where underrepresentation remains substantial.
- Direct the Secretary of Defense to convene a high-level group to examine the degree to which the military's equal opportunity philosophy and management tools (such as performance evaluations, job-specific training, sexual harassment training, and alternative dispute resolution) can be adapted to non-military organizations, including DOD's civilian workforce and private sector organizations. Of particular interest is whether the driving force behind the military's commitment to equal opportunity -- military necessity -- has analogies in other settings. That group, whose members should include retired senior military officers and corporate executives, should report back to the President.
- Instruct DoD officials to share with other agencies the materials that DoD has developed for its equal opportunity training for senior military and civilian officials.

# DoD Minority Officer Representation (by Grade)



NOTE: Graphs depict active duty, commissioned male and female officers.

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## DoD Female Officer Representation (by Grade)

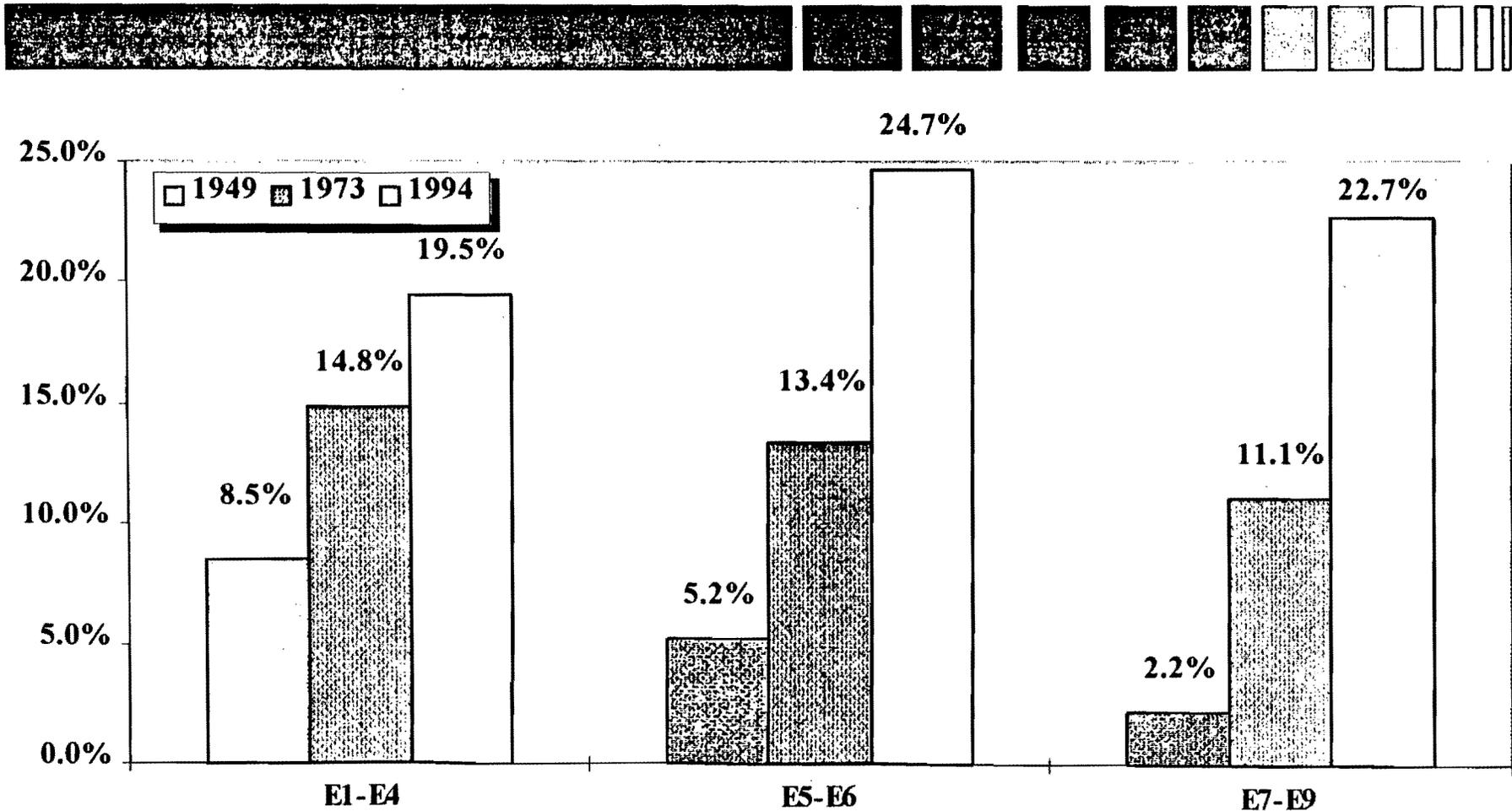
<u>GRADE</u>	<u>1973</u>	<u>1983</u>	<u>1993</u>	<u>1994</u>
O-7 to O-10	0.3%	0.7%	0.9%	1.2%
O-4 to O-6	2.6%	4.4%	10.3%	10.8%
O-1 to O-3	5.2%	12.4%	14.8%	15.1%
<b>DoD Total</b>	<b>4.2%</b>	<b>9.5%</b>	<b>13.0%</b>	<b>13.4%</b>



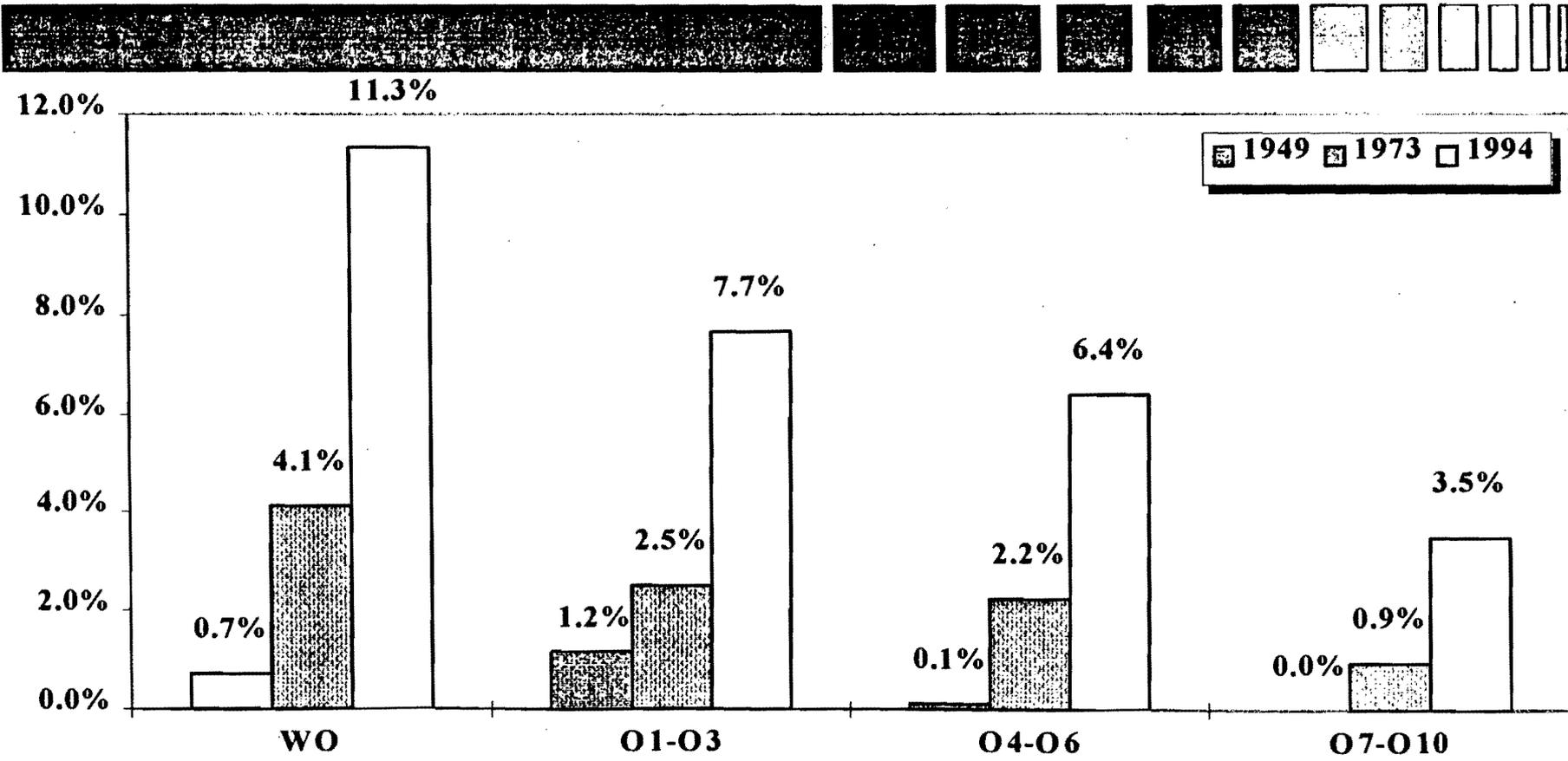
NOTE: Data pertain to active, commissioned officers only.

Source: DMDC 3035EO Reports

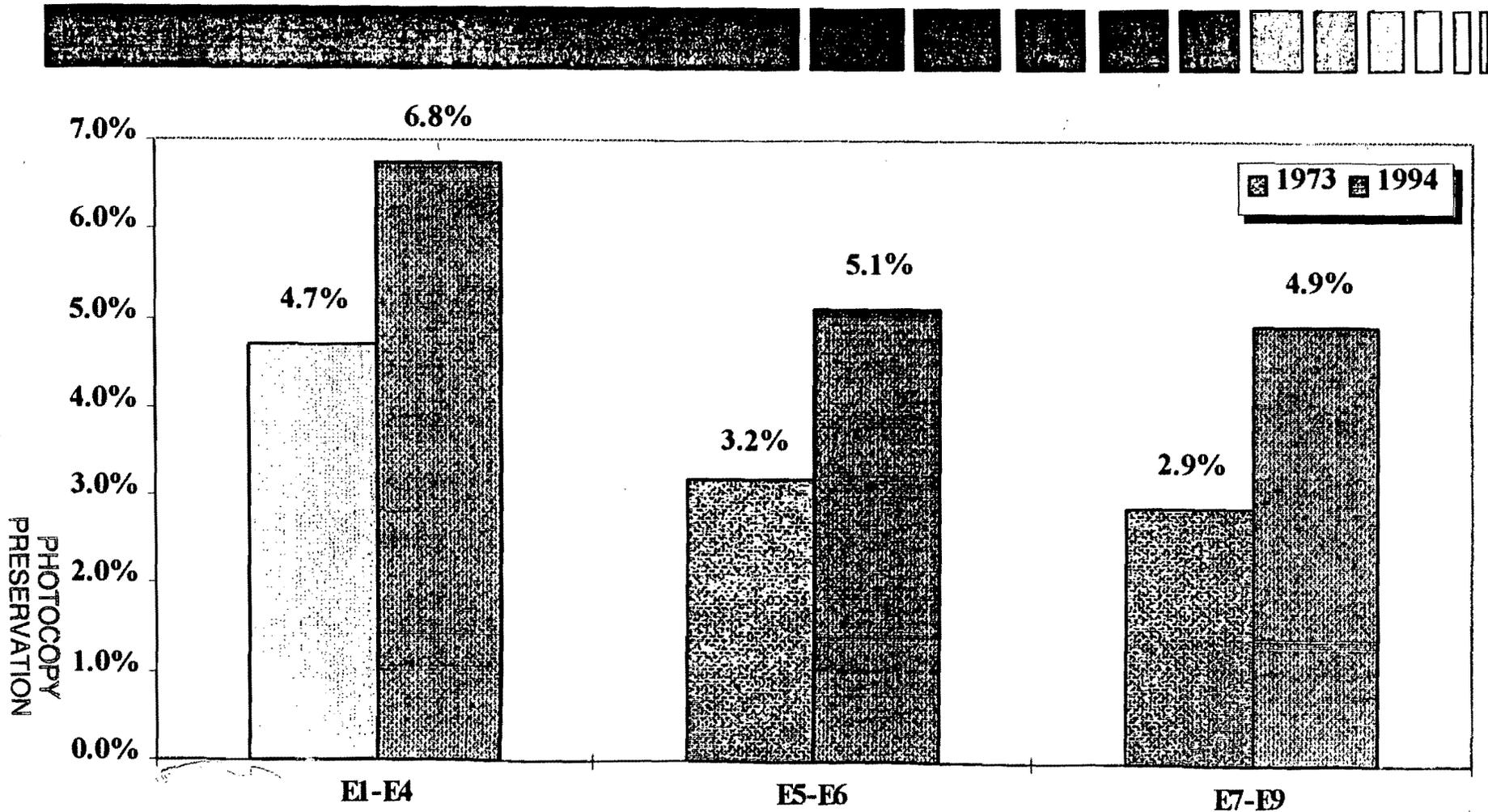
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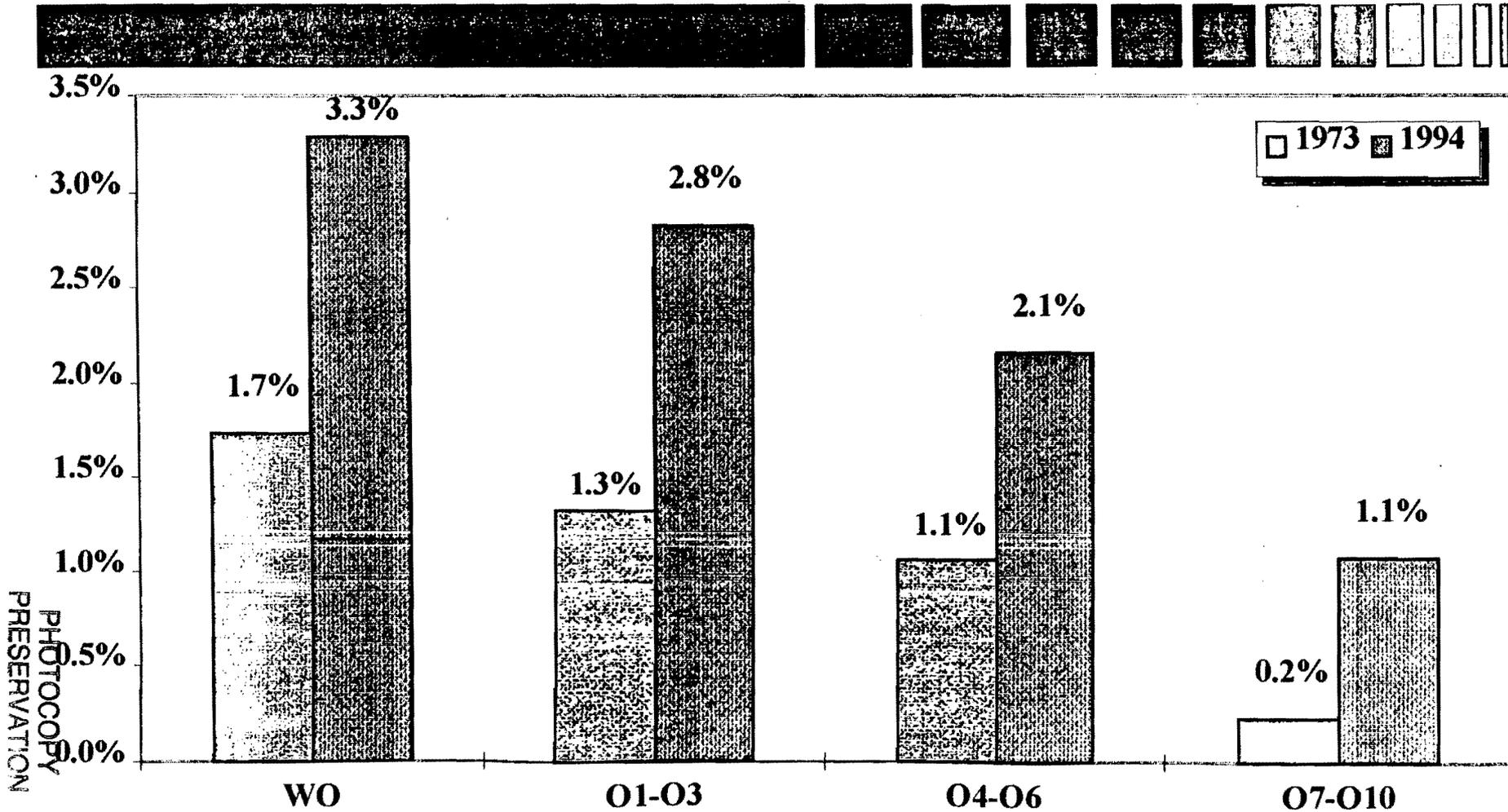
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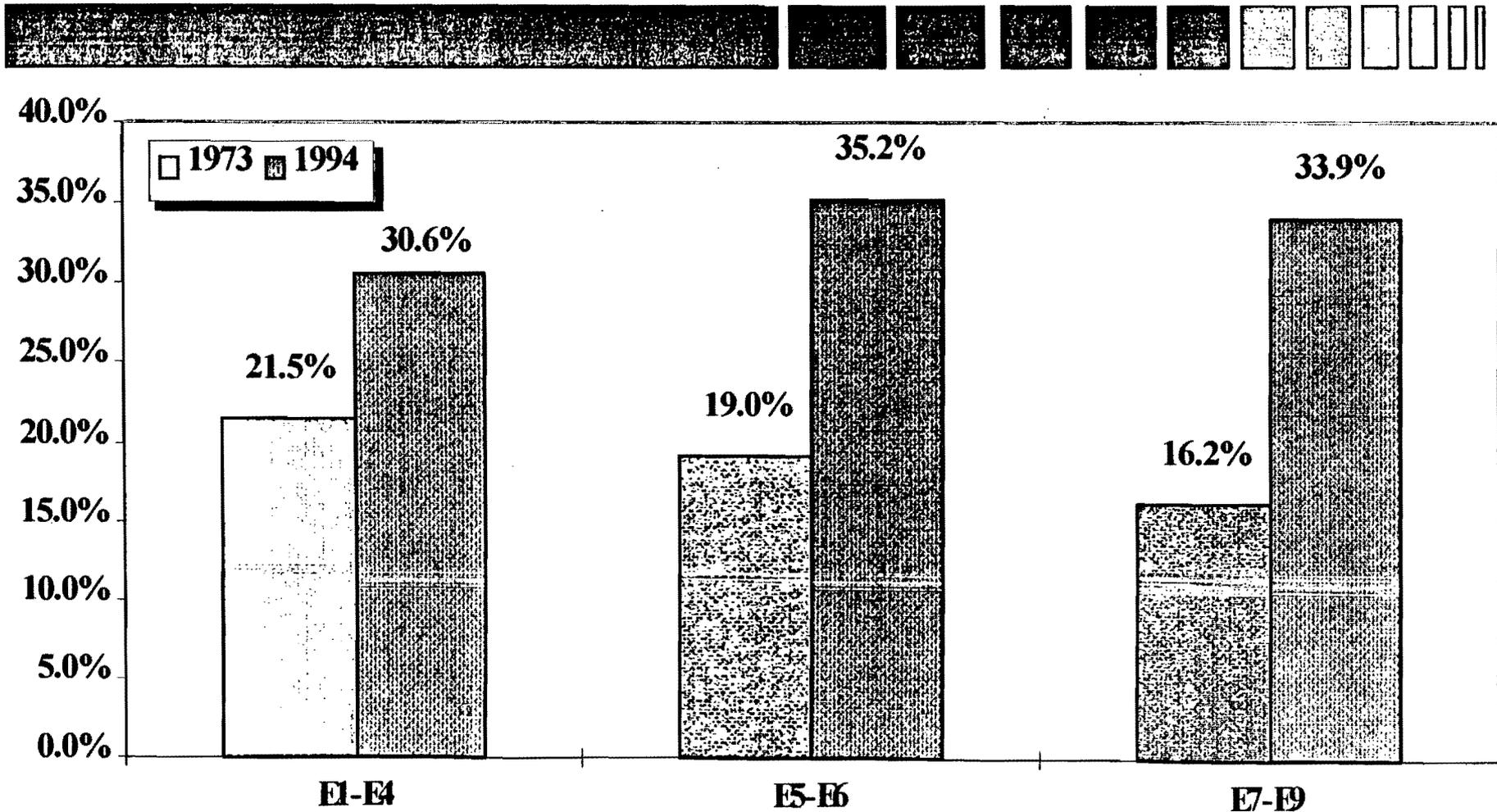
# ACTIVE DUTY MILITARY ENLISTED PERCENT HISPANIC BY GRADE 1973 - 1994



# ACTIVE DUTY MILITARY OFFICER PERCENT HISPANIC BY GRADE 1973 - 1994

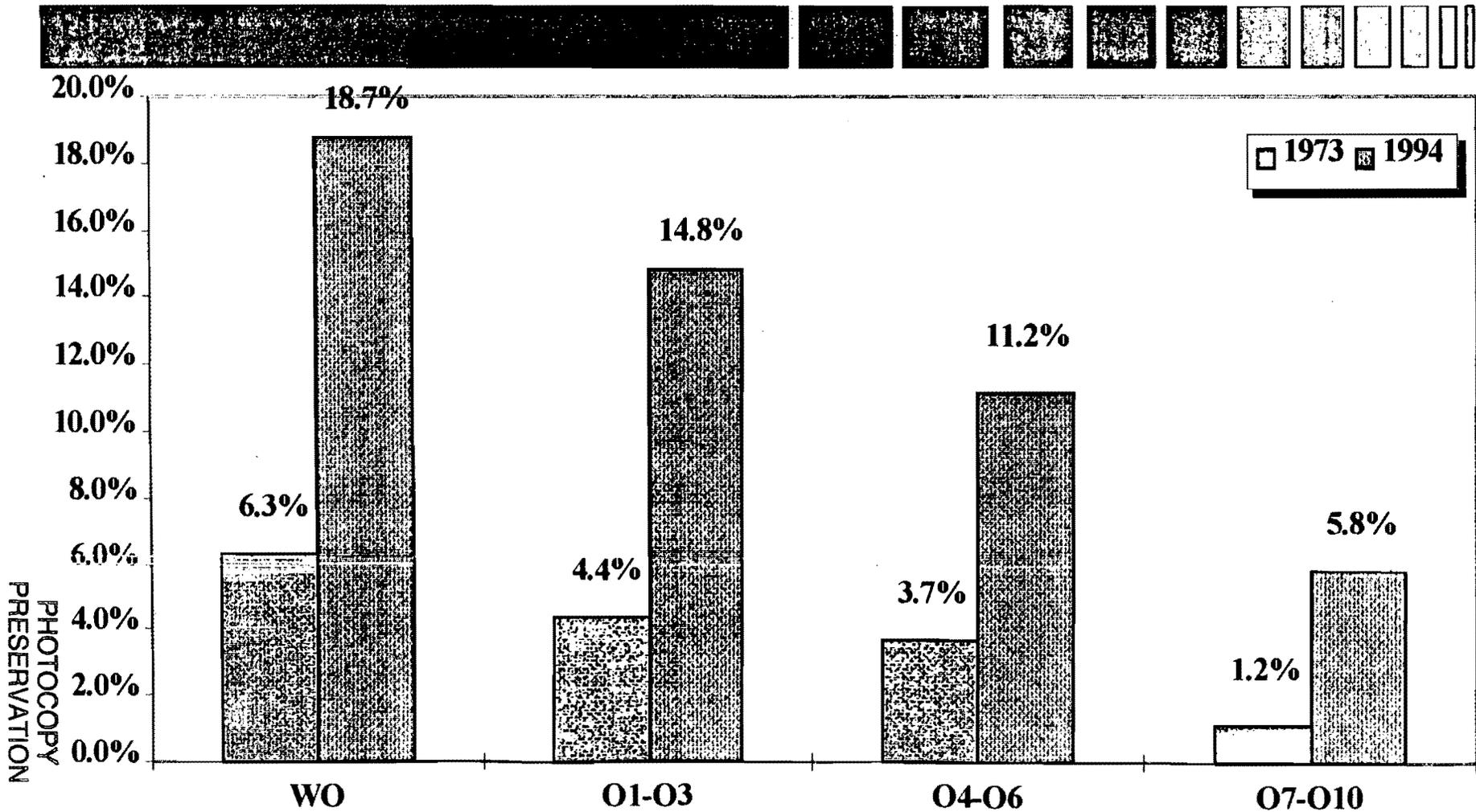


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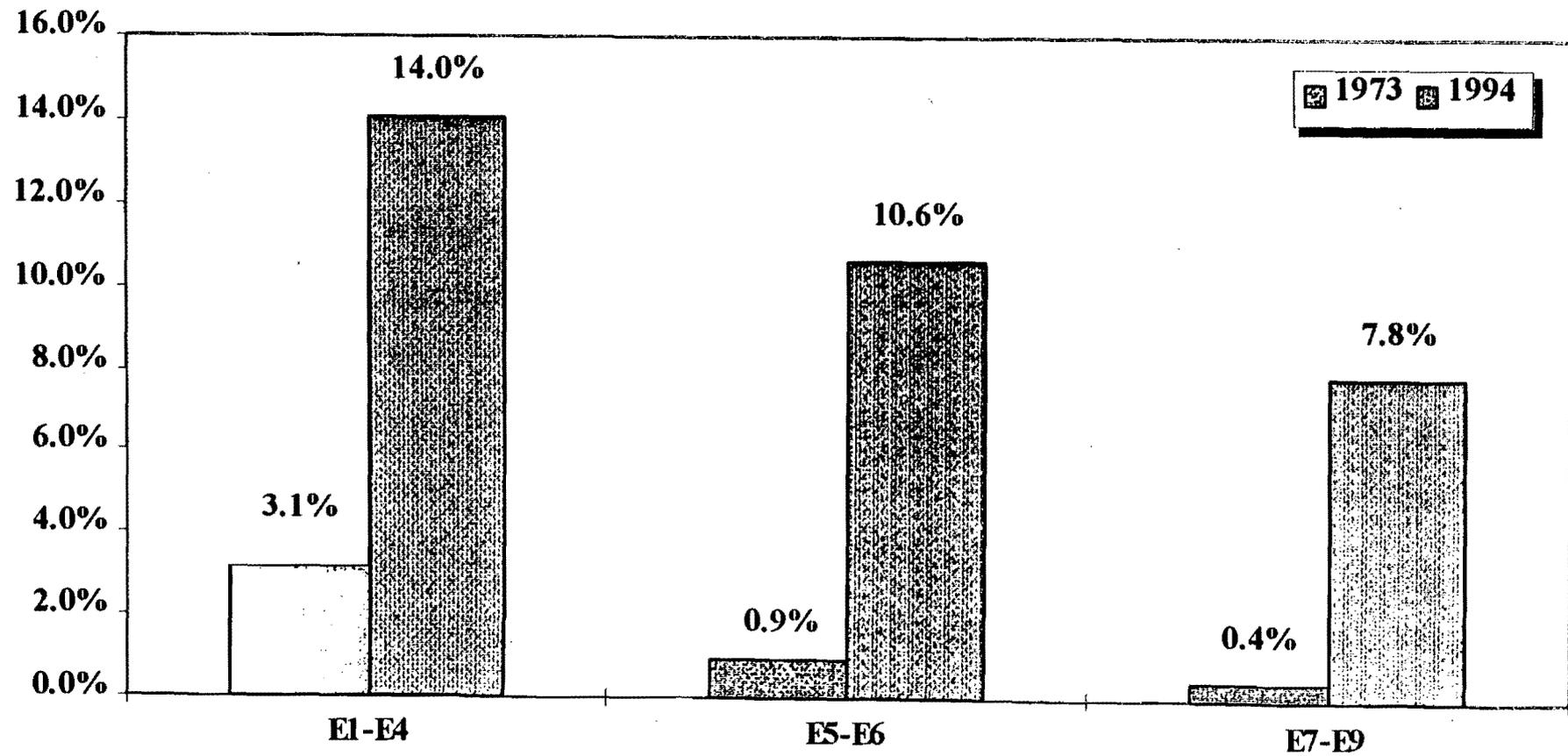


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# ACTIVE DUTY MILITARY OFFICER PERCENT MINORITY BY GRADE 1973 -1994

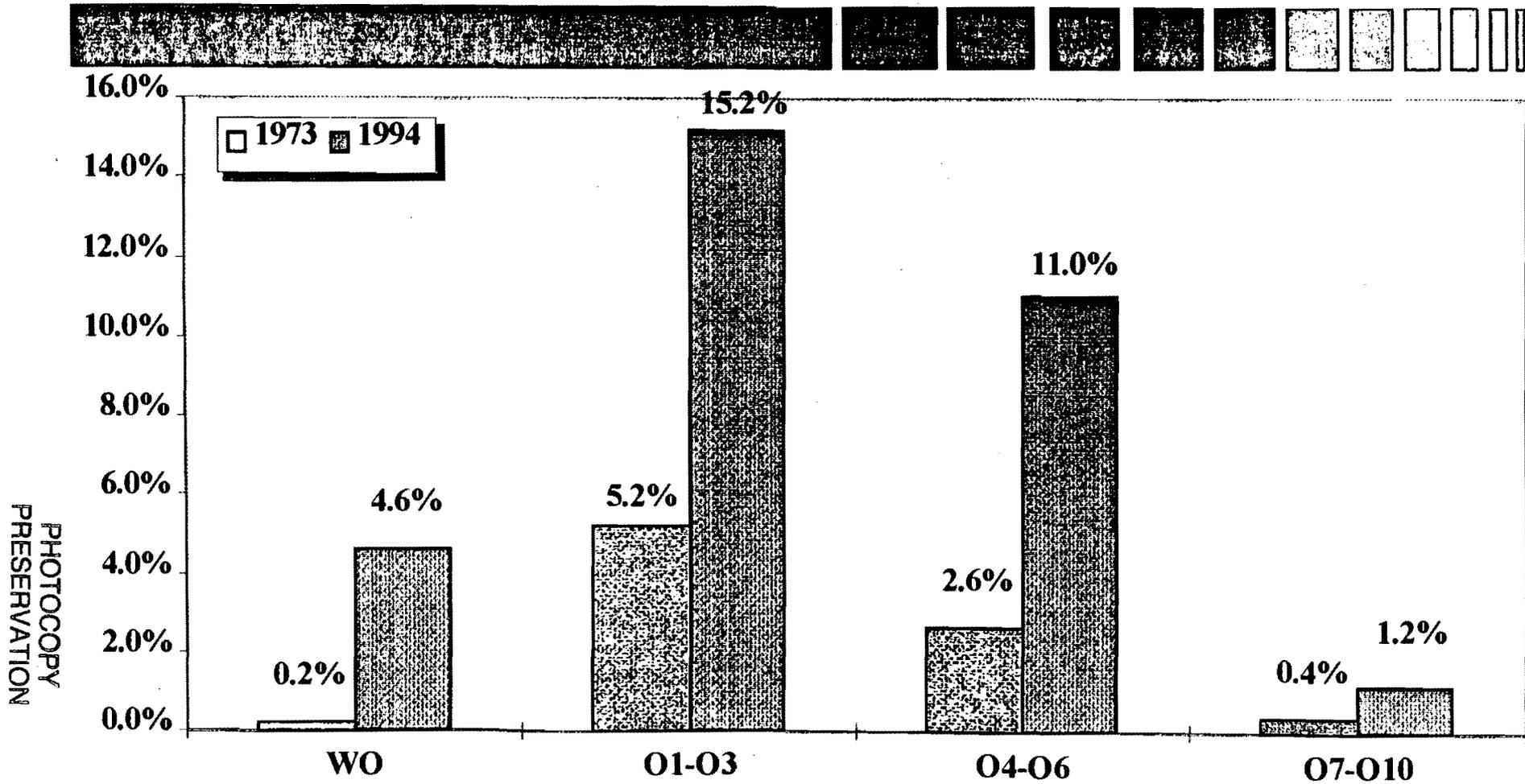


# ACTIVE DUTY MILITARY ENLISTED PERCENT FEMALE BY GRADE 1973 -1994

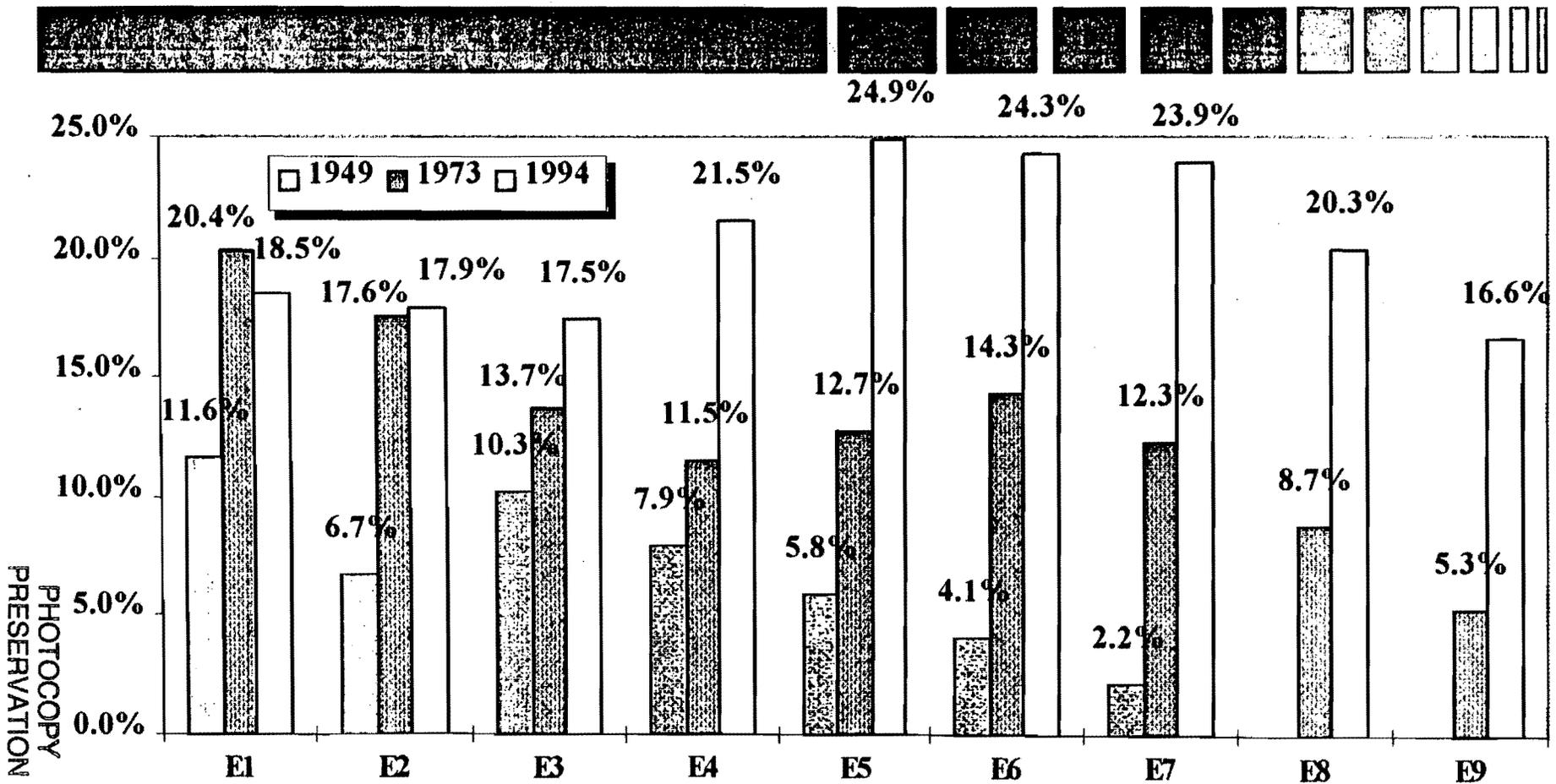


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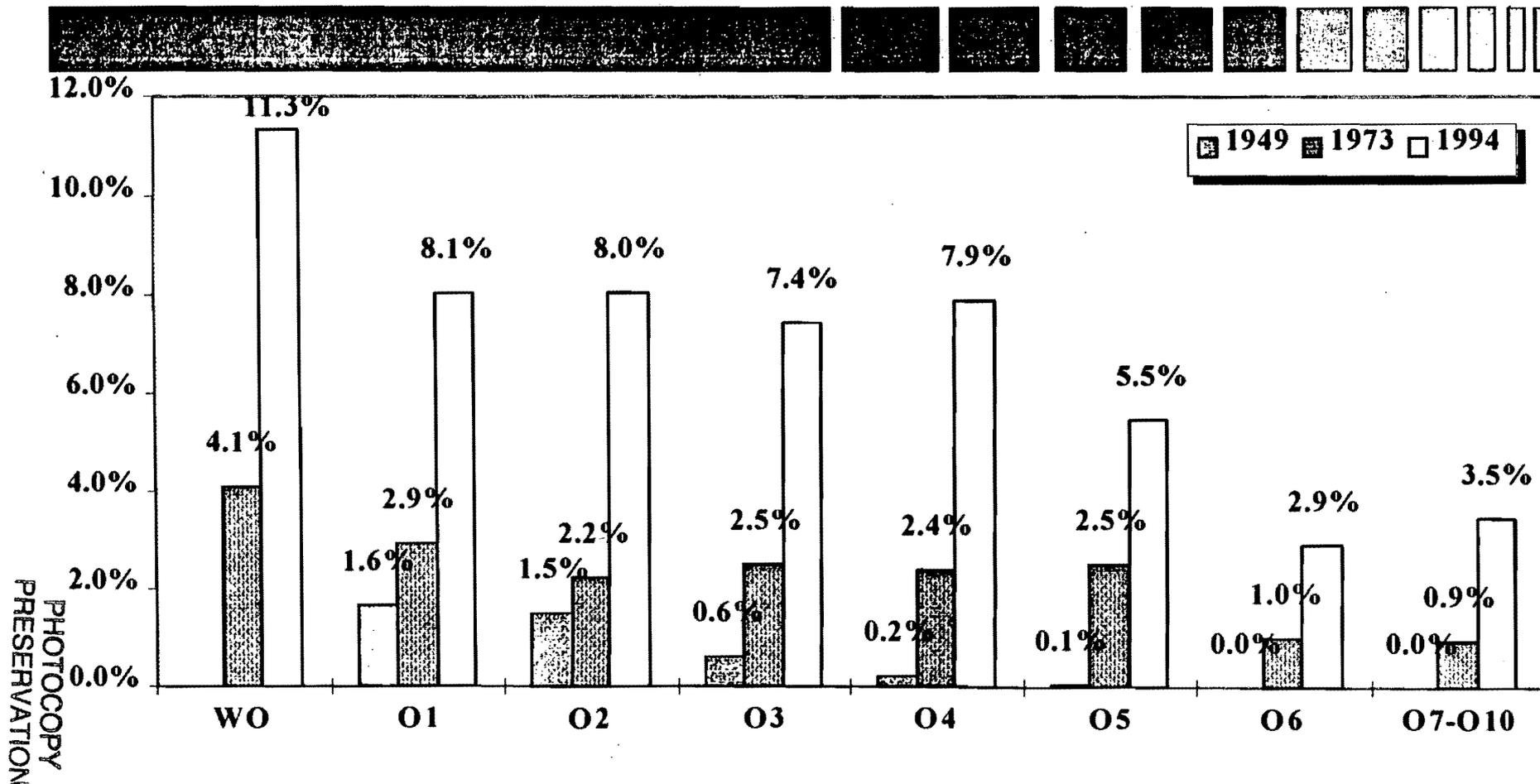
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# ACTIVE DUTY MILITARY ENLISTED PERCENT AFRICAN-AMERICAN BY GRADE 1949 - 1973 - 1994

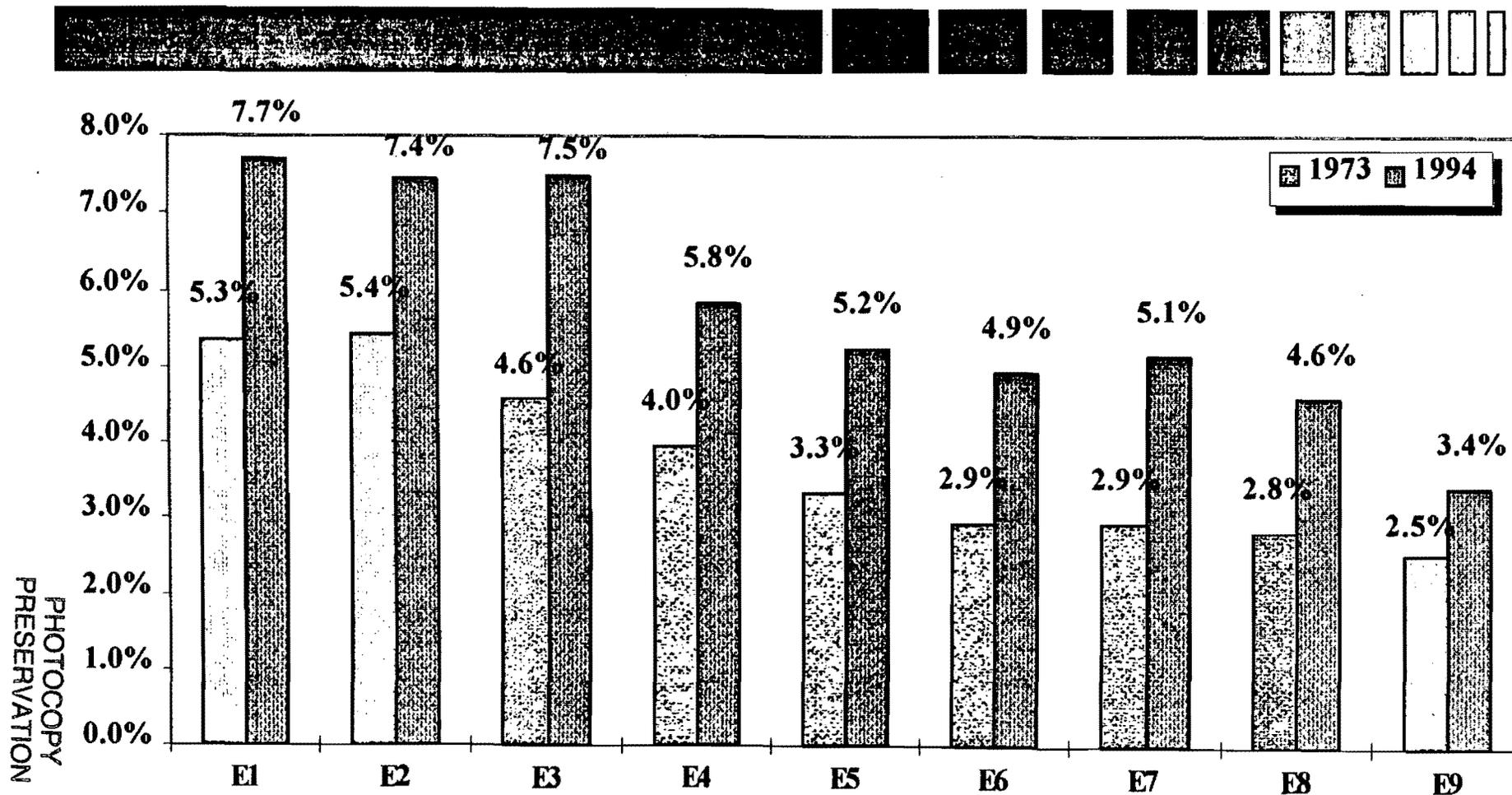


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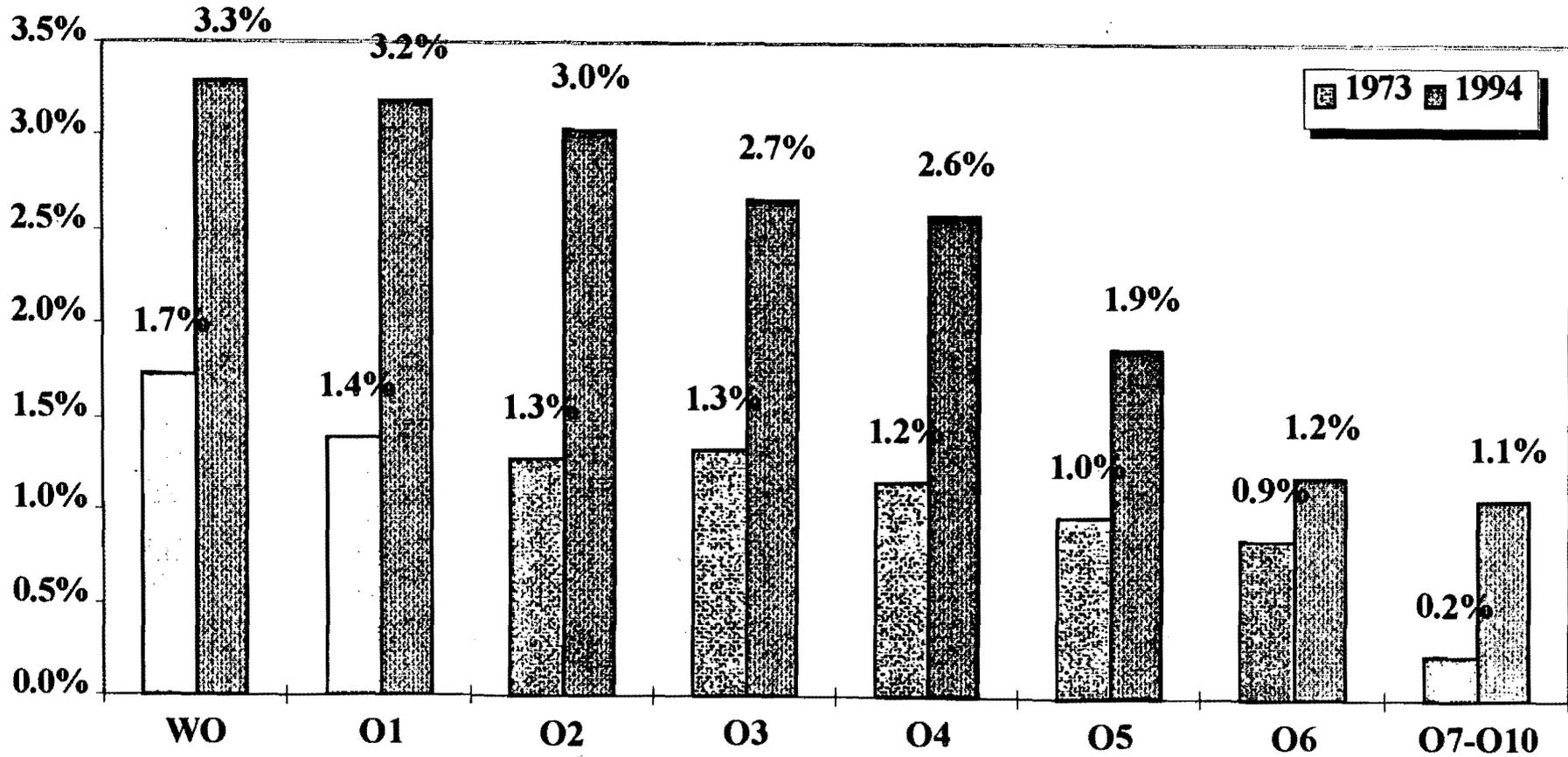


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# ACTIVE DUTY MILITARY ENLISTED PERCENT HISPANIC BY GRADE 1973 -1994



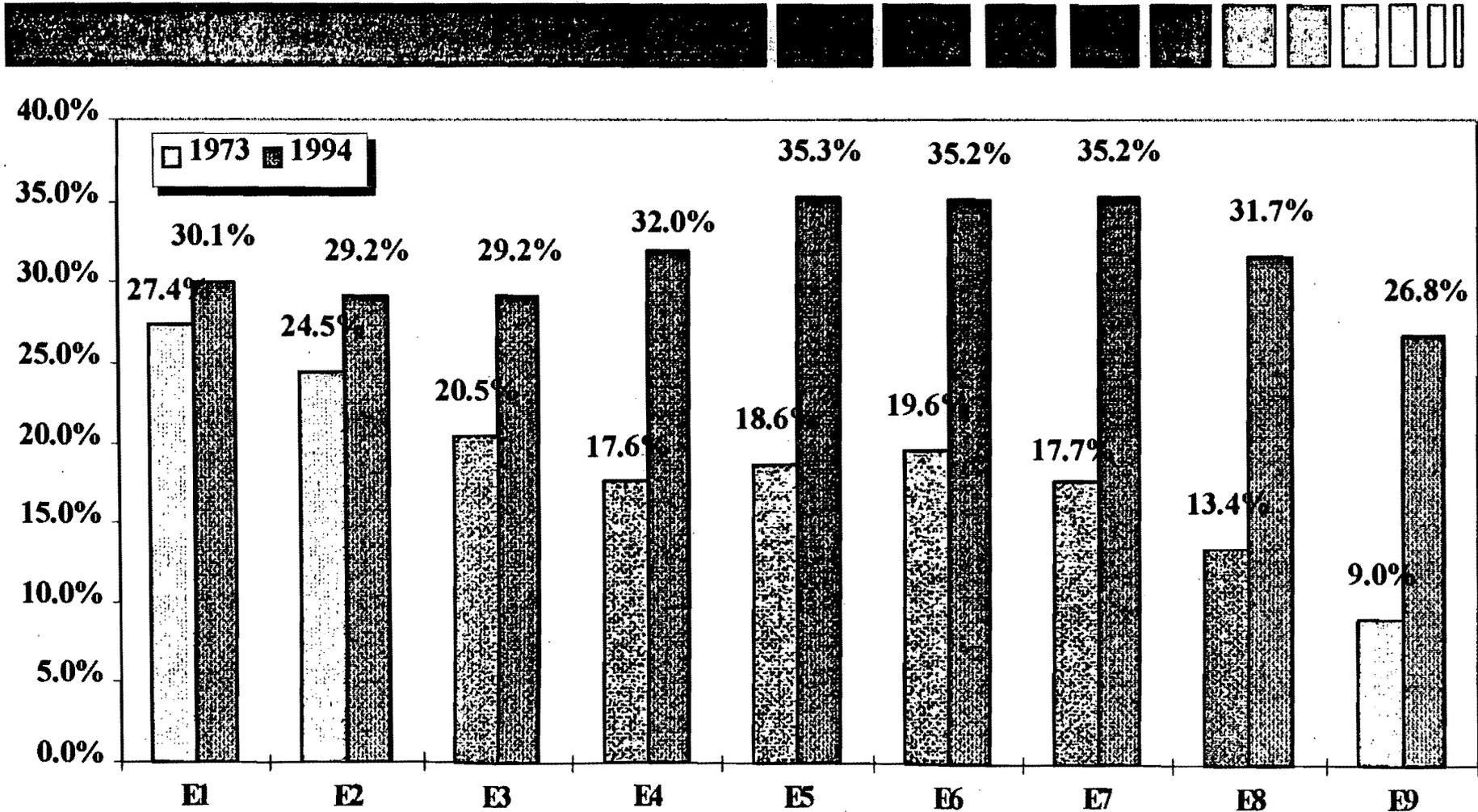
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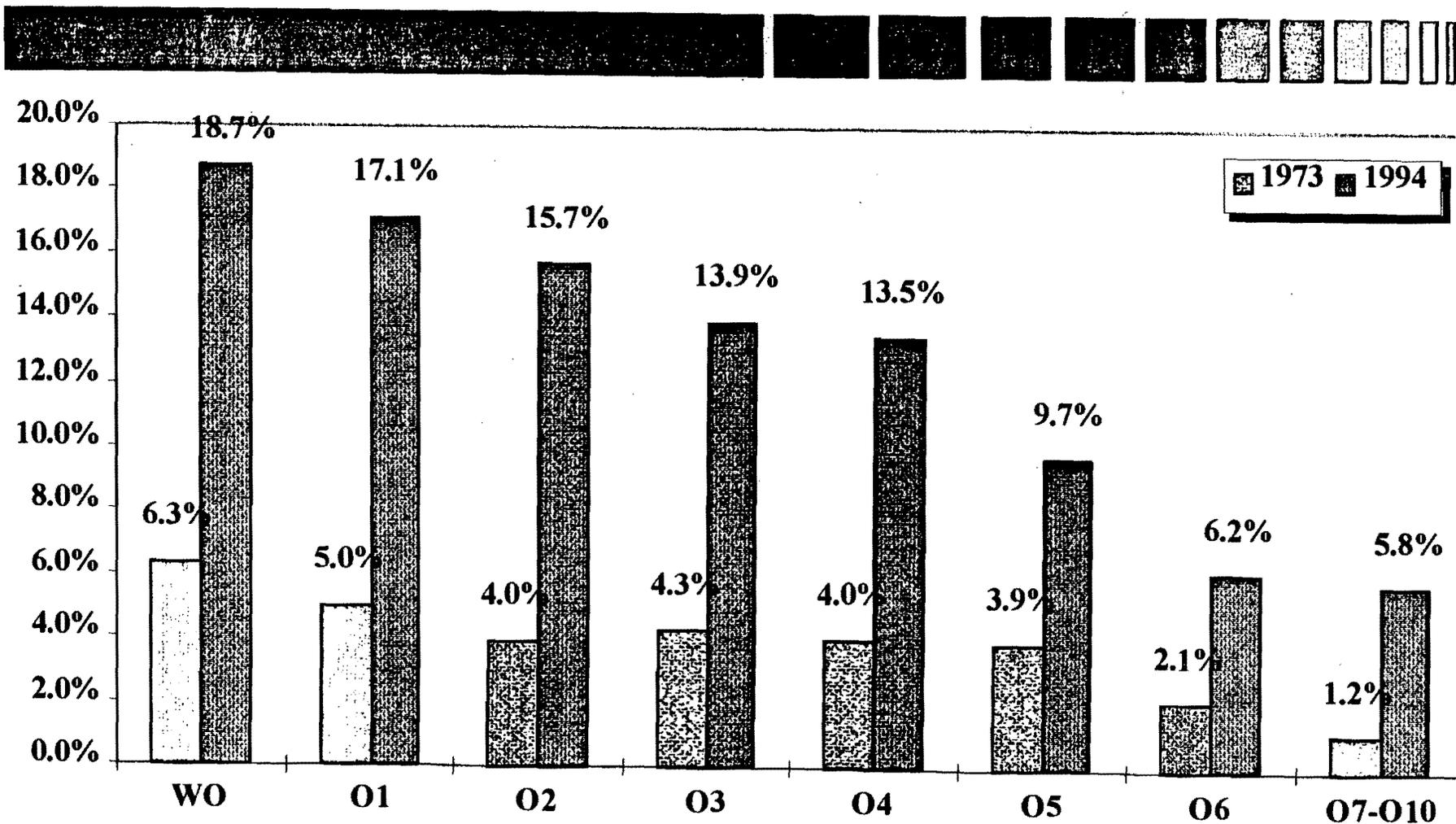
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PRESERVATION



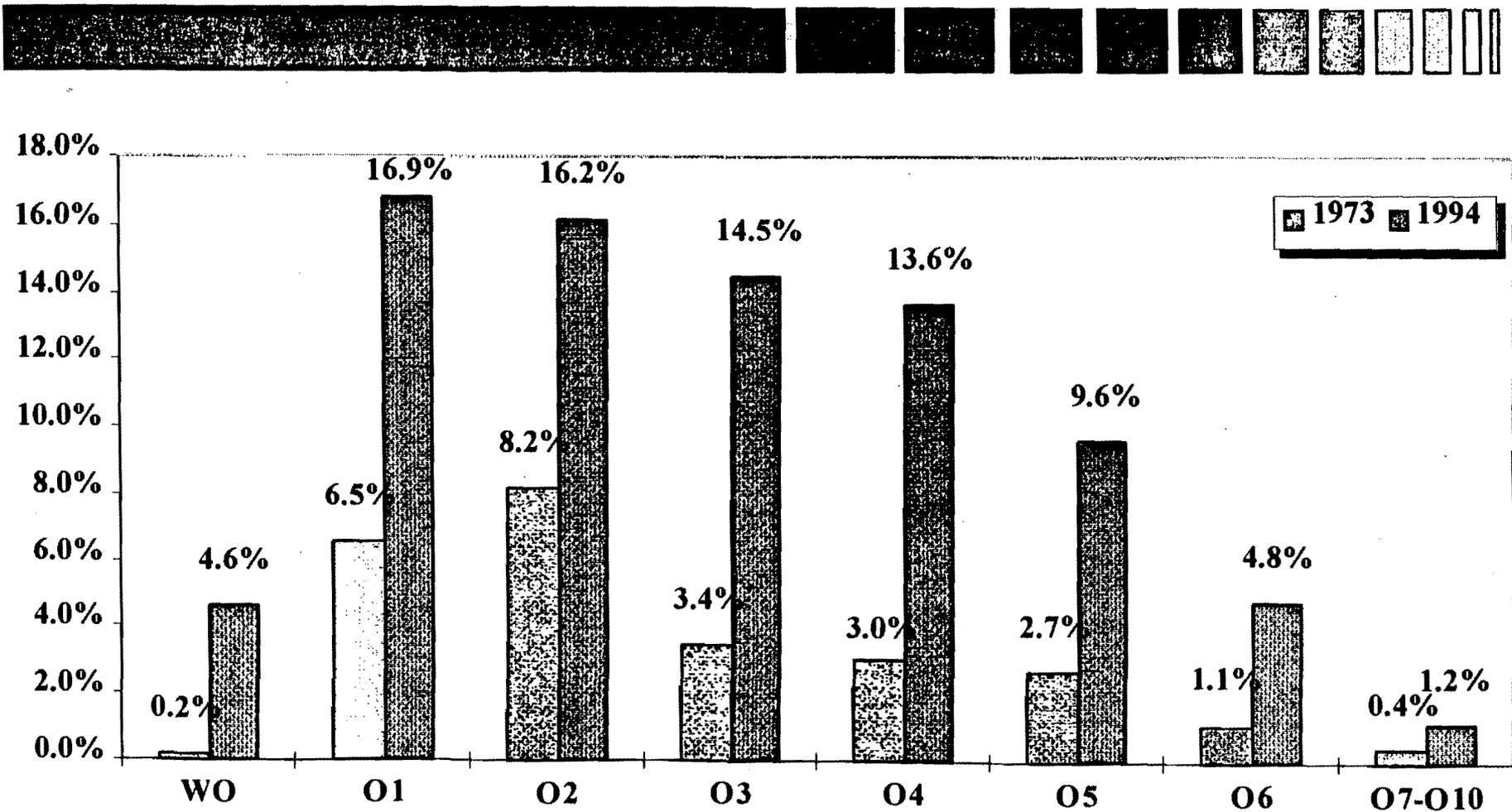
# ACTIVE DUTY MILITARY OFFICER PERCENT MINORITY BY GRADE 1973 -1994

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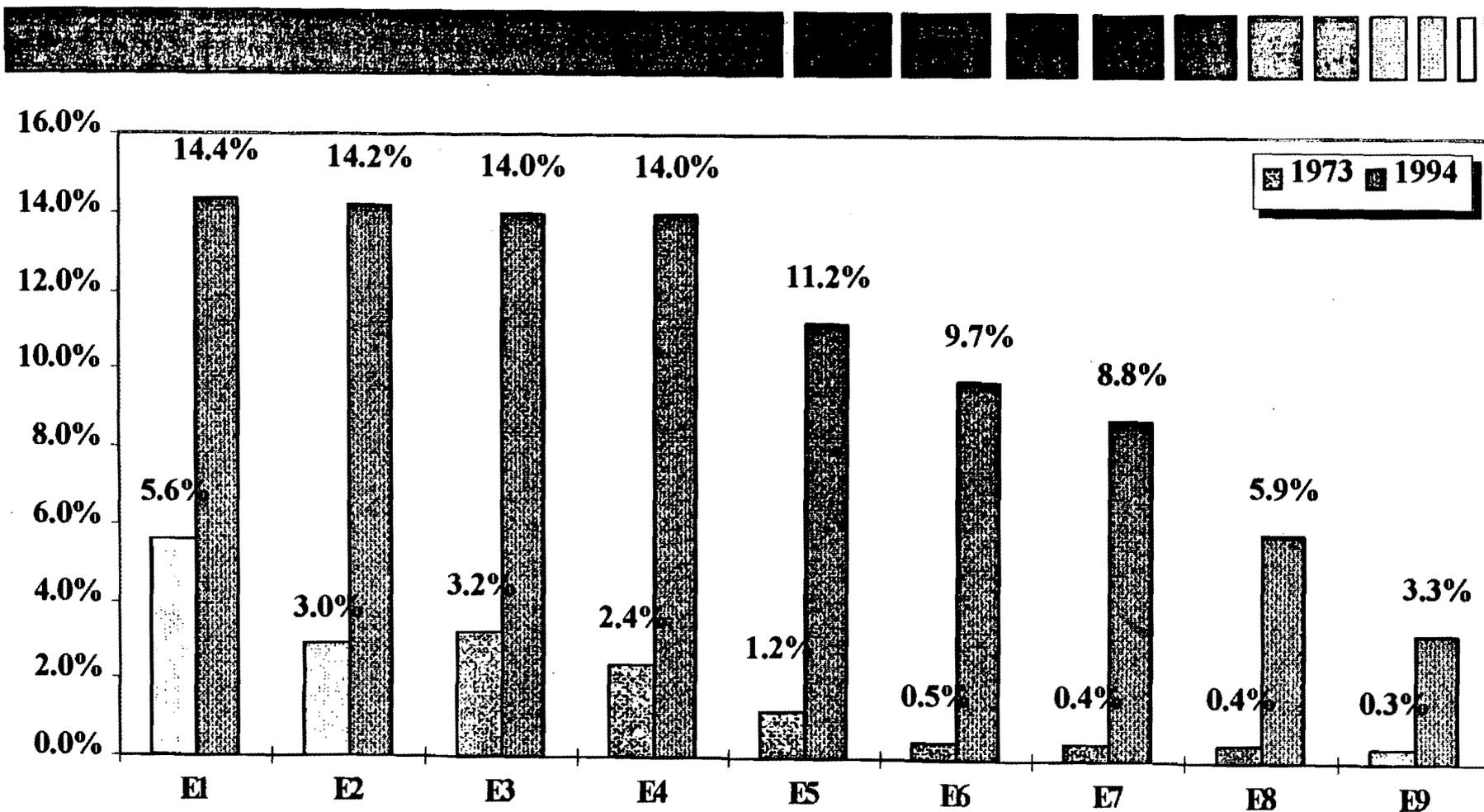
# ACTIVE DUTY MILITARY OFFICER PERCENT FEMALE BY GRADE 1973 - 1994

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# ACTIVE DUTY MILITARY ENLISTED PERCENT FEMALE BY GRADE 1973 - 1994

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## 8. FEDERAL CIVILIAN EMPLOYMENT AFFIRMATIVE ACTION

### 8.1 History and Results

In 1969, President Nixon issued an executive order that required the Federal agencies to establish Federal Affirmative Employment Programs to foster equal employment opportunity for minorities and women. These programs have had a statutory basis since 1972. In 1994 alone, there were 68 agency plans filed.

Since 1978, the Equal Employment Opportunity Commission (EEOC) has had advisory authority for these affirmative employment functions, including the responsibility to review and approve annual equal opportunity plans submitted by each agency. (EEOC collects information and evaluates the work of the agencies, and has a role in adjudication of individual discrimination complaints. It has no broad enforcement authority, and cannot require agencies to change their mode of operation.) EEOC has implemented the various federal affirmative employment program requirements through a series of Management Directives ("MDs"). The first, MD-707, issued in 1981, instructed Federal agencies to submit equal employment plans for a five-year period. It required each agency to determine whether minorities and women were underrepresented in various employment categories and to set annual goals for underrepresented groups in categories where vacancies were expected.

In 1987, EEOC issued MD-714, which **eliminated** the requirement that agencies set goals. MD-714 placed greater emphasis on the identification and removal of barriers to the advancement of women and minorities. It instructed agencies to devise flexible approaches to improving the representation of women and minorities in their workforces.

In 1993 and 1994, EEOC staff drafted MD-715 to succeed MD-714 and circulated it to agencies for comment. Among other things, the draft Directive proposes: (i) consolidating all Directives into one; (ii) reducing reporting requirements; (iii) requiring agency heads to hold senior and program managers accountable for the accomplishment of agency objectives through their actions and performance appraisals; (iv) eliminating any requirement for the use of goals; and (v) requiring the reporting of discharge or separation rates for minorities, women, and people with disabilities, to allow greater emphasis of retention trends.

EEOC has found no single answer to the challenge of overcoming barriers to minorities, women, and people with disabilities in the Federal government. Agencies have unique workforces, and barriers to equal employment opportunity vary from one organization to another. Successes are gradual in nature and depend considerably on the good will engendered in the Federal executives who manage these programs.

In the Federal agencies, minorities comprise a relatively large proportion of the workforce -- roughly 30 percent, compared to 22 percent of the nation's overall workforce. Between 1982 and 1993 overall (white collar and blue collar) and white collar employment of women and every minority group has steadily increased. White women and Hispanics are the only groups whose employment in the overall federal workforce and in white collar ranks remains below their availability in the overall and white collar civilian labor force. Minorities and women continue to be disproportionately employed in clerical jobs and in the lower grade levels of other occupational series. In FY 1993, for example, 85.98 percent of clerical jobs were held by women and 39.48 percent by minorities, while their employment in the Professional workforce was 34.57 percent and 18.08 percent, respectively.

While employment of women and minorities in the Federal workforce has increased, their representation falls as grade level rises. In FY 1993, women comprised 72.90 percent and minorities 38.15 percent of employees in grades 1-8, while 16.16 percent of GS/GM-15 employees were women and 12.04 percent were minorities. In the same year, 13.40 percent of Senior Executive Service (SES) employees were women and 8.5 percent were minorities.

For purposes of this review, EEOC selected and reviewed a cross-section of six agencies that had demonstrated creative ways of addressing equal employment opportunity (ranging in size and variety of job categories): Department of the Navy, Smithsonian Institution, Defense Intelligence Agency, NASA, Pension Benefit Guaranty Corporation, and Health and Human Services. The key observations were:

- Each agency described an aggressive affirmative employment program -- including targeting sources, requiring recruiters to consider and report, management awareness/accountability, external and internal communications strategies -- which had achieved modest success rates.
- Available data are limited to the numbers and percentages of minorities and women employed by grade level by year; no systematic data exist about effects on bystanders, the nature or resolution of complaints, or the actual operation of minority preferences in hiring and promotion.
- Several agencies expressed the belief that agency educational efforts are effective in ameliorating white-male concerns (which are palpable in each agency), but this belief was purely anecdotal. The officials we interviewed admitted that truly disgruntled employees might not attend such voluntary town-hall meetings or workshops.
- Agencies subject to downsizing face special pressures which have reduced gains.
- Those agencies with high percentages of professional or technical jobs attribute their limited progress in minority hiring and promotion in higher grades to competition with the private sector for a limited labor pool.

- Several agencies measure carefully the number of women and minority participants in their SES Candidate Development Programs.

## **8.2 Summary Profiles for Selected Agencies**

### ***8.2.1 Department of the Navy (DON)***

The Secretary of the Navy has directed action on eight initiatives to improve the civilian Equal Employment Opportunity program. These include centrally coordinated recruitment programs at selected Historically Black Colleges and Universities and minority institutions; expanded intern and cooperative education programs; new approaches to the development of employees in the pipeline with particular focus on minorities and women in grades 9 through 15; special recruitment plans for Senior Executive Service positions; and alternative complaint resolution efforts.

Continuous downsizing and restructuring of the DON have significantly reduced intake and promotion opportunities. DON had made some gains in moving women and minorities into the higher grade levels of GS 13-15 and SES in the last two years but downsizing eliminated many of these gains. The major portion of senior-level white collar positions are in science and engineering. Until the labor market increases significantly, DON expects to continue to compete unsuccessfully with the private sector within a limited market.

### ***8.2.2 Pension Benefit Guaranty Corporation (PBGC)***

To improve minority and women recruitment, PBGC has (i) contacted viable recruitment sources and required the recruiting staff to discuss with each selecting official the use of those sources each time a vacancy occurs; (ii) issued quarterly EEO statistics to each office as a reminder of its status in comparison to that of the entire PBGC; and (iii) established a Workforce Diversity Board.

According to EEOC, PBGC has a good record for employing blacks at all grade levels and in Professional and Administrative categories, an average but improving record for employing women at all grade levels and a good record for employing women in the Professional occupations. According to PBGC, during the last year women and minorities were promoted at a slower rate than men and nonminorities, particularly above grade GS-9, but that the rate was within 20 percent of the rate for men and nonminorities.

### ***8.2.3 Defense Intelligence Agency (DIA)***

DIA implemented a comprehensive program that includes affirmative employment activities within a larger diversity management program. The program includes diversity management,

training, affirmative employment plans and programs, adjudication of complaints, deaf and disabled programs, special recruitment, selection reviews, and communications.

According to EEOC, between 1988 and 1993 the representation of women in the Professional, Administrative, Technical, Others and Blue Collar work force increased. The representation of women in the Clerical category decreased. Blacks are fully represented in all of the above categories, while Hispanics, Asian Americans/Pacific Islanders and American Indians/Alaskan Natives either remained far below Blacks and women or have shown no progress. DIA's representation of minorities and women is concentrated in the lower grade levels. Overall, DIA's objectives to increase the number of women and minorities in the upper grade levels, SES and major occupations have not been accomplished during the duration of the multi-year plan, but there has been some improvement.

#### ***8.2.4 The Smithsonian***

The Smithsonian's Affirmative Employment Program consists of five key components: the diversity planning process, the monitoring and assessment system, education and outreach initiatives, recognition/awards and accomplishment reports. Women and minorities are still underrepresented in all job categories.

A ten year trend analysis reveals that the Smithsonian has experienced a decrease in the total work force representation for Hispanics, Asian Americans/Pacific Islanders, and American Indians/Alaskan Natives. Women made the greatest gains, going from 32.63 percent to 40.38 percent. The 1993 SES representation places women at 26.8 percent and Blacks at 8.7 percent.

#### ***8.2.5 Health and Human Services (HHS)***

At HHS, developmental programs have been a main focus of affirmative employment efforts. For example, HHS did outreach to ensure that women and minorities were well-represented in its most recent Senior Executive Service Candidate Development Program. More than half of the candidates in the class were women and 29 percent of the candidates were minorities.

HHS uses a "top-down approach" to affirmative action, believing that a diverse top-echelon will drive these practices down through all levels of the organization. In support of the top-down approach, HHS gives responsibility for furthering affirmative employment to Executive Resources Boards. These Boards, composed of senior management officials, provide advice to the head of the operating division on all SES personnel actions. Also, managers are held accountable for affirmative employment through their performance plans.

#### ***8.2.6 National Aeronautics and Space Administration (NASA)***

The centerpiece and newest initiative in NASA's Equal Opportunity Program is the Equal Opportunity and Diversity Management Plan which was endorsed by the Administrator and all

senior officials of NASA in September 1994. The Plan, to increase the diversity of the workforce while reducing its size, completely redesigns and strengthens the affirmative employment program by establishing voluntary goals and timetables based on in-depth analysis of underrepresentation compared to the relevant civilian labor force statistics.

NASA's EEO profile is worse than that of most Federal agencies; however, it has improved considerably in almost all areas over the last decade. Women and minorities tend to be concentrated in the lower grade levels. NASA states that they cannot compete with the private sector when recruiting for the highly skilled Professional jobs that comprise the majority of their work force (scientist and engineer positions comprise 76 percent of the workforce). In NASA, 82 percent of SES positions are held by white males. White males comprise 37 percent of the population but hold 82 percent of senior management and leadership positions.

### **8.3 Affirmative Action for a Shrinking Federal Workforce**

Civilian employee affirmative action has been relatively non-controversial at a time of a growing or stable federal workforce. However, as the federal government shrinks, tensions will likely increase.

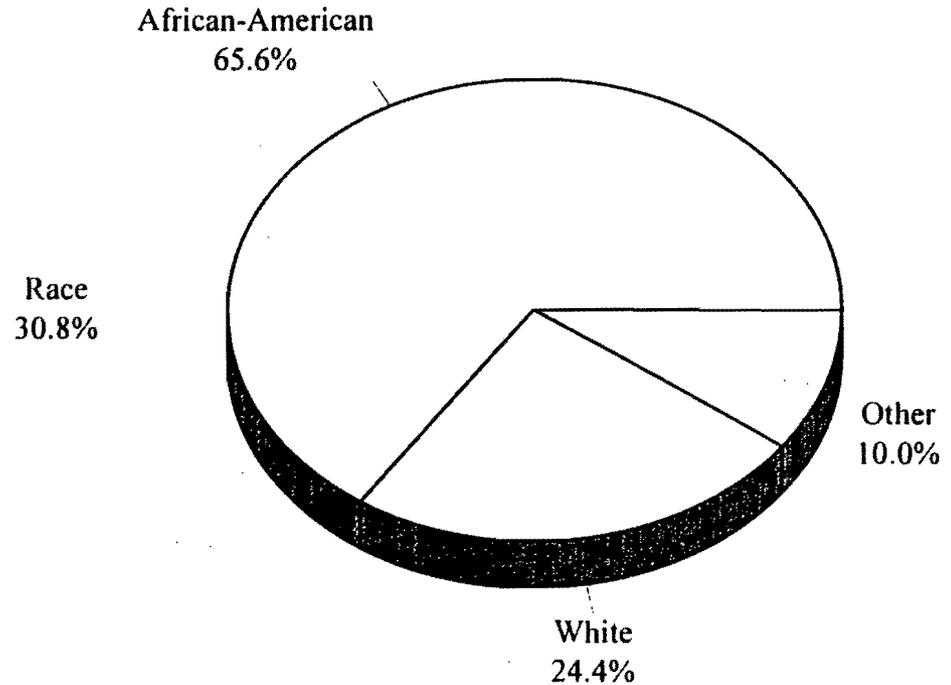
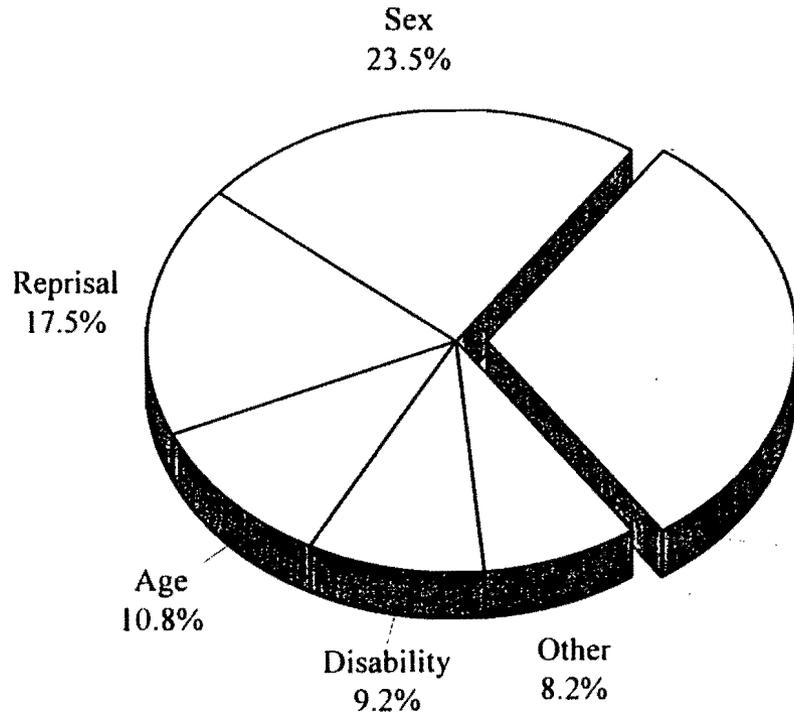
As a result of policies implemented by President Clinton, the federal workforce will soon be the smallest since John F. Kennedy was President. In all, Executive Branch civilian employment has shrunk 8 percent from a total of 2.15 million in 1993 to an anticipated total of 1.9 in 1996, according to the Office of Management and Budget. The budget proposed by the President envisions accelerated reductions, and the budget resolution passed by the Congress envisions even more dramatic personnel reductions. While most reductions have been made through attrition, in the future layoffs and terminations may be required more prominently.

The issues of layoffs and restructuring are salient throughout the economy, not just in the public sector. They are especially painful because it is generally recognized that the decision whether to lay someone off is different from, and more difficult than, a decision to hire someone. The adverse impact on the "nonbeneficiary" is more severe, and less repairable, than in the case of a new job not obtained. Already, several Clinton appointees have indicated that their aggressive efforts to improve affirmative action performance have been met with heightened resentment due to sharply declining FTE ceilings. (Even so, the EEOC does not report a significant increase in formal reverse discrimination actions against federal agencies.)

Current law is evolving in this area, but two propositions are clear. First, layoffs cannot be used as a means to implement an affirmative action policy by "making room" for new, diverse employees. Second, race or gender cannot trump a *bona fide* seniority system.

# Bases of Federal Sector EEOC Complaints

FY1992



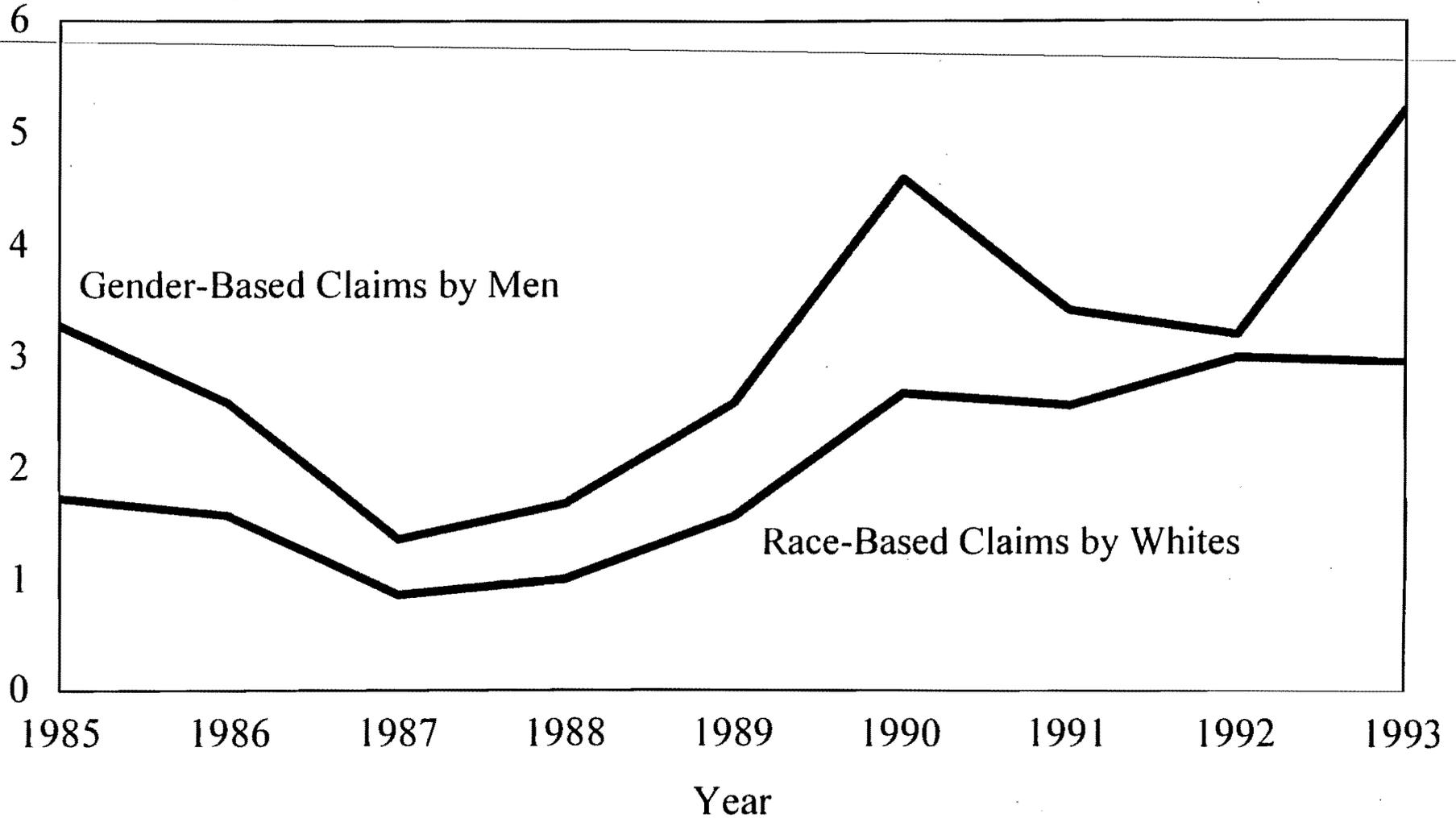
Notes:  
"Other" includes national origin and religion.

N:exh10.prs (5/15/95)

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# Selected Federal Sector Complaints (FY85-FY93)

Race-Based Complaints Filed by Whites & Gender-Based Complaints Filed by Men  
Thousands



Notes:

A complaint may have multiple bases; each basis is treated as a "claim" in this chart. Complaints are closed either by (i) rejection or withdrawal (42.6% of complaints in FY92 were rejected or withdrawn),

(ii) settlement (30.1%), or

(iii) merits decisions (27.3%).

Only a fraction of the merits decisions result in a finding of discrimination

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## 8.4 Conclusions and Recommendations

### 8.4.1 Conclusions

Do the affirmative action programs affecting the federal government's civilian workforce meet President's tests: do they work, and are they fair?

*Does it work?*

Again, the first question to ask is: what is the goal of civilian workforce affirmative action?

The principal goal of federal civilian employment affirmative action is to remedy past discrimination and deter future discrimination -- just as would be the case with a large private employer. For decades, the Federal Civil Service was viewed by African Americans as a principal avenue to economic security, and it was. But few of the jobs were professional, because, tragically, America's government reflected the discrimination of society at large. And some agencies were dominated by a discriminatory mind-set, while others were more receptive to minority advancement. Today, the Federal Government strives to be a model employer. As such, all agencies make affirmative efforts to be inclusive in their hiring and promotion practices, and many include goals and timetables in their annual affirmative action plans.

In addition, because of the unique nature of the government, there are particular benefits to be gained from diversity in the federal workforce. First, in some areas (such as law enforcement), diversity is particularly important to the government's effectiveness at dealing with the broader community. Second, diversity of decisionmakers leads to better decisions, when the goal is a government that truly represents the interests of all the people.

Significant progress has been made toward meeting these goals. Federal agencies, in the aggregate, seek to be model employers, and offer real opportunity for minorities and women that are often not available in the private sector. However, real problems remain. Minorities and women remain seriously underrepresented in the higher ranks and at some agencies. There are many explanatory factors, including the lag required for hires to reach the senior ranks, but the inescapable conclusion is that a glass ceiling impedes progress in the public sector as well -- not as seemingly impenetrable as that in corporate world, but a barrier nonetheless.

As discussed above, it will be still more difficult to retain the appropriate balance in a period of reduction in the size of the Federal workforce. Promotion opportunities are decreasing, jeopardizing efforts to create a more diverse senior workforce and creating pressures and tensions which, if not properly addressed, trigger resentment and demoralization. Agency managers recognize this challenge. Those with whom we consulted express confidence that they are taking appropriate steps, but these expressions were not fully persuasive. Seminars and town hall meetings to discuss "diversity" and "opportunity" are undoubtedly important and necessary

elements of a strategy. It seems unlikely, however, that these will be fully effective. As the Federal workforce shrinks, the risk of tensions will increase.

*Is it fair?*

**(1) Not quotas.**

Policy and law prohibit quotas and numerical straightjackets, and we found no hint of evidence that these prohibited practices take place. Throughout the government, civil service statutes and regulations ensure adherence to merit principles. During the Reagan Administration, EEOC "deregulated" the agencies to provide discretion in whether to use goals and timetables. This flexibility allows managers great latitude in structuring their hiring and promotion policies. But managers must continue to monitor performance to make sure progress does not slow in building a workforce that draws upon the full range of talents and capacities of all citizens.

**(2) Race-neutral options.**

Although managers are encouraged to keep diversity and equal opportunity objectives in mind when conducting outreach and recruiting, these efforts are designed to ensure that hiring and promotion decisions are made from an inclusive pool of qualified candidates. Beyond that, actual decisions are made in accordance with the race- and gender-neutral civil service "merit selection" procedures established by law and regulation, so that race and gender are not given *formal* weight. For those positions in which interviews and subjective factors play an inevitable role, such as policymaking positions in the Senior Executive Service, anecdotal reports are that some managers may give flexible weight to diversity considerations. This is appropriate to redress a manifest imbalance, or when diversity is somehow relevant to the effective performance of the organization -- but with the important caveats regarding avoidance of reverse discrimination as established in the caselaw. (The antidiscrimination enforcement mechanisms of the EEOC and the agencies are designed to prevent and remedy any abuses.)

**(3) Flexible.**

Since 1987, there has been no requirement that agencies use goals and timetables; instead, they are directed to focus on removing barriers to advancement. Accordingly, the programs vary among agencies and departments.

**(4) Transitional.**

Because agencies undertake affirmative employment efforts in accordance with their affirmative action plans, and because agencies review and modify those plans every year, the current efforts are appropriately transitional. It is reasonable to make these judgments narrowly, focusing on

specific job categories and organizational units within each agency, rather than making an aggregate decision for the entire Federal workforce.

**(5) Balanced.**

The data suggest that reverse discrimination charges have been a relatively small and constant proportion of all discrimination complaints filed by federal workers with the Equal Employment Opportunity Commission. (Nevertheless, the long delays all complaints face at the EEOC are a matter of serious concern because delay is a form of unfairness to all concerned -- both complainants and respondents. An ineffective enforcement mechanism makes the promise of a discrimination-free workplace too fragile for comfort.)

The shrinking federal workforce puts into sharp relief the issue of affirmative action's effect on nonbeneficiaries, this time in the context of layoffs. These issues will be increasingly thorny in the future, and will require extra attention to ensure fairness to nonbeneficiaries.

**8.5.2 Recommendations**

We recommend that the President:

- Recognizing that the EEOC is chronically underfunded, direct OMB to work with the Commission to develop a budget proposal that ensures it can effectively carry out its mission. Proposals should specifically address implementation of major new initiatives regarding charge processing, alternative dispute resolution and other efforts to tame the agency's large backlog of private sector complaints.
- Direct the Office of Personnel Management and agency heads to ensure that performance appraisals for managers include evaluation of their performance with respect to equal opportunity objectives, as defined by each agency in light of its circumstances and needs; periodic consideration by agencies of whether appropriate management systems of accountability are in place to pursue the agency's equal opportunity objectives.
- Direct the President's Management Council, working with the EEOC to study and report on the appropriate use of flexible goals and timetables for hiring and promotion, in the context of an overall federal workforce reduction. The overall goal is to ensure that the federal government is a model equal opportunity employer.
- Direct the President's Management Council, working with the EEOC, to identify and report on best agency practices in managing diversity and promoting equal opportunity, and to implement a mechanism to foster dissemination and adoption of those practices throughout the government. The Council should also look to successful examples in the private sector. The Council's efforts should focus on areas of the federal service in which underrepresentation is a significant problem.

## 9. FEDERAL PROCUREMENT POLICIES & PRACTICES

This Part summarizes the Review Team's examination of affirmative procurement efforts administered by the Department of Defense, the Department of Transportation, and the Small Business Administration, including implementation at those agencies of government-wide efforts to contract with Small Disadvantaged Businesses. These agencies were surveyed because they administer programs accounting for a large percentage of government contracting.

### 9.1 Overview and Background

#### 9.1.1 General

Throughout the federal government, several programs seek to increase procurement and contracting with minority- and women-owned businesses. The largest of these efforts are government-wide programs overseen by the SBA; this overall effort is supplemented in some cases by agency-specific initiatives. Under these programs taken as a whole, some procurement contracts are set aside for sole-source or sheltered competition contracting, eligibility for which is targeted to minority-owned businesses (and in some cases non-minority women-owned businesses), but by statute available more broadly to "socially and economically disadvantaged" individuals. There is also a broad, race-neutral, sheltered competition or setaside for small businesses generally. This operates separately and has a lower priority than the more targeted efforts; still, over 93 percent of procurements are with non-minority firms.

We conclude that *flexible goals* for procurement from minority- and women-owned businesses make sense, remain important, and are not in themselves unfair. They have successfully fostered minority and women entrepreneurship, and can be a necessary counterweight to continuing discrimination faced by those businesses. However, to ensure against unintended consequences and abuses, certain additional safeguards are needed.

#### 9.1.2 History and Background

MBE 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.<sup>56</sup>

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<sup>56</sup> See, for example: "Historically there has been an acute shortage of equity capital and long-term debt for small concerns owned by socially and economically disadvantaged individuals." S. Rep. No. 95-1070, 95th Cong., at 3 (1978) (Amendments to the Small Business Investment Act of 1958, P.L. 95-507 (1978)).

This congressional cognizance was recognized by the Court in *Fullilove v. Klutznick*, when it upheld a set-aside program established by Congress at the Department of Transportation.<sup>57</sup>

In *Fullilove*, Chief Justice Burger reviewed the legislative history of the Public Works Employment Act of 1977 and its documentation of the extensive history of discrimination against minorities in contracting and especially federal procurement. The Chief Justice quoted from the 1977 Report of the House Committee on Small business, which explored discrimination in contracting in the construction industry and found: "The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation."<sup>58</sup> The report concluded that "[minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular."<sup>59</sup>

The Chief Justice summarized the congressional findings regarding the difficulties confronting minority businesses as "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."<sup>60</sup>

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<sup>57</sup> "Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1979).

<sup>58</sup> *Fullilove*, 448 U.S. at 466 n.48, quoting H.R. Rep. No. 1791, 94th Cong., 2d Sess., p. 182 (1977).

<sup>59</sup> *Ibid.* As Gunnar Myrdal wrote in 1944:

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 partly 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.

Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, Harper and Bros., 6th Ed., p. 308.

<sup>60</sup> *Fullilove*, 448 U.S. at 467.

Because of these difficulties, in fiscal year 1976 less than 1 percent of all federal procurement was concluded with minority business enterprises."<sup>61</sup>

During the 1980's, Congress repeatedly examined racial discrimination in federal contracting and consistently found that it persisted.<sup>62</sup> In 1987, evidence compiled by Congress showed that little progress had been made in overcoming discriminatory barriers to minority business success: "[o]nly six percent of all firms are owned by minorities; less than two percent of minorities own businesses while the comparable percentage for non-minorities is over six percent; and the average of receipts per minority firm are less than 10 percent the average receipts for all businesses."<sup>63</sup>

The data regarding federal procurement revealed a similar picture. In 1986, "total prime contracts approached \$185 billion, yet minority business received only \$5 billion in prime contracts, or about 2.7 percent of the prime contract dollar."<sup>64</sup>

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<sup>61</sup>*Id.* at 459.

<sup>62</sup> See, e.g., H.R. 5612, To Amend the Small Business Act to extend the Current SBA 8(a) Pilot Program: Hearing on H.R. 5612, Before the Senate Select Comm. on Small Business, 96th Cong., 2d Sess. (1980); 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); Minority Business and Its Contribution to the U.S. Economy: Hearing Before the Senate Comm. on Small Business, 97th Cong. 2d Sess. (1982); 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 Congress., 2d Sess. (1984); State of Hispanic Small Business in America: Hearing Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House of the House Comm. on Small Business, 99th Congress., 1st Sess. (1985); 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's Before a Subcomm. of the House Comm. on Government Operations, 100th Cong., 2d Sess. (1988) [hereinafter 1988 Barriers Hearing]; Surety Board Minority Contractors: hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce, 100th Cong. 2d Sess. (1988) (examining difficulties that minority-owned businesses experience in getting private sector bonding) Small Business Problems: Hearings Before the House Comm. on Small Business, 100th Cong., 1st Sess. (1987).

<sup>63</sup> H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 1987.

<sup>64</sup> *Ibid.*

Such discrimination -- and the impact of prior discrimination -- continues today. The U.S. Commission on Minority Business Development reported in 1992:

[S]tereotypical images of minority owned firms limit their access to the factors of production . . . . 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."<sup>65</sup>

In 1990, African Americans accounted for 12.1 percent of the population but they owned only 3.1 percent of the total business and 1.0 percent of receipts of all U.S. firms. That same year, Hispanic Americans accounted for 9 percent of the population, but only 3.1 percent of U.S. businesses and 1.2 percent of all receipts. The typical minority firm has annual receipts that are less than half that of white-owned firms. And while in 1987 the average payroll among white-owned firms with employees was \$85,786, for minority-owned firms the average payroll was \$38,318. <sup>66</sup>

These disparities have been linked to past and present discriminatory practices, especially in the provision of capital:

- Traditional sources of financial capital, such as commercial banks, have frequently been unavailable to minority business owners. A recently released report by the Federal Reserve Bank of Chicago provides the most recent evidence of unequal access to credit.<sup>67</sup>
- The effects of current and past discrimination in the labor market creates a glass ceiling on minority earning potential and limits inherited income, resulting in compounded difficulties for minorities in generating initial equity investments.

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<sup>65</sup> United States Commission on Minority Business Development, Final Report, at 6 (1992)

<sup>66</sup> United States Commission on Minority Business Development, Final Report (1992), developed from data provided by U.S. Department of Commerce, Bureau of the Census.

<sup>67</sup> The study, released on July 12, 1995, was conducted by Dr. William C. Hunter of the Federal Reserve Bank of Chicago. It involved an analysis of 1,991 loan applications and concluded that there was no evidence of discrimination in comparing well qualified black and white applicants, but there was a statistically significant disparity for marginal applicants. The author attributes the result to affinity between loan officers and white borrowers.

- Scarcity of financial capital has forced the overwhelming majority of minority owned businesses to concentrate in fields that do not require large amounts of capital (very small service businesses with few employees).<sup>68</sup>

The exclusion from entrepreneurial opportunities demonstrated by these statistics is not limited to any single business sector. As the United States Commission on Minority Business Development stated:

The Commission has compared the statistics by major industry category and has found a pattern of disparity across all lines of business endeavor that we believe is correlated to the ethnicity of the business owner. In 1987, the typical minority owned firm's total annual receipts were only 11 percent of all United States firms. In Agriculture/Mining that difference was 51 percent; in Construction 45 percent, in Manufacturing 25 percent; Transportation 37 percent; Finance/ Insurance-Real Estate 36 percent; and in the services industry-- where the greatest numerical share of all businesses are located-- the typical minority firm had receipts of 43 percent of the average service firm in the country.<sup>69</sup>

Discrimination against women has hampered the development of women-owned businesses and limited their ability to compete once formed. Until enactment of the Equal Credit Opportunity Act of 1974, women suffered disabling discrimination in lending which prevented the accumulation of capital: single women were frequently found unworthy of credit, married women were impeded in their efforts to establish a credit history because financial records were in their husbands' names, and alimony and child support were excluded from income. As a result of the barriers confronted by women, "[w]omen owned businesses averaged just \$19,876 per year in annual receipts in 1990, which is 45 percent of the overall average."<sup>70</sup>

The share of federal procurement dollars going to women-owned businesses has been limited. In 1985, for example, only 0.6 percent of all Department of Defense prime contract awards went to women-owned businesses. While that percentage has climbed steadily, it has climbed slowly, reaching only 1.7 percent for 1994.

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<sup>68</sup> For further discussion, See, e.g. Timothy Bates., "The Potential of Black Capitalism." *Public Policy* 21 (Winter 1973); and, generally, Timothy Bates, Major Studies of Minority Business, A Bibliographic Review), Joint Center for Political and Economic Studies (1995).

<sup>69</sup> United States Commission on Minority Business Development, Final Report, p. 4 (1992)

<sup>70</sup> "The State of Small Business," A Report to the President, p.63 (1993).

## 9.2 Policies & Practices

### 9.2.1 Government-Wide Efforts

- **Goals:** Federal law establishes several overall, national goals to encourage broader participation in federal procurement: 20 percent for small businesses; 5 percent for small disadvantaged businesses (SDBs); and 5 percent for women-owned businesses.<sup>71</sup> The SBA consults with each agency to set annual agency-level goals to ensure progress toward the overall goal. (For contracts and firms above certain thresholds, the law requires subcontracting plans in furtherance of these goals.) The goals are themselves flexible, and hence relatively non-controversial. The government-wide SDB goal was met for the first time in 1993.
- **Sole-source contracting:** Under the §8(a) program, which is statutorily mandated, small SDBs can secure smaller contracts (usually less than \$3 million) without open competition. This "sole-sourcing" is accomplished when an agency contracts with SBA, which in turn subcontracts with the SDB.

For a company to participate in the §8(a) program, SBA must certify that the firm is controlled and operated by **socially and economically disadvantaged persons**.<sup>72</sup> By statute, persons from certain racial and ethnic groups -- but not women -- are presumed to be socially disadvantaged; persons are considered economically disadvantaged if they face "diminished capital and credit opportunities" -- measured by asset and net-worth standards.

In FY 1994, the §8(a) program accounted for about 2.7 percent of all government procurement -- about \$4.9 billion. The number of certified §8(a) firms grew from 3,673 in 1990 to 5,833 in 1994, of which 47 percent received contract actions.

Once a firm is certified and brought into the §8(a) program, the 1987 amendments to the statute establish both a "graduation" period of nine years and a requirement that, over time, firms achieve an increasing mix of business from outside the §8(a) program and outside

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<sup>71</sup> The goal for women was added in the 1994 procurement reform legislation, the Federal Acquisition and Simplification Act. Racial minorities are presumed to be "socially disadvantaged" for purposes of the government-wide SDB program, mirroring the statutory presumption in the SBA's §8(a) program described below.

<sup>72</sup> Congress first codified the §8(a) program in 1978. The earlier regulation-based program keyed eligibility to either group status *or* economic disadvantage. Congress and the Carter Administration chose to require that *both* conditions be satisfied in order to focus the program on victims of group-based discrimination and to ensure that all beneficiaries were economically disadvantaged. 15 U.S.C. § 637(a)(1), (4).

federal contracting.<sup>73</sup> Under the prior Administration, the SBA did not aggressively implement these 1987 statutory changes, but it has now done so. Moreover, in recent years there has been increasing emphasis on using competition among §8(a) and SDB firms rather than sole-source procurements.

- **Bid price preferences:** Procurement reforms enacted by Congress last year authorize government-wide use of the 10 percent bid preference for SDBs which previously was a tool available primarily at DOD (the so-called "§1207 program" -- see below). Implementing regulations are scheduled to be finalized this summer. These regulations could have a significant effect on procurement by SDBs in those agencies that do not use an effective set-aside scheme such as DOD's "rule of two," described below.

### *9.2.2. Agency-Specific Efforts*

- **Department of Defense:** In addition to participating in the goal-setting and §8(a) efforts, DOD has two additional efforts, which are significant because DOD executes roughly two-thirds by amount of all federal prime contracts. These additional programs are part of DOD's effort to meet its share of the government-wide goals mentioned above.
  - *SDB shelters or rule-of-two set-asides:* Contracting officers are authorized to limit bidding on a particular contract to small disadvantaged businesses (SDBs) if two or more such firms are potential bidders and the officer determines the prevailing bid will likely be within 10 percent of the fair market price.
  - *SDB 10 percent bid preferences:* Whenever there is full and open competition and procurement is based on price factors alone, contracting officers nationally add 10 percent to the price of *non-SDB* bidders, and then award the contract on the basis of the revised bids. (This is the "§1207" program. Although the applicable statute merely makes this tool *available* to DOD as a means of achieving its contracting goals, the Department's procurement regulations mandate its use.)<sup>74</sup>
  - *Comparative usefulness of tools:* Over 60 percent of DOD's contracting with SDBs occurs through either this "rule of two" set-aside or through the §8(a) program; the 10 percent bid price preference has been little-used in recent years because regulations require that the "rule-of-two" be used whenever possible, as it generally is. (See the accompanying chart.)

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<sup>73</sup> 15 U.S.C. § 636(j)(15).

<sup>74</sup> 10 U.S.C. 2323

- **Department of Transportation**: In addition to participating in the goal-setting and §8(a) efforts, DOT manages an effort to encourage business with minority- *and* women-owned firms through its grants to state and local entities.<sup>75</sup>
  - ***Subcontracting preferences***: In addition to setting goals for subcontracting with women- and minority-owned firms, DOT requires that grant recipients (usually state or local authorities) provide an additional payment to contractors who attain certain levels of contracting with women- or minority-owned subcontractors and who provide certain technical assistance to those subcontractors. The payment is designed to compensate the prime contractor for additional costs for assisting the subcontractors. This compensation incentive is up to 1.5 to 2.0 percent of the total contract.<sup>76</sup>
- **Graduation from sheltered competition**: Unlike the §8(a) program, the DOD and DOT programs do not require that firms graduate from preferences, or that firms have a mix of federal procurement and other business. There is, of course, the "natural" graduation which occurs if a firm becomes bigger than the "small" business size standard established by the Small Business Act, or the owner's wealth rises above the applicable threshold.<sup>77</sup>
- **Certification of eligibility** in these programs differs from SBA's certification for participation in the government-wide §8(a) program. In the DOD programs, the firms self-certify that they are qualified; in the DOT program, the state/local grant recipient is responsible for certifying the subcontractor's status.<sup>78</sup>

### ***9.2.3 Complementary Programs: Technical & Other Assistance***

A number of agencies have other programs to assist women- and minority-owned firms seeking procurement opportunities. These include:

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<sup>75</sup> See, *Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2100 (Jan. 6, 1983) [STAA]*; *superseded by Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, 101 Stat. 132 [STURAA]*; *Intermodal Surface Transportation Efficiency Act of 1991.*

<sup>76</sup> 15 U.S.C. § 644(g); Federal Acquisition Regulation, 8 C.F.R. § 52.219-8.

<sup>77</sup> "Small" varies with the industry, but the maximum number of employees varies between 500 and 1500. See Federal Acquisition Regulations (FAR) Part 19.102. The DOD wealth test is personal assets not more than \$750,000, excluding business assets and personal residence.

<sup>78</sup> 49 C.F.R. part 23; 48 C.F.R. § 52.219-8.

# Targeted Procurement Programs: A Side-by-Side Comparison

PHOTOCOPY PRESERVATION

	GOVERNMENT-WIDE			DEFENSE *		TRANSPORTATION		
	MBE goals**	8(a)	WOB goals	8(a)	SDB set-asides	SDB bid preferences	8(a)	STAA (grants to states and locals)
<b>ADMINISTERING AGENCY</b>	SBA	SBA	SBA	SBA/DOD	DOD	DOD	SBA/DOT	DOT
<b>ELIGIBILITY CRITERIA</b>	race/ethnicity	social and economic disadvantage	gender	social and economic disadvantage	social and economic disadvantage	social and economic disadvantage	social and economic disadvantage	race/ethnicity gender, or social and economic disadvantage
<b>CERTIFICATION BY</b>	N/A	SBA	self	SBA	self	self	SBA	state transportation departments
<b>MECHANISMS</b>	goals & outreach	technical assistance; sole-source and set-asides	goals & outreach	technical assistance; sole-source and set-asides	sheltered competition	price advantages	technical assistance; sole-source and set-asides	reward primes for subcontracts with SDBs
<b>VOLUME (prime contract \$ in FY94)</b>	9.7 billion (4.9%)	5.3 billion (2.7%)	3.1 billion (1.6%)	2.75 billion (2.0%)	1.09 billion (0.97%)	0.36 billion (0.32%)	0.39 billion (15.9%)	\$2.7 billion (incl. sub Ks)

**Abbreviations:**

MBE = Minority Business Enterprise

WOB = Woman-Owned Businesses

SDB = Small Disadvantaged Business

STAA = Surface Transportation Assistance Act

**Notes:**

\*Defense data do not include \$1.6 billion in prime contracts awarded to SDBs in open competition.

\*\*"MBE goals" are 5% in the aggregate, but vary across agencies. Volume data include the 8(a) program.

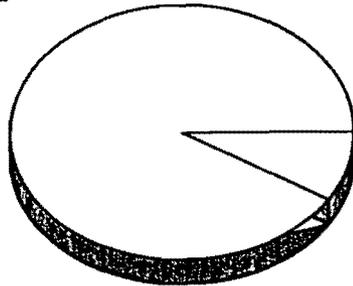
# Minority-Owned Businesses

## Share of Federal Procurement & Other Measures

### All Businesses

Nonminority-owned firms

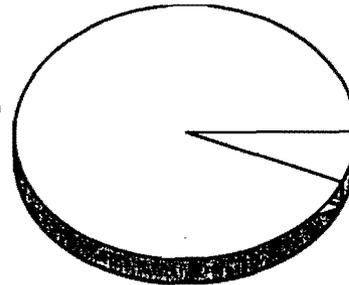
91.1%



### Federal Procurement from Minority-owned Firms

Nonminority-owned firms (\$152.7 B)

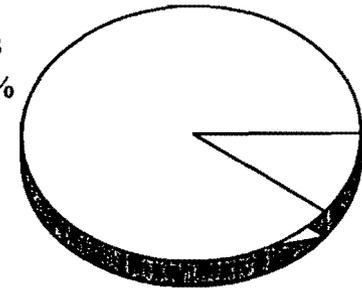
93.6%



8.9%  
Minority-owned firms

### Persons with Bachelor's Degree

White adults  
89.6%



10.4%  
Minority adults

#### Notes:

Minority-owned firms tend to have smaller average receipts than nonminority-owned firms. Thus while representing 8.9% of all businesses, minority-owned firms accounted for only 3.8% of all receipts.

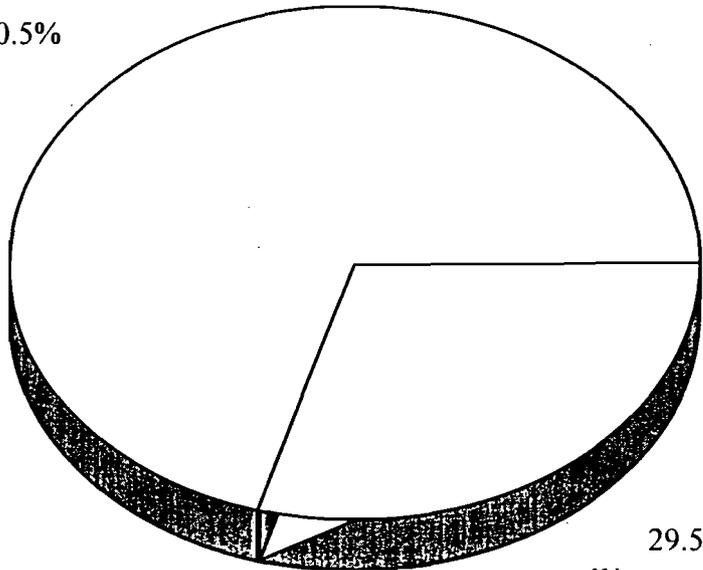
Business data from 1987 (SBA's State of Small Business Report); procurement data from FY1992 (SBA's Report on Federal Procurement Preference Goals).

# Women-Owned Businesses

## Share of All Firms & Share of Federal Procurement

### All Businesses

Male-  
owned  
firms 70.5%

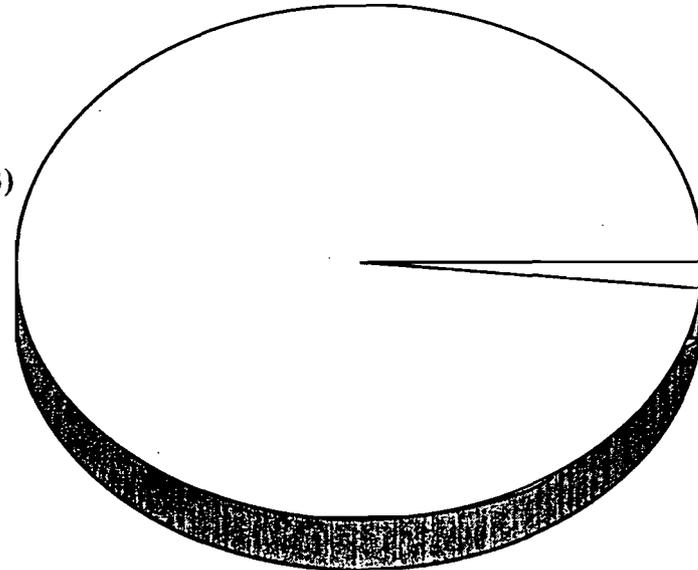


29.5%  
Women-owned  
firms

### Federal Procurement from Women-owned Firms

Male-  
owned  
firms  
(\$177.5 B)

98.4%



1.6%  
Women-  
owned firms  
(\$2.9 B)

#### Notes:

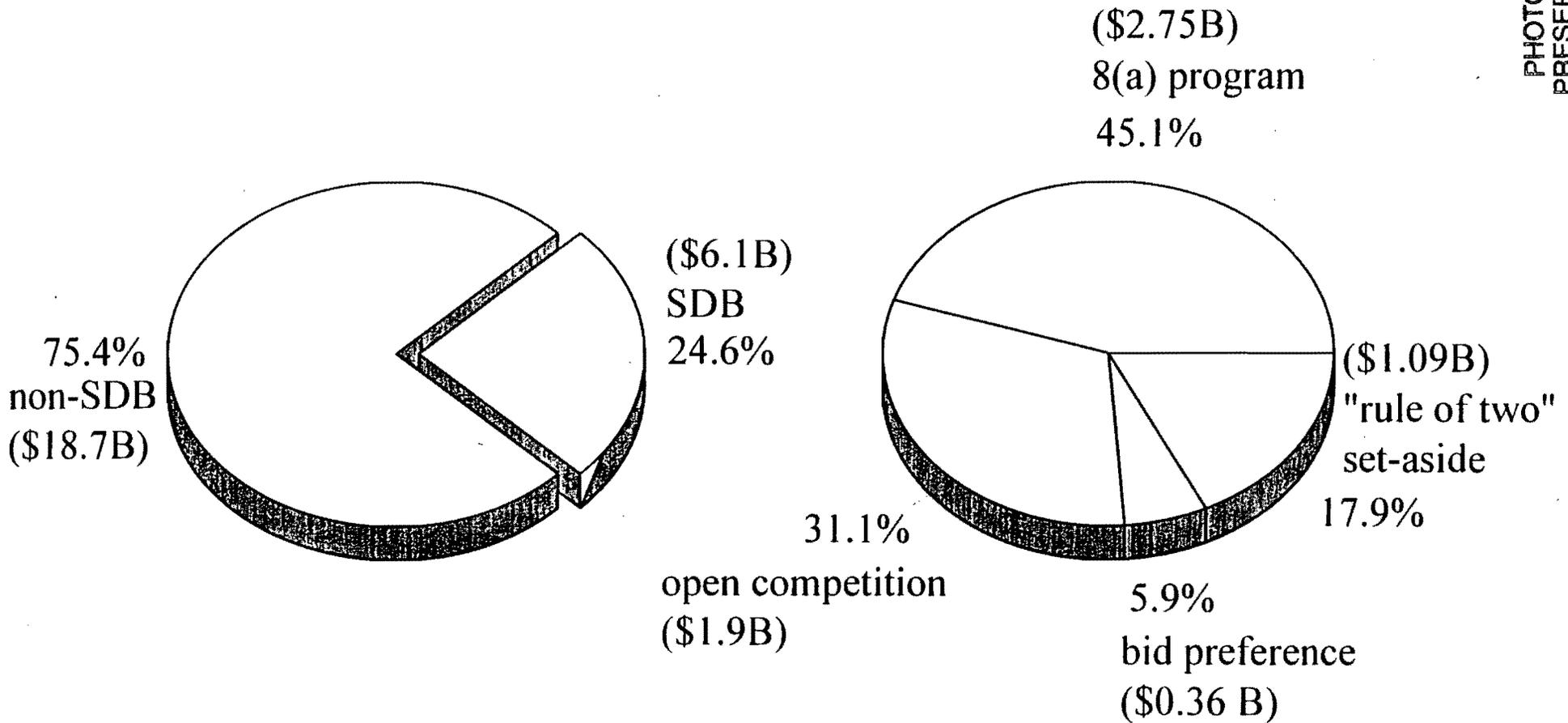
Women-owned firms tend to have smaller average receipts than male-owned firms.

Business data from 1987; procurement data from FY1992.

# DoD Small Business Procurement

SBD/non-SDB & by preference (FY94)

PHOTOCOPY  
PRESERVATION

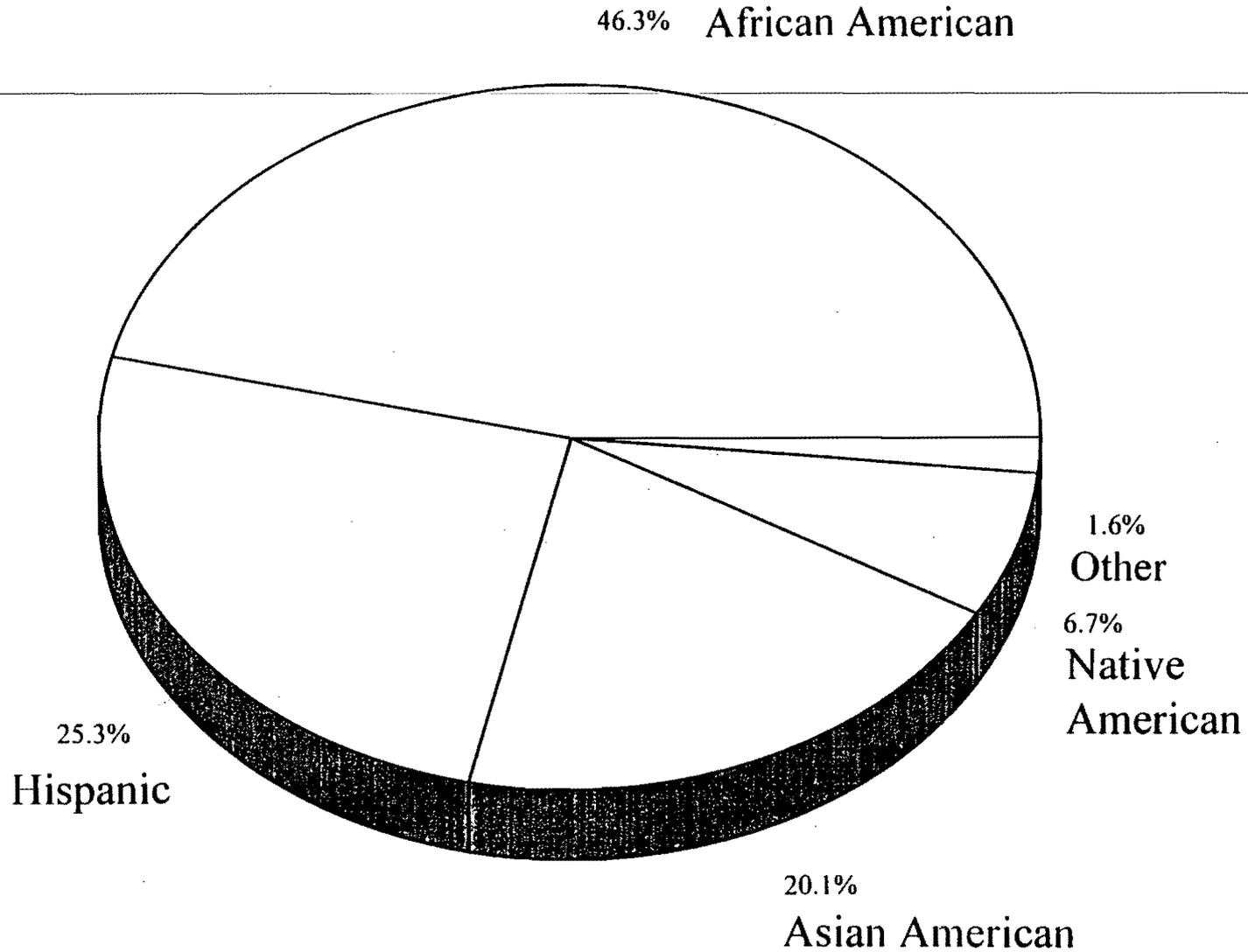


Note: Approximately 90% (\$2.5B) of 8(a) contracts are sole-sourced; the remaining 10% are competed among 8(a) firms.

Abbreviations:  
SDB = small disadvantaged business

# 8(a) Certified Firms by Race & Ethnicity

PHOTOCOPY  
PRESERVATION

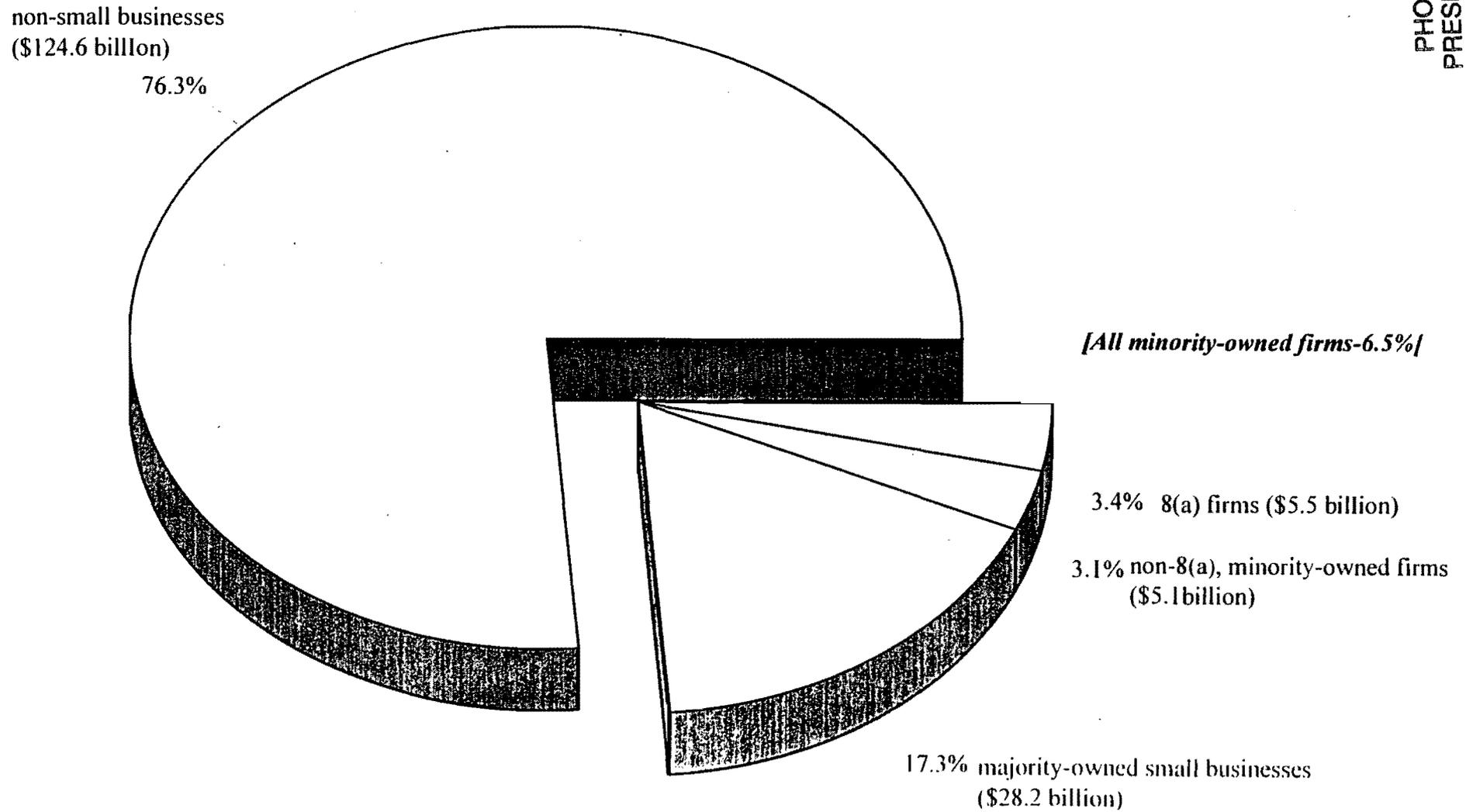


Note: The above data is based on the number of 8(a) firms; the distribution of contract dollars includes a larger share to Hispanic and Asian.

# Distribution of Federal Prime Contracts by Minority Status

(for major federal agencies, FY1994)

PHOTOCOPY  
PRESERVATION



N: exh3.prs (5/9/95)

*[All small business -- 23.7%]*

- SBA maintains several programs that serve small businesses generally, by providing technical assistance, loan guarantees, and equity capital through Small Business Investment Companies (SBICs).
- The *Minority Business Development Administration* (MBDA) at Commerce provides technical assistance and support for women- and minority-owned firms.
- Several agencies maintain "*Mentor-Protégé*" programs which encourage majority firms to advise and nurture new and growing minority-owned firms by providing managerial and technical assistance.
- *SBA's Surety Bond Program* provides up to a 90 percent guarantee for bonds required of contractors and subcontractors on many public and private construction contracts, thereby lowering the small firm's cost of doing business. In FY 1994, SBA approved more than 22,000 bid bond guarantees, resulting in 6,591 final bonds, for a total bond guarantee amount of \$1.08 billion. Although this program is not specifically targeted, 24 percent of bonds went to minority firms; nearly half of these were African-American, and one-quarter were Hispanic.

### 9.3 Performance & Effects

In the face of continuing barriers to full minority participation in economic life, most of these efforts have been very successful in expanding federal procurement from women- and minority-owned firms.<sup>79</sup> Agencies first achieved the 5 percent SDB goal in 1993 and, government-wide, prime contracts for minority-owned businesses were 6.4 percent of the total dollar volume. This approaches the proportion of minority-owned businesses among all U.S. firms, but is considerably below the 10.4 percent minority representation among adults with college degrees. ( See the illustration.)

- In 1994, 32 of the largest 100 African-American owned firms and 17 of the top 100 Hispanic-owned firms were or had been in the §8(a) program.
- Between 1982 and 1991, the dollar volume of all federal procurement contracts over \$25,000 increased by 24 percent. At the same time, contracts awarded to women-owned firms increased by more than 200 percent; contracts awarded to minority-owned firms increased by more than 125 percent.

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<sup>79</sup> The full effect of federal procurement affirmative action is found in the "ripple effect" - diminished discrimination at the state and local level, and in the private sector. Such measurement is inherently difficult.

- Agency-level data show similar trends: for example, between 1985 and 1994, contracting with small, disadvantaged businesses grew from 2.1 percent of DOD procurement to 5.5 percent--an increase of more than \$3 billion.
- Discussions with GSA contracting experts revealed that subcontracting with minority- and women-owned firms on large federal construction projects would likely not occur but for federal pressure in order to meet overall goals. This is also the strongly held view of SBA officials and of leadership in the SDB community.
- While the overall goals and levels of these programs are relatively small nationwide (less than 10 percent), there appears to be a tendency for agencies to concentrate their minority contracting in certain fields -- such as construction -- where there are a significant number of existing minority firms.<sup>80</sup> While this makes operational sense, it also means that, in practice, effective goals, set-asides, and preferences in some fields can exceed the overall goal. Indeed, reports indicate that in a few regions and fields, set-asides account for more than half of all procurements. (It bears emphasis, however, that there are many offsetting situations in which there is little or no SDB contracting done at a particular site or in a particular subindustry.) The government contractor community has pointed out that these types of unintended effects have caused resentment.
- Some proponents of these procurement initiatives argue that they are valuable not only because they combat discrimination and the lingering effects of discrimination facing minority and women entrepreneurs, but also because they indirectly promote **employment** of socially disadvantaged workers and development of economically **distressed areas**. The very limited evidence on these hypotheses suggests that there is, indeed, a meaningful correlation between minority ownership and minority workforce,<sup>81</sup> but the anecdotal evidence is that the relationship varies considerably across sectors. There has not been adequate study of the broader economic development hypothesis.
- The data regarding the effect on business formation and subsequent success of these programs is limited, but somewhat encouraging: SBA statistics for FY 1993 indicate that of the 710 firms that were graduates in that or previous years, 56 percent were still fully operational, 6 percent had curtailed operations, 3 percent had been acquired by other companies, and 35 percent had ceased operations. Comparisons with census data suggest that the failure rates

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<sup>80</sup> See, e.g., GAO/RCED 94-168 (August, 1994), at pp. 24-25.

<sup>81</sup> See, T. Bates, "Do Black-Owned Businesses Employ Minority Workers? New Evidence," *Review of Black Political Economy* 51 (Spring 1988) (research by Professor Timothy Bates, Wayne State University, Detroit, MI., based on 1987 census data).

of graduated §8(a) firms are no worse than, and in fact may be better than, those seen in small businesses generally.<sup>82</sup>

#### 9.4 Evaluations & Proposed Reforms

These programs have been the object of a number of studies, including a Congressionally mandated study during the prior Administration which recommended maintaining and strengthening the federal effort to ensure minority- and women-owned business participation in federal procurement.<sup>83</sup> SBA, this past August, proposed a comprehensive reform of the §8(a) program in testimony before Congress. That proposal is responsive to the great majority of common criticisms.

Generally, critics and commentators reviewing these programs have made the following points:

- **Reorganization:** Some observers emphasize the need to rationalize and coordinate the web of federal programs serving minority- and women-owned firms. For example, in 1992 the U.S. Commission on Minority Business recommended the creation within the Commerce Department of an Administration for the Development of Historically Underutilized Businesses which would assume SBA's §8(a) responsibilities.<sup>84</sup>
- **Graduation:** The §8(a) program now requires "graduation" after nine years, and has phased requirements of non-8(a) and non-federal business mix designed to wean firms from sheltered competition and dependency on federal contracting. In February 1995, of the 1,038 firms in the fifth through ninth year of §8(a) participation, nearly two-thirds met or exceeded the minimum non-8(a) business levels. Some observers have emphasized the need for analogous graduation and business-mix requirements in the DOD and DOT programs.
- **Regional/Sectoral Concentration:** Our analysis found SDB contracts and limited competition concentrated in certain industries and regions, which is undesirable for minority and non-minority firms alike. For example, while DOD's overall goal for SDBs was only 5 percent, more than 35 percent of all DOD construction awards went to SDBs, and more than

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<sup>82</sup> Census data indicate that of all small businesses formed in 1976-78, less than 30 percent survived 6 to 8 years; data for 1982-87 indicate that only 42 percent of black-owned firms survive five years. See, *The State of Small Business: A Report to the President* 214-15 (1993).

<sup>83</sup> See, Final Report of the U.S. Commission on Minority Business Development (Dec. 1992).

<sup>84</sup> See, Final Report of the U.S. Commission on Minority Business Development 51 (Dec. 1992).

two-thirds of these were awarded under sheltered competition. Moreover, in ten States, more than 40 percent of all construction contracts awarded to small business were awarded to SDBs. This concentration occurs at particular sites as well, where in rare instances virtually all small business contracting is with SDBs. On the other hand, some degree of sectoral concentration in SDB procurements is inevitable to "balance" the many sites and subindustries with virtually no SDB participation, and huge procurements for weapons systems and the like, for which no SDBs are available as prime contractors, and still too few as major subcontractors. Additional efforts are clearly needed to expand SDB opportunities more broadly.

- **Self-Certification:** Because DOD's program is based on self-certification by SDBs, it may be prone to abuse, particularly through "front companies." For example:
  - DOD's IG investigated Tyco Manufacturing and referred the case to the US Attorney. The company's owner pled guilty to charges that he falsely represented his firm as Hispanic-owned and controlled.
  - Top officials of Automated Data Management, Inc. were convicted of conspiracy to defraud the government for concealing the firm's ownership structure to participate in the §8(a) program.

Self-certification has obvious advantages in terms of reduced administrative expense and regulatory intrusion. Nevertheless, this must be balanced with the importance of ensuring that affirmative action measures are fair, which means as free of abuses as can reasonably be achieved.

- **Subcontracting:** In FY 1993, the most recent data available, small businesses received about \$63 billion of federal contract dollars, out of roughly \$180 billion in total. About one-third of that amount was from subcontracting. SDBs, on the other hand, received a little over \$13 billion in federal contract dollars, but only *one-sixth* of that was through subcontracting. These figures are consistent with the widely held view that SDBs face greater obstacles to subcontracting participation than do other small firms. The SBA and other agencies believe that expanding the use of SDBs in subcontracting is both feasible and desirable as a strategy for creating more SDB opportunities.
- **Other Program Changes:** Several earlier analyses by the GAO, the SBA Inspector General and commentators have raised criticisms of the §8(a) program, several of which SBA is moving to address by aggressively implementing recent statutory amendments which had languished under the prior Administration. These are reviewed more specifically immediately below.

Past criticisms are that too many §8(a) contracts were awarded on a sole-source basis, i.e., without competition of any kind. This criticism has largely been addressed by recent and

pending reforms. The 1988 law reforming the §8(a) program requires that companies in the program compete among themselves for contracts valued at \$3 million or more. (There is a higher competition threshold of \$5 million for manufactured goods.) Currently, however, many of the larger §8(a) contracts are open-ended agreements that started out as small contracts and grew well beyond the competition threshold when a contracting officer renewed the order. To increase the number of contracts available for competition, SBA has proposed regulations to change this procedure so that an estimated value will be set on these open-ended contracts, which probably will be higher than the initial value. This means more §8(a) contracts will be subject to competitive bidding among participating firms.

Relatedly, the 1988 statute, which will be in full effect at the beginning of 1996, requires §8(a) companies to maintain a specified percentage of private sector business while participating in the program so that these firms are not totally dependent on government contracts. As a result, §8(a) companies will have to compete in both the private and public sectors. This should improve the survival rate of firms graduating out of the sheltered environment of the §8(a) program. It also makes moot an earlier criticism that §8(a) firms were often permanently dependent on a sheltered federal market.

In applying the test of economic disadvantage, the Small Business Act requires exclusion of the §8(a) participant's equity in his/her primary residence, business, and, except in community property states, the spouse's share of the family's wealth.<sup>85</sup> Recent audits of the §8(a) program revealed problematic practices by some firms. These include underreporting of net worth, high salaries and bonuses (more than \$1 million per year) for several business owners, and efforts to "shelter" resources in spousal assets and residences. Defenders of the programs correctly point out that the number of such abuses is small and declining. SBA staff has been receiving training in order to better determine an applicant's net worth. Nevertheless, several of these problems are traceable not to staff expertise, but to provisions in the statute. SBA has already proposed certain amendments to remedy this problem.<sup>86</sup>

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<sup>85</sup> SBA measures economic disadvantage in a three-part test: the individual's net worth, the financial condition of the company, and the company's access to credit. For entry into the program, personal adjusted net worth cannot exceed \$250,000; during the developmental stage of the program (the first four years), it cannot exceed \$500,000; and during the transition stage (the last five years), it cannot exceed \$750,000. In a September 1994 audit of 50 larger §8(a) firms, the SBA Inspector General found that 35 of the 50 owners had a net worth in excess of \$1 million; 13 of the owners, for example, had business equity ranging from \$1 to \$9 million; five owners had personal residences valued at between \$800,000 and \$1.4 million. See *Audit Report on §8(a) Program Continuing Eligibility Reviews*, Report No. 4-3-H-006-021 ("1994 Audit Report") at 7-9 (Sept. 30, 1994).

<sup>86</sup> Testimony by Cassandra Pulley, Deputy Administrator, unveiling the Administration's proposed §8(a) reforms, 1995, S721-1:1:August 9, 1994.

On another matter, pending SBA regulatory changes will help reduce the extent to which §8(a) contracts are concentrated among too few companies. When the requirement that §8(a) companies maintain a specified mix of government and private sector business is fully implemented, there will be a limit on the dollar value of the §8(a) business one company can control. In addition, the proposed regulation limiting open-ended contracts will mean some of the larger §8(a) contracts will be open to competition and will change hands more regularly. Another proposed change will eliminate the distinction between a "local buy" and a "national buy" system, thereby allowing firms to market to the government without geographic restrictions (except for construction contracts).

SBA's Office of Government Contracting also has negotiated a Memorandum of Understanding with DOD to use §8(a) participants who have never received a contract. SBA is negotiating similar agreements with other federal agencies.

- *Minority Employment Effects*

Research has shown that minority-owned businesses have a tendency to hire more minority employees than other firms.<sup>87</sup> SBA believes that in industries such as military base maintenance and construction, a significant number of the employees of §8(a) firms are minorities. In high-technology industries such as computer systems integration and radar development, however, the number of minority employees of §8(a) firms reflects the representation of minorities within the relevant scientific disciplines. Currently, the primary goal of the §8(a) program is business development. SBA thinks that the inclusion of a minority hiring requirement would be an uneconomic burden for some companies, and in tension with the program's long-standing focus on entrepreneurship opportunities. This suggests the need for a separate program focused specifically and directly on creating jobs and economic development in economically distressed communities.

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<sup>87</sup> See, T. Bates, "Do Black-Owned Businesses Employ Minority Workers? New Evidence," *Review of Black Political Economy* 51 (Spring 1988) (research by Professor Timothy Bates, Wayne State University, Detroit, MI., based on 1987 census data).

## 9.5. Conclusions and Recommendations

### 9.5.1 Conclusions

Do the federal affirmative action programs relating to contracting meet the President's tests: Do they work? Are they fair?

*Does it work?*

The several programs discussed in this section have clearly been effective at increasing the amount of Federal contracting with minority- and women-owned businesses. This comes against a backdrop of continuing underrepresentation of minorities and women in the ranks of entrepreneurs. Agency officials believe that a substantial portion of this underrepresentation is the consequence of current and past practices of exclusion and illegal discrimination; *Adarand* now requires careful documentation of this factual predicate of discrimination and its effects. Moreover, experience suggests that contracting opportunities for underrepresented groups would decline sharply in the absence of *some form* of targeted procurement. After the Supreme Court's 1989 *Croson* decision involving the minority contracting program in Richmond, Virginia, the share of city contracting dollars won by minority firms plummeted from over 38.5 percent to only 2.2 percent. (Entrepreneurs also reported a sharp drop in private sector work, which they attributed to the "signaling" effect of the public sector retrenchment.) After a new program was designed and implemented, meeting the constitutional test of strict scrutiny, the figures recovered to slightly above the goal of 16 percent.<sup>88</sup>

In summary, then, the continuing justifications for these programs include:

- *Remedying discrimination.* The Federal programs are a remedial counterweight to the exclusion and discrimination that minority and women entrepreneurs continue to face -- a counterweight that not only opens up opportunity to do business in the federal contracting sector, but ideally helps small disadvantaged businesses develop the resources to penetrate private markets.
- *Mainstream inclusion.* Apart from securing individual fairness, these programs reflect a need to build a stronger economy by tapping the entrepreneurial talents and drive of all segments of the population--that means affirmative efforts to open mainstream opportunities to underrepresented groups.

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<sup>88</sup> The actual 12 month participation rate for MBE's following the 1993 implementation was 17.7 percent.

- *Economic development.* These programs are often supported because they are presumed to contribute to job creation and economic development in distressed communities. The evidence is positive, at least regarding employment, though not fully conclusive.
- *Practicality.* If, for the above reasons, it is appropriate for government to use procurement activity to promote minority and women entrepreneurship, then the final key concern is that the measures adopted be *effective*, not empty aspirations. We must be mindful of the practical realities of the marketplace, and of agency administrative routines.

These preliminary findings and conclusions must be reconsidered in greater detail as part of the post-*Adarand* review being conducted by the Attorney General and the various agencies. That review must ascertain whether race-based programs are narrowly tailored to achieve a compelling governmental interest, so as to satisfy the strict scrutiny standard of constitutional review.

### *Is it fair?*

The above quite legitimate objectives do not imply that every detail of any conceivable procurement preference would be justified. There are important constraints of fairness, most of which are given substantial effect in the operation of the current contracting programs.

#### **(1) Not quotas.**

The contracting programs are not quotas because the statutes and regulations establish flexible goals rather than numerical straightjackets:<sup>89</sup> they reflect an aspiration that 5 percent of contracting be with minority firms, not a guarantee that it will happen. Indeed, for many years it did not happen. On the other hand, it is also clear that the governing statutes and regulations enable contracting officers to use the entrepreneur's race and economic disadvantage, in combination, as a condition of eligibility for participation in various forms of sheltered competition. Individual contracts are set aside for §8(a) firms or SDBs only. As a practical matter, non-minorities find it difficult to establish "social disadvantage" under the terms of the law, so the programs are in effect targeted on members of traditionally discriminated-against

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<sup>89</sup> Even where one statute seems to speak commandingly of a rigid numerical set aside, it elsewhere gives the agency head authority to waive or modify the numerical target as appropriate. See, *Surface Transportation Assistance Act of 1992*, Pub. L. 97-424, 6 Stat. 2100 (Jan. 6, 1983) [STAA]; *superseded by Surface Transportation and Uniform Relocation Assistance Act of 1987*, Pub. L. 100-17, Stat. 132 [STURAA]. Read together, these provisions amount to the usual kind of flexible goal, though with a pointed Congressional emphasis suggesting that the Secretary of Transportation would be expected to defend carefully a decision to set lesser ambitions.

groups. Nevertheless, over 18 of every 20 contracting opportunities (by dollar) continue to go to non-minority, male-owned firms.

## **(2) Race-Neutral Options**

The review team examined, insofar as was possible, the consideration given by agencies and the Congress to various race- and gender-neutral approaches to expanding entrepreneurial opportunities for minorities and women. Unfortunately, it is difficult at present to evaluate the effectiveness of such alternatives. There is no readily available data, for example, on the extent to which non-minority entrepreneurs, who already benefit from the long-standing preference for all small businesses, would benefit from a new preference targeted only on *economic disadvantage*, i.e., on entrepreneurs below a certain threshold of personal assets. We believe, however, that moving from social *and* economic disadvantage to focus on *economic disadvantage only* would seriously undermine efforts to create entrepreneurship opportunities for minorities and women, given continuing patterns of exclusion and discrimination.

Another approach would be to provide preferences to firms that will perform contracts in economically distressed areas, thereby stimulating employment and economic development. These are worthy goals, paralleling those of the Administration's Empowerment Zones initiative. They are, however, only indirectly related to the specific goal of combatting business-related discrimination and opening entrepreneurship to underrepresented groups.

These two approaches are not good substitutes for one another; each has valuable objectives; geographic targeting does not create new problems of racial exclusion, but may do little to address the *old* problems of gender- and race-based entrepreneurial exclusion and would help create jobs and economic development in distressed areas.

## **(3) Flexible and minimally intrusive.**

As a practical matter, some degree of explicit targeting is the only effective way to ensure that entrepreneurial opportunities are increasingly open to minorities and women. The question remains how best to minimize abuse of the program .

As a threshold matter, it is important to bear in mind that, largely because of race-neutral preferences for all small businesses, *non-minority* small businesses win roughly *three times* as much in procurement dollars as minority firms. In that sense, *the procurement structure as a whole benefits non-minorities far more than minorities, and is not as intrusive or exclusionary as would be a procurement system in which the only significant preferences were exclusively for minorities.*

Nevertheless, because of the special scrutiny focused on distinctions based on race, we have examined some alternatives.

- *Tighten eligibility.* Eligibility for sheltered competition could be more sharply limited in duration or to a subgroup of those now eligible -- by, for example, using a much more restrictive asset test. While a certain measure of this is warranted to address perceived abuses of SDB programs, a very short graduation period would result in a very high business failure rate, essentially slamming shut the door to opportunity. Similarly, too tight an asset test would be unrealistic; owners of businesses capable of providing essential services and goods to the government will very rarely be economically struggling in an absolute sense, since potential to take advantage of entrepreneurial opportunity depends significantly on such factors as education, experience and personal financial security.
- *Expand eligibility to women.* The system could be made less race-focused by making all women eligible. This is currently the case only in SDB programs at Transportation and a few other agencies.
- *Expand eligibility to economic disadvantage generally.* The current eligibility test, requiring both social disadvantage *and* economic disadvantage, could be broadened to "social disadvantage *or* economic disadvantage." (Social disadvantage, as explained above, effectively means membership in a discriminated-against group.) Practically speaking, such a preference program would simply key to the assets or net worth of the entrepreneur. Therefore, it would not be an effective tool in areas where discrimination locks minorities and women out of opportunity.

Our conclusion is that the expansion of eligibility would marginally expand opportunities for non-minorities, but that doing so would risk significant dilution of efforts to expand entrepreneurial opportunity to individuals who have traditionally been excluded by virtue of their membership in discriminated-against groups.

#### (4) Transitional.

Programs should be transitional in two senses. First, an individual beneficiary should be provided with an *entryway* to entrepreneurial opportunity rather than a *guarantee* of business success. Second, the program as a whole should have an agreed measure of success, so that once equal opportunity has been achieved, and the field of competition is level, the program can *sunset* and we can rely exclusively on antidiscrimination and less intrusive measures, such as outreach.

With respect to *entryway*, only the §8(a) program has a specific graduation limit of nine years, while all SDB programs have implicit graduation based on firm size and assets of the entrepreneur. Still, some form of limit, measured in years or perhaps cumulative contract dollars, seems highly desirable because otherwise the notion of using sheltered competition to provide an *opportunity* to succeed at business would instead become an effort to *guarantee* such success.

With respect to *sunset*, these procurement programs have been subject to a relatively intense level of continuing review by the agencies and by Congress. Annual procurement data are used to set and track goals, and several Members of Congress have long taken a strong interest in the details of how the programs are administered. Nevertheless, additional research and analysis is needed to formulate a set of measures for when a given procurement program will have accomplished enough to be declared "successful," so that it can fairly be terminated.

**(5) Balanced.**

Finally, we return to the observation that these programs cause only a minor diminution in opportunity for nonminority firms. In that respect, current programs are balanced and equitable in the large.

The Review identified some minor, localized difficulties, however. In a few situations, the operation of the set asides leads to very large concentrations of SDB contract awards at certain government sites, and/or in certain subindustries. This "crowding" or concentration is driven by the appropriate desire of contracting officials to achieve their goals by taking advantage of the fact that a critical mass of SDB firms happen to exist in that region or field. Current rules give agency heads discretion to adjust set asides to prevent such concentrated impacts on non-SDB firms, but such adjustments are not always made. The problem of subindustry, or sectoral concentration of SDB firms is more complex, but also needs attention. Not only is there some risk of unbalanced impact on certain non-SDB entrepreneurs, there is also the danger of effectively isolating SDB's in particular lines of business. The goal of these programs is to open up opportunity broadly, creating and expanding beach heads in the mainstream economy, not erecting entrepreneurial ghettos. These difficulties can be addressed by proper exercise of agency discretion.

**9.5.2 Recommendations:**

The efforts of Congress and the Executive branch to provide equal opportunity for minority and women entrepreneurs has succeeded in fostering successful businesses, but that success is neither complete nor unalloyed. In most respects, the use of race and gender by these programs is fair. Significant possibilities exist, however, to address the remaining concerns without risking the gains in opportunity for minorities and women. At a minimum, these possibilities deserve serious consideration by agency heads and by the Congress.

These programs providing sheltered competition for eligible firms should be structured with greater practical flexibility, *so that they promote opportunity as broadly as possible, consistent with effectiveness in accomplishing the important goal of opening doors to those who have been historically excluded from business opportunities as a result of group-based discrimination and exclusion.* Therefore, we recommend that the President instruct agencies, under the leadership of the National Economic Council as follows:

- **Reforms:** The Administrator of the Small Business Administration, the Deputy Director for Management of OMB, and White House staff will lead formulation of detailed government-wide proposals to address abuses in the current operation of the procurement programs focused on opportunity for minority and women entrepreneurs. Specifically, the proposals should:

1. Tighten the economic disadvantage test. So that business owners cannot hide assets under a spouse's name so as to qualify for a set-aside, reform the asset test to count the value of the personal residence and to consider the spouse's assets (now excluded) in a manner analogous to treatment of a 49 percent owner of the enterprise.

2. Tighten requirements for graduation. Apply §8(a)'s 9 year graduation limit to all SDB programs, but then direct the agencies, with White House coordination, to establish more sophisticated objective industry-specific criteria for determining when any individual firm "develops" beyond the need for sheltered competition. Agencies should consider, for example, establishing caps on the dollar value of contracts, plus a cap on total dollars a single firm can win through sheltered competition, varying by industry if appropriate. These measures will also reduce the concentration of §8(a) awards among a limited number of successful firms.

3. Enforce stringent safeguards against fronts and pass-throughs. Create a uniform, certification process for all SDBs. (Where feasible, specially licensed private firms should conduct the certifications, by analogy with the role of independent certified public accountants.) Require certification audits at time of first contract and periodically thereafter to verify continuing eligibility and to monitor for "fronts" and "pass-through" companies. Increase penalties.

4. Establish measures to reduce regional/industry concentrations. Direct the agencies, with White House coordination, to exercise oversight to prevent excessive use of sheltered competition in particular regions or industries. Direct the agencies, with appropriate interagency coordination, to determine industries/areas where sheltered competition programs may be phased out based upon successful inclusion.

- **Adarand compliance:** In accord with the Directive issued by the President, the agencies will examine the extent of continuing patterns of discrimination and exclusion in the industries and regions with which they do business. Agencies should use those findings to develop guidelines for measuring when minority and women entrepreneurs have achieved a full measure of equal opportunity to participate in the economic mainstream, making sunset of the programs appropriate. (The Attorney General has the leadership role as regards the legal aspects of this task, and the White House staff will provide any necessary interagency coordination of policy considerations.)

- *Empowerment contracting*: Under the leadership of the Community Empowerment Board chaired by the Vice President, agencies should develop an "empowerment contracting" program to target procurement dollars on small firms located in communities suffering persistent, severe economic distress, or employing a substantial number of workers from those communities. Looking beyond the issue of fair and effective responses to discrimination, we must recognize that there are communities and regions in our country where the free enterprise system is not working to provide jobs and opportunity. Although the Administration has taken several steps to help poor communities directly -- including, for example, Empowerment Zones, Community Development Banks, the reinvention of HUD, and more effective enforcement of the Community Reinvestment Act -- more is needed. This initiative would help bring jobs and economic development to areas in great need.

## 10. EDUCATION AND HHS POLICIES & PRACTICES

### 10.1 Overview

Several DoEd and HHS programs are targeted on the basis of race, gender or disability. Most of these are programs designed to increase the representation of minorities or women in certain professions or fields; others support institutions that have a high enrollment of racial and ethnic minorities. Federally funded minority- or gender-targeted scholarships are one strategy for accomplishing increased representation of minorities or women in certain professions. However, most such scholarships are funded by non-federal public and private sources (e.g., institutions, private foundations, and state and local governments) and are not, therefore, "federal programs." Federal policy is formally relevant only because such efforts must comply with federal civil rights laws when institutions are recipients of federal financial assistance. Finally, it bears mention that most of these programs at DoEd and HHS are targeted by race or gender on the basis of express Congressional authorization to use such criteria, rather than based on some more general delegation of authority.

### 10.2 Policies & Practices.

#### *10.2.1 Programs to Increase Representation in Certain Fields*

DoEd, HHS and the National Service Foundation (NSF) operate several programs that have as their primary purpose increasing the representation of underrepresented groups in certain fields and occupations. The justifications for addressing this underrepresentation extend beyond distributive justice to remedying the specific continuing effects of discrimination in some institutions and fields, improving the quality of participating institutions by supporting the diversity critical to that quality, and securing for the nation the broad pool of human resources needed for competitiveness and progress in the decades ahead. Almost all of this support is provided as assistance to institutions, rather than direct assistance to individuals. Many of these programs are minority- and/or gender-targeted, that is, they employ group membership (or an institution's attention to targeted groups) as a condition of eligibility. Illustrative examples include:

- **The Program To Encourage Minority Students to Become Teachers:** This DoEd program provides grants to institutions of higher education with schools of education, and is designed to: (1) improve recruitment and training opportunities in education for minority individuals, including minority language individuals; (2) increase the number of minority teachers in elementary and secondary education; and (3) identify and encourage minority students in the 7th through 12th grades to aspire to and prepare for careers in elementary and secondary school teaching. The program prepares and places minority students as teachers in elementary or secondary schools with at least 50 percent minority enrollment, including urban and rural public or private nonprofit schools.
- **The Faculty Development Fellowship Program:** This DoEd program provides grants to institutions that have a "demonstrated record of enhancing the access to [graduate education for] individuals from underrepresented groups." The grants support fellowships for the continuing education of minority faculty members, defined by statute to include "African-Americans, Asian Americans, Hispanics, Native Americans, Pacific Islanders, and Native Hawaiians."
- **Institute for International Public Policy:** This DoEd program is designed to increase significantly the number of African Americans and other underrepresented minorities in international service, including private international voluntary organizations and the foreign service of the United States. It provides a single grant to a consortium of higher education institutions to establish and administer the Institute.
- **National Science Foundation Programs:** The NSF administers programs designed to address underrepresentation of women and minorities in the fields of science, engineering, and mathematics. For example, the NSF funds the Graduate Fellowships for Women in Engineering and Computer and Information Science Program, which is designed to increase the numbers of women entering these two fields. This specific program provides funding to individuals; however, some NSF programs direct their support to institutions.
- **National Institutes of Health (NIH) Programs:** Pursuant to statutory direction to "increase the number of women and individuals from disadvantaged backgrounds (including racial and ethnic minorities)," NIH (part of HHS) supports underrepresented minorities in research and education programs. This was approved by Congress in the 1993 NIH Revitalization Act. Most of these programs are minority-targeted, although that is not expressly required in every statute. Examples include:
  - **National Center for Research Resources (NCCR) Minority Initiative** provides grants to high schools to support underrepresented minorities interested in certain natural sciences. The program leaves to the school to determine which "ethnic or racial group[s] are] underrepresented in biomedical or behavioral research." The program description notes that nationally, Black Americans, Hispanic Americans, Native Americans and Pacific Islanders, are underrepresented in these fields.

- **Minority Predoctoral Fellowship Program** supports individual Ph.D. and M.D./Ph.D. candidates who are members of groups underrepresented in the biomedical sciences. The applicant's institution defines which groups are eligible, but NIH gives "priority consideration" to "African Americans, Hispanics, Native Americans Alaskan Natives, and Pacific Islanders." This program provides funding to institutions. The institutions then administer the program to a large degree, "tailoring" it to their needs.

HHS also administers programs that target the "disadvantaged." HHS defines "disadvantage" in race- and gender-neutral terms; however, from year to year, HHS sets funding priorities that may use, for example, race or ethnicity as one of several factors in funding, or that may rely instead on outreach.

- **Federal Health Professions Education Programs:** HHS currently administers over 40 programs concerning the education of health professionals. Most of these programs are designed to assist "disadvantaged populations" and are race- and gender-neutral. These programs serve large percentages of underrepresented minorities. For example:
  - **HHS' Scholarships for Disadvantaged Students:** This program provides grants to institutions that serve students from "disadvantaged backgrounds,"<sup>90</sup> defined by HHS regulations as students from low-income families or "from environment[s] that ha[ve] inhibited the individual from obtaining the knowledge, skill or abilities required to enroll in . . . a health professions school."<sup>91</sup> Under this program, special statutory consideration is directed to institutions with underrepresented minority enrollment in excess of the national average. Of the 7,500 students who participated in the Scholarships for Disadvantaged Students (SDS) program, more than half were underrepresented minorities.
  - Of the 108 participants in the **Disadvantaged Health Professions Faculty Loan Repayment Program**, 77% are African-American, 11% Hispanic, and 11% disadvantaged whites. This program encourages graduate students from disadvantaged backgrounds, including Caucasians, to become teachers, helping them to pay-off loans, if they agree to become Professors.

[*Note:* The Administration recently proposed consolidating these programs into five "clusters"; Senators Kassebaum and Kennedy have co-sponsored a similar measure. One of the clusters addresses "minority and disadvantaged training;" another addresses diversity in nurse training programs.]

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<sup>90</sup> 42 U.S.C. § 293a(b).

<sup>91</sup> 57 Fed. Reg. 8347 (1992).

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While the measures in the following three subsections lie outside the focus of this Review, we mention them by way of comparison to note the variety of efforts designed to promote inclusion.

### *10.2.2 Support for Minority Institutions*

A second set of programs provide targeted assistance to institutions that serve (or historically have served) a high proportion of minorities. These efforts include:

- **Support for HBCUs:** Several DoEd and NSF programs provide assistance to the 103 historically black colleges and universities ("HBCUs"). Funds for these programs may be used for a variety of purposes -- including programs to establish development offices; strengthen physical, financial, and academic structures and resources; purchase telecommunications equipment; establish outreach programs; and help HBCUs gain access to private-sector financing. (Admissions policies of these institutions are, of course, nondiscriminatory.)
- **Support for Hispanic-Serving and Minority-Serving Institutions:** DoEd's Hispanic-Serving Institutions Program makes grants to institutions with an enrollment of at least 25% Hispanic students (of which 50% must be low-income, first generation college students and an additional 25% must be low-income or first generation college students). One component, the Strengthening Institutions Program, makes grants to institutions with at least 50 percent minority student enrollment to enable these institutions to expand and improve their capacities to serve minority and low-income students.

### *10.2.3 Programs to Serve Special Needs*

DoEd also administers a number of major programs for individuals with special needs, including programs for individuals with disabilities and for individuals with limited proficiency in English.

- **IDEA:** The Individuals with Disabilities Education Act ensures that all children with disabilities have available to them appropriate public education designed to meet their unique needs. This is accomplished through formula grants to states, 75% of which is passed through to local education agencies, and through competitive grants for research, training, demonstration, and technical assistance.
- **The Rehab Act:** The primary purposes of the Rehabilitation Act are to (1) provide vocational rehabilitation services to individuals with disabilities to prepare for gainful employment; (2) provide independent living services to individuals with severe disabilities to enhance their independence, productivity, and quality of life; (3) increase the number of qualified personnel who are trained to deliver rehabilitation services; and (4) conduct rehabilitation research.

- **Language-Related Programs:** The Department also supports a number of programs targeted to students with limited proficiency in English. These include the Bilingual Education Act (which is dedicated to expanding the capacity of school districts to educate these students) and the Migrant Education Program (which provides funds for States for supplementary education services for the children of migrant agricultural workers and fishermen.)

#### *10.2.4 Efforts to Ensure Access*

Finally, apart from programs directly or indirectly supporting training or outreach for individuals, DoEd and the NSF also undertake broader activities that further equal opportunity for traditionally underrepresented groups. These efforts include:

- **WEEA:** The Women's Educational Equity Act Program promotes gender equity in education by making grants and awarding contracts to educational agencies for research and development of strategies to support gender equity and for projects that implement effective gender equity policies and programs in schools. Relatedly, the NSF's **Women and Girls Program** also supports programs which develop and implement gender equity policies from the grade school level through the graduate school level.
- **Advisory Activities:** Many DoEd programs establish advisory or governing boards, councils, or panels and in many cases, the membership of these entities is specified (or diversity is encouraged) based on race, gender, or disability. For example, Goals 2000 requires that local improvement plans be developed by a panel that is "representative of the diversity of students and the community with regard to race, language, ethnicity, gender, disability, and socioeconomic characteristics."

### **10.3 Performance & Effects**

Relatively few of these programs have been formally studied or reviewed. The more significant efforts include:

- **HBCUs:** Since their creation in 1965, the programs supporting HBCUs have never been thoroughly evaluated; however, in FY 1995, Congress appropriated \$1 million to evaluate support for HBCUs.
- The **IDEA program** has been closely examined, and the consensus view is that this program has significantly contributed to a steady decline in the dropout rate for children with disabilities and an increase in their graduation rate, over the past five years. The number of children served and the number of teachers serving these children have also increased.
- In 1994, the GAO issued a formal evaluation of the **WEEA**. Its primary finding was that the WEEA program supported direct services to a small number of girls and women; the GAO

recommended that program resources be devoted to eliminating systematic inequitable policies and practices in schools.

- **Health Professions:** In 1994, the GAO also reviewed the various HHS programs intended to increase the representation of underrepresented groups in the health professions. Emphasizing that data in this area are inadequate, the study found, in relevant part, that:
  - The representation of African-Americans, Hispanics, and Native Americans in health education and practice is increasing.
  - Evidence that this increase will improve access to care in undeserved areas is "inconclusive."
  - "Evaluations ... have not conclusively linked these programs to changes in the supply, distribution, and minority representation of health professionals."
- However, as regards the importance of remedying the problems of under-representation in the health professions and various research fields, HHS credits several far more thorough published studies and articles referenced only in passing by the GAO. These studies indicate that: minority health professionals are considerably more likely to work in undeserved communities;<sup>92</sup> "bedside bias" toward minority patients is more likely to occur in institutions where there are few minority professionals;<sup>93</sup> minority researchers are more likely to bring special sensitivities to medical research problems relating to minority populations and

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<sup>92</sup> Institute of Medicine, *Balancing the Scales of Opportunity: Ensuring Racial and Ethnic Diversity in the Health Professions*, p. 16; Huckman, Beverly B. and Rattenbury, Bruce, "The Need to Bring More Minority Students into Medicine," *American Medical News*, 35 (29), p. 39-41 (1992); Nickens, H.W., "The Rationale for Minority-Targeted Programs in Medicine in the 1990s," *Journal of the American Medical Association*, 267 (17); p. 2390-95 (1992); Council on Graduate Medical Education, *Third Report: Improving Access to Health Care Through Physician Workforce Reform: Directions for the 21st Century*, p. 13, 19-21 (1992).

<sup>93</sup> Nazario, Sonia, "Treating Doctors for Prejudice; Medical Schools Are Trying to Sensitize Students to 'Bedside Bias,'" *Los Angeles Times*, Dec. 20, 1993; Blendon, Robert J., Aiken, Linda H., Freeman, Howard E., and Corey, Christopher R., "Access to Medical Care for Black and White Americans," *Journal of the American Medical Association*, 261, p. 280 (1989).

communities,<sup>94</sup> and minority professionals are more likely to provide training and mentoring to members of minority groups.<sup>95</sup>

#### 10.4 Concerns & Complaints

These programs have generated little controversy and few complaints. Typical of the isolated objections are:

- An East Indian student filed a Title VI complaint against Marquette University regarding its Minority Engineering Scholars Program, which was funded through NSF's Research Careers for Minority Students (RCMS) program. The student charged he was discriminated against on the basis of his national origin. NSF had earlier determined that Asians were *not* underrepresented in sciences and engineering (but that "American Indians, Blacks, Hispanics, and Native Pacific Islanders" were). Accordingly, the Department of Education's Office for Civil Rights (OCR) found insufficient evidence of a Title VI violation. OCR reasoned that the NSF was authorized by Congress to devise programs to increase minority participation in science and engineering, and thus that the RCMS program was not in violation of Title VI. From a broader perspective, OCR's findings reflect the understanding that tying benefits to group membership is not an end in itself, but must reflect the central policy purpose of opening opportunity to groups by virtue of their underrepresentation. Moreover, in as much as a race-conscious program must be narrowly tailored to serve the compelling national interest in removing barriers and broadening participation in critical research sectors, that tailoring must recognize when a specific minority group is no longer underrepresented.
- The HHS Scholarships for Disadvantaged Students (SDS) program provides grants to institutions to support the recruitment and training of disadvantaged nursing students (and does so without a preference for race or gender). SDS regulations published in 1991 require that, in order to qualify for SDS assistance, an institution must have at least one minority faculty member. Wichita State University's application for an SDS grant was denied because it did not have any minority faculty. A faculty member from the University wrote to Senator Dole, who forwarded the letter to HHS.

The Department replied that the minority-faculty requirement is implicit in the authorizing legislation, which requires that a qualifying institution have a program "for recruiting and

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<sup>94</sup> Lillie-Blanton, Marsha and Hoffman, Sandra C., "Conducting an Assessment of Health Needs and Resources in a Racial/Ethnic Minority Community," *Health Services Research*, 30 (1), p. 229 (1995). This article references the Tuskegee Institute study as leaving a legacy of mistrust, particularly in African American communities, of research.

<sup>95</sup> Institute of Medicine, *Op. Cit.*, p. 19; COGME, *Op. Cit.*, p. 29.

retaining minority faculty."<sup>96</sup> It is HHS' view that an institution cannot "retain" minority faculty unless it *has* minority faculty; that in a competitive application program, it is reasonable to take past success at recruiting minority faculty as evidence of commitment to serving minority students effectively; and that 181 other institutions were able to satisfy this eligibility condition. The faculty member argued that institutions that are interested in serving disadvantaged students sometimes lack the financial resources to compete for "qualified" minority faculty.

- During a subcommittee hearing, one Representative asked the Assistant Secretary for Postsecondary Education why the Department supports HBCUs, which the Representative characterized as segregated institutions. The witness responded that (i) these institutions are open to all students; (ii) Congress chose to strengthen these institutions because of their unique role in serving populations who were historically denied access to postsecondary education because of their race; and (iii) the statutory definition of HBCU does not require a school to have a predominantly African-American student body in order to qualify as an HBCU.

## 10.5 A Note on Minority-Targeted Scholarships

Minority-targeted scholarships include both (i) scholarships for which minority status is the *only* requirement for eligibility (i.e., where minority status is a necessary and sufficient condition) and (ii) scholarships for which minority status is one of several requirements for eligibility (i.e., where minority status is a necessary but not sufficient condition). When public resources or institutions are involved, such programs are subject to strict constitutional scrutiny under *Adarand* and previous caselaw.

### 10.5.1 Current Use of Minority-targeted Scholarships

The GAO, in a 1994 study found that at the undergraduate level, scholarships (from all funding sources) for which minority status is the *only* requirement for eligibility are rare, accounting for less than 0.25% of all scholarship monies; that scholarships for which minority status is one of several requirements for eligibility represent about 3% of scholarship monies; and that scholarships for which minority status is one factor among many considered are somewhat more common. On the other hand, DoEd officials note that there are countless scholarship programs which are limited to white students, at least *de facto*, because of some condition on family origins, membership in some social or fraternal organization, family affiliation with the particular school, etc.

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<sup>96</sup> 42 U.S.C. § 293a(b)(2).

A few GAO case studies illustrate the use of minority-exclusive and minority-designated scholarships:

- At a small public college, less than one percent of the student body is minority. The school initiated minority-targeted scholarships in 1972, paying the difference between in-state and out-of-state tuition (about \$3900). The school believes these scholarships are useful, particularly for recruiting minorities from out-of-state (the State population is 95% white). Reacting to the Bush Administration's 1991 policy, questioning the permissibility of minority-targeted scholarships, the school suspended its program; as a result, in 1992 only one minority student received assistance (compared to the usual 5 or so students).<sup>97</sup>
- At a private law school, the student body is 8% minority. Nearly half of the minority students receive minority-targeted aid. The school initiated minority-targeted scholarships in 1984 as part of a broader minority-recruitment strategy; the effort has had significant effects: the minority representation has risen from 2% to 8%. School officials consider the scholarships "vital" because (i) they signal the school's seriousness about diversity, and (ii) they allow the school to compete with other schools in order to achieve diversity benefitting that institution.<sup>98</sup>
- At an undergraduate school of a private university, the student body is 14% minority. Half of these students receive minority-targeted assistance. The school's program (established in 1970) serves students from "disadvantaged" backgrounds based on financial need. Each year the program serves a few needy white students -- officials offered the example of a student with two blind parents. The program has been successful at recruiting minority students: in 1969, minorities accounted for 2 percent of the student body; in 1989, they accounted for 16%. When financing for the scholarships declined briefly in 1972, the number of African-American students dropped by more than 50%.<sup>99</sup>

### **10.5.2 Federal Policy**

In late 1990, organizers of college football's Fiesta Bowl pledged to set aside certain proceeds from the game to establish minority-targeted scholarships at the participating schools. The Bush Administration's Department of Education announced that such scholarships might be illegal under Title VI. However, after a lengthy review and public comment, the Department, in 1994, promulgated new policy guidelines regarding how Title VI would be applied to minority-targeted aid. Those rules permit the use of race as a condition of eligibility for financial aid in order (a)

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<sup>97</sup> See "Higher Education: Information on Minority-Targeted Scholarships" United States General Accounting Office, Pp. 68-71 (1994).

<sup>98</sup> *Ibid.*, 71-76.

<sup>99</sup> *Ibid.*, 82-88.

to remedy past discrimination or (b) to promote diversity, provided the measure is narrowly tailored. A measure is "narrowly tailored" if (1) race-neutral means would have been ineffective; (2) a less extensive or intrusive use of race would have been ineffective; (3) the measure is of limited extent and duration, and is applied in a flexible manner; (4) the institution periodically reviews the continuing need for the measure; and (5) the effect on nonbeneficiaries is sufficiently small and diffuse so as not to unduly burden their opportunity to receive financial aid. DoEd and DOJ believe these guidelines satisfy the constitutional tests established by the Supreme Court.

A number of schools have been working with the Department of Education to tailor their scholarship programs to the Department's 1994 guidelines which called for race-based scholarships to be periodically reviewed to assess their continuing justification and to determine whether less racially exclusive means can achieve diversity goals. For example, a community college in Florida funded scholarships for minority students when the school was 80 percent white but the school had not reevaluated its scholarship programs to assess whether consideration of race was still warranted. After meeting with the Assistant Secretary of Civil Rights, the school agreed to adopt racially neutral need-based scholarships as a method to continue achieving diversity in the student body without considering race.

### *10.5.3 Additional Observations*

In general, the Department of Education believes that there is a virtual consensus within the higher-education community that minority-targeted scholarships are essential to meeting schools' diversity and remedial needs, and that race-neutral approaches will not always be reasonably effective.

To redress the lingering effects of past discrimination, the University of Maryland established a merit-based scholarship program (the Banneker scholarship program) for which only African-Americans are eligible. An Hispanic student challenged the constitutionality of this program and a district court rejected the challenge, emphasizing that the program was a narrowly-tailored remedy for past discrimination. However, in *Podberesky v. Kirwan*,<sup>100</sup> the Fourth Circuit overturned that decision; the Supreme Court declined to review the case.

By denying the University's request, the Supreme Court merely declined to hear the appeal requested by the University of Maryland in the Podberesky case. It neither ruled against race-targeted scholarships, nor affirmed the decision of the Fourth Circuit Court of Appeals that the University had not submitted sufficient evidence to justify the Banneker scholarship program at issue. The Department of Education's policy on race-targeted student financial aid has not changed as a result of the Supreme Court's recent action. Race-targeted student aid is legal in many circumstances as a remedy for past discrimination or as a tool to achieve a diverse student body.

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<sup>100</sup> 38 F.3d 147 (1994), cert. denied, 115 S. Ct. 2001 (1995).

On the other hand, responding to the controversial nature of race-targeted scholarships, some institutions have modified their efforts. At present, according to HHS and DoEd, there are insufficient data to conclude that such approaches would be acceptably effective in producing the desired remedial and diversity benefits. Despite the promising result in Colorado, without further experimentation and research the risk is too great that nationwide adoption of such measures will dilute targeted resources at a time of increasing fiscal pressures. Such research should be undertaken expeditiously to determine whether race-neutral alternatives will, in fact, work.

Finally, some observers have expressed skepticism about whether minority-targeted scholarships actually expand opportunity by "growing the pool." These observers believe that universities are simply bidding for a finite number of qualified minorities and that real growth in the pool will require far more investment in secondary and primary education, rather than simply financial aid at the university level. Defenders of targeted programs agree that continued efforts are needed on the investment front, but argue that post-secondary education as a whole is far more inclusive than it would be without these affirmative efforts. The number of minority and women students prepared for and interested in further education may be influenced by the degree to which genuine opportunity is available and outreach is effective.

## 10.6 Conclusions and Recommendations

Do the federal government's affirmative action programs relating to education, health and human services meet the President's tests: do they work, and are they fair?

### 10.6.1 Conclusions

#### *Does it work?*

Because education is so fundamental to virtually all aspects of social and economic opportunity in America, the federal government's affirmative action programs in this area seek not only to deter and remedy discrimination, but also to promote inclusion of underrepresented groups. The fundamental problem addressed by these targeted programs in HHS and DoEd is the continuing underrepresentation of historically discriminated against groups in key professions and in institutions of higher education. Agency officials and experts generally agree that among the important factors explaining the underrepresentation are *current discrimination, past discrimination, and the lingering effects of that past discrimination* -- including direct and indirect effects on both individuals and on institutions.

This problem remains a critical challenge because:

- *Remediation:* A great many institutions and professions have never made an effective break with their history of discrimination and exclusion. Whether one looks at the statistics on continuing illegal discrimination, at the report of the *Glass Ceiling*

*Commission*, or at the glacial pace with which patterns of historical exclusion are reversed in specific settings.

- *Opportunity*: Increasingly, educational institutions are the engines of opportunity in the economy, and education is often the first rung on the opportunity ladder. Ensuring the inclusion of underrepresented groups therefore remains an invaluable tool for making the promise of equal opportunity a reality.
- *Wasting no talent*: As the President has stated, the competitiveness of our companies and economy depends upon building an inclusive economy so that we create the opportunity and encouragement owed every American to develop their talents to the fullest of their potential, and use those talents productively. The inevitable result will be stronger families, businesses and communities. Indeed, in science, higher education and several other fields addressed by Federal programs, *studies project dangerous shortages of talent* if we continue to draw the ranks of those professions so overwhelming from among white males only.
- *Quality*: Finally, there is broad agreement that diversity is critical to the quality of certain institutions and professions. While higher education is the most familiar example of this, the biomedical and life sciences are another. Officials at HHS and NIH point out that training and support for underrepresented groups is one means, albeit very imperfect, of providing a workforce of service providers likely to be concerned with undeserved populations. There is an added purpose, however, in ensuring that research agendas over time reflect the full range of society's needs: experts state, for example, that participation of minorities and women in biomedical research helps ensure not only that key questions are being addressed, but that the questions are even asked in the first place.

The evidence as to whether these particular programs meet these goals is positive but incomplete. The participation of women and minorities at every level of education has dramatically increased in recent decades; these programs have played a positive role in that progress, but it is difficult to quantify how much of that improvement is due to affirmative action, and how much to other societal and policy factors. The studies referred to above indicate that program effects have been positive; however, they also suggest more work needs to be done.

#### *Is it fair?*

We conclude that these DoEd and HHS programs have few adverse effects on nonbeneficiaries, and that in general the criticisms raised can be answered. Concerning minority-targeted scholarships, for example, DoEd estimates that only 40 cents of every \$1000 in Federal educational assistance funding is devoted to such targeted programs; they should be understood as a very minor element of an overall, balanced, opportunity strategy addressing many needy populations and several national purposes. More broadly, these programs serve strong national interests related to the effective remedying of discrimination, root and branch, and the securing

of a full measure of opportunity needed to create strong institutions and a strong economy for the future.

### ***10.6.2 Recommendations***

- Instruct the Office of Management and Budget to work with agency heads to ensure that each agency has appropriate plans over time to conduct continuing reviews on the effectiveness and fairness of any program using race or gender as a condition of eligibility or as a key factor earmarking funds.
- Instruct the Office of Management and Budget to work with agency heads to ensure that equal opportunity objectives and measures are included, where appropriate, in the implementation of the Government Performance and Results Act.

**11. OTHER FEDERAL POLICIES:  
THE FEDERAL COMMUNICATIONS COMMISSION,  
AND THE DEPARTMENTS OF TREASURY AND AGRICULTURE**

In addition to the various classes of programs discussed above, there are a number of other federal efforts that are noteworthy. This Part discusses several such programs.

**11.1 FCC Programs**

**11.1.1 Policies & Practices**

In 1978, after convening a conference on minority ownership policies, the FCC concluded that the perspectives of minorities and programming directed specifically to minorities were inadequately represented in the broadcast media, and that adequate representation of minority viewpoints was necessary for both the minority and non-minority communities. The agency determined that increased minority ownership of broadcast enterprises was needed to ensure this diversity of views and programming. (In *Metro Broadcasting*,<sup>101</sup> the Supreme Court later relied upon Congressional and Commission findings that minority ownership increased the diversity of broadcast programming.) The agency also determined that various other methods of encouraging more programming diversity that pre-dated 1978, e.g., consideration of minority status in comparative hearings, had not been fully effective.

Since that time, the FCC has undertaken a number of initiatives. Most prominently, since 1994, in response to Congressional directive, the Commission has fashioned measures to ensure that smaller businesses, including businesses owned by minorities and women have opportunities to participate in the auctions of personal communications services and other new spectrum-based technologies.

A summary of the principal FCC policies and practices regarding minorities follows:

- **Auctions for personal communications services:** In 1993, Congress authorized the FCC to conduct auctions to award licenses for communications technologies which use the electromagnetic spectrum. Since implementing this authority, the FCC has raised over \$9 billion in auction revenue for the U.S. Treasury. In authorizing the use of auctions, Congress directed the FCC to "ensure that ... businesses owned by members of minority groups and

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<sup>101</sup> *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding credits, and other procedures."<sup>102</sup> The FCC created bidding credits, tax certificates, and installment payment plans for women and minority-owned businesses in these auctions in order to overcome the problem of general lack of capital access by these groups. In the fourth auction, scheduled to be held in mid-1995, the FCC created special measures for smaller entities, with enhanced measures for small businesses owned by minorities and women. However, these measures provided by the statute and FCC implementing rules were constitutionally challenged, and the auction was initially stayed by a federal court. That case was recently settled and the auction will take place later this summer.

Fearing additional constitutional challenges to the fourth auction in the wake of the *Adarand* decision, many minority- and women-owned businesses urged the FCC to modify its rules by eliminating race- and gender-conscious measures. The FCC has proposed to do so, but the proposal would apply only to the fourth auction. The FCC plans to continue to explore ways to preserve race- and gender-based rules for subsequent spectrum auctions.

- **Consideration of minority status in comparative broadcast hearings:** The FCC considers minority ownership in administrative proceedings to grant new broadcast licenses. Minority ownership is considered a plus in so-called comparative hearings, and weighed together with other relevant factors. These factors include diversification of ownership, proposed service, past broadcast record, and efficient use of frequency. This program was upheld by the U.S. Supreme Court in *Metro Broadcasting*. For several years, the Commission's appropriations statute has prohibited it from re-examining this policy.
- **Efforts targeted at women in comparative broadcast hearings:** In 1978, the FCC extended to women-owned businesses its policy of awarding comparative credit in hearings to award new broadcast licenses. However, in 1992, the D.C. Circuit -- in an opinion by then-Judge Thomas over a dissent by then-Chief Judge Mikva -- struck down the FCC preference favoring women applicants. In *Lamprecht v. FCC*,<sup>103</sup> the court found no correlation demonstrated by the FCC between women ownership and diversified programming. The FCC has not attempted to reinstate this gender-based preference.
- **Distress sale policy:** Under this policy, a broadcaster whose license has been designated for revocation or whose renewal has been denied can assign the license to an FCC-approved minority enterprise, and thereby avoid the otherwise applicable transfer restrictions. The purchase price by the minority entity must not exceed 75% of the fair market value. This policy has had a minuscule impact because very few stations are subject to distress sales, and

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<sup>102</sup> 47 U.S.C. §309(j)(4)(C), (D).

<sup>103</sup> 958 F.2d 382 (D.C. Cir. 1992).

they tend to be smaller radio stations. For several years, the Commission's appropriations statute has prohibited it from re-examining this policy. This policy was also upheld by the U.S. Supreme Court in *Metro Broadcasting*.

- **Tax certificate policy (the "Viacom" issue):** Under FCC's tax certificate policy (carried out pursuant to § 1071 of the Internal Revenue Code<sup>104</sup>) and the Commission's current appropriations statute, an owner of a radio or television station can sell to a minority-owned enterprise (the minority buyer must maintain both legal and actual control over business operations), and thereby defer capital gains and/or reduce the basis of certain depreciable property. This program often lowers the price of the station for a minority buyer, thus overcoming the general problem of lack of minority access to capital. This program was the one most frequently used in the transfer of licenses to minorities. In the fall of 1994, the FCC proposed reforms in the § 1071 program. Before the issues could be fully explored, Congress in April 1995 repealed the authorization for this program, attaching the repeal to an unrelated provision.

### *11.1.2 Performance & Effects*

Until Congress authorized the use of auctions to award new personal communication services licenses, the FCC had given away licenses for free. The FCC believes that absent affirmative measures to foster participation by small minority- and women-owned businesses, the use of auctions to award licenses would have erected a formidable new barrier to their participation in the telecommunications revolution, affecting an industry which is owned almost exclusively by non-minority white males.

We now have some data concerning participation by minority and women owned businesses in auctions for licenses to provide communications services, three of which have already occurred. In the first auction, which attracted very high bids for a small number of nationwide licenses, no women- or minority-owned businesses won. However, in the next auction, which involved 594 local licenses for much smaller bids, minority businesses won 23.6% of the licenses and women-owned businesses won 38.2% of the licenses. In light of the results of the first auction, the FCC made some changes in its system of benefits for these groups, and in the third auction, which involved 30 licenses for large regions, approximately 35% of the licenses were won by women- and minority-owned businesses.<sup>105</sup>

Although the FCC has been barred by Congress in recent years from utilizing its funds to evaluate certain of its minority broadcast ownership programs, existing data and anecdotal

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<sup>104</sup> 26 U.S.C. § 1071.

<sup>105</sup> FCC, "Representation of Minorities and Women Among FCC Auction Winners" (4/17/95).

evidence demonstrate that the FCC's efforts have encouraged a marked increase in the percentage of minority-owned broadcast and cable television systems. In 1978, 0.5 percent of all licenses were minority-owned; today, 2.9 percent are. The FCC has testified that most sales to minorities occurring after 1978 *would not have happened* without its § 1071 tax certificate policy.<sup>106</sup>

The vast majority of existing minority broadcast owners have utilized tax certificates at some point during the past 15 years. In 42% of these cases, licenses were later transferred, with an average holding period of four years; the FCC says that this is not an unusually short time for this industry. The data show that the great majority of tax certificates have been used to acquire relatively small radio and television stations.<sup>107</sup> The FCC believes that the program has not been abused, either through the use of sham "minority-controlled" companies or through the rapid flipping of licenses by new minority owners.

### *11.1.3 Evaluations & Proposed Reforms*

The licensing of new telecommunications technology raises policy considerations distinct from the § 1071 program, because there is no link between ownership and diversity of viewpoints expressed. However, the FCC believes that the licensing of new telecommunications technologies creates an unprecedented opportunity to provide small minority- and women-owned businesses meaningful opportunities to participate in this rapidly expanding sector. In addition, obtaining a license in these auctions merely gives the winner the ability to try to succeed in a highly competitive field. Finally, FCC officials believe that its program to enable women and minorities to bid more successfully in these auctions has resulted thus far in increased revenue to the United States Treasury through an increase in the number of bidders.

During recent Congressional consideration of tax legislation, the FCC proposed a number of reforms of the tax certificate program benefiting the sellers of broadcast licenses to minority-owned and controlled entities. The FCC proposals would have limited and targeted the tax benefits. The Administration indicated in testimony and in negotiations on Capitol Hill that it favored such reforms rather than total repeal of the provision. Nevertheless, Congress has repealed the provision, and done so retroactively in order to reach the multibillion dollar Viacom transaction.

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<sup>106</sup> Statement of William Kennard, General Counsel of the Federal Communications Commission, before the Senate Committee on Finance, March 7, 1995, at 10; Statement of William Kennard, General Counsel of the Federal Communications Commission, before the House Committee on Ways & Means, Subcommittee on Oversight, Jan. 27, 1995 at 11.

<sup>107</sup> Federal Communications Commission, "Summary of FCC Tax Certificate Data," at 4 (Data as of 2/28/95).

This repeal is significant because the FCC believes that the § 1071 program was by far the best method to increase minority ownership of broadcast, cable, and satellite stations, and thereby achieve diversified programming. Because of a general lack of access to capital and limited publicity regarding sales of existing stations, minorities have failed to achieve increased station ownership without the tax certificate program.

The question of minority and women ownership of broadcast, cable, and satellite stations will be quite important in the near future because the technology in this industry is rapidly changing, transforming the meaning of "broadcast." Congress, the Administration, and the FCC will have to address the issue of whether the current station owners will simply be allowed to transfer their ownership and control to the new technology, and thereby largely retain the current ratios of ownership, or whether an entirely new system should be adopted that would open the market to a broadening of opportunity and participation. (Commission staff state that some proposals for allocation of the new digital HDTV spectrum threaten virtual elimination of low power television stations, which is one of the areas in which there has been a higher percentage of minority ownership.)

The Commission remains committed to diversifying ownership in the telecommunications industry in both the broadcast sector, where format diversity is critical, and in non-broadcast areas of emerging technologies, where the Commission believes that entrepreneurial opportunity in new industries is likely to be dominated by established firms, to the longer run detriment of the industry and the economy as a whole.

## **11.2 The Treasury: Minority Bank Deposits**

### ***11.2.1 Policies & Practices***

Pursuant to Executive Order 11458, promulgated in 1969, the Treasury Department administers a "minority-owned bank deposit" program in which these banks receive special consideration to act as depository institutions holding cash for federal agencies, as long as no increased cost or risk for the government results. This is a totally voluntary program through which the Treasury Department encourages federal agencies and private entities to use minority-owned financial institutions. The most important element of the program is the deposits made by businesses for federal tax payments.

### ***11.2.2 Program Effects and Future***

From 1991 through 1994, the amount of such deposits made in minority-owned financial institutions ranged from a high of 2.8% of the total, to a low of 2.1% (which was \$21 billion in 1994). These deposits were made in 117 minority-owned financial institutions in 1994, approximately 1% of the total number of institutions receiving such deposits. (The Treasury

Department does not have data showing what percentage of federal agency deposits are placed in minority-owned banks under this program.)

This program had considerable potential for minority-owned institutions because the Treasury Department, federal agencies, and private entities have wide discretion in choosing which financial institution to use. This potential was never realized as the prior two Administrations largely ignored the program.

This program in the near future will have much less value because technology will soon sharply increase direct electronic deposits of taxes by businesses; this will eliminate the need for a financial institution in the middle, and will save considerable money for both businesses and the Government. Consequently, the massive tax deposits currently being made in both minority-owned and other banks will decline sharply. This technological advance will have a particularly adverse impact on minority-owned financial institutions because many of them had become partially dependent upon the federal tax deposits. The program also has limited utility for federal agency deposits because the Treasury Department, as a policy matter, prefers not to have agency money deposited outside the Treasury.

### 11.3 Agriculture Programs

Pursuant to a statutory requirement, the Department of Agriculture gives preferences to "socially disadvantaged" persons in the sale of farm properties, and sets aside loan funds for farmers in this group. These programs have not generated much controversy recently, although a prior version of the farm sale program was severely criticized by the U.S. Court of Appeals for the Fifth Circuit in 1993, because it prohibited a non-minority farmer from purchasing a particular farm.<sup>108</sup>

In the Agricultural Credit Act of 1987, Congress required the Secretary of Agriculture to establish "annual target participation rates, on a county wide basis, that shall ensure that members of socially disadvantaged groups will receive loans made or insured [under the statutory scheme], and will have the opportunity to purchase or lease inventory farmland."<sup>109</sup> Congress further provided in 1992, that "socially disadvantaged group" means "a group whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as a member of the group

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<sup>108</sup> See *Moore v. U.S. Department of Agriculture*, 993 F.2d 1222 (5th Cir. 1993) ("One wonders what substantial relation to an important interest is satisfied in operating, if that is what happened, a government program for the sale of agricultural land with a racial criterion this crude").

<sup>109</sup> 7 U.S.C. § 2003(a)(1).

without regard to their individual qualities."<sup>110</sup> Thus, "socially disadvantaged" now includes minorities and women.

The Department of Agriculture obtains farm property when farmers default on government loans. Once former owner preservation rights are exhausted, the agency sells its farm property for a specific assessed value. When the statutory scheme was created, the agency set aside specific farms for sale only to socially disadvantaged farmers, depending upon the number of minority farmers in a state. This program did not work well in increasing or stabilizing minority farm ownership because properties that were set aside for minorities often were not in the right location for purchase by a willing minority buyer.

Given this failure, the agency abolished the set-asides in 1992, and substituted by regulation a preference system instead. Under the current program, a farm is put up for sale at an appraised value, and any of the preference groups described in the regulations can apply to purchase. The sale is made to whichever prospective buyer is in the highest preference group. These groups are, in order: socially disadvantaged "beginning" farmers, all other beginning farmers, socially disadvantaged family farmers, all other family farmers. (Congress has been trying to boost the number of new family farmers in recent years.) If there are no qualified buyers from these preference groups, the agency attempts to lease the farm to these same groups. If there are no interested parties, the farm is sold to a non-preference buyer, which is usually a large, corporate farm business.

There has been little criticism of the current preference program, largely because there have been relatively few farms sold to socially disadvantaged buyers. In 1992, only 2.7% (24 out of 889) of the farms sold went to socially disadvantaged individuals. For 1993, this figure was 2.6% (33 out of 1244); and for 1994, it was 4.7% (53 out of 1120). The agency expects the sale figures to increase in the future as women farmers are now considered socially disadvantaged. There is some cost to this program because it would likely be less expensive if the agency did not acquire property in the first place.

This program also contains a loan component under which a percentage of loan money for farms is set aside for women and minorities. Although the amounts vary considerably from state to state, the agency roughly estimates that about 10% percent of the funds available nationally during the last several years has been set aside for socially disadvantaged farmers. This aspect of the program has led to resentment recently as the agency has exhausted its generally-available farm loan funds, but had funds available for loans to socially disadvantaged farmers.

USDA officials report that the justifications offered for these programs over the years have been several. Many observers have argued that government policies and practices in the past operated in a discriminatory fashion and diminished the opportunities available to minority farmers. Some

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<sup>110</sup> 7 U.S.C. § 2003(d).

observers stress broader problems of discrimination in the rural economy -- access to credit, for example. Still others simply observe the sharp declines in the numbers of minorities engaged in farming, and argue that true integration of rural and economic life will be improved if something can be done about this underrepresentation.

#### 11.4 Conclusions and Recommendations

Apart from the principal areas discussed in earlier chapters, Congress has created a number of affirmative action measures scattered across the government in order to respond to problems of unequal opportunity and exclusion. Some of those sampled in this chapter have recently ended, or are scheduled to end soon. As a general matter, however, the President should direct agencies to:

- Establish a process to review the effectiveness and fairness of affirmative action programs on a continuing basis, using the principles described in this Report.
- Ensure that every affirmative action program is reviewed, and proposals prepared to eliminate or reform any program that:
  - creates a quota;
  - creates preferences for unqualified individuals;
  - creates reverse discrimination; or
  - continues even after its equal opportunity purposes have been achieved.

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PHOTOCOPY  
PRESERVATION

## THE WHITE HOUSE

WASHINGTON

July 19, 1995

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Evaluation of Affirmative Action Programs

This Administration is committed to expanding the economy, to strengthening programs that support children and families, and to vigorous, effective enforcement of laws prohibiting discrimination. These commitments reflect bedrock values -- equality, opportunity, and fair play -- which extend to all Americans, regardless of race, ethnicity, or gender.

While our Nation has made enormous strides toward eliminating inequality and barriers to opportunity, the job is not complete. As the United States Supreme Court recognized only one month ago in *Adarand Constructors, Inc. v. Peña*, "[t]he 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." This Administration will continue to support affirmative measures that promote opportunities in employment, education, and government contracting for Americans subject to discrimination or its continuing effects. In every instance, we will seek reasonable ways to achieve the objectives of inclusion and antidiscrimination without specific reliance on group membership. But where our legitimate objectives cannot be achieved through such means, the Federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair.

Accordingly, in all programs you administer that use race, ethnicity, or gender as a consideration to expand opportunity or provide benefits to members of groups that have suffered discrimination, I ask you to take steps to ensure adherence to the following policy principles. The policy principles are that any program must be eliminated or reformed if it:

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- (a) creates a quota;
- (b) creates preferences for unqualified individuals;
- (c) creates reverse discrimination; or
- (d) continues even after its equal opportunity purposes have been achieved.

In addition, the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña* requires strict scrutiny of the justifications for, and provisions of, a broad range of existing race-based affirmative action programs. You recently received a detailed legal analysis of *Adarand* from the Department of Justice. Consistent with that guidance, I am today instructing each of you to undertake, in consultation with and pursuant to the overall direction of the Attorney General, an evaluation of programs you administer that use race or ethnicity in decision making. With regard to programs that affect more than one agency, the Attorney General shall determine, after consultations, which agency shall take the lead in performing this analysis.

Using all of the tools at your disposal, you should develop any information that is necessary to evaluate whether your programs are narrowly tailored to serve a compelling interest, as required under *Adarand's* strict scrutiny standard. Any program that does not meet the constitutional standard must be reformed or eliminated.

William J. Clinton

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U. S. Department of Justice

Office of Legal Counsel

Washington, D. C. 20530

June 28, 1995

## MEMORANDUM TO GENERAL COUNSELS

From: Walter Dellinger   
Assistant Attorney General

Re: Adarand

This memorandum sets forth preliminary legal guidance on the implications of the Supreme Court's recent decision in Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (U.S. June 12, 1995), which held that federal affirmative action programs that use racial and ethnic criteria as a basis for decisionmaking are subject to strict judicial scrutiny. The memorandum is not intended to serve as a definitive statement of what Adarand means for any particular affirmative action program. Nor does it consider the prudential and policy questions relevant to responding to Adarand. Rather, it is intended to provide a general overview of the Court's decision and the new standard for assessing the constitutionality of federal affirmative action programs.

Our conclusions can be briefly summarized. Adarand made applicable to federal affirmative action programs the same standard of review, strict scrutiny, that City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), applied to state and local affirmative action measures -- with the important caveat that, in this area, Congress may be entitled to greater deference than state and local governments. Although Adarand itself involved contracting, its holding is not confined to that context; rather, it is clear that strict scrutiny will now be applied by the courts in reviewing the federal government's use of race-based criteria in health, education, hiring, and other programs as well.

The Supreme Court in Adarand was careful to dispel any suggestion that it was implicitly holding unconstitutional all federal affirmative action measures employing racial or ethnic classifications. A majority of the Justices rejected the proposition that "strict scrutiny" of affirmative action measures means "strict in theory, fatal in fact," and agreed that "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country" may justify the use of race-based remedial measures in certain circumstances. 63 U.S.L.W. at 4533. See id. at 4542 (Souter, J., dissenting); id. at 4543 (Ginsburg, J., dissenting). Only two Justices advocated positions that approach a complete ban on affirmative action.

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The Court's decision leaves many questions open -- including the constitutionality of the very program at issue in the case. The Court did not discuss in detail the two requirements of strict scrutiny: the governmental interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest. As a consequence, our analysis of Adarand's effects on federal action must be based on Croson and the lower court decisions applying strict scrutiny to state and local programs. It is unclear, however, what differences will emerge in the application of strict scrutiny to affirmative action by the national government; in particular, the Court expressly left open the question of what deference the judiciary should give to determinations by Congress that affirmative action is necessary to remedy discrimination against racial and ethnic minority groups. Unlike state and local governments, Congress may be able to rely on national findings of discrimination to justify remedial racial and ethnic classifications; it may not have to base such measures on evidence of discrimination in every geographic locale or sector of the economy that is affected. On the other hand, as with state and local governments under Croson, Congress may not predicate race-based remedial measures on generalized, historical societal discrimination.

Two additional questions merit mention at the outset. First, the Court has not resolved whether a governmental institution must have sufficient evidence of discrimination to establish a compelling interest in engaging in race-based remedial action before it takes such action. A number of courts of appeals have considered this question in reviewing state and local affirmative action plans after Croson, and all have concluded that governments may rely on "post-enactment" evidence -- that is, evidence that the government did not consider when adopting the measure, but that reflects evidence of discrimination providing support for the government's determination that remedial action was warranted at the time of adoption. Those courts have said that the government must have had some evidence of discrimination when instituting an affirmative action measure, but that it need not marshal all the supporting evidence at that time. Second, while Adarand makes clear that remedying past discrimination will in some circumstances constitute a compelling interest sufficient to justify race-based measures, the Court did not address the constitutionality of programs aimed at advancing nonremedial objectives -- such as promoting diversity and inclusion. For example, under Justice Powell's controlling opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), increasing the racial and ethnic diversity of the student body at a university constitutes a compelling interest, because it enriches the academic experience on campus. Under strict scrutiny, it is uncertain whether and in what settings diversity is a permissible goal of affirmative action beyond the higher education context. To the extent that affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective beyond the achievement of diversity itself.

Our discussion in this memorandum proceeds in four steps. In Section I, we analyze the facts and holding of Adarand itself, the scope of what the Court did decide, and the questions it left unanswered. Section II addresses the strict scrutiny standards as applied to state and local programs in Croson and subsequent lower court decisions; we consider the details of both the compelling interest and the narrow tailoring requirements Croson

mandated. In Section III, we turn to the difficult question of how precisely the Croson standards should apply to federal programs, with a focus on the degree of deference courts may give to congressional determinations that affirmative action is warranted. Finally, in an appendix, we sketch out a series of questions that should be considered in analyzing the validity under Adarand of federal affirmative action programs that employ race or ethnicity as a criterion. The appendix is intended to guide agencies as they begin that process.

## I. The Adarand Case

### A. Facts

Adarand involved a constitutional challenge to a Department of Transportation ("DOT") program that compensates persons who receive prime government contracts 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 at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). The Act further provides that members of designated racial and ethnic minority groups are presumed to be socially disadvantaged. *Id.* § 637(a)(5), § 637(d)(2),(3); 13 C.F.R. § 124.105(b)(1).<sup>1</sup> The presumption is rebuttable. 13 C.F.R. §§ 124.111(c)-(d), 124.601-124.609.<sup>2</sup>

In Adarand, a nonminority firm submitted the low bid on a DOT subcontract. However, the prime contractor awarded the subcontract to a minority-owned firm that was presumed to be socially disadvantaged; thus, the prime contractor received additional compensation from DOT. 63 U.S.L.W. at 4525. The nonminority firm sued DOT, arguing that it was denied the subcontract because of a racial classification, in violation of the equal protection component of the Fifth Amendment's Due Process Clause. The district court granted summary judgment for DOT. The Court of Appeals for the Tenth Circuit affirmed, holding that DOT's race-based action satisfied the requirements of "intermediate scrutiny," which it determined was the applicable standard of review under the Supreme Court's rulings

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<sup>1</sup> The following groups are entitled to the presumption: African American; Hispanic; Asian Pacific; Subcontinent Asian; and Native American. *See Adarand*, 63 U.S.L.W. at 4524. This list of eligible groups parallels that of many federal affirmative action programs.

<sup>2</sup> DOT also uses the subcontractor compensation mechanism in implementing the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 145, and its successor, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-22. Both laws provide that "not less than 10 percent" of funds appropriated thereunder "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." STURAA and ISTEA adopt the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions. *Adarand*, 63 U.S.L.W. at 4525.

in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), and Fullilove v. Klutznick, 448 U.S. 448 (1980). See Adarand, 63 U.S.L.W. at 4525.

B. The Holding

By a five-four vote, in an opinion written by Justice O'Connor, the Supreme Court held in Adarand that strict scrutiny is now the standard of constitutional review for federal affirmative action programs that use racial or ethnic classifications as the basis for decisionmaking. The Court made clear that this standard applies to programs that are mandated by Congress, as well as those undertaken by government agencies on their own accord. 63 U.S.L.W. at 4530. The Court overruled Metro Broadcasting to the extent that it had prescribed a more lenient standard of review for federal affirmative action measures. Id.<sup>3</sup>

Under strict scrutiny, a racial or ethnic classification must serve a "compelling interest" and must be "narrowly tailored" to serve that interest. Id.<sup>4</sup> This is the same standard of review that, under the Supreme Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), applies to affirmative action measures adopted by state and local governments. It is also the same standard of review that applies to government classifications that facially discriminate against minorities. 63 U.S.L.W. at 4529, 4531.

In a portion of her opinion joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, Justice O'Connor sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'" when it comes to affirmative action. Id. at 4533 (quoting Fullilove, 448 U.S. at 519 (Marshall, J., concurring in the judgment)). While that familiar maxim doubtless remains true with respect to classifications that, on their face, single out racial and ethnic minorities for invidious treatment,<sup>5</sup> Justice O'Connor's opinion declared that the federal government may have a compelling interest to act on the basis of race to overcome the "persistence of both the practice and lingering effects of racial discrimination against minority groups in this country." Id. In this respect, Justice O'Connor's opinion in Adarand tracks her majority opinion in Croson. There, too, the Court declined to interpret

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<sup>3</sup> Justice O'Connor (along with three other Justices) had dissented in Metro Broadcasting and urged the adoption of strict scrutiny as the standard of review for federal affirmative action measures.

<sup>4</sup> A classification reviewed under intermediate scrutiny need only (i) serve an "important governmental interest and (ii) be "substantially related" to the achievement of that objective. Metro Broadcasting, 497 U.S. at 564-65.

<sup>5</sup> See, e.g., McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (racial and ethnic classifications that single out minorities for disfavored treatment are in almost all circumstances "irrelevant to any constitutionally acceptable legislative purpose") (internal quotations omitted); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies" state law that prohibited interracial marriages).

the Constitution as imposing a flat ban on affirmative action by state and local governments. 488 U.S. at 509-11.

Two members of the Adarand majority, Justices Scalia and Thomas, wrote separate concurring opinions in which they took a more stringent position. Consistent with his concurring opinion in Croson, Justice Scalia would have adopted a near-absolute constitutional bar to affirmative action. Taking issue with Justice O'Connor's proposition that racial classifications may be employed in certain circumstances to remedy discrimination against minorities, Justice Scalia stated that the "government can never have a 'compelling interest' in discriminating on the basis of race to 'make-up' for past racial discrimination in the opposite direction." 63 U.S.L.W. at 4534 (Scalia, J., concurring in part and concurring in the judgment).<sup>6</sup> According to Justice Scalia, "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual . . . ." Id. The compensation of victims of specific instances of discrimination through "make-whole" relief, which Justice Scalia accepts as legitimate, is not affirmative action, as that term is generally understood. Affirmative action is a group-based remedy: where a group has been subject to discrimination, individual members of the group can benefit from the remedy, even if they have not proved that they have been discriminated against personally.<sup>7</sup> Justice O'Connor's treatment of affirmative action in Adarand is consistent with this understanding.

Although Justice Thomas joined the portion of Justice O'Connor's opinion holding that the government's interest in redressing the effects of discrimination can be sufficiently compelling to warrant the use of remedial racial and ethnic classifications, he apparently agrees with Justice Scalia's rejection of the group-based approach to remedying discrimination. Justice Thomas stated that the "government may not make distinctions on the basis of race," and that it is "irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help

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<sup>6</sup> In his Croson concurrence, Justice Scalia said that he believes that "there is only one circumstance in which the States may act by race to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification." 488 U.S. at 524 (Scalia, J., concurring in the judgment). For Justice Scalia, "[t]his distinction explains [the Supreme Court's] school desegregation cases, in which [it has] made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. Id. The school desegregation cases are generally not thought of as affirmative action cases, however. Outside of that context, Justice Scalia indicated that he believes that "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that our Constitution is color-blind." Id. at 521.

<sup>7</sup> See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 482 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986) (plurality opinion); id. at 287 (O'Connor, J., concurring).

those thought to be disadvantaged." *Id.* (Thomas, J., concurring in part and concurring in the judgment).

The four dissenting Justices in *Adarand* (Justices Stevens, Souter, Ginsburg, and Breyer)<sup>8</sup> would have reaffirmed the intermediate scrutiny standard of review for congressionally authorized affirmative action measures established in *Metro Broadcasting*, and would have sustained the DOT program on the basis of *Fullilove*, where the Court upheld federal legislation requiring grantees to use at least ten percent of certain grants for public works projects to procure goods and services from minority businesses. Justices Stevens and Souter argued that the DOT program was more narrowly tailored than the legislation upheld in *Fullilove*. 63 U.S.L.W. at 4539-41 (Stevens, J., dissenting); *id.* at 4542 (Souter, J., dissenting). All four dissenters stressed that there is a constitutional distinction between racial and ethnic classifications that are designed to aid minorities and classifications that discriminate against them. As Justice Stevens put it, there is a difference between a "No Trespassing" sign and a "welcome mat." *Id.* at 4535 (Stevens, J., dissenting). *See id.* ("an attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a [race-based] subsidy that enables a relatively small group of [minorities] to enter that market."); *see also id.* at 4543 (Souter, J., dissenting); *id.* at 4544 (Ginsburg, J., dissenting). For the dissenters, Justice O'Connor's declaration that strict scrutiny of affirmative action programs is not "fatal in fact" signified a "common understanding" among a majority of the Court that those differences do exist, and that affirmative action may be entirely proper in some cases. *Id.* at 4543 (Ginsburg, J., dissenting). In Justice Ginsburg's words, the "divisions" among the Justices in *Adarand* "should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects." *Id.* The dissenters also emphasized that there is a "significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality." *Id.* at 4537 (Stevens, J., dissenting); *id.* at 4542 (Souter, J., dissenting). They stressed that unlike state and local governments, Congress enjoys express constitutional power to remedy discrimination against minorities; therefore, it has more latitude to engage in affirmative action than do state and local governments. *Id.* at 4538 (Stevens, J., dissenting). Justice Souter noted that the majority opinion did not necessarily imply a contrary view. *Id.* at 4542 (Souter, J., dissenting).

Thus, there were at most two votes in *Adarand* (Justices Scalia and Thomas) for anything that approaches a blanket prohibition on race-conscious affirmative action. Seven justices confirmed that federal affirmative action programs that use race or ethnicity as a decisional factor can be legally sustained under certain circumstances.

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<sup>8</sup> Justice Stevens wrote a dissenting opinion that was joined by Justice Ginsburg. Justice Souter wrote a dissenting opinion that was joined by Justices Ginsburg and Breyer. And Justice Ginsburg wrote a dissenting opinion that was joined by Justice Breyer.

### C. Scope of Adarand

Although Adarand involved government contracting, it is clear from the Supreme Court's decision that the strict scrutiny standard of review applies whenever the federal government voluntarily adopts a racial or ethnic classification as a basis for decisionmaking.<sup>9</sup> Thus, the impact of the decision is not confined to contracting, but will reach race-based affirmative action in health and education programs, and in federal employment.<sup>10</sup> Furthermore, Adarand was not a "quota" case: its standards will apply to any classification that makes race or ethnicity a basis for decisionmaking.<sup>11</sup> Mere outreach and recruitment efforts, however, typically should not be subject to the Adarand standards. Indeed, post-Croson cases indicate that such efforts are considered race-neutral means of increasing minority opportunity.<sup>12</sup> In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, Adarand ordinarily would be inapplicable.<sup>13</sup>

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<sup>9</sup> By voluntary affirmative action, we mean racial or ethnic classifications that the federal government adopts on its own initiative, through legislation, regulations, or internal agency procedures. This should be contrasted with affirmative action that is undertaken pursuant to a court-ordered remedial directive in a race discrimination lawsuit against the government, or pursuant to a court-approved consent decree settling such a suit. Prior to Croson, the Supreme Court had not definitely resolved the standard of review for court-ordered or court-approved affirmative action. See United States v. Paradise, 480 U.S. 149 (1987) (court order); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (consent decree). The Court has not revisited the issue since Croson was decided. Lower courts have applied strict scrutiny to affirmative action measures in consent decrees. See, e.g., Stuart v. Roache, 951 F.2d 446, 449 (1st Cir. 1991) (Breyer, J.).

<sup>10</sup> Title VII of the 1964 Civil Rights Act is the principal federal employment discrimination statute. The federal government is subject to its strictures. See 42 U.S.C. § 2000e-17. The Supreme Court has held that the Title VII restrictions on affirmative action in the workplace are somewhat more lenient than the constitutional limitations. See Johnson v. Transportation Agency, 480 U.S. 616, 627-28 n.6 (1987). But see id. at 649 (O'Connor, J., concurring in the judgment) (expressing view that Title VII standards for affirmative action should be "no different" from constitutional standards).

<sup>11</sup> We do not believe that Adarand calls into question federal assistance to historically-black colleges and universities.

<sup>12</sup> See, e.g., Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994); Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 290 (1993); Coral Constr. Co. v. King County, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

<sup>13</sup> Outreach and recruitment efforts conceivably could be viewed as race-based decisionmaking of the type subject to Adarand if such efforts work to create a "minorities-only" pool of applicants or bidders, or if they are so focused on minorities that nonminorities are placed at a significant competitive disadvantage.

Adarand does not require strict scrutiny review for programs benefitting Native Americans as members of federally recognized Indian tribes. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court applied rational basis review to a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian tribes. The Court reasoned that a tribal classification is "political rather than racial in nature," because it is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." Id. at 554. See id. at 553 n.24.

Adarand did not address the appropriate constitutional standard of review for affirmative action programs that use gender classifications as a basis for decisionmaking. Indeed, the Supreme Court has never resolved the matter.<sup>14</sup> However, both before and after Croson, nearly all circuit court decisions have applied intermediate scrutiny to affirmative action measures that benefit women.<sup>15</sup> The Sixth Circuit is the only court that has equated racial and gender classifications: purporting to rely on Croson, it held that gender-based affirmative action measures are subject to strict scrutiny.<sup>16</sup> That holding has been criticized by other courts of appeals, which have correctly pointed out that Croson does not speak to the appropriate standard of review for such measures.<sup>17</sup>

#### D. Open Questions on Remand

Adarand did not determine the constitutionality of any particular federal affirmative action program. In fact, the Supreme Court did not determine the validity of the federal legislation, regulations, or program at issue in Adarand itself. Instead, the Court remanded the case to the Tenth Circuit for a determination of whether the measures satisfy strict scrutiny.

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with respect to access to contracts, grants, or jobs.

<sup>14</sup> The lone gender-based affirmative action case that the Supreme Court has decided is Johnson v. Transportation Agency, 480 U.S. 616 (1987). But Johnson only involved a Title VII challenge to the use of gender classifications -- no constitutional claim was brought. Id. at 620 n.2. And as indicated above (see supra note 10), the Court in Johnson held that the Title VII parameters of affirmative action are not coextensive with those of the Constitution.

<sup>15</sup> See, e.g., Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1579-80 (11th Cir. 1994); Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1009-10 (3d Cir. 1993); Lamprecht v. FCC, 958 F.2d 382, 391 (D.C. Cir. 1992) (Thomas, J.); Coral Constr. Co. v. King County, 941 F.2d at 930-31; Associated Gen. Contractors v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987).

<sup>16</sup> See Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989); see also Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993), cert. denied, 114 S. Ct. 1190 (1994).

<sup>17</sup> See, e.g., Ensley Branch, NAACP v. Seibels, 31 F.3d at 1580.

Adarand left open the possibility that, even under strict scrutiny, programs statutorily prescribed by Congress may be entitled to greater deference than programs adopted by state and local governments. This is a theme that some of the Justices had explored in prior cases. For example, in a portion of her Croson opinion joined by Chief Justice Rehnquist and Justice White, Justice O'Connor wrote that Congress may have more latitude than state and local governments in utilizing affirmative action. And in his concurrence in Fullilove, Justice Powell, applying strict scrutiny, upheld a congressionally mandated program, and in so doing, said that he was mindful that Congress possesses broad powers to remedy discrimination nationwide. In any event, in Adarand, the Court said that it did not have to resolve whether and to what extent courts should pay special deference to Congress in evaluating federal affirmative action programs under strict scrutiny.

Aside from articulating the components of the strict scrutiny standard, the Court's decision in Adarand provides little explanation of how the standard should be applied. For more guidance, one needs to look to Croson and lower court decisions applying it. That exercise is important because Adarand basically extends the Croson rules of affirmative action to the federal level -- with the caveat that application of those rules might be somewhat less stringent where affirmative action is undertaken pursuant to congressional mandate.

## II. The Croson Standards

In Croson, the Supreme Court considered a constitutional challenge to a Richmond, Virginia ordinance that required prime contractors who received city contracts to subcontract at least thirty percent of the dollar amount of those contracts to businesses owned and controlled by members of specified racial and ethnic minority groups -- commonly known as minority business enterprises ("MBEs"). The asserted purpose of Richmond's ordinance was to remedy discrimination against minorities in the local construction industry.

Croson marked the first time that a majority of the Supreme Court held that race-based affirmative action measures are subject to strict scrutiny.<sup>18</sup> Justice O'Connor's opinion in Croson<sup>19</sup> said that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this

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<sup>18</sup> Croson was decided by a six-three vote. Five of the Justices in the majority (Chief Justice Rehnquist, and Justices White, O'Connor, Scalia, and Kennedy) concluded that strict scrutiny was the applicable standard of review. Justice Stevens concurred in part and concurred in the judgment, but consistent with his long-standing views, declined to "engag[e] in a debate over the proper standard of review to apply in affirmative-action litigation." 488 U.S. at 514 (Stevens, concurring in part and concurring in the judgment).

<sup>19</sup> Justice O'Connor's opinion was for a majority of the Court in some parts, and for a plurality in others.

compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." 488 U.S. at 493 (plurality opinion). See also *id.* at 520 (Scalia, J., concurring in the judgment) ("[S]trict scrutiny must be applied to all governmental classifications by race, whether or not its asserted purpose is 'remedial' or 'benign.'"). In short, the compelling interest inquiry centers on "ends" and asks why the government is classifying individuals on the basis of race or ethnicity; the narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the racial or ethnic classification.

Applying strict scrutiny, the Court held that (a) the Richmond MBE program did not serve a "compelling interest" because it was predicated on insufficient evidence of discrimination in the local construction industry, and (b) it was not "narrowly tailored" to the achievement of the city's remedial objective.

#### A. Compelling Governmental Interest

##### 1. Remedial Objectives

Justice O'Connor's opinion in Croson stated that remedying the identified effects of past discrimination may constitute a compelling interest that can support the use by a governmental institution of a racial or ethnic classification. This discrimination could fall into two categories. First, the government can seek to remedy the effects of its own discrimination. Second, the government can seek to remedy the effects of discrimination committed by private actors within its jurisdiction, where the government becomes a "passive participant" in that conduct, and thus helps to perpetuate a system of exclusion. 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment). In either category, the remedy may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior discriminatory conduct that has ceased. See Adarand, 63 U.S.L.W. at 4542 (Souter, J., dissenting) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.").

Croson requires the government to identify with precision the discrimination to be remedied. The fact and legacy of general, historical societal discrimination is an insufficient predicate for affirmative action: "While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." 488 U.S. at 499. See *id.* at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group."). Similarly, "amorphous" claims of discrimination in certain sectors and industries are inadequate. *Id.* at 499 ("[A]n amorphous claim that there

has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."). Such claims "provide[] no guidance for [the government] to determine the precise scope of the injury it seeks to remedy, and would have "no logical stopping point." Id. at 498 (internal quotations omitted). The Court indicated that its requirement that the government identify with specificity the effects of past discrimination anchors remedial affirmative action measures in the present. It declared that "[i]n the absence of particularized findings" of discrimination, racial and ethnic classifications could be "ageless in their reach into the past, and timeless in their ability to affect the future." Id. at 498. (internal quotations omitted).

The Court in Croson did not require a judicial determination of discrimination in order for a state or local government to adopt remedial racial or ethnic classifications. Rather, relying on Justice Powell's plurality opinion in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Court said that the government must have a "strong basis in evidence for its conclusion that remedial action was necessary." Croson, 488 U.S. at 500 (quoting Wygant, 476 U.S. at 277). The Court then suggested that this evidence should approach "a prima facie case of a constitutional or statutory violation" of the rights of minorities. 488 U.S. at 500.<sup>20</sup> Notably, the Court said that significant statistical disparities between the level of minority participation in a particular field and the percentage of qualified minorities in the applicable pool could permit an inference of discrimination that would support the use of racial and ethnic classifications intended to correct those disparities. Id. at 507. See id. at 501 ("There is no doubt that where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.") (internal quotations omitted). But the Court said that a mere underrepresentation of minorities in a particular sector or industry when compared to general population statistics is an insufficient predicate for affirmative action. Id. ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who may possess the necessary qualifications) may have little probative value.") (internal quotations omitted).

Applying its "strong basis in evidence" test, the Court held that the statistics on which Richmond based its MBE program were not probative of discrimination in contracting by the city or local contractors, but at best reflected evidence of general societal discrimination. Richmond had relied on limited testimonial evidence of discrimination, supplemented by

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<sup>20</sup> Lower courts have consistently said that Croson requires remedial affirmative action measures to be supported by a "strong basis in evidence" that such action is warranted. See, e.g., Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1553 (11th Cir. 1994); Concrete Works v. City and County of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995); Donaghy v. City of Omaha, 933 F.2d 1448, 1458 (8th Cir.), cert. denied, 502 U.S. 1059 (1991). Some courts have said that this evidence should rise to the level of prima facie case of discrimination against minorities. See, e.g., O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir. 1992); Stuart v. Roache, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); Cone Corp. v. Hillsborough County, 908 F.2d 908, 915 (11th Cir.), cert. denied, 498 U.S. 983 (1990).

statistical evidence regarding: (i) the disparity between the number of prime contracts awarded by the city to minorities during the years 1978-83 (less than one percent) and the city's minority population (fifty percent), and (ii) the extremely low number of MBEs that were members of local contractors' trade associations. The Court found that this evidence was insufficient. It said that more probative evidence would have compared, on the one hand, the number of qualified MBEs in the local labor market with, on the other hand, the number of city contracts awarded to MBEs and the number of MBEs in the local contractors' associations.

In Adarand, Justice O'Connor's opinion noted that "racial discrimination against minority groups in this country is an unfortunate reality," and as an example, it pointed to the "pervasive, systematic, and obstinate discriminatory conduct" that underpinned the court-ordered affirmative action measures that were upheld in United States v. Paradise, 480 U.S. 149 (1987). 63 U.S.L.W. at 4533 (internal quotations omitted).<sup>21</sup> Her opinion did not say, however, that only overwhelming evidence of the sort at issue in Paradise can justify affirmative action. Again, Croson indicates that what is required is a "strong basis in evidence" to support the government's conclusion that race-based remedial action is warranted, and that such evidence need only approach a prima facie showing of discrimination against minorities. 488 U.S. at 500. The factual predicate in Paradise plainly exceeded a prima facie showing. Post-Croson lower court decisions support the conclusion that the requisite factual predicate for race-based remedial action does not have to rise to the level of discrimination in Paradise.

The Court in Croson left open the question whether a government may introduce statistical evidence showing that the pool of qualified minorities would have been larger "but for" the discrimination that is to be remedied. Post-Croson lower court decisions have indicated that such evidence can be probative of discrimination.<sup>22</sup>

Croson also did not discuss the weight to be given to anecdotal evidence of discrimination that a government gathers through complaints filed with it by minorities or through testimony in public hearings. Richmond had relied on such evidence as additional

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<sup>21</sup> The measures at issue in Paradise were intended to remedy discrimination by the Alabama Department of Public Safety, which had not hired a black trooper at any rank for four decades, 480 U.S. at 168 (plurality opinion), and then when blacks finally entered the department, had consistently refused to promote blacks to the upper ranks. Id. at 169-71.

<sup>22</sup> See, e.g., Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1008 (3d Cir. 1993); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992); cf. Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d 1401, 1415 (9th Cir. 1991) (government had evidence that an "old boy network" in the local construction industry had precluded minority businesses from breaking into the mainstream of "qualified" public contractors).

support for its MBE plan, but the Court discounted it. Post-Croson lower court cases, however, have said that anecdotal evidence can buttress statistical proof of discrimination.<sup>23</sup>

In addition, Croson did not discuss which party has the ultimate burden of persuasion as to the constitutionality of an affirmative action program when it is challenged in court. Prior to Croson, the Supreme Court had spelled out the following evidentiary rule: while the entity defending a remedial affirmative action measure bears the initial burden of production to show that the measures are supported by "a strong basis in evidence," the "ultimate burden" of proof rests upon those challenging the measure to demonstrate that it is unconstitutional. Wygant, 476 U.S. at 277-78 (plurality opinion).<sup>24</sup> Lower courts consistently have said that nothing in Croson disturbs this evidentiary rule.<sup>25</sup>

Finally, and perhaps most significantly, Croson did not resolve whether a government must have sufficient evidence of discrimination at hand before it adopts a racial classification, or whether "post-hoc" evidence of discrimination may be used to justify the classification at a later date -- for example, when it is challenged in litigation. The Court did say that governments must "identify [past] discrimination with some specificity before they may use race-conscious relief." 488 U.S. at 504. However, every court of appeals to consider the question has allowed governments to use "post-enactment" evidence to justify affirmative action -- that is, evidence that the government did not consider when adopting a race-based remedial measure, but that nevertheless reflects evidence of discrimination providing support for the determination that remedial action was warranted at the time of adoption.<sup>26</sup> Those

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<sup>23</sup> See, e.g., Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1002-03 (while anecdotal evidence of discrimination alone rarely will satisfy the Croson requirements, it can place important gloss on statistical evidence of discrimination); Coral Constr. Co. v. King County, 941 F.2d at 919 ("[t]he combination of convincing anecdotal and statistical evidence is potent;" anecdotal evidence can bring "cold numbers to life"); Cone Corp. v. Hillsborough County, 908 F.2d at 916 (testimonial evidence adduced by county in developing MBE program, combined with gross statistical disparities in minority participation in public contracting, provided "more than enough evidence on the question of prior discrimination and need for racial classification").

<sup>24</sup> See also Wygant, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment) (when the government "introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the [government] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [challengers] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored'").

<sup>25</sup> See, e.g., Concrete Works v. City and County of Denver, 36 F.3d at 1521-22; Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1005; Cone Corp. v. Hillsborough County, 908 F.2d at 916.

<sup>26</sup> See Concrete Works v. City & County of Denver, 36 F.3d at 1521; Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1004; Coral Constr. Co. v. King County, 941 F.2d at 920. As the Second Circuit put it when permitting a state government to rely on post-enactment evidence to defend a race-

courts have interpreted Croson as requiring that a government have some evidence of discrimination prior to embarking on remedial race-conscious action, but not that it marshal all such evidence at that time.<sup>27</sup>

## 2. Nonremedial Objectives

Because Richmond defended its MBE program on remedial grounds, the Court in Croson did not explicitly address if and when affirmative action may be adopted for "nonremedial" objectives, such as promoting racial diversity and inclusion. The same is true of the majority opinion in Adarand, since the program at issue in that case also is said to be remedial. In his Adarand dissent, Justice Stevens said that the majority's silence on the question does not foreclose the use of affirmative action to serve nonremedial ends. 63 U.S.L.W. at 4539 (Stevens, J., dissenting). Thus, in the wake of Croson and Adarand, there are substantial questions as to whether and in what settings nonremedial objectives can constitute a compelling interest.<sup>28</sup>

To date, there has never been a majority opinion for the Supreme Court that addresses the question. The closest the Court has come in that regard is Justice Powell's

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based contracting measure, "[t]he law is plain that the constitutional sufficiency of . . . proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the program's enactment." Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992).

<sup>27</sup> See Concrete Works v. City and County of Denver, 36 F.3d at 1521 ("Absent any preenactment evidence of discrimination, a municipality would be unable to satisfy Croson. However, we do not read Croson's evidentiary requirement as foreclosing the consideration of post-enactment evidence."); Coral Constr. Co. v. King County, 941 F.2d at 920 (requirement that municipality have "some evidence" of discrimination before engaging in race-conscious action "does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. Rather, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the [program]."). One court has observed that the "risk of insincerity associated with post-enactment evidence . . . is minimized" where the evidence "consists essentially of an evaluation and re-ordering of [the] pre-enactment evidence" on which a government expressly relied in formulating its program. Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1004. Application of the post-enactment evidence rule in that case essentially gave the government a period of transition in which to build an evidentiary foundation for an affirmative action program that was adopted before Croson, and thus without reference to the Croson requirements. In Coral Construction, the Ninth Circuit permitted the government to introduce post-enactment evidence to provide further factual support for a program that had been adopted after Croson, with the Croson standards in mind. See Coral Constr. Co. v. King County, 941 F.2d at 914-15, 919-20.

<sup>28</sup> Given the nation's history of discrimination, virtually all affirmative action can be considered remedial in a broad sense. But as Croson makes plain, that history, on its own, cannot properly form the basis of a remedial affirmative action measure under strict scrutiny.

separate opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), which said that a university has a compelling interest in taking the race of applicants into account in its admissions process in order to foster greater diversity among the student body.<sup>29</sup> According to Justice Powell, this would bring a wider range of perspectives to the campus, and in turn, would contribute to a more robust exchange of ideas -- which Justice Powell said was the central mission of higher education and in keeping with the time-honored First Amendment value in academic freedom. See id. at 311-14.<sup>30</sup> Since Bakke, Justice Stevens has been the most forceful advocate on the Court for nonremedial affirmative action measures. He has consistently argued that affirmative action makes just as much sense when it promotes an interest in creating a more inclusive and diverse society for today and the future, as when it serves an interest in remedying past wrongs. See Adarand, 63 U.S.L.W. at 4539 (Stevens, J., dissenting); Croson, 488 U.S. at 511-12 & n.1 (Stevens, J., concurring); Johnson v. Transportation Agency, 480 U.S. 616, 646-47 (1987) (Stevens, J., concurring); Wygant, 476 U.S. at 313-15 (Stevens, J., dissenting). As a circuit judge in a case involving an ostensibly remedial affirmative action measure, Justice Ginsburg announced her agreement with Justice Stevens' position "that remedy for past wrong is not the exclusive basis upon which racial classifications may be justified." O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) (citing Justice Stevens' concurrence in Croson, 488 U.S. at 511).

In Metro Broadcasting, the majority relied on Bakke and Justice Stevens' vision of affirmative action to uphold FCC affirmative action programs in the licensing of broadcasters on nonremedial grounds; the Court said that diversification of ownership of broadcast licenses was a permissible objective of affirmative action because it serves the larger goal of exposing the nation to a greater diversity of perspectives over the nation's radio and television airwaves. 497 U.S. at 567-68. The Court reached that conclusion under intermediate scrutiny, however, and thus did not hold that the governmental interest in seeking diversity in broadcasting is "compelling." Adarand did not overrule the result in Metro Broadcasting -- a point not lost on Justice Stevens. See Adarand, 63 U.S.L.W. at 4539 (Stevens, J., dissenting) ("The majority today overrules Metro Broadcasting only insofar as it" is inconsistent with the holding that federal affirmative action measures are subject to strict scrutiny. "The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is not inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case . . . .").

On the other hand, portions of Justice O'Connor's opinion in Croson and her dissenting opinion in Metro Broadcasting appear to cast doubt on the validity of nonremedial

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<sup>29</sup> Although Justice Powell wrote for himself in Bakke, his opinion was the controlling one in the case.

<sup>30</sup> Although it apparently has not been tested to any significant degree in the courts, Justice Powell's thesis may carry over to the selection of university faculty: the greater the racial and ethnic diversity of the professors, the greater the array of perspectives to which the students would be exposed.

affirmative action programs. In one passage in her opinion in Croson, Justice O'Connor stated that affirmative action must be "strictly reserved for the remedial setting." Id. at 493 (plurality opinion). Echoing that theme in her dissenting opinion (joined by Chief Justice Rehnquist and Justices Kennedy and Scalia) in Metro Broadcasting, Justice O'Connor urged the adoption of strict scrutiny for federal affirmative action measures, and asserted that under that standard, only one interest has been "recognized" as compelling enough to justify racial classifications: "remedying the effects of racial discrimination." 497 U.S. at 612. Justice Kennedy's separate dissent in Metro Broadcasting was also quite dismissive of non-remedial justifications for affirmative action; he criticized the majority opinion for "allow[ing] the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination"). Id. at 632 (Kennedy, J., dissenting).

Nowhere in her Croson and Metro Broadcasting opinions did Justice O'Connor expressly disavow Justice Powell's opinion in Bakke. Accordingly, lower courts have assumed that Justice O'Connor did not intend to discard Bakke.<sup>31</sup> That proposition is supported by Justice O'Connor's own concurring opinion in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), in which she expressed approval of Justice Powell's view that fostering racial and ethnic diversity in higher education is a compelling interest. Id. at 286. Furthermore, in Wygant, Justice O'Connor said that there might be governmental interests other than remedying discrimination and promoting diversity in higher education that might be sufficiently compelling to support affirmative action. Id. For example, Justice O'Connor left open the possibility that promoting racial diversity among the faculty at primary and secondary schools could count as a compelling interest. Id. at 288 n\*. In his Wygant dissent, Justice Stevens argued that this is a permissible basis for affirmative action. Id. at 313-15 (Stevens, J., dissenting).

On the assumption that Bakke remains the law, it is clear that to the extent affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective, beyond the mere achievement of diversity itself.<sup>32</sup> As Bakke teaches, in higher education, that asserted goal is the enrichment of the academic experience. And according to

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<sup>31</sup> See Winter Park Communications, Inc. v. FCC, 873 F.2d 347, 353-54 (D.C. Cir. 1989), aff'd sub. nom. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Winter Park, 873 F.2d at 357 (Williams, J., concurring in part and dissenting in part); Shurberg Broadcasting, Inc. v. FCC, 876 F.2d 902, 942 (D.C. Cir. 1989) (Wald, C.J., dissenting), aff'd sub. nom. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). In Davis v. Halpern, 768 F. Supp. 968 (S.D.N.Y. 1991), the court reviewed the law of affirmative action in the wake of Croson and Metro Broadcasting, and, citing Justice Powell's opinion in Bakke, said that a university has a compelling interest in seeking to increase the diversity of its student body. Id. at 981. See also United States v. Board of Educ. Township of Piscataway, 832 F. Supp. 836, 847-48 (D.N.J. 1993) (under constitutional standards for affirmative action, diversity in higher education is a compelling governmental interest) (citing Bakke and Croson).

<sup>32</sup> The Court has consistently rejected "racial balancing" as a goal of affirmative action. See Croson, 488 U.S. at 507; Johnson, 480 U.S. at 639; Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 475 (1986) (plurality opinion); Bakke, 438 U.S. at 307 (opinion of Powell, J.).

the majority in Metro Broadcasting, the asserted independent goal that justifies diversifying the owners of broadcast licenses is adding variety to the perspectives that are communicated in radio and television. That same kind of analysis must be applied to efforts to promote racial and ethnic diversity in other settings.

For instance, diversification of the ranks in a law enforcement agency arguably serves vital public safety and operational needs, and thus enhances the agency's ability to carry out its functions effectively. See Wygant, 476 U.S. at 314 (Stevens, J., dissenting) ("[I]n law enforcement . . . in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of whites."); Paradise, 480 U.S. at 167 n.18 (plurality opinion) (noting argument that race-conscious hiring can "restore[] community trust in the fairness of law enforcement and facilitate[] effective police service by encouraging citizen cooperation").<sup>33</sup> It is more difficult to identify any independent goal that may be attained by diversifying the racial mix of public contractors. Justice Stevens concurred in the judgment in Croson on precisely that ground. Citing his own Wygant dissent, Justice Stevens contrasted the "educational benefits to the entire student body" that he said could be achieved through faculty diversity with the minimal societal benefits (other than remedying past discrimination, a predicate that he said was not supported by the evidence in Croson) that would flow from a diversification of the contractors with whom a municipality does business. See Croson, 488 U.S. at 512-13 (Stevens, J., concurring in part and concurring in the judgment). Furthermore, the Court has stated that the desire to develop a growing class of successful minority entrepreneurs to serve as "role models" in the minority community is not, on its own, a valid basis for a racial and ethnic classification. See Croson, 488 U.S. at 497 (citing Wygant, 476 U.S. at 276 (plurality opinion)); see also Wygant, 476 U.S. at 288 n\* (O'Connor, J., concurring).

Diversification of the health services profession was one of the stated predicates of the racial and ethnic classifications in the medical school admissions program at issue in Bakke. The asserted independent goal was "improving the delivery of health-care services to communities currently underserved." Bakke, 438 U.S. at 310. Justice Powell said that "[i]t may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification." Id. The

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<sup>33</sup> See also Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981) ("The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police.").

problem in Bakke, however, was that there was "virtually no evidence" that the preference for minority applicants was "either needed or geared to promote that goal." Id.<sup>34</sup>

Assuming that some nonremedial objectives remain a legitimate basis for affirmative action after Adarand, there is a question of the nature of the showing that may be necessary to support racial and ethnic classifications that are premised on such objectives. In higher education, the link between the diversity of the student body and the diversity of viewpoints on the campus does not readily lend itself to empirical proof. Justice Powell did not require any such evidence in Bakke. He said that the strong First Amendment protection of academic freedom that allows "a university to make its own judgments as to education includes the selection of its student body." Bakke, 438 U.S. at 312. A university is thus due some discretion to conclude that a student "with a particular background -- whether it be ethnic, geographic, culturally advantaged or disadvantaged -- may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." Id. at 314.

It could be said that this thesis is rooted in a racial stereotype, one that presumes that members of racial and ethnic minority groups have a "minority perspective" to convey. As Justice O'Connor stated in Croson, a driving force behind strict scrutiny is to ensure that racial and ethnic classifications are not motivated by "stereotype." Croson, 488 U.S. at 493 (plurality opinion). There are sound arguments to support the contention that seeking diversity in higher education rests on valid assumptions. The thesis does not presume that all individuals of a particular race or ethnic background think and act alike. Rather, it is premised on what seems to be a common sense proposition that in the aggregate, increasing the diversity of the student body is bound to make a difference in the array of perspectives communicated at a university. See Metro Broadcasting, 497 U.S. at 579 ("The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in Bakke that greater admission of minorities would contribute, on average, to the robust exchange of ideas.") (internal quotations omitted). Nonetheless, after Croson and Adarand, a court might demand some proof of a nexus between the diversification of the student body and the diversity of viewpoints expressed on the campus.<sup>35</sup> Likewise, a court may demand a factual predicate to support the proposition that greater diversity in a law enforcement agency will serve the operational needs of the agency

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<sup>34</sup> Aside from the proffered justification in Bakke, the government may have other reasons for seeking to increase the number of minority health professionals.

<sup>35</sup> Justice Powell cited literature on this subject in support of his opinion in Bakke. See 438 U.S. at 312-13 n.48, 315 n.50.

and improve its performance,<sup>36</sup> or that minority health care professionals are more likely to work in medically underserved communities.<sup>37</sup>

#### B. Narrow Tailoring Test

In addition to advancing a compelling goal, any governmental use of race must also be "narrowly tailored." There appear to be two underlying purposes of the narrow tailoring test: first, to ensure that race-based affirmative action is the product of careful deliberation, not hasty decisionmaking; and, second, to ensure that such action is truly necessary, and that less intrusive, efficacious means to the end are unavailable. As it has been applied by the courts, the factors that typically make up the "narrow tailoring" test are as follows: (i) whether the government considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the program's scope; (iii) the manner in which is used, that is, whether race is a factor in determining eligibility for a program or whether race is just one factor in the decisionmaking process; (iv) the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden caused by the program. In Adarand, the Supreme Court referred to its previous affirmative action decisions for guidance on what the narrow tailoring test entails. It specifically mentioned that when the Tenth Circuit reviewed the DOT program at issue in Adarand under intermediate scrutiny, it had not addressed race-neutral alternatives or the duration of the program.

Before describing each of the components, three general points about the narrow tailoring test deserve mention. First, it is probably not the case that an affirmative action measure has to satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors are not relevant in every case. For example, the objective of the program may determine the applicability or weight to be given a factor. The factors may play out differently where a program is nonremedial.

Third, the narrow tailoring test should not necessarily be viewed in isolation from the compelling interest test. To be sure, the inquiries are distinct: as indicated above, the compelling interest inquiry focuses on the ends of an affirmative action measure, whereas the

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<sup>36</sup> See Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 215 (4th Cir. 1993) (although the use of racial classifications to foster diversity of police department could be a constitutionally permissible objective, city failed to show a link between effective law enforcement and greater diversity in the department's ranks).

<sup>37</sup> See Bakke, 438 U.S. at 311 (opinion of Powell, J.) (noting lack of empirical data to support medical school's claim that minority doctors will be more likely to practice in a disadvantaged community).

narrow tailoring inquiry focuses on the means. However, as a practical matter, there may be an interplay between the two. There is some hint of this in Croson. In several places, the Court said that the weak predicate of discrimination on which Richmond acted could not justify the adoption of a rigid racial quota -- which suggests that if Richmond had opted for some more flexible measure the Court might have been less demanding when reviewing the evidence of discrimination. By the same token, the more compelling the interest, perhaps less narrow tailoring is required. For example, in Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986), and United States v. Paradise, 480 U.S. 149 (1987), the Supreme Court upheld what on their face appear to be rather rigid classifications to remedy egregious and persistent discrimination.

However, it bears emphasizing that the Supreme Court has never explicitly recognized any trade-off between the compelling interest and narrow tailoring tests. It is also far from clear that the Court in Croson would have found that a more flexible MBE program, supported by the generalized evidence of discrimination on which Richmond relied, could withstand strict scrutiny. In addition, the membership of the Court has changed dramatically in the years since Sheet Metal Workers and Paradise. Both cases were decided by five-four margins, and only one member of the majority (Justice Stevens) remains. And while Justice O'Connor agreed with the majority in Sheet Metal Workers and Paradise that ample evidence of deeply entrenched discrimination gave rise to a very weighty interest in race-based action, she dissented on the ground that the particular remedies selected were too rigid.

#### 1. Race-Neutral Alternatives

In Croson, the Supreme Court said that the Richmond MBE program was not "narrowly tailored," in part because the city apparently had not considered race-neutral means to increase minority participation in contracting before adopting its race-based measure. The Court reasoned that because minority businesses tend to be smaller and less-established, providing race-neutral financial and technical assistance to small and/or new firms and relaxing bonding requirements might achieve the desired remedial results in public contracting -- increasing opportunities for minority businesses. 488 U.S. at 507, 510. Justice Scalia suggested an even more aggressive idea: "adopt a preference for small businesses, or even for new businesses -- which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have a racially disproportionate impact, but they are not based on race." Id. at 526 (Scalia, J., concurring). As such, they would not be subjected to strict scrutiny.

The Court in Croson did not specify the extent to which governments must consider race-neutral measures before resorting to race-conscious action. It would seem that the government need not first exhaust race-neutral alternatives, but only give them serious

attention.<sup>38</sup> This principle would comport with the purposes of ensuring that race-based remedies are used only when, after careful consideration, a government has concluded that less intrusive means would not work. It also comports with Justice Powell's view that in the remedial setting, the government need not use the "least restrictive means" where they would not accomplish the desired ends as well. See Fullilove, 448 U.S. at 508 (Powell, J., concurring); see also Wygant, 476 U.S. at 280 n.6 (plurality opinion of Justice Powell) (narrow tailoring requirement ensures that "less restrictive means" are used when they would promote the objectives of a racial classification "about as well") (internal quotations omitted).<sup>39</sup>

This approach gives the government a measure of discretion in determining whether its objectives could be accomplished through some other avenue. In addition, under this approach, the government may not be obliged to consider race-neutral alternatives every time that it adopts a race-conscious measure in a particular field. In some situations, the government may be permitted to draw upon a previous consideration of race-neutral alternatives that it undertook prior to adopting some earlier race-based measure.<sup>40</sup> In the absence of prior experience, however, a government should consider race-neutral alternatives at the time it adopts a racial or ethnic classification. More fundamentally, even where race-neutral alternatives were considered, a court might second-guess the government if the court believes that an effective race-neutral alternative is readily available and hence should have been tried. See Metro Broadcasting, 497 U.S. at 625 (O'Connor, J., dissenting) (FCC affirmative action programs are not narrowly tailored, in part, because "the FCC has never determined that it has any need to resort to racial classifications to achieve its asserted interest, and it has employed race-conscious means before adopting readily available race-neutral, alternative means"); United States v. Paradise, 480 U.S. at 199-200 (O'Connor, J., dissenting) (district court's race-based remedial order was not narrowly tailored because the court "had available several alternatives" that would have achieved the objectives in a less intrusive manner).<sup>41</sup>

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<sup>38</sup> See Coral Constr. King County, 941 F.2d at 923 ("[W]hile strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative.").

<sup>39</sup> Cf. Billish v. City of Chicago, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] Croson requires"), cert. denied, 114 S. Ct. 290 (1993).

<sup>40</sup> See Contractors Ass'n v. City of Philadelphia, 6 F.3d at 1009 n.18.

<sup>41</sup> See also Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994) (city should have implemented race-neutral alternative of establishing non-discriminatory selection procedures in police and fire departments instead of adopting race-based procedures; "continued use of discriminatory tests. . . compounded the very evil that [race-based measures] were designed to eliminate"); Aiken v. City of Memphis, 37 F.3d 1155, 1164 (6th Cir. 1994) (remanding to lower court, in part, because evidence suggested that the city should have used obvious set of race-neutral alternatives before resorting to race-

## 2. Scope of Program/Administrative Waivers

Justice O'Connor's opinion for the Court in Croson criticized the scope of Richmond's thirty percent minority subcontracting requirement, calling it a "rigid numerical quota" that did not permit consideration, through some form of administrative waiver mechanism, of whether particular individuals benefiting from the ordinance had suffered from the effects of the discrimination that the city was seeking to remedy. 488 U.S. at 508. At first blush, this criticism of the Richmond plan may appear to conflict with previous Court decisions, joined by Justice O'Connor, that held that race-based remedial measures need not be limited to persons who were the victims of discrimination. (See supra p. 5.) Upon closer reading, however, Croson should not be interpreted as introducing a "victims-only" requirement through the narrow tailoring test.<sup>42</sup> The Court's rejection in Adarand of Justice Scalia's position that compensation is due only to individuals who have been discriminated against personally provides further confirmation that Croson did not impose any such requirement.

The Court's focus in Croson on individualized consideration of persons seeking the benefit of a racial classification appears to have been animated by three separate concerns about the scope of the Richmond plan. First, the Court indicated that in order for a remedial affirmative action program to be narrowly tailored, its beneficiaries must be members of groups that were the victims of discrimination. The Court faulted the Richmond plan because it was intended to remedy discrimination against African-American contractors, but included among its beneficiaries Hispanics, Asian-Americans, Native-Americans, Eskimos, and Aleuts -- groups for which Richmond had proffered "absolutely no evidence of past discrimination." Id. at 506. Therefore, the Court said, even if the Richmond MBE program was "'narrowly tailored' to compensate African-American contractors for past discrimination, one may legitimately ask why they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow?" Id.<sup>43</sup> Second, the Court said that the Richmond plan was not even narrowly tailored to remedy discrimination against black

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conscious measures).

<sup>42</sup> Most lower courts have not construed Croson in that fashion. See, e.g., Billish v City of Chicago, 962 F.2d 1269, 1292-94 (7th Cir. 1992), rev'd on other grounds, 989 F.2d 890 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 290 (1993); Coral Constr. Co. v. King County, 941 F.2d at 925-26 n.15; Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431, 437 (10th Cir. 1990). But see Winter Park v. FCC, 873 F.2d 347, 367-68 (D.C. Cir. 1989) (Williams, J., concurring in part and dissenting in part) (interpreting Croson as requiring that racial classifications be limited "to victims of prior discrimination"); Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1347, 1362 (E.D. Pa. 1989) (MBE program not narrowly tailored, in part, because it "containe[d] no provision to identify those who were victims of past discrimination and to limit the program's benefits to them").

<sup>43</sup> See O'Donnell Constr. Co. v. District of Columbia, 963 F.2d at 427 (MBE program was not narrowly tailored because of "random inclusion of racial groups for which there was no evidence of past discrimination").

contractors because "a successful black entrepreneur . . . from anywhere in the country" could reap its benefits. *Id.* at 508. That is, the geographic scope of the plan was not sufficiently tailored.<sup>44</sup> Third, the Court contrasted the "rigidity" of the Richmond plan with the flexible waiver mechanism in the ten percent minority participation requirement that was upheld in *Fullilove*. As the Court in *Croson* described it, the requirement in *Fullilove* could be waived where a minority business charged a "higher price [that] was not attributable to the effects of past discrimination." *Id.* See *Fullilove*, 448 U.S. at 488 (plurality opinion). The theory is that where a business is struggling to overcome discrimination, it may not have the capacity to submit a competitive bid. That an effective waiver provision allows for "individualized consideration" of a particular minority contractor's bid does not mean that the contractor has to be a "victim" of a specific instance of discrimination. It does mean that if the contractor is wealthy and has entered the mainstream of contractors in the community, a high bid might not be traceable to the discrimination that a racial or ethnic classification is seeking to redress. Instead, such a bid might reflect an effort to exploit the classification.<sup>45</sup>

### 3. Manner in Which Race is Used

The Court's attack on the "rigidity" of the Richmond ordinance also implicates another common refrain in affirmative action jurisprudence: the manner in which race is used is an integral part of the narrow tailoring requirement. The clearest statement of the Court's somewhat mixed messages in this area is that programs that make race or ethnicity a requirement of eligibility for particular positions or benefits are less likely to survive constitutional challenge than programs that merely use race or ethnicity as one factor to be considered under a program open to all races and ethnic groups.<sup>46</sup>

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<sup>44</sup> Compare *Associated Gen. Contractors v. Coalition for Economic Equity*, 950 F.2d at 1418 (MBE program intended to remedy discrimination against minorities in county construction industry was narrowly tailored, in part, because scope of beneficiaries was limited to minorities within the county) with *Podberesky v. Kirwan*, 38 F.3d 147, 159 (4th Cir.) (scholarship program intended to remedy discrimination against African-Americans in Maryland was not narrowly tailored, in part, because African-Americans from outside Maryland were eligible for the program), *cert. denied*, 115 S. Ct. 2001 (1995).

<sup>45</sup> See *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 425 (7th Cir.) (noting that administrative waiver mechanism enabled state to exclude from scope of beneficiaries of affirmative action plan in public contracting "two wealthy black football players" who apparently could compete effectively outside the plan), *cert. denied*, 500 U.S. 954 (1991); *Concrete General, Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 381 (D. Md. 1991) (MBE program not narrowly tailored, in part, because it had "no provision to 'graduate' from the program those contracting firms which have demonstrated the ability to effectively compete with non-MBE's in a competitive bidding process"); see also *Shurberg Broadcasting, Inc. v. FCC*, 876 F.2d at 916 (opinion of Silberman, J.) ("There must be some opportunity to exclude those individuals for whom affirmative action is just another business opportunity.").

<sup>46</sup> The factor that we labeled above as "scope of beneficiaries/administrative waivers" is sometimes considered by courts under the heading of "flexibility", along with a consideration of the manner in which race is used. For the sake of clarity we have divided them into two separate components of the narrow

Two types of racial classifications are subject to criticism as being too rigid. First and most obvious is an affirmative action program in which a specific number of positions are set aside for minorities. The prime example is the medical school admissions program that the Court invalidated in Bakke. Justice Powell's pivotal opinion in the case turned squarely on the fact that the program reserved sixteen percent of the slots at the medical school for members of racial and ethnic minority groups. Another example of this type of classification is the program upheld in Fullilove. It provides that, except where the Secretary of Commerce determines otherwise, at least ten percent of the amount of federal grants for certain public works projects must be expended by grantees to purchase goods or services from minority-owned businesses. 42 U.S.C. § 6705(f)(2).

The second type of classification that is vulnerable to attack on flexibility grounds is a program in which race or ethnicity is the sole or primary factor in determining eligibility. One example is the FCC's "distress sale" program, which allows a broadcaster whose qualifications have been called into question to transfer his or her license prior to an FCC revocation hearing, provided the transferee is a minority-owned business.<sup>47</sup> Another example of affirmative action programs in which race or ethnicity is a requirement of eligibility are college scholarships that are reserved for minorities.<sup>48</sup>

Under both types of classifications, persons not within the designated categories are rendered ineligible for certain benefits or positions.<sup>49</sup> Justice Powell's opinion in Bakke

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tailoring test.

<sup>47</sup> The distress sale program was upheld under intermediate scrutiny in Metro Broadcasting.

<sup>48</sup> There is a plausible distinction between college scholarships that are reserved for minorities and admissions quotas that reserve places at a college for minorities. In Podberesky v. Kirwan, 38 F.3d 147 (4th Cir 1994), cert. denied, 115 S. Ct. 2001 (1995), the Fourth Circuit held that a college scholarship program for African Americans was unconstitutional under Croson. The Fourth Circuit's decision, however, did not equate the scholarship program with the admissions quota struck down in Bakke, and it did not turn on the fact that race was a requirement of eligibility for the program.

<sup>49</sup> The statutes and regulations under which DOT has established the contracting program at issue in Adarand are different. Racial and ethnic classifications are used in the form of a presumption that members of minority groups are "socially disadvantaged." However, that presumption is rebuttable, and members of nonminority groups are eligible for the program "on the basis of clear and convincing evidence" that they are socially disadvantaged. Adarand, 63 U.S.L.W. at 4524. See id. at 4540 (Stevens, J., dissenting) (arguing that the relevant statutes and regulations in Adarand are better tailored than the Fullilove legislation, because they "do[] not make race the sole criterion of eligibility for participation in the program." Members of racial and ethnic are presumed to be disadvantaged, but the presumption is rebuttable, and even if it does not get the presumption, "a small business may qualify [for the program] by showing that it is both socially and economically disadvantaged").

rested on the fact that the admissions program at issue was a quota that saved places for minorities solely on the basis of their race.<sup>50</sup> As Justice Powell put it, such a program

tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.

438 U.S. at 319. Justice Powell contrasted admissions programs that require decisions based "solely" on race and ethnicity, *id.* at 315, with programs in which race or ethnic background is simply one factor among many in the admissions decision. Justice Powell said that in the latter type of program, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317. In Justice Powell's view, such programs are sufficiently flexible to meet the narrow tailoring requirement.

This line of reasoning also resonates in Johnson v. Transportation Agency, 480 U.S. 616 (1987). There, the Supreme Court upheld an affirmative action plan under which a state government agency considered the gender of applicants<sup>51</sup> as one factor in making certain promotion decisions. The Court noted that the plan "set[] aside no positions for women," but simply established goals for female representation that were not "construed" by the agency as "quotas." *Id.* at 638. The Court further observed that the plan "merely authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants." *Id.* The Court stressed that in the promotion decision in question, "sex . . . was but one of numerous factors [that were taken] into account." *Id.* The agency's plan "thus resemble[d]" the type of admissions program "approvingly noted by Justice Powell" in Bakke: it "requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants." *Id.* See also *id.* at 656-57 (O'Connor, J., concurring in judgment) (agency's promotion decision was not made "solely on the basis of sex;" rather, "sex was simply used as a 'plus factor'").

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<sup>50</sup> Bakke is the only Supreme Court affirmative action case that ultimately turned on the "quota" issue. In Croson, the Court referred disparagingly to the thirty percent minority subcontracting requirement at issue in the case as a "quota," but that was not in itself the basis for the Court's decision.

<sup>51</sup> Although Johnson was a Title VII gender classification case, its reasoning as to the distinction between quotas and goals is instructive with respect to the constitutional analysis of racial and ethnic classifications.

Finally, Croson itself touches on the point. The Court said that in the absence of a waiver mechanism that permitted individualized consideration of persons seeking a share of city contracts pursuant to the requirement that thirty percent of the dollar value of prime contracts go to minority subcontractors, the Richmond plan was "problematic from an equal protection standpoint because [it made] the color of an applicant's skin the sole relevant consideration." 488 U.S. at 508.

#### 4. Comparison of Numerical Target to Relevant Market

Where an affirmative action program is justified on remedial grounds, the Court has looked at the size of any numerical goal and its comparison to the relevant labor market or industry. This factor involves choosing the appropriate measure of comparison. In Croson, Richmond defended its thirty percent minority subcontracting requirement on the premise that it was halfway between .067 percent -- the percentage of city contracts awarded to African-Americans during the years 1978-83 -- and 50 percent -- the African-American population of Richmond. The Court in Croson demanded a more meaningful statistical comparison and much greater mathematical precision. It held that numerical figures used in a racial preference must bear a relationship to the pool of qualified minorities. Thus, in the Court's view, the thirty percent minority subcontracting requirement not narrowly tailored, because it was tied to the African-American population of Richmond, and as such, rested on the assumption that minorities will choose a particular trade "in lockstep proportion to their representation in the local population." 488 U.S. at 507.<sup>52</sup>

#### 5. Duration and Periodic Review

Under Croson, affirmative action represents a "temporary" deviation from "the norm of equal treatment of all racial and ethnic groups." Croson, 488 U.S. at 510. A particular measure therefore should last only as long as it is needed. See Fullilove, 448 U.S. at 513 (Powell, J., concurring). Given this imperative, a racial or ethnic classification is more likely to pass the narrow tailoring test if it has a definite end-date,<sup>53</sup> or is subject to

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<sup>52</sup> Compare Aiken v. City of Memphis, 37 F.3d at 1165 (remanding to lower court, in part, because race-based promotion goals in consent decree were tied to "undifferentiated" labor force statistics; instructing district court on remand to determine whether racial composition of city labor force "differs materially from that of the qualified labor pool for the positions" in question) with Edwards v. City of Houston, 37 F.3d 1097, 1114 (5th Cir. 1994) (race-based promotion goals in city police department were narrowly tailored, in part, because the goals were tied to the number of minorities with the skills for the positions in question), reh'g granted, 49 F.3d 1048 (5th Cir. 1995).

<sup>53</sup> See Paradise, 480 U.S. at 178 (plurality opinion) (race-based promotion requirement was narrowly tailored, in part, because it was "ephemeral," and would "endure[] only until" non-discriminatory promotion procedures were implemented); Sheet Metal Workers, 478 U.S. at 487 (Powell, J., concurring) (race-based hiring goal was narrowly tailored, in part, because it "was not imposed as a permanent requirement, but [was] of limited duration"); Fullilove, 448 U.S. at 513 (Powell, J., concurring) (race-based classification in public works legislation was narrowly tailored, in part, because it was "not a

meaningful periodic review that enables the government to ascertain the continued need for the measure. The Supreme Court has said that a set end-date is less important where a program does not establish specific numerical targets for minority participation. Johnson, 480 U.S. at 640. However, it remains important for such a program to undergo periodic review. See id. at 639-40.

Simply put, a racial or ethnic classification that was justified at the point of its adoption may no longer be required at some future point. If the classification is subject to reexamination from time to time, the government can react to changed circumstances by fine-tuning the classification, or discontinuing it if warranted. See Fullilove, 448 U.S. at 489 (plurality opinion); see also Metro Broadcasting, 497 U.S. at 594; Sheet Metal Workers, 478 U.S. at 478 (plurality opinion); id. at 487-88 (Powell, J., concurring).

## 6. Burden

Affirmative action necessarily imposes a degree of burden on persons who do not belong to the groups that are favored by a racial or ethnic classification. The Supreme Court has said, however, that some burdens are acceptable, even when visited upon individuals who are not personally responsible for the particular problem that the classification seeks to address. See Wygant, 476 U.S. at 280-81 (plurality opinion) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."). This was implicitly reaffirmed in Croson and Adarand: in both cases, the Court "recognize[d] that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be,"<sup>54</sup> but declined to hold that the imposition of that burden pursuant to an affirmative action measure is automatically unconstitutional.

In some situations, however, the burden imposed by an affirmative action program may be too high. As a general principle, a racial or ethnic classification crosses that threshold when it "unsettle[s] . . . legitimate, firmly rooted expectation[s],"<sup>55</sup> or imposes the "entire burden . . . on particular individuals."<sup>56</sup> Applying that principle in an employment case where seniority differences between minority and nonminority employees were involved, a plurality of the Court in Wygant stated that race-based layoffs may impose a more substantial burden than race-based hiring and promotion goals, because "denial of a

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permanent part of federal contracting requirements"); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d at 428 (ordinance setting aside a percentage of city contracts for minority businesses was not narrowly tailored, in part, because it contained no "sunset provision" and no "end [was] in sight").

<sup>54</sup> Adarand, 63 U.S.L.W. at 4531 (citing Croson).

<sup>55</sup> Johnson, 480 U.S. at 638.

<sup>56</sup> Sheet Metal Workers, 478 U.S. at 488 (Powell, J., concurring).

future employment opportunity is not as intrusive as loss of an existing job." Wygant, 476 U.S. at 282-83; see also id. at 294 (White, J., concurring). In a subsequent case, however, Justice Powell warned that "it is too simplistic to conclude that hiring [or other employment] goals withstand constitutional muster whereas layoffs do not . . . . The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue." Sheet Metal Workers, 478 U.S. at 488 n.3 (Powell, J., concurring).

In the contracting area, a racial or ethnic classification would upset settled expectations if it impaired an existing contract that had been awarded to a person who is not included in the classification. This apparently occurs rarely, if at all, in the federal government. A more salient inquiry therefore focuses on the scale of the exclusionary effect of a contracting program. For example, in Fullilove, Justice Powell thought it salient that the contracting requirement at issue in the case reserved for minorities a very small amount of total funds for construction work in the nation (less than one percent), leaving nonminorities able to compete for the vast remainder. For Justice Powell, this rendered the effect of the program "limited and so widely dispersed that its use is consistent with fundamental fairness." Fullilove, 448 U.S. at 515. In some instances, conversely, the exclusionary effect of racial classifications in contracting may be considered too large. For example, the lower court in Croson held that Richmond's thirty percent minority subcontracting requirement imposed an impermissible burden because it placed nonminorities at a great "competitive disadvantage." I.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1361 (4th Cir. 1987). Similarly, an affirmative action program that effectively shut nonminority firms out of certain markets or particular industries might establish an impermissible burden. For example, the dissenters in Metro Broadcasting felt that the FCC's distress sale unduly burdened nonminorities because it "created a specialized market reserved exclusively for minority controlled applicants. There is no more rigid quota than a 100% set-aside . . . . For the would-be purchaser or person who seeks to compete for the station, that opportunity depends entirely upon race or ethnicity." 497 U.S. at 630 (O'Connor, J., dissenting). The dissenters also dismissed the majority's contention that the impact of distress sales on nonminorities was minuscule, given the small number of stations transferred through those means. The dissenters said that "[i]t is no response to a person denied admission at one school, or discharged from one job, solely on the basis of race, that other schools or employers do not discriminate." Id.

### C. The Post-Croson Landscape at the State and Local Level

Croson has not resulted in the end of affirmative action at the state and local level. There is no doubt, however, that Croson, in tightening the constitutional parameters, has diminished the incidence of such programs, at least in contracting and procurement. The post-Croson experience of governments that continue to operate affirmative action programs

in that area is instructive.<sup>57</sup> Many governments reevaluated their MBE programs in light of Croson, and modified them to comport with the applicable standards. Typically, the centerpiece of a government's efforts has been a "disparity study," conducted by outside experts, to analyze patterns and practices in the local construction industry. The purpose of a disparity study is to determine whether there is evidence of discrimination against minorities in the local construction industry that would justify the use of remedial racial and ethnic classifications in contracting and procurement. Some studies also address the efficacy of race-neutral alternatives. In addition to obtaining a disparity study, some governments have held public hearings in which they have received evidence about the workings of the local construction industry.

Post-Croson affirmative action programs in contracting and procurement tend to employ flexible numerical goals and/or bidding preferences in which race or ethnicity is a "plus" factor in the allocation decision, rather than a hard set-aside of the sort at issue in Croson. It appears that many of the post-Croson contracting and procurement programs that rest on disparity studies have not been challenged in court.<sup>58</sup> At least one of the programs was sustained in litigation.<sup>59</sup> Another was struck down as inconsistent with the Croson standards.<sup>60</sup> Challenges to other programs were not resolved on summary judgment, and

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<sup>57</sup> A comprehensive review of voluntary affirmative action in public employment at the state and local level after Croson is beyond the scope of this memorandum. We note that a number of the programs have involved remedial racial and ethnic classifications in connection with hiring and promotion decisions in police and fire departments. Some of the programs have been upheld, and others struck down. Compare Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994) (upholding race-based hiring goal in county fire department under Croson) with Long v. City of Saginaw, 911 F.2d 1192 (6th Cir. 1990) (striking down race-based hiring goal in city police department under Croson and Wygant).

<sup>58</sup> That has been true in Richmond. It is our understanding that the city conducted a post-Croson disparity study and enacted a new MBE program that establishes a bidding preference of "20 points" for prime contractors who pledge to meet a goal of subcontracting sixteen percent of the dollar value of a city contract to MBEs. The program works at the "prequalification" stage, when the city is determining its pool of eligible bidders on a project. Once the pool is selected, the low bidder is awarded the contract.

<sup>59</sup> See Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).

<sup>60</sup> Associated Gen. Contractors v. City of New Haven, 791 F. Supp. 941 (D. Conn. 1992), vacated on mootness grounds, 41 F.3d 62 (2d Cir. 1994).

were remanded for further fact finding.<sup>61</sup> Contracting and procurement programs that were not changed after Croson have met with a mixed reception in the courts.<sup>62</sup>

### III. Application of the Croson Standards at the Federal Level

In essence, Adarand federalizes Croson, with one important caveat: Congress may be entitled to some deference when it acts on the basis of race or ethnicity to remedy the effects of discrimination. The Court in Adarand hinted that at least where a federal affirmative action program is congressionally mandated, the Croson standards might apply somewhat more loosely. The Court concluded that it need not resolve whether and to what extent the judiciary should pay special deference to Congress in this area. The Court did, however, cite the opinions of various Justices in Fullilove, Croson, and Metro Broadcasting concerning the significance of Congress' express constitutional power to enforce the antidiscrimination guarantees of the Thirteenth and Fourteenth Amendments -- under Section 2 of the former and Section 5 of the latter -- and the extent to which courts should defer to exercises of that authority that entail the use of racial and ethnic classifications to remedy discrimination. See 63 U.S.L.W. at 4531. Some of those opinions indicate that even under strict scrutiny, Congress does not have to make findings of discrimination with the same degree of precision as a state or local government, and that Congress may be entitled to some latitude with respect to its selection of the means to the end of remedying discrimination.<sup>63</sup>

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<sup>61</sup> Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); Concrete Works v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995). The courts in these two cases commented favorably on aspects of the programs at issue and the disparity studies by which they are justified.

<sup>62</sup> We are aware of at least one such program that survived a motion for summary judgment and apparently is still in effect today. See Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.), cert. denied, 498 U.S. 983 (1990). Others have been invalidated. See, e.g., O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992); Contractors' Assoc. v. City of Philadelphia, WL 11900 (E.D. Pa. Jan. 11, 1995); Arrow Office Supply Co. v. City of Detroit, 826 F. Supp. 1072 (E.D. Mich. 1993); F. Buddie Constr. Co. v. City of Elyria, 773 F. Supp. 1018 (N.D. Ohio 1991); Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1349 (E.D. Pa. 1989).

<sup>63</sup> Section 1 of the Fourteenth Amendment prohibits states and municipalities from denying persons the equal protection of the laws. Section 5 gives Congress the power to enforce that prohibition. Because Section 1 of the Fourteenth Amendment only applies to states and municipalities, see United States v. Guest, 383 U.S. 745, 755 (1966), it is uncertain whether Congress may act under Section 5 of that amendment to remedy discrimination by purely private actors. See Adarand, 63 U.S.L.W. at 4538 n.10 (Stevens, J., dissenting) ("Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of § 5's applicability to pure regulation of private individuals."); Metro Broadcasting, 497 U.S. at 605 (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials."). Nevertheless, remedial legislation adopted under Section 5 of the Fourteenth Amendment does not necessarily have to act on the states directly. Indeed, when Congress

In Fullilove, Justice Powell's concurring opinion said that even under strict scrutiny, "[t]he degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." Fullilove, 448 U.S. at 515 n.14 (Powell, J., concurring). It was therefore of paramount importance to Justice Powell that the racial and ethnic classification in Fullilove was prescribed by Congress, which, Justice Powell admonished, "properly may -- and indeed must -- address directly the problems of discrimination in our society." Id. at 499. Justice Powell emphasized that Congress has "the unique constitutional power" to take such action under the enforcement clauses of the Thirteenth and Fourteenth Amendments. Id. at 500. See id. at 483 (plurality opinion) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with the competence and authority to enforce equal protection guarantees."). Justice Powell observed that when Congress uses those powers, it can paint with a broad brush, and can devise national remedies for the national problem of racial and ethnic discrimination. Id. at 502-03 (Powell, J., concurring). Furthermore, Justice Powell said that through repeated investigation of that problem, Congress has developed familiarity with the nature and effects of discrimination: "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." Id. at 503. Because Congress need not redocument the fact and history of discrimination each time it contemplates adopting a new remedial measure, the findings that supported the Fullilove legislation were not restricted to the actual findings that Congress made when it enacted that measure. Rather, the record included "the information and expertise that Congress acquires in the consideration and enactment of earlier legislation." Id. A court reviewing a race-based remedial act of Congress therefore "properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against [minorities]." Id. Finally, Justice Powell gave similar deference to Congress when it came to applying the narrow tailoring test. He said that in deciding how best to combat discrimination in the country, the "Enforcement Clauses of the Thirteenth and Fourteenth Amendments give Congress a . . . measure of discretion to choose a suitable remedy." Id. at 508.

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seeks to remedy discrimination by private parties, it may be indirectly remedying discrimination of the states; for in some cases, private discrimination was tolerated or expressly sanctioned by the states. Private discrimination, moreover, often can be remedied under the enforcement provisions of the Thirteenth Amendment. Section 1 of that amendment prohibits slavery and involuntary servitude. Section 2 gives Congress the power to enforce that prohibition by passing remedial legislation designed to eliminate "the badges and incidents of slavery in the United States." Jones v. Alfred Mayer Co., 392 U.S. 409, 439 (1968). The Supreme Court has held that such legislation may be directed at remedying the discrimination of private actors, as well as that of the states. Id. at 438. See also Runyon v. McCrary, 427 U.S. 160, 179 (1976). In Fullilove, the plurality opinion concluded that the Commerce Clause provided an additional source of power under which Congress could adopt race-based legislation intended to remedy the discriminatory conduct of private actors. See Fullilove, 448 U.S. at 475 (plurality opinion).

Justice O'Connor's opinion in Croson is very much in the same vein. She too commented that Congress possesses "unique remedial powers . . . under § 5 of the Fourteenth Amendment." Croson, 488 U.S. at 488 (plurality opinion) (citing Fullilove, 448 U.S. at 483 (plurality opinion)). By contrast, state and local governments have "no specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," but rather are subject to its "explicit constraints." Id. at 490 (plurality opinion). Therefore, in Justice O'Connor's view, state and local governments "must identify discrimination, public or private, with some specificity before they may use race-conscious relief." Id. at 504. Congress, on the other hand, can make, and "has made national findings that there has been societal discrimination in a host of fields." Id. It may therefore "identify and redress the effects of society-wide discrimination" through the use of racial and ethnic classifications that would be impermissible if adopted by a state or local government. Id. at 490 (plurality opinion).<sup>64</sup> Justice O'Connor cited her Croson opinion and reiterated these general points about the powers of Congress in her Metro Broadcasting dissent. See 497 U.S. at 605 (O'Connor, J., dissenting) ("Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its unique remedial powers . . . under § 5 of the Fourteenth Amendment.") (internal quotations omitted).

It would be imprudent, however, to read too much into Justice Powell's opinion in Fullilove and Justice O'Connor's opinion in Croson. They do not, for example, support the proposition that Congress may simply assert that because there has been general societal discrimination in this country, legislative classifications based on race or ethnicity are a necessary remedy. The more probable construction of those opinions is that Congress must have some particularized evidence about the existence and effects of discrimination in the sectors and industries for which it prescribes racial or ethnic classifications. For example, Congress established the Fullilove racial and ethnic classification to remedy what the Court saw as the well-documented effects of discrimination in one industry -- construction -- that had hindered the ability of minorities to gain access to public contracting opportunities. See Fullilove, 448 U.S. at 505-06 (Powell, J., concurring); see also id. at 473 (plurality opinion).

Based on this reading of Croson and Fullilove, the endorsement in Adarand of strict scrutiny of federal affirmative action programs does not mean that Congress must find discrimination in every jurisdiction or industry affected by such a measure (although it is unclear whether, as a matter of narrow tailoring, the scope of a classification should be narrowed to exclude regions and trades that have not been affected by the discrimination that is to be remedied.). State and local governments must identify discrimination with some precision within their jurisdictions; Congress' jurisdiction is the nation as a whole. But after Adarand, Congress is subject to the Croson "strong basis in evidence" standard. Under that standard, the general history of racial discrimination in the nation would not be a sufficient

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<sup>64</sup> Justices Kennedy and Scalia declined to join that part of Justice O'Connor's opinion in Croson that drew a distinction between the respective powers of Congress and state or local governments in the area of affirmative action.

predicate for a remedial racial or ethnic classification. In addition, evidence of discrimination in one sector or industry is not always probative of discrimination in other sectors and industries. For example, a history of lending discrimination against minorities arguably cannot serve as a catch-all justification for racial and ethnic classifications benefitting minority-owned firms through the entire economy; application of the narrow tailoring test would suggest that if lending discrimination is the problem being addressed, then the government should tackle it directly.<sup>65</sup>

Furthermore, under the new standard, Congress probably does not have to hold a hearing or draft a report each time it adopts a remedial racial or ethnic classification. But where such a classification rests on a previous law or series of laws, those earlier measures must be supported by sufficient evidence of the effects of discrimination. And if the findings in the older laws are stale, Congress or the pertinent agency may have to demonstrate the continued relevance of those findings; this would satisfy the element of the narrow tailoring test that looks to the duration of classifications and whether they are subject to reevaluation. Where the record is sparse, Congress or the relevant agency may have to develop it. That endeavor may involve the commissioning of disparity studies of the type that state and local governments around the country undertook after Croson to demonstrate that remedial racial and ethnic classifications in public contracting are warranted. Together, the myriad state and local studies may provide an important source of evidence supporting the use by the federal government of national remedial measures in certain sectors of the economy.

Whatever deference a court might accord to federal remedial legislation after Adarand, it is undecided whether the same degree of deference would be accorded to nonremedial legislation. In Metro Broadcasting, the majority gave substantial deference to congressional judgments regarding the need for diversity in broadcasting and the linkage between the race of a broadcaster and programming output. Metro Broadcasting, 497 U.S. at 566, 572-73, 591 n.43. The dissenters did not do so, precisely because the classifications were nonremedial and hence, in their view, did not implicate Congress' powers under the Enforcement Clauses of the Thirteenth and Fourteenth Amendments. Id. at 605, 628-29 (O'Connor, J., dissenting).

Finally, many existing federal affirmative action programs are not specifically mandated by Congress. Courts are unlikely to accord federal agencies acting without a congressional mandate the same degree of deference accorded judgments made by Congress itself. Agencies do not have the "institutional competence" and explicit "constitutional

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<sup>65</sup> Patterns and practices of bank lending to minorities, may, however, reflect a significant "secondary effect" of discrimination in particular sectors and industries, i.e., because of that discrimination, minorities cannot accumulate the necessary capital and achieve the community standing necessary to qualify for loans.

authority" that Congress possesses. Adarand, 63 U.S.L.W. at 4538 (Stevens, J., dissenting).<sup>66</sup> Although some existing agency programs were not expressly mandated in the first instance in legislation, they may nonetheless be viewed by a court as having been mandated by Congress through subsequent congressional action. For example, in Metro Broadcasting, the programs at issue were established by the FCC on its own; Congress' role was limited to FCC oversight hearings and the passage of an appropriations riders that precluded the FCC from using any funds to reconsider or cancel its programs. 497 U.S. at 572-79. The majority concluded that this record converted the FCC programs into measures that had been "specifically approved -- indeed, mandated by Congress." Id. at 563.

Under strict scrutiny, it is uncertain what level of congressional involvement is necessary before a court will review an agency's program with deference. What may be required is evidence that Congress plainly has brought its own judgment to bear on the matter. Cf. Adarand, 63 U.S.L.W. at 4537 (Stevens, J., dissenting) ("An additional reason for giving greater deference to the National Legislature than to a local law-making body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives . . . .") (emphasis added); id. at 4538 (Stevens, J., dissenting) ("Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.") (emphasis added).

#### IV. Conclusion

Adarand makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with the strict scrutiny standard. No affirmative action program should be suspended prior to such an evaluation. The information gathered by many agencies in connection with the President's recent review of federal affirmative action programs should prove helpful in this regard. In addition, appended to this memo is a nonexhaustive checklist of questions that provides initial guidance as to what should be considered in that review process. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any given program.

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<sup>66</sup> See Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532, 1540 n.3 (W.D. Wisc. 1989) (noting that for purposes of judicial review of affirmative action measures, there is a distinction between congressionally mandated measures and those that are "independently established" by a federal agency), aff'd, 922 F.2d 419 (7th Cir.), cert. denied, 500 U.S. 954 (1991); cf. Bakke, 438 U.S. at 309 (opinion of Powell, J.) (public universities, like many "isolated segments of our vast governmental structure are not competent to make [findings of national discrimination], at least in the absence of legislative mandates and legislatively determined criteria").

## Appendix: Questions to Guide Review of Affirmative Action Programs

### I. Authority

Is the use of racial or ethnic criteria as a basis for decisionmaking mandated by legislation? If not mandated, is it expressly authorized by legislation? If there is no express authorization, has there been any indication of congressional approval of an agency's action in the form of appropriations riders or oversight hearings? These questions are important, because Congress may be entitled to some measure of deference when it decides that racial and ethnic classifications are necessary.

If there is no explicit legislative mandate, authorization, or approval, is the program premised on an agency rule or regulation that implements a statute that, on its face, is race-neutral? For example, some statutes require agencies to give preferences to "disadvantaged" individuals, but do not establish a presumption that members of racial groups are disadvantaged. Such a statute is race-neutral. Other statutes, like those at issue in Adarand, require agencies to give preferences to "disadvantaged" individuals, but establish a rebuttable presumption that members of racial groups are disadvantaged. Such a statute is race-conscious, because it authorizes agencies to use racial criteria in decisionmaking.

### II. Purpose

What is the objective of the program? Is it intended to remedy discrimination, to foster racial diversity in a particular sector or industry, or to achieve some other purpose? Is it possible to discern the purpose from the face the relevant statute or legislation? If not, does the record underlying the relevant legislation or regulation shed any light on the purpose of the program?

#### A. Factual Predicate: Remedial Programs

If the program is intended to serve remedial objectives, what is the underlying factual predicate of discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in a particular sector or industry, or a statistical underrepresentation of minorities in a sector or industry? Without more, these are impermissible bases for affirmative action. If the discrimination to be remedied is more particularized, then the program may satisfy Adarand. In assessing the nature of the factual predicate of discrimination, the following factors should be taken into account:

1. Source. Where can the evidence be found? Is it contained in findings set forth in a relevant statute or legislative history (committee reports and hearings)? Is evidence contained in findings that an agency has made on its own in connection with a rulemaking process or in the promulgation of guidelines? Do the findings expressly or implicitly rest on

findings made in connection with a previous, related program (or series of programs)?

2. Type. What is the nature of the evidence? Is it statistical or documentary? Are the statistics based on minority underrepresentation in a particular sector or industry compared to the general minority population? Or are the statistics more sophisticated and focused? For example, do they attempt to identify the number of qualified minorities in the sector or industry or seek to explain what that number would look like "but for" the exclusionary effects of discrimination? Does the evidence seek to explain the secondary effects of discrimination -- for example, how the inability of minorities to break into certain industries due to historic practices of exclusion has hindered their ability to acquire the requisite capital and financing? Similarly, where health and education programs are at issue, is there evidence on how discrimination has hampered minority opportunity in those fields, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical and documentary evidence, is there testimonial or anecdotal evidence of discrimination in the record underlying the program -- for example, accounts of the experiences of minorities and nonminorities in a particular field or industry?

3. Scope. Are the findings purported to be national in character and dimension? Or do they reflect evidence of discrimination in certain regions or geographical areas?

4. "Authorship". If Congress or an agency relied on reports and testimony of others in making findings, who is the "author" of that information? The Census Bureau? The General Accounting Office? Business and trade associations? Academic experts? Economists? (There is no necessary hierarchy in assessing authorship, but the identity of the author may affect the credibility of the findings.)

5. Timing. Since the adoption of the program, have additional findings of discrimination been assembled by Congress or the agency that could serve to justify the need for the program when it was adopted? If not, can such evidence be readily assembled now? These questions go to whether "post-enactment" evidence can be marshaled to support the conclusion that remedial action was warranted when the program was first adopted.

**B. Factual Predicate: Nonremedial Programs**

Adarand does not directly address whether and to what extent nonremedial objectives for affirmative action may constitute a compelling governmental interest. At a minimum, to the extent that an agency administers a nonremedial program intended to promote diversity, the factual predicate must show that greater diversity would foster some larger societal goal beyond diversity for diversity's sake. The level and precision of empirical evidence supporting that nexus may vary, depending on the nature and purpose of a nonremedial program. For a nonremedial program, the source, type, scope, authorship, and timing of underlying findings should be assessed, just as for remedial programs.

### III. Narrow Tailoring

#### A. Race-Neutral Alternatives

Did Congress or the agency consider race-neutral means to achieve the ends of the program at the time it was adopted? Race-neutral alternatives might include preferences based on wealth, income, education, family, geography. In the commercial setting, another such alternative is a preference for new, emerging businesses. Were any of these alternatives actually tried and exhausted? What was the nature and extent of the deliberation over any race-neutral alternatives -- for example, congressional debate? agency rulemaking? Was there a judgment that race-neutral alternatives would not be as efficacious as race-conscious measures? Did Congress or the agency rely on previous consideration and rejection of race-neutral alternatives in connection with a prior, related race-conscious measure (or series of measures)?

#### B. Continued Need

How long has the program been in existence? Even if there was a compelling justification at the time of adoption, that may not be the case today. Thus, an agency must determine whether there is a continued need for the program. In that regard, does the program have an end date? Has the end date been moved back? Is the program subject to periodic oversight? What is the nature of that oversight -- does Congress play a role through hearings/reports, or does the agency conduct the review or oversight on its own? Has the program ever been adjusted or modified in light of a periodic review? What were the results of the most recent review and oversight conducted by either Congress or the agency? Is there evidence of what might result if the racial classification were discontinued? For example, is there evidence of the current level of minority participation in government contracting where racial criteria are not used (which may speak to whether discrimination can be remedied without a preference)?

#### C. Pool of Beneficiaries

Are the benefits of the program spread relatively equally among minority individuals or businesses? Is there information on whether the same individuals or businesses tend to reap most of the benefits, and if so, whether those beneficiaries have overcome discrimination? If the program is intended to remedy discrimination against minorities, does it include among its beneficiaries subgroups that may not have been discriminated against? Is there a procedure for tailoring the pool of beneficiaries to exclude such subgroups? Is there a mechanism for evaluating whether the program is needed for segments within a larger industry that have been the locus of discrimination?

D. Manner in Which Race is Used

Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such facial requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decisionmaking? Could the objectives of a program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

E. Burden

What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification that the program establishes? Does the program displace those persons from existing positions/contracts? Does it upset any settled expectations that they have? Even if that is not the case, the burden may be impermissible where the exclusionary impact is too great. What is the exclusionary impact in terms of size and dimension? What is the dollar value of the contracts/grants/positions in question? Does the exclusionary impact of the program fall upon a particular group or class of individuals or sectors, or is it more diffuse? What is the extent of other opportunities outside the program? Are persons who are not eligible for the preference put at a significant competitive disadvantage as a result of the program?