

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Affirmative Action Review (3 pages)	7/11/1995	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9590

FOLDER TITLE:

[Affirmative Action]

ds45

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE
WASHINGTON

Agenda
Affirmative Action Briefing
Monday, June 24, 1996
2 - 3:30 PM
Room 450, OEOB

2:00 - 2:10 p.m.	Kitty Higgins <i>Assistant to the President and Cabinet Secretary</i>	Welcome and Overview
2:10 - 2:20 p.m.	George Stephanopoulos <i>Senior Advisor to the President and Executive Assistant to the Chief of Staff</i>	President's Commitment to Affirmative Action
2:20 - 2:45 p.m.	Deval Patrick <i>Assistant Attorney General for Civil Rights</i>	Justice Department's Proposal for Reforming Federal Procurement
2:45 - 3:00 p.m.	Steve Kelman <i>Administrator, Office of Federal Procurement Policy, Office of Management and Budget</i>	Pilot Program for Expanding Opportunities for Small Business Service Contractors
3:00 - 3:15 p.m.	Diane Litman <i>Manager, Information Resources Division, U.S. Department of Transportation</i>	Best Practices in Affirmative Action Procurement
3:15 - 3:30 p.m.	Alexis Herman <i>Assistant to the President and Director of Public Liaison</i>	Where Do We Go From Here?

Summary
Justice Department Proposal to Reform
Affirmative Action in Federal Procurement — May 22, 1996

- After the Adarand decision — while reaffirming his commitment to affirmative action programs — President Clinton instructed federal agencies to work with the Justice Department to ensure that such programs are fair and that they comply with the Supreme Court's test.
- After a thorough review of the legislative history authorizing affirmative action and the statistical data demonstrating that racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting market, the Justice Department concluded — there still exists a compelling need for race-conscious affirmative action measures in federal procurement that target assistance to small businesses, owned by socially and economically disadvantaged individuals.
- The Justice Department's proposal is designed to ensure that such programs are consistent with the President's directive to mend affirmative action and that they comport with the Supreme Court's ruling last June in Adarand Constructors, Inc. v. Peña. The Supreme Court held that federal race-conscious based affirmative action programs must comply with strict judicial scrutiny — such programs must serve a compelling government interest and must be narrowly tailored.
- Certification and Eligibility
 - ▶ Small and disadvantaged business (SDB) programs assist small firms owned by individuals that are disadvantaged socially (subjected to racial or cultural bias) and economically (that bias has led to decreased economic opportunities compared to others). Applicants to these programs will be required to submit a form to the procuring agency verifying their eligibility.
 - ▶ Members of designated racial and national origin groups presently are presumed by statute to be socially and economically disadvantaged. The proposal does not affect those presumptions. Under the proposal, nonminority applicants may establish by a preponderance of evidence — instead of the current clear and convincing standard — that they are socially and economically disadvantaged. This change will open SDB participation to more women and nonminorities.
 - ▶ All applicants to SDB programs will be required to submit a certification from an SBA approved organization verifying that the individuals claiming disadvantage own and control the company as defined by SBA regulations.

- Use of Race-Neutral Mechanisms

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

- Establishment of Benchmark Limitations

- ▶ In order to ensure that race-conscious procurement is not used unnecessarily, benchmarks will be developed for each industry in which the government contracts. Benchmarks will seek to measure the level of minority contracting that would exist absent the effects of discrimination.
- ▶ Benchmarks will be calculated by combining the capacity of available minority firms in the industry with an adjustment, where applicable, for the amount that discrimination has suppressed that availability.

- Application of Benchmark Limitations

- ▶ Where minority participation falls below the benchmark, a price or evaluation credit will be authorized for the evaluation of bids by SDBs and prime contractors who commit to subcontract with SDBs.
- ▶ When SDB participation exceeds the benchmark, the credit would be lowered or suspended. When that occurs, the SBA concurrently will limit the use of the 8(a) program in that industry by restricting entry, speeding graduation, or restricting the number of 8(a) awards in the industry.
- ▶ After this system is in place for two years, a thorough review will be conducted, and changes to the amount and methods of assistance would be considered at that time.

- Public comment on Proposal

- ▶ The Department of Justice proposal is being published in the May 23 Federal Register for a 60-day public comment period.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FOR IMMEDIATE RELEASE:
Monday, June 10, 1996

CONTACT:
Lawrence J. Haas
(202) 395-7254

**ADMINISTRATION EXPANDS OPPORTUNITIES
FOR SMALL BUSINESS SERVICE CONTRACTORS**

The Clinton Administration announced today an aggressive program to give small and small-disadvantaged businesses more opportunities to compete for Federal contracts, particularly professional and technical services.

Small and small-disadvantaged businesses have shown they can compete in technical and engineering services, information technology, software development, research and development, advisory and assistance services, and other service areas. But, to reduce lead times and avoid delays, the Federal Government often buys services under large "task order contracts" rather than individual contracts -- limiting participation by small and small-disadvantaged businesses.

The Administration plans to launch a pilot program to cut the legal waiting period between soliciting and awarding service contracts of up to \$1 million that are set aside for small businesses. This effort will make these contracts more viable, thus reducing the need for large task order contracts. Participating agencies will be able to publish procurement opportunities on the Internet and use shorter deadlines for receiving offers. The Administration also will create a handbook for agencies and small businesses on the latest streamlining techniques for mid-sized service contracts, such as the use of oral presentations, electronic commerce, and simplified evaluation techniques. The pilot program will not affect services bought under the 8(a) Program.

The Administration also is making changes in task order procedures to help small businesses. The Administration is asking agencies to structure task order contracts as multiple award contracts that would guarantee small and small-disadvantaged businesses the opportunity to compete for work on individual task orders. The Federal Acquisition Streamlining Act of 1994, an Administration "reinventing government initiative," gave agencies the authority to make multiple awards for the same or similar services (from a single solicitation) to two or more contractors, and to conduct quick, informal competitions for the tasks.

-- more --

To improve existing small business subcontracting programs, the Administration is asking agencies to give weight to subcontracting plans in evaluating prime contractors for award -- and to include performance under the plan in the contractor's performance record. And it is encouraging agencies to consider, when appropriate, the creation of subcontracting goals based on the overall value of the procurement -- not the projected value of subcontracting proposed by the contractor.

These initiatives should help ensure a "level playing field" and enable small businesses to continue demonstrating their competence in providing professional and technical services to the government.

* * *

Questions and Answers
Justice Department Proposal to Reform Affirmative Action
in Federal Procurement — May 22, 1996

1. What is the purpose of the Department of Justice proposal to reform federal procurement?

The Justice Department proposals are designed to ensure that affirmative action programs in federal procurement comply with the standards set out by the Supreme Court in Adarand v. Peña. They are part of the Administration's commitment to "mend" — not end affirmative action.

2. How is this proposal really different from the SDB programs in effect up to now?

There are several significant differences. First, the proposal would tighten certification requirements for small, disadvantaged businesses ("SDB's"). Second, agencies would be required to implement measures that do not rely on race to broaden the opportunities for small, minority firms. Third, the proposal would establish a system of "benchmark limitations" that would tie affirmative action to objective data demonstrating that minority owned firms have been disadvantaged in particular industries and regions of the country. The proposed system would not use racial set-asides — limiting certain contracts only for minority bidding. Instead, contracts would be open to all firms and agencies would be able to use bidding and evaluation credits as part of the bidding process, a tool that was previously authorized only at the Department of Defense and in a few other aspects of federal procurement.

3. What are the benchmark limitations and how would they work?

The benchmark limitations will represent the level of minority participation in federal procurement that would be expected in the absence of discrimination. They are a measure of the capacity of minority contractors to perform the work in a particular industry — or what it would be, absent discrimination. Benchmark limitations will be calculated for different industries. If in an industry, the minority participation in federal procurement matches or exceeds the capacity of minority firms to do the work, the use of race-conscious measures would be reduced or suspended.

4. What are bidding and evaluation credits, and how will they work in practice?

Bidding and evaluation credits can work in several ways. The simplest example of a bidding credit is when a contracting officer is authorized to award a contract to an SDB if the SDB is qualified to perform the work and its bid is within a certain percentage of the fair market value of the contract. The Federal Acquisition Streamlining Act ("FASA") passed by Congress in 1994 authorizes credits of up to 10%. Under the Justice Department proposal, the credit will be anywhere from 0 to 10% of fair market value, depending on whether the benchmark shows that minority contracting in an industry or region is approaching the

level that would be expected absent the effects of discrimination. In a similar fashion, an evaluation credit would be available to non-SDB prime contractors who commit to using SDB subcontractors.

The proposal does not require agencies to use numerical credits based on the price of the contract. Agencies will have flexibility to develop other methods for awarding credits to SDB's and prime contractors who use SDB subcontractors.

5. Won't the continued use of SDB programs restrict the opportunities for non-minority firms?

No. For one, the proposal is intended to open participation in the SDB program to more women and nonminorities. Moreover, firms that do not participate in SDB programs received over 93 % of the government's contracting business in FY 1995, and that will continue under the proposal. Under this proposal, apart from business development programs, contracts will be awarded in competitive bidding, with bidding and evaluation credits, rather than having contracts set aside for bidding only by minority firms. In addition, the reforms are designed to ensure that SDB awards will not be unduly concentrated in particular industries and geographic markets. The calculations of the benchmark limitations will limit the use of race-conscious measures to circumstances where minority participation in contracting has been reduced by discrimination and its effects.

6. Are the benchmark limitations quotas?

No. A quota is a fixed number that must be achieved in disregard of the availability of qualified individuals. It lacks flexibility and disregards merit. The benchmark limitations are precisely the opposite. They impose limitations on the use of race-conscious measures and will be developed through reference to qualified available minority firms. As minority firms are more successful in obtaining federal contracts, reliance on race-based mechanisms will decrease.

The benchmark limitations provide a means to measure success in providing opportunities for minorities, but they do not set a minimum or a maximum level of minority contracting that must be achieved.

At no time would an agency ever be required to award a contract to an unqualified firm simply to meet a benchmark.

7. Under the proposed reforms, will set-asides under the SDB program continue?

No. Agencies would only be authorized to use price and evaluation credits under the SDB program. After this system is in place for two years, a thorough review will be conducted, and changes to the amount and methods of assistance would be considered at that time.

8. What is the proposal's impact on the 8(a) program? Why include 8(a) at all if the Justice Department is defending constitutional challenges to that program?

The 8(a) program would remain in effect. This proposal is not designed to reform the 8(a) program. Section 8(a) is a business development program that is distinct from the other SDB programs. It is more narrowly tailored because of its more stringent requirements for eligibility and certification, especially with respect to whether participating firms are economically disadvantaged. Furthermore, firms in the 8(a) program must develop and meet business development plans and they may only stay in the program for a limited time. The Justice Department will continue to defend the constitutionality of the program on that basis. To ensure that affirmative action in federal procurement is fair and consistent with the spirit of this reform, agency use of the 8(a) program will be guided by the benchmark limitations established under the proposal. If the level of minority contracting in an industry exceeds the benchmark calculation, the SBA Administrator would take appropriate action to modify the 8(a) program in that industry, through any of the following means:

- ▶ Limiting entry of new firms into the program in that industry for some time.
- ▶ Accelerating graduation for firms that do not need the full period of sheltered competition.
- ▶ Limiting the number of 8(a) contracts awarded in particular industries or in specific geographic areas where contracts may be unduly concentrated.

9. Is the proposal a retreat from current affirmative action programs? Will it result in a reduction in minority contracting?

The proposal implements the new authority extended to federal agencies by FASA to promote opportunities for SDBs, including the use of the measures such as price and evaluation credits for minority firms, described in the proposal. Previously, only DoD and a handful of smaller agencies had this authority. The proposal also emphasizes that agencies should make even more efforts to use tools that do not explicitly rely on racial criteria in procurement decisions, such as outreach and training for SDB contractors.

10. Does this proposal affect affirmative action programs for women-owned businesses?

This proposal may increase opportunities for women. The proposal would lower the standard of proof that women-owned businesses, among others, must meet to establish that they are socially and economically disadvantaged, thereby potentially making it easier for them to qualify as SDBs. Women-owned businesses may be certified as small disadvantaged businesses and participate in the reformed SDB program if they meet the social and economic disadvantage criteria for eligibility.

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

11. What is the next step for the proposal, and when do you expect the program to be implemented?

The next step is a 60 day comment period. We expect that the notice of this proposal will generate a good number of constructive comments that will enable us to refine and improve the proposal. After evaluating the comments, the next step would be to reduce the proposal to formal proposed regulations and proceed through the rulemaking procedures. We hope to have the proposal up and running in FY 1997.

12. Who will be responsible for implementing this proposal?

Currently, the proposal contemplates that the Commerce Department will establish the appropriate benchmark figures, in consultation with the General Services Administration (GSA) and the Small Business Administration (SBA).

13. Doesn't the Supreme Court's Adarand decision prohibit this type of affirmative action program?

No. The Supreme Court explicitly recognized that the "unfortunate reality" of discrimination still exists, and that government programs may, and indeed should, address both discrimination and its "lingering effects." What the Supreme Court did require is that federal programs that rely on race in decisionmaking must satisfy the "strict scrutiny" standard. That is, they must be narrowly tailored to further a compelling governmental interest. Remedying the effects of discrimination is just such a compelling interest, and the Supreme Court stated that strict scrutiny is not meant to be "strict in theory, but fatal in fact."

14. How does this proposal meet the Supreme Court's test that race-based measures be narrowly tailored?

First, the proposal requires that agencies at all times use race-neutral alternatives, such as outreach and training, to the maximum extent possible. Only where those efforts fail to adequately extend opportunities to disadvantaged firms can race-conscious efforts be invoked.

Second, the program is flexible. Race will only be relied on when the data on procurement shows that minority businesses have been disadvantaged. Use of the benchmark limitations ensures that any reliance on race is closely tied to the availability of minority firms to

perform the work in question. Moreover, any credits awarded will be adjusted to match the need for a remedial effort in a particular industry.

Third, race will not be relied upon as the sole factor in SDB procurement decisions. The use of credits ensures that all firms have an opportunity to compete and that minority firms will have to demonstrate that they are qualified to perform the work.

Fourth, the duration of the program is inherently limited. The principal statutes that this proposal implements, FASA and the Department of Defense Authorization Act, expire at the end of the fiscal year 2000. Moreover, as minority firms are more successful in obtaining federal contracts, reliance on race-based mechanisms will decrease automatically. When the effects of discrimination have been eliminated, so will the program.

Finally, the proposal will not unduly burden non-minority businesses. As a practical matter, the overwhelming percentage of federal procurement money will continue to flow, as it does now, to nonminority businesses. Furthermore, reliance on the benchmark limitations will ensure that race-based decisionmaking cannot result in concentrations of minority contracting in particular industries or regions and will thereby limit the impact on nonminorities.

15. What does the proposal do to combat fraud?

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

16. Do SDB programs create benefits for unqualified firms?

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

17. Are SDB programs restricted to minorities?

No. Any business owned by any socially and economically disadvantaged individual may participate in the program. The proposed reforms would make it easier for non-minority firms to establish that they are socially and economically disadvantaged by lowering the standard of proof from clear and convincing evidence to a preponderance of the evidence.

18. The proposal states that it does not affect the DOT affirmative action programs that fund state and local procurement for highways and airport construction. Aren't those programs subject to Adarand as well? Will the administration be proposing separate changes to those programs?

These programs are being evaluated, as are all federal programs, by the Department of Justice, as a part of its post-Adarand review. Any necessary changes will be made by the agencies.

19. We have had affirmative action in federal procurement for two decades. Why do we still need minority business programs? Do they really serve a "compelling interest?"

In the 1970's, minority-owned firms received only 1% of the federal contracting dollar. With affirmative action programs, minority businesses have been able to make some progress in breaking into a government procurement system that had effectively locked them out before. The evidence today demonstrates, however, that discriminatory practices continue to create additional hurdles for minority firms competing for government contracts. The evidence of discrimination paints a compelling picture for remedial action in government procurement, a need that was reaffirmed by Congress in 1994 when it enacted FASA

- ▶ The typical white-owned business receives three times as many loan dollars as the typical black-owned business with the same amount of equity capital. In construction, white-owned firms receive fifty times as many loan dollars as black-owned firms with identical equity.
- ▶ Once formed, the exclusion of minority firms from "old boy" business networks deprives them of critical information about potential contracts and places them at a competitive disadvantage.
- ▶ Difficulties in obtaining bonding also handicaps minority firms who want to participate in government procurement. One Louisiana study found that minority firms were nearly twice as likely to be rejected for bonding, three times more likely to be rejected for bonding for over \$1 million, and on average were charged higher rates for the same bonding policies than white firms with the same experience level.

20. What impact will these proposals have on legislation now pending in Congress that eliminates all federal affirmative action?

The Justice Department reforms do not explicitly address the Dole-Canady legislation. However, these reforms are a serious and thoughtful effort to address affirmative action in procurement and to meet the President's commitment to "mend it, not end it." This proposal demonstrates that programs can be fashioned which meet the Supreme Court's standards and address the continuing need to eliminate the effects of discrimination against minority-owned firms, without eliminating affirmative action entirely. That is what the Dole-Canady bill would do, and that is unacceptable.

Talking Points
Department of Justice Proposal to Reform
Affirmative Action in Federal Procurement — May 23, 1996

- The Department of Justice today released a proposal yesterday that is published in today's Federal Register for the reform of affirmative action in federal procurement, and asked for public comment on the proposal.
- The proposal is designed to ensure that such measures comply with strict judicial scrutiny as required by the Supreme Court in the case of Adarand Constructors, Inc. v. Peña, and are consistent with the President's directive last year to mend affirmative action.
- The proposal would permit agencies to use some tools (evaluation and price credits) to assist disadvantaged business, but would limit the use of such tools. The proposal also requires agencies to implement measures that do not rely on race to broaden the opportunities for small, minority firms.
- The Justice Department proposal will combat fraud and abuse by tightening eligibility, emphasize the use of race-neutral measures, preserve race-conscious measures where necessary to remedy identified effects of discrimination, but ensure that their effect and duration is tied to the extent and persistence of the discrimination, and preserve competition. Specifics include:
 - ▶ Limits on the use of race-conscious measures: The government would assess levels of minority participation in the affected industries to determine whether or not assistance is necessary to overcome the effects of discrimination. If it is necessary, and if race-neutral means are not sufficient, a system of credits for certified and eligible SDBs would be used. The amount of assistance would be tied to the extent of the effects of discrimination that SDBs have suffered in particular industries and will be sensitive to conditions in each market.
 - ▶ Certification & eligibility: The standard of evidence by which non-minority applicants may establish that they too are socially and economically disadvantaged would be lowered to open SDB participation to a wider pool of businesses. For the first time, individuals will be required to present certification that they own and control a business. The SBA and the DOJ, working together, will crack down on individuals who misrepresent their disadvantaged status or their ownership and control of a business.
 - ▶ Limits on methods: This proposal uses bidding and evaluation credits designed to give some assistance to SDBs, but to retain the essential element of competition in the procurement process. SDB set-asides are not used. After this system is in place for two years, a thorough review will be conducted, and changes to the amount and methods of assistance would be considered at that time.

- The 8(a) program would remain in effect. However, agency use of 8(a) would be guided by the benchmark limitations established under the proposal.
- These procurement reforms represent real and substantial change. As small disadvantaged businesses are more successful in obtaining federal contracts, reliance on race-based mechanisms will decrease automatically.
- As required by the Supreme Court in Adarand, the Department of Justice has concluded that the government has a compelling interest in using race-conscious tools in federal procurement. That interest is evidenced by the very real ongoing impact of discrimination on the ability of minorities to participate in government contracting. Among the specific findings:
 - ▶ Recent studies show that, due to discriminatory barriers to entry into business, minorities are significantly less likely than whites to form their own business.
 - ▶ Discrimination in the workplace diminishes the opportunities for minorities to gain the necessary experience to start business ventures.
 - ▶ Discrimination by lenders and by bonding companies create additional hurdles for minority firms competing for government contracts.
 - ▶ The exclusion of minority owned firms from "old boy" business networks deprives them of critical information about potential contracts and places them at a competitive disadvantage.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

June 5, 1996

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES
AND THE DEPUTY UNDER SECRETARY OF DEFENSE
(ACQUISITION REFORM)
DIRECTORS OF SMALL AND DISADVANTAGED BUSINESS
UTILIZATION

FROM: Steven Kelman *SK*
Administrator

SUBJECT: Expanding Opportunities for Small Business Service
Contractors

I want to enlist your support for an aggressive program to expand opportunities for small businesses in the procurement of services, particularly professional and technical services, awarded both as individual prime and task order type contracts. Small and small disadvantaged businesses (SB/SDB's) have demonstrated their ability to be competitive in areas such as technical and engineering services, information technology services, software development, research and development, and advisory and assistance services. These services are frequently bought under large task order contracts which often are too large for effective SB/SDB participation. I believe the strategies listed below will serve to "level the playing field" and provide small businesses with the opportunities to demonstrate their competence in these and other services areas.

FOR TASK ORDER CONTRACTING:

A. Enhanced Intra-agency Communications

There needs to be enhanced communications between the Procurement Executive and the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) regarding the planning for large task order contracts. Such planning will encourage discussions on issues regarding participation by SB/SDB's early in the acquisition planning process. Matters such as identification of segments of work for which SB/SDB's can qualify and perform, involvement of 8(a) firms, and the encouragement of small business participation in the overall competition can be resolved. We understand that there has been increasing interest among some SB/SDB's in small business teaming arrangements to bid on contracts. Discussions between Procurement Executives and OSDBU's could well consider steps agencies could take to facilitate such teaming.

B. Multiple Award Task Order Contracts

FASA authorizes agencies to make multiple awards for the same or similar services (from a single solicitation) to two or more contractors. To enhance SB/SDB participation, solicitations may be structured in such a manner that will guarantee that those firms will have an opportunity to win prime contracts, which then will allow SB/SDB's to compete for individual task orders under the contracts. The Department of Transportation (DOT), under its Information Technology Omnibus Procurement (ITOP), structured its solicitation in such a manner. For three categories of information technology services, DOT recently awarded 20 information technology services prime contracts. DOT divided up its requirement into three parts and then guaranteed the award of at least three prime contracts for each part -- at least one "full and open" award, at least one competitive small business setaside, and at least one competitive 8(a) setaside. Ten of the prime contracts awarded under ITOP were to small and small disadvantaged businesses. Award of the prime contracts to SB/SDB's guarantees that such businesses will be able to be considered for individual task orders under the procedures newly established in FAR Part 16.5. Another approach agencies may wish to consider is restructuring very large task-order contracts into a number of medium-sized contracts for which SB/SDB's are able to compete.

I ask that each agency examine your major task order contracts for professional or technical services up for competition or re-competition during the next two years and submit to me by September 1 information about plans you have for increasing SB/SDB participation in those contracts, especially at the prime level, at the time of competition or re-competition.

C. Improving the Effectiveness of Subcontracting Programs

Several agencies have demonstrated success in improving subcontracting opportunities for SB/SDB's by assigning weight to the quality of the subcontracting plan, or for past performance under earlier plans, as an evaluation factor in the overall competition for the contract. It should be made clear to successful offerors that their subcontracting plans will be aggressively monitored and that their performance in this area may be reflected in their record of past performance for consideration in future awards. Consideration should also be given to establishing subcontracting goals based on the overall value of the procurement rather than the projected value of the subcontracting proposed by the contractor. (Note: In some cases, this may not be a realistic approach. The dollar value of the contract may have no effect on the potential for subcontracting.)

FOR PRIME CONTRACTING:

A. Pilot Program for Prime Contracts Setaside for Small Businesses

Provisions of the Small Business Act and the Office of Federal Procurement Policy Act authorize the waiver of the notice and wait requirements for proposed procurements after coordination with the Administrator of the Small Business Administration (SBA) and the Administrator for Federal Procurement Policy (OFPP). OFPP is working with SBA to establish a pilot program in which competitive procurements for services of \$1 million or less, setaside for small businesses, would be conducted using shortened provisions for notice and wait to prospective contractors. The purpose of the test would be to see whether such shortened notice and wait periods encouraged agencies to award a larger proportion of their total service requirements as prime contracts in the under-\$1 million range. The test would go on for several years, and OFPP would track results using FPDS data. This is designed as a limited test, involving a small number of organizations within agencies and Department of Defense components. Interested organizations should volunteer by July 10.

B. Handbook on Streamlined Procedures for Acquisition of Services from Small Businesses

The National Aeronautics and Space Administration (NASA) is achieving excellent participation by small businesses in its "Mid Range" procurement test program. Under the "Mid Range" test, NASA is using streamlined negotiating techniques to negotiate contracts for up to \$1 million, with a \$5 million limit for the life of the contract. We would like to form a working group of OFPP, OSDBU and agency representatives to develop a handbook that will provide guidance for agencies on the latest techniques for streamlined competitions for mid-size service contract procurements. The handbook will cover topics such as oral presentations, electronic commerce, and the simplified evaluation techniques pioneered by NASA in their mid-range program. Again, the idea is to encourage agencies to award more professional and technical services contracts as individual prime contracts by making it easier for them to do so.

C. FTE Relief

OMB is willing to consider providing agencies with more procurement FTEs if it can be demonstrated that these additional resources are needed to implement improvements in the evaluation, award, and administration of service contracts at the prime level, if this would result in savings in program dollars that outweigh the cost of the additional FTEs.

My staff point of contact for these initiatives is Linda Williams at 202-395-3302. Her address is New Executive Office Building, Room 9013, Washington, DC 20503. Please address any questions, as well as responses to my requests for information on upcoming task order contracts and for volunteers for the pilot program, to her.

Registered Federal Reporter

Thursday
May 23, 1996

Part VI

Department of Justice

Federal Procurement; Proposed Reforms
to Affirmative Action; Notice

DEPARTMENT OF JUSTICE

Proposed Reforms to Affirmative Action in Federal Procurement

AGENCY: Department of Justice.

ACTION: Public notice and invitation for reactions and views.

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

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

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

Congress in 1994 extended the affirmative action authority granted DoD by section 2323 to all agencies of the federal government through enactment of the Federal Acquisition Streamlining Act (FASA), Public Law No. 103-355, sec. 7102, 108 Stat. 3243, 15 U.S.C. 644 note.⁴ Because of *Adarand* and the effort to review federal affirmative action programs in light of that decision, regulations to implement the affirmative action authority granted by FASA have been delayed. See 60 Fed. Reg. 448258, 48259 (Sept. 18, 1995). This proposal provides the basis for those regulations.

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

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

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

⁴ FASA states that in order to achieve goals for SDB participation in procurement negotiated with the Small Business Administration, an "agency may enter into contracts using—(A) less than full and open competition by restricting the competition for such awards to small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(C) of section 8 of the Small Business Act (15 U.S.C. 637); and (B) a price evaluation preference not in excess of 10 percent when evaluating an offer received from such a small business concern as the result of an unrestricted solicitation."

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

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

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

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

⁵ This proposal addresses only affirmative action in the federal government's own direct procurement. It does not address affirmative action in procurement and contracting that is undertaken by states and localities pursuant to programs in which such entities receive funds from federal agencies (e.g., the Disadvantaged Business Enterprise program that the Department of Transportation administers pursuant to the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, section 1003(b), 105 Stat. 1919-1922, and the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47101, et seq.).

the formulation of revised procurement regulations.

Overview of Structure

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

I. Eligibility and Certification

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

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

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

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

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

A. Social and Economic Disadvantage

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

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

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

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

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

B. Ownership and Control

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

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

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

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

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

C. Challenges

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

⁸ The form that such individuals are to complete will ask whether they previously have applied for SDB certification and been rejected or accepted. A rejected firm will not be permitted to re-apply for certification for one year after rejection, unless it can show changed circumstances.

⁹ The standard certification form will accommodate one eligibility criterion peculiar to the DoD's SDB program under 10 U.S.C. 2323—that the majority of earnings must directly accrue to the socially and economically disadvantaged individuals that own and control the concern. The standard certification form will accommodate this criterion by including a DoD-specific section requiring the concern to attest that the majority of the firm's earnings do flow in this manner.

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

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

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

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

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

- The owners of the firm are not in fact socially or economically disadvantaged;
- The firm is not owned and controlled by the individuals who meet the definition of social and economic disadvantage;
- The disadvantaged firm has acted, or is acting, as a front company by failing to complete required percentages of the work contracted to the concern.¹¹

Upon receiving a protest supported by specific factual information, the SBA will make an eligibility determination by examining documentation from the SDB including, for example, personal and business financial statements, business records, ownership certifications, and other information deemed necessary to permit a determination as to the eligibility of the firm. Current regulations require the SBA to make a determination concerning the eligibility of the firm within 15 days of the filing of the challenge or notify the contracting officer of any delay.

D. Enforcement

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

¹¹ The basis for such a challenge would be 48 C.F.R. 19.508, which requires completion of a minimum percentage of contract activities by the firm awarded a contract through a small business set aside or the 8(a) program. A clause must be inserted in such contracts that limits the amount of work that can be subcontracted. 48 C.F.R. 52.219-14. These requirements will be expanded to include contracts awarded through the reformed SDB program as well.

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

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

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

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

II. Benchmark Limits

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

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

¹² See, e.g., 10 U.S.C. 2323 (5% goal for DoD contracting with SDBs); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (10% goal for highway construction projects carried out directly by the Department of Transportation).

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

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

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

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

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

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

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

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

III. Mechanisms for Increasing Minority Opportunity

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

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

ensure that its operation is subject to those limitations.

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

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

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

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

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

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

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

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

IV. Interaction of Benchmark Limits and Mechanisms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 8(a) Program

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

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

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

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

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

V. Outreach and Technical Assistance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

Michael C. Small,

Deputy Associate Attorney General.

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

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

¹ *Adarand* involved a constitutional challenge to a Department of Transportation ("DOT") program that compensates prime contractors if they hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged" individuals. The legislation on which the DOT program is based, the Small Business Act, establishes a government-wide goal for participation of such concerns at "not less than 5 percent of the total value of all prime contract and

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

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

subcontract awards for each fiscal year." 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 and economically disadvantaged. *Id.* § 637(a)(5)(6), § 637(d)(2), (3). In *Adarand*, the Supreme Court stated that the presumption constitutes race-conscious action, thereby triggering application of strict scrutiny. 115 S. Ct. at 2105.

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

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

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

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

principle that the beneficiaries of race-conscious remedial measures need not be limited to those individuals who themselves demonstrate that they have suffered some identified discrimination. See *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 482 (1986); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277–78 (1986) (plurality opinion); *Id.* at 287 (O'Connor, J., concurring).

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

opportunities for members of racial and ethnic minority groups.⁵

All told, the evidence that the Justice Department has collected to date is powerful and persuasive. It shows that the discriminatory barriers facing minority-owned businesses are not vague and amorphous manifestations of historical societal discrimination. Rather, they are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct.⁶

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

⁵ It is well-established that the factual predicate for a particular affirmative action measure is not confined to the four corners of the legislative record of the measure. See, e.g., *Concrete Works v. City and County of Denver*, 36 F.3d 1513, 1520-22 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

⁶ Congress has also adopted affirmative action measures in federal procurement, as well as in programs that fund the procurement activities of state and local governments, that are intended to assist women-owned businesses. At present, such measures are subject to intermediate scrutiny, not the *Adarand* strict scrutiny standard. Therefore, they have not been the focus of the post-*Adarand* review that the Justice Department is coordinating. However, some of the evidence collected by the Justice Department bears on the constitutional justification for affirmative action programs for women in government procurement. See, e.g., Interagency Committee on Women's Business Enterprise, *Expanding Business Opportunities for Women* (1996); National Foundation for Women Business Owners and Dunn & Bradstreet Information Services, *Women-Owned Businesses: A Report on the Progress and Achievement of Women-Owned Enterprises—Breaking the Boundaries* (1995); *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 103d Cong., 2d Sess. (1994).

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

I. Survey of the Legislative Record

In evaluating the evidentiary predicate for affirmative action in federal procurement, it is highly significant that the measures have been authorized by Congress, which has the unique and express constitutional power to pass laws to ensure the fulfillment of the guarantees of racial equality in the Thirteenth and Fourteenth Amendments.⁷ These explicit constitutional commands vest Congress with the authority to remedy discrimination by private actors, as well as state and local governments.⁸ Congress may also exercise its constitutionally grounded spending and commerce powers to ensure that discrimination in our nation is not inadvertently perpetuated through government procurement practices.⁹ In exercising its remedial authority, Congress need not target only deliberate acts of discrimination. It may also strive to eliminate the effects of discrimination that continue to impair opportunity for minorities, even in the absence of ongoing, intentional acts of discrimination.¹⁰ Furthermore, in combatting discrimination and its effects, Congress has the latitude to develop national remedies for national problems. Congress need not make findings of discrimination with the same degree of precision as do state or local governments. Nor is it obligated to

⁷ See *Crosan*, 488 U.S. at 488 (plurality opinion); *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980) (plurality opinion); *id.* at 500 (Powell, J., concurring); see also *Adarand*, 115 S. Ct. at 2114; *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990); *id.* at 605-06 (O'Connor, J., dissenting); cf. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1125 (1996) (reaffirming that broad grant of remedial power under Section 5 of the Fourteenth Amendment enables Congress to override state sovereign immunity).

⁸ See *Crosan*, 488 U.S. at 490 (plurality opinion); *Fullilove*, 448 U.S. at 476-78 (plurality opinion); *id.* at 500 (Powell, J., concurring); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); see also *Adarand*, 115 S. Ct. at 2126 (Stevens, J., dissenting); *Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., dissenting).

⁹ See *Crosan*, 488 U.S. at 492 (plurality opinion) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."); see also *Metro Broadcasting*, 497 U.S. at 563-64; *Fullilove*, 448 U.S. at 473-76 (plurality opinion).

¹⁰ See *Adarand*, 115 S. Ct. at 2117 (Congress may adopt affirmative action to remedy "both the practice and the lingering effects of discrimination"). Accord *id.* at 2133 (Souter, J., dissenting) (government may act to redress effects of discrimination "that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination").

make findings of discrimination in every industry or region that may be affected by a remedial measure.¹¹

Congress has repeatedly examined the problems that racial discrimination poses for minority-owned businesses. A complete discussion of the entire record of Congress in this area is beyond the scope of this memorandum.¹² The

¹¹ *Crosan*, 488 U.S. at 490, 504; *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring).

¹² Congressional hearings on the subject from 1980 to the present include the following: *The Small Business Administration's 8(a) Minority Business Development Program: Hearing Before the Senate Comm. on Small Business*, 104th Cong., 1st Sess. (1995); *Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993); *Department of Defense: Federal Programs to Promote Minority Business Development: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993); *SBA's Minority Business Development Program: Hearing Before the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993); *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 103d Cong., 1st Sess. (1993); *Fiscal Economic and Social Crises Confronting American Cities: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 2d Sess. (1992); *Small Disadvantaged Business Issues: Hearing Before the Investigations Subcomm. of the House Comm. on Armed Services*, 102d Cong., 1st Sess. (1991); *Federal Minority Business Programs: Hearing Before the House Comm. on Small Business*, 102d Cong., 1st Sess. (1991); *To Amend the Civil Rights Act of 1964: Permitting Minority Set-Asides: Hearing Before the Senate Comm. on Governmental Affairs*, 101st Cong., 2d Sess. (1990); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. of Small Business*, 101st Cong., 2d Sess. (1990); *Minority Business Set-Aside Programs: Hearing Before the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1990); *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989); *Surety Bonds and Minority Contractors: Hearing Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988); *Twenty Years after the Kerner Commission: The Need for a New Civil Rights Agenda: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the 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 Projects: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988); *The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Small Business Problems: Hearings Before the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987);

theme that emanates from this record is unequivocal: Congress has adopted race-conscious remedial measures in procurement directly in response to its findings that "widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority-owned business to have an equal chance at developing in our economy."¹³ Furthermore, Congress has recognized that expanding opportunities for minority-owned businesses in government procurement helps to bring into mainstream public contracting networks firms that otherwise would be excluded as a result of discriminatory barriers. In light of Congress' expansive remedial charter, it is a fundamental principle that courts must accord a significant degree of deference to those findings and the attendant judgment of the Congress that remedial measures in government procurement are warranted.¹⁴

Minority Business Development Act: Hearing Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program: Hearings Before the Senate Comm. on Small Business, 100th Cong., 1st Sess. (1987); Minority Enterprise and General Small Business Problems: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Senate Comm. on Small Business, 99th Cong., 2d Sess. (1986); The State of Hispanic Small Business in America: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 1st Sess. (1985); Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program: Hearings Before the Senate Comm. on Small Business, 98th Cong., 1st Sess. (1983); Minority Business and Its Contribution to the United States Economy: Hearing Before the Senate Comm. on Small Business, 97th Cong., 2d Sess. (1982); Small Business and the Federal Procurement System: Hearings Before the Subcomm. on General Oversight of the House Comm. on Small Business, 97th Cong., 1st Sess. (1981); Small and Minority Business in the Decade of the 1980's (Part I): Hearings Before the House Comm. on Small Business, 97th Cong., 1st Sess. (1981); Small Business and the Federal Procurement System: Hearings Before the Subcomm. on General Oversight of the House Comm. on Small Business, 97th Cong., 1st Sess. (1981); To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearings on H.R. 5612 Before the Senate Select Comm. on Small Business, 96th Cong., 2d Sess. (1980).

¹³ *Affirmative Action Review: Report to the President 55 (1995).*

¹⁴ See *Crason*, 488 U.S. at 488-90 (plurality opinion); *Fullilove*, 448 U.S. at 472-73 (plurality opinion); *id.* at 508-10 (Powell, J., concurring); see also *Metro Broadcasting*, 497 U.S. at 563; *id.* at 605-

The relevant congressional findings encompass a broad range of problems confronting minority-owned businesses. They include "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses."¹⁵

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

¹⁵ *Fullilove*, 448 U.S. at 467 (plurality opinion). This principle was not disturbed by the Supreme Court's ruling in *Adarand*; thus, it continues to have force, even under strict scrutiny. See *Adarand*, 115 S. Ct. at 2114; *id.* at 2126 (Stevens, J., dissenting); *id.* at 2133 (Souter, J., dissenting).

¹⁶ *Fullilove*, 448 U.S. at 467 (plurality opinion).

¹⁷ That program targets federal procurement opportunities for small firms owned and controlled by individuals who are socially and economically disadvantaged. See 15 U.S.C. § 637(a). Members of certain minority groups are presumed to be socially disadvantaged. 13 C.F.R. Pt. 124.

¹⁸ 15 U.S.C. § 644(g).

¹⁹ H.R. Rep. No. 468, 94th Cong., 1st Sess. 2 (1975).

²⁰ S. Rep. No. 1070, 95th Cong., 2d Sess. 14 (1978). See also H.R. Rep. No. 949, 95th Cong., 2d Sess. 8 (1978).

²¹ Pub. L. No. 95-507, § 201, 92 Stat. 1757, 1760 (1978). See 124 Cong. Rec. 35,204 (1978) (statement of Sen. Welcker) (commenting on the introduction of the conference report on the 8(a) legislation and observing that the report recognizes the existence of a "pattern of social and economic discrimination that continues to deprive racial and ethnic

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

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

minorities of the opportunity to participate fully in the free enterprise system"). In the same year it passed the 8(a) legislation, Congress considered an additional bill that sought to target federal assistance to minority-owned firms. In introducing that measure, Senator Dole remarked that "minority businessmen can compete equally when given equal opportunity. One of the most important steps this country can take to insure equal opportunity for its hispanic, black and other minority citizens is to involve them in the mainstream of our free enterprise system." 124 Cong. Rec. 7681 (1978).

²¹ H.R. Rep. No. 460, 100th Cong., 1st Sess. 16, 18 (1987). See 133 Cong. Rec. 37,814 (1987) (statement of Sen. Bumpers) (discussing proposed revisions to 8(a) program and commenting that minorities "continue to face discrimination in access to credit and markets"); *id.* at 33,320 (statement of Rep. Conte) (discussing proposed revisions to 8(a) program and commenting that effects of discrimination continued to be felt, and that 8(a) amendments were needed to "create a workable mechanism to finally redress past discriminatory practices"). See generally S. Rep. No. 394, 100th Cong., 2d Sess. (1988); *The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Comm. on Small Business, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings Before the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); Minority Business Development Act: Hearing Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. (1987); Minority Enterprise and General Small Business Problems: Hearings Before the Senate Comm. on Small Business, 100th Cong., 1st Sess. (1987); Minority Enterprise and General Small Business Problems: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Senate Comm. on Small Business, 99th Cong., 2d Sess. (1986); *The State of Hispanic Small Business in America: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 1st Sess. (1985).**

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

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

²² S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). The DoT goals were initially established in the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097 (1982). They were continued in the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145 (1987). Congress held further hearings on the subject after passage of STURAA. See *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988). Congress subsequently reauthorized the goals in the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1914, 1919 (1991). See 137 Cong. Rec. S7571 (June 12, 1991) (statement of Sen. Simpson) (expressing support for continuation of disadvantaged business program at Transportation Department).

Congress has established comparable initiatives to encourage disadvantaged business participation in grant programs administered by the Environmental Protection Agency (EPA). For example, recipients of grants awarded by EPA under the Clean Air Act are required to set disadvantaged business goals. See 42 U.S.C. § 7601 note; see also 42 U.S.C. § 4370d (establishing an SDB goal for recipients of EPA funds used in support of certain environmental-related projects); H.R. Rep. No. 226, 102 Cong., 1st Sess. 48 (1991).

²³ 10 U.S.C. § 2323.

²⁴ See H.R. Rep. No. 332, 99th Cong., 1st Sess. 139-40 (1985) (if disadvantaged firms had been able to "participate in the 'early' development of major Defense systems, they would have had an opportunity to gain the expertise required to bid on such contracts"); see also H.R. Rep. No. 450, 99th Cong., 1st Sess. 179 (1985); 131 Cong. Rec. 17,445-17,448 (1985); H.R. Rep. No. 1086, 98th Cong., 2d Sess. 100-01 (1984).

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

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

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

²⁵ See 131 Cong. Rec. 17,447 (1985) (statement of Rep. Conyers) (affirmative action needed to break down "buddy-buddy contracting" at the Defense Department, "which has the largest procurement program in the Federal Government"); *id.* (statement of Rep. Schroeder) (an "old boy's club" in Defense Department contracting excludes many minorities from business opportunities); see also *Department of Defense: Federal Programs to Promote Minority Business Development: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. 49 (1993) (statement of Rep. Roybal-Allard) ("Old attitudes and old habits die hard * * *. Defense contracting has, traditionally, been a closed shop. Only a select few need apply. Since the passage of the minority contracting opportunity law, some progress has been made."); H.R. Rep. No. 1086, 98th Cong., 2d Sess. 100-101 (1984) (low level of participation by disadvantaged firms in Defense Department contracting indicated a need to expand procurement opportunities at that agency for such firms).

²⁶ H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994).

²⁷ 140 Cong. Rec. H9242 (Sept. 20, 1994) (statement of Rep. Dellums).

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

²⁸ Beginning with the Small Business Act of 1953, Congress has authorized numerous programs to "aid, counsel, assist, and protect * * * the interests of small-business concerns" and "insure that a fair proportion of the total purchases and contracts for supplies and services for the government be placed with small-business enterprises." Pub. L. No. 163, § 202, 67 Stat. 232 (1953). After recognizing in the 1960s the specific problems facing minority owned businesses, Congress attempted to address them through race-neutral measures. For example, in 1971, Congress amended the Small Business Investment Act to create a surety bond guarantee program to assist small businesses that have trouble obtaining traditional bonding. In 1972, Congress created a new class of small business investment companies to provide debt and equity capital to small businesses owned by socially and economically disadvantaged individuals. And over the years, Congress has continuously reviewed and strengthened programs to assist all small businesses through the Small Business Act. See e.g. Pub. L. No. 93-386, 88 Stat. 742 (1974); Pub. L. No. 94-305, 90 Stat. 663 (1976); Pub. L. No. 95-89, 91 Stat. 553 (1977).

²⁹ *Crosen*, 488 U.S. at 550 (Marshall, J., dissenting). Accord *Fullilove*, 448 U.S. at 467. (plurality opinion); *id.* at 511 (Powell, J., concurring); see also *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 48 (1990) (statement of Ray Marshall); H.R. Rep. No. 468, 94th Cong., 1st Sess. 32 (1975).

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

³¹ *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. 57, 62-90 (1990); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 39-44 (1990) (statement of Andrew Brimmer).

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

II. Discriminatory Barriers to Minority Contracting Opportunities

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

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

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

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

The following provides an overview of both categories of evidence.

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

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

- Minorities make up more than 20 percent of the population; yet, minority-owned businesses are only 9 percent of all U.S. businesses and receive less than 4 percent of all business receipts.³³
- Minority firms have, on average, gross receipts that are only 34% of that of nonminority firms.³⁴
- The average payroll for minority firms with employees is less than half that of nonminority firms with employees.³⁵

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

³² *Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the House Comm. on Small Business, 97th Cong., 1st Sess. 4 (1981)*. See also H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994).

³³ United States Commission on Minority Business Development, *Final Report 2-6* (1992). These statistics are based on 1987 census data, the most recent full data available regarding the status of minority-owned businesses. Preliminary reports from 1992 census data reveal that the status of minority firms has not significantly improved. For instance, African Americans are 12 percent of the population but, in 1992, owned only 3.6% of all businesses (up from 3.1% in 1987) and received just 1 percent of all U.S. business receipts (which is the same level as in 1987).

³⁴ *Id.* at 3.

³⁵ *Id.* at 4.

³⁶ *Id.* at 60.

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

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

1. Discrimination by Trade Unions and Employers

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

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

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

³⁹ Samuel Doctors & Anne Huff, *Minority Enterprise and the President's Council 4-6* (1973) (quoted in Tuchfarber et al., *City of Cincinnati: Croson Study 150* (1992)).

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

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

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

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

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

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

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

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

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

(1971). See also *Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980) (selection criteria, including aptitude test, and the requirement of a high school diploma as a condition of eligibility were discriminatory).

⁴⁶ *United States v. Iron Workers Local 86*, 443 F.2d 544, 548 (9th Cir.) (differential application and admissions requirements between whites and blacks; spurious reasons given for rejections of blacks), cert. denied, 404 U.S. 984 (1971); *Stms v. Sheet Metal Workers Int'l Ass'n*, 489 F.2d 1023 (6th Cir. 1973) (union waived requirements for white applicants).

⁴⁷ *United States v. United Bhd. of Carpenters and Joiners of America*, 457 F.2d 210, 215 (7th Cir.) cert. denied, 409 U.S. 851 (1972) (family relation requirement excluded minorities from Carpenters trade); *United States v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 438 F.2d 679, 683 (7th Cir.) (requiring family relationships between new and existing members "effectively precluded non-white membership") cert. denied, 404 U.S. 830 (1971); *Asbestos Workers, Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (rule restricting membership to sons or close relatives of current members perpetuated the effect of past exclusion of minorities).

⁴⁸ *Jaynes Associates, Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 24 (1989) (citing findings of President's Commission on Equal Opportunity).

⁴⁹ Steve Askin & Edmund Newton, *Blood, Sweat and Steel*, Black Enterprise, Vol. 14, at 42 (1984).

⁵⁰ Department of Labor Memorandum from Arthur Fletcher to All Agency Heads (1969) (cited in *Affirmative Action Review: Report to the President* 11 (1995)) (introducing the "Philadelphia Plan" requiring the use of affirmative action goals and timetables in construction, Secretary Fletcher noted that "equal employment opportunity in these trades in the Philadelphia area is still far from a reality. * * * We find, therefore, that special measures are required to provide equal opportunity in these seven trades").

⁵¹ See *Pennsylvania v. Operating Eng'rs, Local 542*, 469 F. Supp. 329, 339 (E.D. Pa. 1978) (unions

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

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

held liable for racial discrimination in employee referral procedures and practices); Waldinger & Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, Politics and Society, Vol. 19, No. 3, at 299 (1991) ("Despite rules and formal procedures, informal relationships still dominate the union sector's employment processes."); Edmund Newton, *Steel, The Union Field*, Black Enterprise, Vol. 14, at 46 (1984) (discrimination in operation of hiring halls "operated as impenetrable barriers" to minority job seekers). See generally Barbara Lindeman Schlei & Paul Grossman, *Employment Discrimination Law* 619-28 (1983).

⁵² *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n. 1 (1979).

⁵³ *Taylor v. United States Dept. of Labor*, 552 F. Supp. 728, 734 (E.D. Pa. 1982). See *Minority Business Participation in Department of Transportation Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 201 (1985) (testimony of James Haughton) (minority contractors continue to "suffer[] heavily because they have been victims to that discrimination as practiced by the unions"); Division of Minority and Women's Business Development, *Opportunity Denied! A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State* 41 (1992) ("At least seven reports were issued by federal, state and city commissions and agencies between 1963 and 1982 documenting the pattern of racial exclusion from New York's skilled trade unions by constitution and by-law provisions, member sponsorships rules, subjective interview tests and other techniques, as well as the complicity of construction contractors and the acquiescence of government agencies in those practices.").

⁵⁴ 478 U.S. 421 (1986)

⁵⁵ *Id.* at 476.

⁴¹ Samuel Doctors & Anne Huff, *Minority Enterprise and the President's Council* 4-6 (1973) (quoted in Tuchfarber et al., *City of Cincinnati: Croson Study* 150 (1992)).

⁴² *Affirmative Action Review: Report to the President* 7 (1995).

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

⁴⁴ S. Rep. No. 872, 88th Cong., 1st Sess. 1 (1964); See, e.g., Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. VII, 11-17 (1990) (In 1963, minorities were prohibited from joining Atlanta unions representing plumbers, electricians, steel workers and bricklayers); TEM Associates, *Minority/Women Business Study: Revised Final Report, Phase I, Volume I* 3-13 ("In 1963, not one of the 1,000 persons in apprenticeship training in Dade County was Black, and the Miami Sheet Metal Workers local, like most other trade unions, was all white.").

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

union for decades. Such exclusion continued notwithstanding the passage of Title VII and a series of administrative and judicial findings in the 60s and 70s that the local had engaged in blatant discrimination in shutting minorities out of the program. Indeed, even into the 80s, the local persisted in violating court orders to open up the program to minorities.⁵⁶

More recently, a Yale University economist prepared a report documenting the history of discrimination by New Haven unions that "confirms the nationwide pattern of discrimination."⁵⁷ Prior to the passage of the Civil Rights Act of 1964, New Haven's unions prohibited minority membership, and minority workers were almost completely segregated into jobs that whites would not take because they required working under conditions of extreme heat or discomfort.⁵⁸ After passage of the Civil Rights Act, minorities were prevented from entering unions by a rule requiring that at least three current members sponsor the application of any new member.⁵⁹ Although the policy was race-neutral on its face, "it was almost impossible to find three members who would nominate a minority [and] stand up for him in a closed meeting when other members would undoubtedly attack the candidate and his sponsors."⁶⁰ This and other discriminatory policies prevented all but five African Americans from joining the 1,216 white members of the highest paid skilled trade unions in 1967, and throughout the mid-70s, unions and apprenticeship programs remained virtually all-white.⁶¹ The report concluded that the history of "blocked access to the skilled trades is the most important explanation of the low numbers of minority and women construction contractors today."⁶²

⁵⁶ *Id.* at 433-34.

⁵⁷ Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 25-26 (1989).

⁵⁸ *Id.* at 26-27.

⁵⁹ *Id.* at 28.

⁶⁰ *Id.* at 28.

⁶¹ *Id.* at 33; New Haven Board of Aldermen, *Minority and Women Business Participation in the New Haven Construction Industry: Committee Report 7* (1990).

⁶² Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 34 (1989). Comparable conclusions about the impact of trade union discrimination have been reached in studies from other jurisdictions around the country. See, e.g., D.J. Miller & Associates, *et al.*, *The Disparity Study for Memphis Shelby County Intergovernmental Consortium* 11-46 (Oct. 1994) ("In Memphis, trade unions have historically discriminated against African Americans."); *Report of the Blue Ribbon Panel to the Honorable Richard M. Daley, Mayor of the City of Chicago* 43 (March

There is no doubt that trade unions have put much of the discriminatory past behind them, and they now provide an important source of opportunity for minorities. Some barriers to full opportunity remain, however.⁶³

A parallel history of discriminatory treatment by employers has prevented minorities from rising into the private sector management positions that are most likely to lead to self-employment. In 1972, Congress found that only 3.5 percent of minorities held managerial positions compared to 11.4 percent of white employees.⁶⁴ Congress attributed this underrepresentation to continued discriminatory conduct by "employers, labor organizations, employment agencies and joint labor-management committees."⁶⁵ Evidence derived from caselaw and academic studies shows a variety of discriminatory employment practices, including promoting white employees over more qualified minority employees;⁶⁶ relying on word-of-mouth recruiting practices that exclude minorities from vacancy announcements;⁶⁷ and creating

1990) ("The Task Force specifically notes the exclusion of minorities and women from the building trades."); National Economic Research Associates, *et al.*, *Availability and Utilization of Minority and Women-Owned Business Enterprises at the Massachusetts Water Resources Authority* 72 (Nov. 1990) ("A number of M/WBE owners complain that problems caused by unions are exacerbated by state bidding requirements that make it difficult or impossible for non-union firms to bid."); Coopers & Lybrand, *et al.*, *State of Maryland Minority Business Utilization Study* 9 (Feb. 1990) (discussing discriminatory union practices).

⁶³ See BPA Economics, *et al.*, *MBE/WBE Disparity Study of the City of San Jose* 1-34 (1990) ("When trying to join unions, minorities may face testing and experience requirements that are waived in the case of relatives of current union members."); Waldinger & Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction, Politics and Society*, Vol. 19, No. 3, at 296-97 (1991) ("In 1987, blacks averaged less than 80 percent of parity for all skilled trades with even lower levels of representation in the most highly paid crafts like electricians and plumbers."); *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and National Security Subcomm. of the Comm. on Government Operations*, 101st Cong., 2d Sess. 111-15 (1990).

⁶⁴ H.R. Rep. No. 238, 92d Cong., 2d Sess. 3 (1972).

⁶⁵ *Id.* at 7.

⁶⁶ See, e.g., *Winbush v. Iowa*, 69 FEP Cases 1348 (8th Cir. 1995) (evidence was "overwhelming" that employer had engaged in disparate treatment with respect to promotion of black employees); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (99 percent white management structure caused, in part, by promoting lesser qualified white employees over more qualified minorities).

⁶⁷ See, e.g., *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 313 (6th Cir. 1975), vacated and remanded on other grounds, 431 U.S. 951 (1977) (finding discrimination in "the practice of relying on referrals by a predominantly white work force"); *Long v. Sapp*, 502 F.2d 34, 41 (5th Cir. 1974) (word-of-mouth recruitment serves to perpetuate all-white

promotion systems that lock minorities into inferior positions.⁶⁸

A study published earlier this year surveyed a broad range of current labor market evidence and concluded that employment discrimination is "not a thing of the past."⁶⁹ Rather, race still matters when it comes to determining access to the best employment opportunities.⁷⁰ Progress has been made, of course. Yet, "more than three decades after the passage of the Civil Rights Act, segregation by race and sex continues to be the rule rather than the exception in the American workplace, and discrimination still reduces the pay and prospects of workers who are not white or male."⁷¹ The exclusionary conduct frequently is not deliberate, and the people on top—who are mostly white and male—often believe that they are behaving fairly. But old habits die hard: reliance on outmoded stereotypes and group reputations, and the persistence of "invisible biases" work to perpetuate a system that creates disadvantages in employment for minorities today.⁷²

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

work force); *Thomas v. Washington County Sch. Bd.*, 915 F.2d 922 (4th Cir. 1990). See also Univ. of Mass., *Barriers to the Employment and Work-Place Advancement of Latinos: A Report to the Glass Ceiling Commission* 52 (Aug. 1994) (word-of-mouth recruiting methods that rely on social networks are a significant "exclusionary barrier" to employment opportunities for minorities); Roosevelt Thomas, *et al.*, *The Impact of Recruitment, Selection, Promotion and Compensation Policies and Practices on the Glass Ceiling*, submitted to U.S. Department of Labor Glass Ceiling Commission, 14 (April 1994) (noting that "recruitment practices primarily consist[ing] of word-of-mouth and employee referral networking * * * promote the filling of vacancies almost exclusively from within. If the environment is already homogenous, which many are, it maintains this same 'home-grown' environment"); Gertrude Ezorsky, *Racism and Justice: The Case for Affirmative Action* 14-18 (1991); U.S. Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* 8 (1981); Barbara Lindeman Schiel & Paul Grossman, *Employment Discrimination Law* 571 (1983).

⁶⁸ See, e.g., *Paxton v. Union National Bank*, 688 F.2d 552, 565-566 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983); *Sears v. Bennett*, 645 F.2d 1365 (10th Cir. 1981) (system requiring that porters, all of whom were black, forfeit seniority when changing jobs designed to prevent promotion of black employees), cert. denied, 456 U.S. 964 (1982); *Terrell v. U.S. Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981) (seniority system created for clearly discriminatory purposes), vacated on other grounds, 456 U.S. 955 (1982). See also Ella Bell & Stella Nkomo, *Barriers to Workplace Advancement Experienced by African Americans* 3 (1994) ("African Americans * * * are functionally segregated into jobs less likely to be on the path to the top levels of management.")

⁶⁹ Barbara Bergmann, *In Defense of Affirmative Action* 32-33 (1996).

⁷⁰ *Id.* at 33.

⁷¹ *Id.* at 62.

⁷² *Id.* at 63-82.

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

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

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

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

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

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

⁷⁶ *Id.* at 111.

⁷⁷ *Id.* at 9.

⁷⁸ *Id.* at iv–vi.

⁷⁹ *Id.* at 15–16.

⁸⁰ *Id.* at 13.

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

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

2. Discrimination by Lenders

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

⁸¹ *Id.* at 10–11.

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

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

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

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

⁸⁴ *Availability of Credit to Minority and Women-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking*, 103d Cong., 2d Sess. 6 (1994) (statement of Andrew Hove). One reason that minorities starting small businesses are especially reliant on bank lending is because they traditionally lack personal wealth or access to other sources of private credit, such as loans from family or friends. See generally Oliver & Shapiro, *Black Wealth/White Wealth* (1993).

⁸⁵ See *The Wall Street Journal Reports: Black Entrepreneurship R.1* (1992) (Roper Organization poll of 472 minority business owners listed access to capital as the primary barrier to their business development); United States Commission on Minority Business Development, *Final Report 12* (1992) (“One of the most formidable stumbling blocks to the formation and development of minority businesses is the lack of access to capital.”).

⁸⁶ See *Availability of Credit to Minority and Women-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking*, 103d Cong., 2d Sess. 27 (1994) (statement of Wayne Smith) (while perhaps more subtle than discrimination in mortgage lending, discrimination in business lending exists); H.R. Rep. No. 870, 103d Cong., 2d Sess. 7 (1994) (“There is a widespread reluctance on the part of the commercial banking * * * and capital markets to take the same risks with a [minority] entrepreneur that they would readily do with a white one.”); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. 26 (1988) (statement of Joann Payne) (“[b]ecause of the ethnic and sex discrimination practiced by lending institutions, it was very difficult for minorities and women to secure bank loans.”); *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 363 (1985) (statement of James Laducer) (North Dakota banks “refuse to lend monies to minority businesses from nearby Indian communities”); see also *Fiscal Economic and Social Crises Confronting American Cities: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 2d Sess. (1992); *Federal Minority Business Programs: Hearing Before the House Comm. on Small Business*, 102d Cong., 1st Sess. (1991); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. (1990); *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy and Minority Enterprise Development of the House Comm. on Small Business*, 101 Cong., 1st Sess. (1989).

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

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

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

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

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

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

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

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

Our nation's history has created a "cycle of negativity" that reinforces prejudice through its very practice; restraints on capital availability lead to failures, in turn, 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.⁹⁷

B. Discrimination in Access to Contracting Markets

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

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

1. Discrimination by Prime Contractors and Private Sector Customers

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

⁹⁸ See New Haven Board of Aldermen, *Minority and Women Business Participation in the New Haven Construction Industry* 10 (1990) ("The construction industry in New Haven remains to a large extent a closed network of established contractors and subcontractors who have close long-term relationships and are highly resistant to doing business with 'outsiders.'"); Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. II, 61 (1990) (member of trade association testified that "contractors develop good working relationships with certain subcontractors and tend to use them repeatedly, even in a few cases when their prices are just a little bit higher than other subcontractors").

⁹⁹ See National Economic Research Associates, *The State of Texas Disparity Study: A Report to the Texas Legislature as Authorized by H.B. 2626, 73rd Legislature* 148 (1994) ("African American owner * * * told by an employee of a prime contractor that the contractor prefers to work with [nonminority-owned firms] and works with [minority-owned firms] only when required to do so."); D.J. Miller & Associates, *Disparity Study for Memphis/Shelby County Intergovernmental Consortium VII-10* (1994) ("Majority companies will not do business with [minority-owned businesses] because they lack confidence in [them] and are not willing to go beyond those businesses with whom they have a 10 to 15 year relationship."); Brown, Botz & Coddington, *Disparity Study: City of Phoenix VIII-10* (July 1993) ("From the responses of a number of MBE/WBEs, another form of marketplace discrimination that severely hampers their access to the marketplace is denial of the opportunity to bid. This may occur in a variety of ways, including, but not limited to, the use of non-competitive procurement and selection procedures, as well as intentional acts of rejection."); National Economic Research Associates, *The Utilization of Minority and Woman-Owned Businesses by Contra Costa County: Final Report* ix, xiii (1992) (70 percent of minority-owned firms reported seldom or never being used for contracts that do not contain affirmative action requirements); National Economic Research Associates, *The Availability and Utilization of Minority-Owned Business Enterprises at the*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ There is also evidence that minorities face discrimination in mortgage lending. See Munnell et al., *Mortgage Lending in Boston: Interpreting the HMDA Data*, 86 Am. Econ. Rev. 25 (1996) (finding that minority applicants were 60 percent more likely to be rejected for a mortgage loan than white males with identical characteristics, including age, income, wealth, and education). This serves to aggravate the problems that minorities face in seeking business loans, because an important source of collateral for such loans to a new firm is the home of the owner of the firm. Thus, mortgage discrimination that impedes the ability of minorities to obtain loans to purchase homes (or drives them to purchase less valuable homes than they otherwise would) diminishes their ability to post collateral for business loans.

⁹⁷ United States Commission on Minority Business Development, *Final Report* 6 (1992). While the nation has made great strides in overcoming racial bias, the Commission's apt characterization of the debilitating effects of lending discrimination mirrors the description of the problem in a landmark monograph written over one-half century ago:

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

Gunnar Myrdal, *An American Dilemma: The Negro and Modern Democracy* 308 (6th ed. 1944).

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

⁸⁸ Crown & Bates, *Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies*, Journal of Urban Affairs, Vol. 14, No. 1, at 34 (1992).

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

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

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

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

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

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

Massachusetts Water Resources Authority 74 (1992) (55 percent of minority-owned construction firms reported that prime contractors that use their firms on contracts with affirmative action requirements seldom or never used their firms on projects that do not contain such requirements); *A Study to Identify Discriminatory Practices in the Milwaukee Construction Marketplace* 125 (Feb. 1990) ("Only 18% of black contractors currently have private sector contracts with primes with which they have worked on public sector contracts with MBE requirements."); see also *Coral Constr. Co. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (noting reports that nonminority firms in the county refused to work with minority firms); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 983 (1990) (noting reports that when minority contractors in the county "approached prime contractors, some prime contractors either were unavailable or would refuse to speak to [the minority contractors]");

¹⁰⁰ See *Associated Gen. Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1416 (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992) (noting reports that local minority firms were "denied contracts despite being the low bidder," and "refused work even after they were awarded the contracts as low bidder"); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 983 (1990) ("[c]ontrary to their practices with non-minority subcontractors," local prime contractors would take minority subcontractors' bids "around to various non-minority subcontractors until they could find a non-minority to underbid [the minority firm]"); BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas IX-12* (1992) (low bidding Hispanic contractor told that he was not given subcontract because the prime contractor "did not know him" and that the prime "had problems with minority subs in the past"); BPA Economics, *MBE/WBE Disparity Study for the City of San Jose* (Vol. J) III-1 (1990) (describing practices contributing to low utilization in construction contracts as including "bid shopping, insufficient distribution of notices of contracts [and] insufficient lead time to prepare bids"); BBC Research and Consulting, *The City of Tucson Disparity Study IX-9-IX-11* (June 1994) (same).

¹⁰¹ See, e.g., *How State and Local Governments Will Meet the Croson Standard: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 54 (1989) (statement of Marc Bendick) ("[t]he same prime contractor who will use a minority subcontractor on a city contract and will be terribly satisfied with the firm's performance, will simply not use that minority subcontractor on a private contract where the prime contractor is not forced to use a minority firm."); *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and National Security Subcomm. of the Comm. on Government Operations*, 101st Cong., 2d Sess. 57 (1990) (statement of Gloria Molina); *id.* at 100-101 (statement of E.R. Mitchell); *id.* at 113 (statement of Manuel Rodriguez); *A Bill to Reform the Capital*

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

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

2. Discrimination by Business Networks

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

Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation and Minority Enterprise Development of the House Comm. on Small Business, 100th Cong., 1st Sess. 593 (1987) (statement of Edward Irons); *Small Disadvantaged Business Issues: Hearings Before the Investigations Subcomm. of the House Comm. on Armed Services*, 100th Cong., 1st Sess. 19-23 (1991) (statement of Parren Mitchell);

¹⁰² Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. I, 9-10 (1990). See also D.J. Miller & Associates, *City of Dayton: Disparity Study* 183 (1991) ("A small percentage of Black firms' revenues come from private sector projects.");

¹⁰³ Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. III, 15, 34 (1990).

¹⁰⁴ New Haven Board of Aldermen, *Minority and Women Participation in the New Haven Construction Industry* 10 (1990).

¹⁰⁵ National Economic Research Associates, *The Utilization of Minority and Women-Owned Businesses by the City of Hayward* 6-23 (1993).

¹⁰⁶ See BBC Research and Consulting, *City of Tucson Disparity Study IX-23* (1994).

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

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

¹⁰⁷ Bailey & Waldinger, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction, Politics and Society*, Vol. 19, No. 3, 298 (1991). See Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. II, 35 (1990) ("Most job seekers find their jobs through informal channels. So too it is with construction markets, especially in the private sector.");

¹⁰⁸ *Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. 127 (1988) (statement of Parren Mitchell). See H.R. Rep. No. 870, 103d Cong., 2d Sess. 15 n.36 ("The construction industry is close-knit; it is family dominated (and reflects an old buddy network. Minorities and women, unless they are part of construction families, have been and will continue to be excluded whenever possible."); *Minorities and Franchising: Hearings Before the House Comm. on Small Business*, 102d Cong., 1st Sess. 54 (1991) (statement of Rep. LaFalce) (discussing "problems relating to exclusion of minorities or groups of minorities from franchise systems"); 131 Cong. Rec. 17,447 (1985) (statement of Rep. Schroeder) (an "old boy's club" excludes many minorities from business opportunities).

¹⁰⁹ See, e.g., *Associated Gen. Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (1991) (municipal study showed that there "continued to operate an 'old boy network' in awarding contracts, thereby disadvantaging (minority firms)"); cert. denied, 503 U.S. 985 (1992); BBC Research & Consulting, *The City of Tucson Disparity Study* 202 (1994) (citing "numerous detailed examples of the exclusionary operation of good old boy networks"); National Economic Research Associates, *The Utilization of Minority and Women Owned Business Enterprises by the Southeastern Pennsylvania Transportation Authority* 107 (1993) (exclusion from "old-boy

Continued

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

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

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

¹¹⁰ *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) (finding that district court's "failure to order (word-of-mouth recruitment practices) to be supplemented by affirmative action * * * was clearly an abuse of power"). See National Economic Research Associates, *Availability and Utilization of Minority and Women Owned Business Enterprises at the Massachusetts Water Resources Authority 74* (1990) (finding that minorities "need to spend much more time and money on marketing because they do not have established networks and reputations"); Minority Business Enterprise Legal Defense and Education Fund, *An Examination of Marketplace Discrimination in Durham County 16* (1991) (citing "numerous allegations that black contractors * * * learned of bid opportunities much later than their white competitors that are tied into the 'good old boy' network").

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

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

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

3. Discrimination in Bonding and By Suppliers

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

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

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

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

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

¹¹⁶ H.R. Rep. No. 870, 103d Cong. 2d Sess. 15 (1994).

¹¹⁷ See *Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. 2 (1993) (statement by Rep. Kweisi Mfume) ("Similarities between a banker's ability to make arbitrary credit decisions and a surety producer or an underwriter's capability of injecting personal prejudice into the bonding process are compelling indeed."); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. 40 (1990) (statement of Andrew Brimmer); *Id.* at 165-66 (statement of Edward Bowen); *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. 107 (1988) (statement of Marjorie Herter) ("Discrimination against women and minorities in the bonding market is quite prevalent").

¹¹⁸ See Division of Minority and Women's Business Development, *Opportunity Denied! A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State*, Executive Summary 57 (1992) (noting that 47 witnesses reported "specific incidents of racial discrimination * * * In attempting to secure performance bonds"); National Economic Research Associates, *The Utilization of Minority and Women-Owned Business Enterprises by Alameda County 202, 212* (June 1992) (nearly 50 percent of minority businesses reported experiencing bonding discrimination); National Economic Research Associates, *The Utilization of Minority and Women-Owned Business Enterprises by Costa County 231, 241* (May 1992) (noting evidence of bonding discrimination); Board of Education of the City of Chicago, *Report Concerning Consideration of the Revised Plan for Minority and Women Business Enterprise Economic Participation 316* (1991) ("Bonding is selectively and capriciously provided or denied with the decision being 85 percent subjective."); Mason Tillman Associates, *Sacramento Municipal Utility District, M/WBE Disparity Study 119, 135-43* (1990) (noting evidence of bonding discrimination).

¹¹⁹ D.J. Miller & Associates, *State of Louisiana Disparity Study Vol. 2*, pp. 35-57 (June 1991).

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

¹¹⁴ 40 U.S.C. §§ 270a-270e.

¹¹⁵ United States Congress, *Federal Compliance to Minority Set-Asides: Report to the Speaker, U.S. House of Representatives, by the Congressional Task Force on Minority Set-Asides 29* (1988). See also H.R. Rep. No. 870, 103d Cong., 2d Sess. 14 (1994) ("Inability to obtain bonding is one of the top three reasons that new minority small businesses have difficulty procuring U.S. Government contracts."); *Minority Business Participation in Department of Transportation Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 159 (1985) (statement of Sherman Brown) ("Virtually everyone connected with the minority contracting industry * * * apparently agrees that surety bonding is one of the biggest obstacles in the development of minority firms.")

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

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

¹²⁰ Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia*, Pt. III, 131-38 (1990).

¹²¹ *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.) cert. denied, 498 U.S. 983 (1990). Evidence of pricing discrimination outside the contracting setting indicates that the problem cuts across the economy. For example, a recent testing study of automobile purchases showed that, on average, black men were charged nearly \$1,000 more for cars than white men. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991).

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

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

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

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

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

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

¹²⁴ Brimmer & Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia* Pt. II, 76 (1990).

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

¹²⁶ In describing what it takes for the government to establish a remedial predicate in procurement, the Court in *Croson* said that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509.

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

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

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

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

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

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

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

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

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

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

- After the court of appeals decision in *Croson* invalidating the City of Richmond's minority business program in 1987, minority participation in municipal construction contracts dropped by 93 percent.¹³⁰

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

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

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

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

participation in the city's prime contracts.¹³⁴

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

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

¹³⁴ BPA Economics, et al., *MBE/WBE Disparity Study for the City of San Jose*, Vol. III, 118-19 (1990).

¹³⁵ The role of state and local governments in impeding contracting opportunities for minority firms is most directly addressed through federal programs that authorize recipients of federal funds to take affirmative action in their procurement activities. Those programs plainly are examples of the exercise of Congress' power under the Fourteenth Amendment to remedy discrimination by state and local governments. See *Adarand*, 115 S. Ct. at 2126 & n.9 (Stevens, J., dissenting). Since that same state and local conduct constitutes an impediment to minority opportunity in contracting markets in which the federal government does business, it also serves as a basis for affirmative action measures in the federal government's own procurement. Therefore, those measures too entail an exercise of Congress' authority under the Fourteenth Amendment. See *id.* at 2132 n.1 (Souter, J., dissenting) (for purposes of exercise of Congress'

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

III. Conclusion

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

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

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

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

¹³⁶ See *Croson*, 488 U.S. at 492.

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

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

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

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

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

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

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

BILLING CODE 4410-01-P

I support affirmative action. The persistence of discrimination and its effects and the need to build an inclusive society that will use the talents of all of our citizens require that affirmative action continue. Affirmative action must be done right. Quotas are wrong. Reverse discrimination is wrong. The Administration's Affirmative Action Review concluded that most affirmative action programs continue to help remedy discrimination and create a more inclusive society. I believe, therefore, that we must "mend it, not end it" and we are moving forward toward that objective.

PHOTOCOPY
PRESERVATION

Steve -

Let you a voicemail about
the attached. I need to know
if the attached needs to be
updated. It's going to "Senior
Staff" first thing in the AM.
Please let me know.

Don Collins
65681

AFFIRMATIVE ACTION/EQUAL OPPORTUNITY

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

President Bill Clinton
July 19, 1995

President Clinton believes there is still a need for affirmative action that is done right -- we need to mend it, not end it. As we approach the 21st century, President Clinton believes we must restore the American Dream to all Americans; find common ground amid our great diversity; and strengthen the American commitment to equal opportunity for all, special treatment for none.

A RECORD OF ACCOMPLISHMENT:

- **Done Right, Affirmative Action Works.** In 1995, President Clinton ordered a review of the federal government's affirmative action programs. That review concluded that affirmative action is still an effective tool to expand economic and educational opportunity:
 - The military's approach, ensuring it has a wide pool of qualified candidates for every promotion, has given us the world's most diverse and best qualified military leadership.
 - Education Department programs targeted at minorities do a lot of good with a small investment -- about 40 cents of every \$1,000 in student aid.
 - The goals and timetables first instituted by President Nixon for large federal contractors have prevented discrimination and fostered fairness-- without quotas or mandated outcomes.
 - "Set-asides" have helped build up firms owned by minorities and women who were historically excluded from the "old boy" network. They have helped a new generation of entrepreneurs to flourish, fostering self-reliance and economic growth.

- **Presidential Directive to Ensure Affirmative Action:** On July 19, 1995, President Clinton directed all federal agencies to comply with the Supreme Court's decision in Adarand and to apply four standards to make sure that all affirmative action programs are fair:
 - No quotas.
 - No reverse discrimination.
 - No preferences for unqualified individuals.
 - No continuation of programs that have met their goals.
 - Any program that does not meet any of these four principles must be eliminated or changed.

PHOTOCOPY
PRESERVATION

- **Reform "Set-Asides"**: To address cases where "set-asides" have been misapplied, misused or even intentionally abused, President Clinton ordered his Administration to:
 - Crack down on "set-aside" fraud and abuse to make sure "set-asides" go to businesses that need them most. No permanent "set-asides" for any company.
 - Comply with the Supreme Court's Adarand decision. Limit set-asides to areas where serious discrimination remains.
- **Helping Distressed Communities**: President Clinton has directed Vice President Gore to develop new ways to use government contracting to help businesses locate in distressed areas and hire workers from those areas.

THE CHALLENGES AHEAD:

We must not become the first generation of Americans since the end of Reconstruction to narrow the reach of equal opportunity. We must continue the struggle toward equal opportunity for all and special treatment for none. America cannot afford to waste a single person as we confront new challenges. Affirmative action has closed many gaps in economic opportunity, but we still have a long way to go. The unemployment rate for African-Americans remains about twice that of whites. Women still make only 72% as much as men. The federal government received more than 90,000 complaints of employment discrimination based on race, ethnicity and gender in 1994 and hate crimes and violence are still ugly realities in the lives of many Americans.

That is why President Clinton will continue to work to ensure equal opportunity for all Americans and to prevent this issue from dividing us. There are those who would use this issue to divide us. They must not succeed. America will survive and prosper as a society only if we are confident and united. Today in America, 150 racial and ethnic groups co-exist in harmony -- an achievement unmatched in human history. President Clinton believes we have a responsibility to renew and strengthen the ideals that fostered that unity.

Last Update: March 12, 1996

AFFIRMATIVE ACTION/EQUAL OPPORTUNITY

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

President Clinton, July 19, 1995

Overview

The President believes that there is still a need for affirmative action that is done right -- we need to mend it, not end it. As we approach the 21st century, the President believes we must restore the American Dream of opportunity; find Common Ground amid our great diversity of opinion and experience; and strengthen the American commitment to Equal Opportunity for all, special treatment for none.

Accomplishments

Presidential Directive to Ensure Affirmative Action. On July 19, 1995, the President directed all federal agencies to comply quickly with the Supreme Court's decision in Adarand and to apply four standards to make sure that all affirmative action programs are fair:

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

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

Reform "Set-Asides". To address cases where "set-asides" have been misapplied, misused or even intentionally abused, the President ordered that the Administration:

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

Background

Done Right, Affirmative Action Works. The Administration's review concluded that affirmative action is still an effective tool to expand economic and educational opportunity:

- o The military's approach, ensuring it has a wide pool of qualified candidates for every promotion, has given us the world's most diverse and best qualified military leadership.
- o Education Department programs targeted at minorities do a lot of

good with a small investment -- about 40 cents of every \$1,000 in student aid.

- o The goals and timetables first instituted by President Nixon for large federal contractors have prevented discrimination and fostered fairness-- without quotas or mandated outcomes.
- o "Set-asides" have helped build up firms owned by minorities and women who were historically excluded from the "old boy" network. They have helped a new generation of entrepreneurs to flourish, fostering self-reliance and economic growth.

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

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

Agenda

- Complete agency compliance with President's directive to ensure that Administration's programs conform to Adarand.
- Prevent this issue from dividing us. There are those who would use this issue to divide us. They must not succeed. America will survive and prosper as a society if we are confident and united. Today in America, 150 racial and ethnic groups co-exist in harmony -- an achievement unmatched in human history. President Clinton believes we have a responsibility to renew and strengthen the ideals that fostered that unity.

Stephen Warnath

PHOTOCOPY
PRESERVATION

AFFIRMATIVE ACTION

OPPORTUNITY FOR AMERICANS -- BUILDING A STRONGER NATION

Increasing opportunity for all Americans makes citizens more productive, building stronger communities and a stronger nation. This country has not yet achieved equality of opportunity or stamped out discrimination. We must help people develop their capacities so they can fully participate in our society.

This Administration is **against quotas** and guaranteed results. But we do need to guarantee a genuine equality of opportunity for all Americans.

There are affirmative action programs which have made a great deal of difference to the lives of Americans who have been disadvantaged and who, in turn, have made our country stronger.

THREE EXAMPLES

The best example is the United States military where an intense effort is made to develop peoples' capacities to fully participate and contribute as much as possible. Everyone is given a chance to rise as high as their abilities can take them. The military makes a special effort to make sure every time there is a promotion pool that it reflects the racial and gender makeup of the people in the rank just below. No unqualified person gets promoted, but the military works very hard to make sure that people's innate abilities get developed and that they get a chance. In education, training, leadership, development, the military is a model -- it looks like America and it works.

The Small Business Administration, under this Administration, last year increased loans to minorities by over two-thirds, to women by over 8 percent, and we didn't make a single loan to an unqualified person. We gave people who never had a chance before to get in business -- to help build the economy and create jobs.

This Administration has appointed more women and minorities to be Federal judges than the past three Presidents, one Democrat and two Republicans, combined. And this group has the highest percentage of judges rated well-qualified by the American Bar Association.

REVIEWING AFFIRMATIVE ACTION PROGRAMS

We don't have to retreat from affirmative action programs that have done great things for the American people and haven't hurt other people. We must defend without apology whatever is being done that is right and decent and just lifts people up. But we need to realize that there is a real problem that must be addressed. There are people who believe that they have been treated unfairly as a result of affirmative action.

The President has directed that the Administration undertake a review of all Federal affirmative action programs and ask: Does it work? Is it fair? Has there been any reverse discrimination? Is it necessary? Does it achieve the desired objective or is there an alternative way to achieve the objective without giving a preference by race or gender?

PROTECTING ALL CITIZENS AGAINST DISCRIMINATION

Improperly designed or implemented affirmative action plans weaken our national community. We want to support the programs that are working, but we want to get rid of ones that are not.

A NATIONAL CONVERSATION

This is an opportunity for a national conversation. This is an opportunity to have us do this together. Stand up for the affirmative action programs that are good, that work, that bring us together, but don't do it in a way that gives some an opportunity to exploit it for a cheap political victory.



Warrnath

Leadership Conference on Civil Rights

1629 "K" St., NW, Suite 1010
Washington, D.C. 20006
202/466-3311

FYI
RALPH

FOUNDERS:

Arnold Aronson
A. Philip Randolph*
Roy Wilkins*

OFFICERS

CHAIRPERSON

Dorothy I. Height

VICE CHAIRPERSONS

Antonia Hernandez

Judith L. Lichtman

William L. Taylor

SECRETARY

Horace Deets

TREASURER

Gerald W. McEntee*

LEGISLATIVE CHAIRPERSON

Jane O'Grady

COUNSEL EMERITUS

Joseph L. Rauh, Jr.*

HONORARY CHAIRPERSONS

Marvin Caplan

Benjamin L. Hooks

Clarence M. Mitchell, Jr.*

EXECUTIVE COMMITTEE

Barbara Arnwine

Lawyers' Committee For
Civil Rights Under Law

Owen Bieber

International Union of
United Automobile Workers

Becky Cain

League of Women Voters

Jackie DeFazio

American Association of University Women

Matthew Finucane

Asian Pacific American Labor Alliance

Keith Geiger

National Education Association

Eugene Glover

National Council of Senior Citizens

Marcia Greenberger

National Women's Law Center

Leslie Harris

People For The American Way

Wade Henderson

NAACP

Patricia Ireland

National Organization for Women

Elaine Jones

NAACP Legal Defense & Educational Fund, Inc.

Laura Murphy Lee

American Civil Liberties Union

Joseph Lowery

Southern Christian Leadership Conference

Leon Lynch

United Steelworkers of America

Robert L. Polk

National Council of Churches

Hugh Price

National Urban League

David Saperstein

Union of American Hebrew Congregations

Richard Womack

AFL-CIO

Harriett Woods

National Women's Political Caucus

Patrlsha Wright

Disability Rights Education and Defense Fund

Raul Yzaguirre

National Council of La Raza

Daniel Zingale

Human Rights Campaign Fund

**COMPLIANCE/ENFORCEMENT
COMMITTEE**

Karen Narasaki, Chairperson

STAFF

ACTING EXECUTIVE DIRECTOR

Richard Womack

ADMINISTRATIVE ASSISTANT

Lisa M. Haywood

POLICY/RESEARCH ASSOCIATE

Karen McGill Arrington

(*Deceased)

"Equality In a Free, Plural, Democratic Society"



Leadership Conference on Civil Rights

1629 "K" St., NW, Suite 1010
Washington, D.C. 20006
202/466-3311

MEMORANDUM

FYI

To: Members of the Press
From: Ralph G. Neas
Date: 3-22-95

Recently, the Executive Order on Affirmative Action (11246) has become part of the debate on affirmative action. Along with the Voting Rights Act of 1965, the Executive Order on Affirmative Action is perhaps the nation's most important and effective civil rights program over the past thirty years. Literally millions of women and minorities have been given an opportunity to compete in the workplace thanks to the Executive Order. The heart and soul of the Executive Order, the provision for goals and timetables and the prohibition of quotas, is the model on which almost all other affirmative action programs are based.

Some pertinent facts about the Executive Order on Affirmative Action:

- Affirmative Action programs under the Executive Order consist essentially of three elements, all of which are prepared by the employer. If the employer receiving federal funds determines that there is an underutilization of women and minorities in the workforce, the employer must establish goals and timetables and then must make good faith efforts to meet them. Failure to meet a goal does not subject one to sanctions as long as there were good faith efforts.
- The Executive Order on Affirmative Action prohibits quotas.
- The goals and timetables language was added to the 1965 Johnson Executive Order by President Richard Nixon and Secretary of Labor George Shultz in 1970. The business community recommended this "management by objectives" concept to the Nixon Administration in the late 1960s.
- Private and public studies, including one done by the Reagan Labor Department, have shown that the Executive Order program has worked well and does not lead to quotas.
- The Executive Order has always had strong business community support.
- The Executive Order has always had strong bipartisan support. Indeed, 69 Senators and more than half of the Reagan Cabinet opposed the efforts of Ed Meese, Brad Reynolds, and Clarence Thomas to gut the Executive Order in 1985 by deleting the goals and timetables provision.

Enclosed are materials from the successful 1985/86 campaign to save the Executive Order on Affirmative Action.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Affirmative Action Review (3 pages)	7/11/1995	P5

**This marker identifies the original location of the withdrawn item listed above.
For a complete list of items withdrawn from this folder, see the
Withdrawal/Redaction Sheet at the front of the folder.**

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9590

FOLDER TITLE:

[Affirmative Action]

ds45

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

**Mexican American
Legal Defense
and Educational Fund**

1518 "K" Street, N.W.
Suite 410
Washington, D.C. 20005
(202) 628-4074
FAX: (202) 393-4206



MALDEF

November 14, 1996

VIA FACSIMILE

Alexis Herman
Assistant to the President and Director of Public Liaison
THE WHITE HOUSE
1600 Pennsylvania Avenue, N.W.
Second Floor, West Wing
Washington, D.C. 20500

Dear Ms. Herman:

I will be in Washington, D.C. on December 4, 1996, and wish to request a meeting with the President and Senior Administration personnel on that date.

As you know, MALDEF is a national civil rights organization that protects and promotes the rights of this country's 27 million Latinos. Through litigation and legislative advocacy, and community/parent leadership development, MALDEF is particularly dedicated to maintaining and securing rights in employment, education, immigration, political access, and language.

I would be particularly interested in discussing our concerns regarding the pending changes to recently enacted welfare and immigration legislation, as well as the upcoming debate regarding affirmative action. Additionally, we are interested in the Administration's considerations for Presidential nominations and judicial appointments in the next Congress.

Should you require additional information or have any questions regarding this request, please do not hesitate to contact Georgina Verdugo, Washington, D.C. Regional Counsel at (202) 628-4074 or my secretary, Clara Oropeza at (213) 629-2512.

The Administration has worked closely with civil rights advocates, and has recognized the importance of continuing to build this relationship. I look forward to speaking with you personally regarding these important and timely issues.

Sincerely,

ANTONIA HERNÁNDEZ
President and General Counsel

cc: **Suzanna Valdez**

National Office
634 South Spring Street
11th Floor
Los Angeles, CA 90014
(213) 628-2512

Regional Offices
542 South Dearborn Street
Suite 750
Chicago, IL 60605
(312) 427-9363

182 Second Street
2nd Floor
San Francisco, CA 94105
(415) 543-5598

The Book Building
140 E. Houston Street
Suite 300
San Antonio, TX 78205

1518 "K" Street, N.W.
Suite 410
Washington, D.C. 20005
(202) 628-4074

WOMEN WON'T GO BACK

**White House Briefing
March 27, 1996
Feminist Majority**

Women Won't Go Back

The Campaign to Save Women's Rights and Civil Rights

Co-Sponsoring Organizations

- 9 to 5 Los Angeles Working Women
Action for Grassroots Empowerment & Neighborhood
Development Alternatives
Alliance of Women Entrepreneurs
Alumnae Resources
American Association of Women in Community Colleges
American Civil Liberties Union of Pomona Valley
American Civil Liberties Union of Southern California
American Institute of Architects, Los Angeles - Diversity
Committee
American Jewish Congress, Pacific Southwest Region
American Women in Radio and Television, Golden
Gate Chapter
Asian Pacific American Legal Center
Association for Women in Architecture
Association for Women in Computing, San Francisco Chpt.
Association of Black Women Physicians
Bay Area Network of Gay/Lesbian Educators
Black Business Association
Black Women Lawyers Association of Los Angeles
Black Women's Forum
California Abortion Rights Action League
California American Association of University Women
California Council of Jewish Women
California Family Planning Council
California Federation of Business and Professional Women
California National Organization for Women
California Women Construction Owners & Executives
California Women in Environmental Design
California Women Lawyers
California Women's Law Center
Californians for Justice
Center for Partnership Studies
Coalition of 100 Black Women
Coalition of Labor Union Women
Comision Femenil de Los Angeles
Commission on the Status of Women of San Mateo County
Concerned Faculty at UCLA
Equal Opportunity Coalition of San Diego
Federally Employed Women
Feminist Majority
Girls, Inc. Of Alameda County
Hispanas Organized for Political Equality
Hollywood Women's Political Committee
Human Rights Campaign Fund
Japanese American Bar Association
Jewish Women International
John M. Langston Bar Association
Latin-American Professional Women's Association
Lawyers for Human Rights
League of Women Voters of California
League of Women Voters of Los Angeles County
Los Angeles Advertising Women
Los Angeles Business Alliance
Los Angeles City Commission on the Status of Women
Los Angeles National Organization for Women
Los Angeles Regional Family Planning Council
Los Angeles Unified School District Commission for
Gender Equity
Los Angeles Women's Leadership Network
Mexican-American Bar Association
Mexican-American Legal Defense and Educational Fund
Multi-Cultural Collaborative
NAACP Legal Defense and Educational Fund
National Association of Minorities in Cable of Southern
California
National Association of Women Business Owners of
Los Angeles
National Center for Lesbian Rights
National Center for Women and Policing
National Council of Jewish Women of Los Angeles
National Lawyers Guild of Los Angeles
National Lawyers Guild of San Francisco/Bay Area,
Affirmative Action Committee
National Organization for Women
National Women Construction Owners & Executives
Older Women's League, Ohlone East Bay Chapter
Organization of Women Architects
OUT THERE
Parents for Title IX
Philippino American Bar Association
Pomona Valley Coalition for Affirmative Action
Queen's Bench
Sacramento Civil Rights Network
San Francisco Commission on the Status of Women
Southern California Americans for Democratic Action
Southern California Chinese Lawyers Association
Southern Christian Leadership Conference
The Women's Foundation
United Farm Workers
W.A.K.E. UP/Mount St. Mary's College
Women For:
Women For: Orange County
Women, Inc.
Women in Film
Women Lawyers Association of Los Angeles
Women Lawyers of Alameda County
Women's Coalition South Bay
Women's Political Committee
Women's Transportation Coalition
YWCA of Greater Los Angeles
YWCA of Oakland
YWCA of Sacramento
YWCA of San Francisco-San Mateo-Marin County
YWCA of the USA

Freedom '96 Summer

WOMEN WON'T GO BACK!

The Internship of a Lifetime

Counter the Attack on Our Pay Checks and Education!

The Campaign to Save Women's Rights and Civil Rights wants you for a once in a lifetime internship—Freedom Summer '96. Keep the doors of opportunity open for women and people of color as you lead the fight to tell California and the nation -- **WOMEN WON'T GO BACK!**

This November, voters in California will decide whether to pass a deceptive "Civil Rights" Initiative, placed on the ballot by opponents of women's rights and civil rights. The initiative, if passed, will ban affirmative action programs for women and people of color in public employment, education, and contracting. Additionally, the initiative will *make discrimination against women and girls legal* by gutting the state's constitutional protection against sex discrimination.

This is not an isolated attack -- **IT IS SWEEPING THE NATION!** Similar measures are being circulated for the ballot in Colorado, Washington, Oregon, and Florida. Virtually identical bills were introduced in another 17 state legislatures and nine in Congress.

Our Future is on the Line!

The passage of these deceptive "Civil Rights" Initiatives -- which are really Civil Wrongs -- mean a dangerous return to the days when educational,

athletic and employment opportunities were severely restricted -- a day when women could be fired for being pregnant or shut out of jobs for having preschool children.

Remember, the "glass ceiling" is cracked, but not yet broken. The people making the decisions about whom to hire, fire and admit are still predominantly male. Affirmative action programs make it possible for women to pursue their education and employment in areas still entrenched in sexism. Without these programs and with only the skeleton of sex discrimination law, women will once again be faced with a future restricted to a mere handful of options instead of a world of opportunity.

We must sound the alarm and alert the nation to this attempt to slam the doors of opportunity on women and people of color!

From '64 to '96: Still Fighting!

The historic 1964 Freedom Summer of the Civil Rights Movement focused the nation's attention on the injustices of racial bigotry and hatred. Students from across the country traveled to Mississippi to register and mobilize African-American voters in unprecedented numbers.

Now, with the threat to close the doors of opportunity on women and people of color and turn back the clock on women's rights, we must mobilize a massive student campaign -- this time to save women's rights and civil rights. We must sound the alarm and alert the nation to this attempt to slam the doors of opportunity on women and people of color!



NEWS RELEASE

**For Immediate Release
Sunday, March 24, 1996**

**Contact: Jennifer Nelson
(916) 368-2274**

DOLE ENDORSES CCRI

Westminster, CA -- Republican presidential candidate Senator Bob Dole formally endorsed the California Civil Rights Initiative (CCRI) today, appearing at a rally in Orange County with California Governor Pete Wilson and CCRI chairman Ward Connerly.

"We appreciate Senator Dole's support at the national level and welcome his endorsement, which reminds all of us that it is the responsibility of each state to prohibit discrimination and preferences in state programs," said Connerly. "California can show the way with the California Civil Rights Initiative."

The California Civil Rights Initiative would amend California's Constitution to include a ban on race and gender preferences in government hiring, contracting and education programs. The measure's signature petitions are currently being reviewed by the Secretary of State's office. Once the validity of the signatures is determined, CCRI will appear on the November 1996 ballot.

In addition to endorsing CCRI, Senator Dole is authoring federal legislation which would enact similar bans on race and gender preferences in government-run programs at the federal level. Dole's legislation -- the Equal Opportunity Act of 1995 -- prohibits the federal government from granting preferences in three key areas: federal employment, federal contracting, and programs wholly administered by the federal government.

"We applaud Senator Dole's efforts to enact bans on race and gender preferences at the federal level," said Connerly. "But it is important that states take the steps necessary to ensure that people are judged on their abilities, not on their race or gender."

###

Freedom '96 Summer

WOMEN WON'T GO BACK!

The Internship of a Lifetime

Counter the Attack on Our Pay Checks and Education!

The Campaign to Save Women's Rights and Civil Rights wants you for a once in a lifetime internship—Freedom Summer '96. Keep the doors of opportunity open for women and people of color as you lead the fight to tell California and the nation — **WOMEN WON'T GO BACK!**

This November, voters in California will decide whether to pass a deceptive "Civil Rights" Initiative, placed on the ballot by opponents of women's rights and civil rights. The initiative, if passed, will ban affirmative action programs for women and people of color in public employment, education, and contracting. Additionally, the initiative will *make discrimination against women and girls legal* by gutting the state's constitutional protection against sex discrimination.

This is not an isolated attack — **IT IS SWEEPING THE NATION!** Similar measures are being circulated for the ballot in Colorado, Washington, Oregon, and Florida. Virtually identical bills were introduced in another 17 state legislatures and nine in Congress.

Our Future is on the Line!

The passage of these deceptive "Civil Rights" Initiatives — which are really Civil Wrongs — mean a dangerous return to the days when educational,

athletic and employment opportunities were severely restricted — a day when women could be fired for being pregnant or shut out of jobs for having preschool children.

Remember, the "glass ceiling" is cracked, but not yet broken. The people making the decisions about whom to hire, fire and admit are still predominantly male. Affirmative action programs make it possible for women to pursue their education and employment in areas still entrenched in sexism. Without these programs and with only the skeleton of sex discrimination law, women will once again be faced with a future restricted to a mere handful of options instead of a world of opportunity.

We must sound the alarm and alert the nation to this attempt to slam the doors of opportunity on women and people of color!

From '64 to '96: Still Fighting!

The historic 1964 Freedom Summer of the Civil Rights Movement focused the nation's attention on the injustices of racial bigotry and hatred. Students from across the country traveled to Mississippi to register and mobilize African-American voters in unprecedented numbers.

Now, with the threat to close the doors of opportunity on women and people of color and turn back the clock on women's rights, we must mobilize a massive student campaign — this time to save women's rights and civil rights. We must sound the alarm and alert the nation to this attempt to slam the doors of opportunity on women and people of color!

Sponsored by The Feminist Majority and

The Campaign to Save Women's Rights and Civil Rights

1600 Wilson Blvd. #801 • Arlington, VA 22209 • (703) 522-2214 • Fax: (703) 522-2219

E-mail: femmaj@feminist.org • Web Site: <http://www.feminist.org>

Women Won't Go Back!

The Campaign to Save Women's Rights and Civil Rights

- Yes!** Sign me up for Freedom Summer '96
 Sign me up for Freedom Fall '96
 Send me Squad Coordinator information to organize my school or group
 I can lead/join a voter registration team on campus

Name: _____ Affiliation (school or group): _____

Address: _____

City, State, Zip: _____

Phone: _____ FAX: _____ E-Mail: _____

End of spring term: _____

- I need housing
 I can provide housing for myself and _____ other people in the following areas: _____

The Feminist Majority • 1600 Wilson Blvd. #801 • Arlington, VA 22209 • (703) 522-2214 • Fax: (703) 522-2219
8105 W. Third St. • Los Angeles, CA 90048 • (213) 651-0495 • (213) 653-2689 • E-mail: femmaj@feminist.org

 Registration deadline for June 1st training session is May 1st; deadline for July 1st training session is June 1st.

Volunteer for Freedom!

Join thousands of Freedom Activists in California for an intense "on the ground" experience in women's rights and civil rights organizing. We need your strength to combat the stealth attacks on the rights of women and people of color!

Form Freedom Summer Squads! Organize your campuses, teams, friends, co-workers, feminist, African-American, Latina, Asian-American, Lesbian/Bisexual/Gay, and church groups for this all out effort to save women's and civil rights - before it's too late! Although this is an unpaid internship, many students have successfully raised funds in their communities to cover expenses.

Freedom Summer '96 Squads will organize massive voter registration drives on campuses and in the community for this historic fight for women's rights and civil rights.

Freedom Summer Activists will distribute educational literature and staff phonebanks to alert California voters to the dangers posed by the deceptive "Civil Rights" Initiative, and go door-to-door and work-place-to-workplace to educate and mobilize voters. Freedom Summer '96 Squads will show California and the nation the strength of our voices and our votes!

Freedom Fall '96

Take your fall semester off to Save Women's Rights and Civil Rights! You will work with thousands of students mobilized on university and college campuses throughout California to register, educate, and get out the vote. Our goal is to register the largest percentage of students of any state in history! Freedom Activists will work on campuses and in communities to dramatically increase voter registration for 18-24 year-old voters -- a wealth of untapped voting power! Through intense grass-roots campus and community organizing Freedom Fall Activists will:

- Sound the alarm about the danger to women's and civil rights..
- Build campus coalitions
- Organize massive voter registration drives
- Create educational/awareness events
- Table and leaflet at concerts, lectures

Freedom Activists will organize the defeat of the deceptive California "Civil Rights"

Initiative. Together, with your Freedom Squad, launch an intense absentee ballot campaign to ensure the voices and votes of students are heard!

Don't miss this chance for the Internship of a Lifetime! Young people have changed the political tide before -- from Civil Rights to Women's Rights. We must continue to shape the face of the nation as we enter not only the '96 election season, but also a new century. We must not allow programs ensuring our education and pay checks to be endangered on our watch -- **WOMEN WON'T GO BACK!!**



NEWS RELEASE

**For Immediate Release
Sunday, March 24, 1996**

**Contact: Jennifer Nelson
(916) 368-2274**

DOLE ENDORSES CCRI

Westminster, CA -- Republican presidential candidate Senator Bob Dole formally endorsed the California Civil Rights Initiative (CCRI) today, appearing at a rally in Orange County with California Governor Pete Wilson and CCRI chairman Ward Connerly.

"We appreciate Senator Dole's support at the national level and welcome his endorsement, which reminds all of us that it is the responsibility of each state to prohibit discrimination and preferences in state programs," said Connerly. "California can show the way with the California Civil Rights Initiative."

The California Civil Rights Initiative would amend California's Constitution to include a ban on race and gender preferences in government hiring, contracting and education programs. The measure's signature petitions are currently being reviewed by the Secretary of State's office. Once the validity of the signatures is determined, CCRI will appear on the November 1996 ballot.

In addition to endorsing CCRI, Senator Dole is authoring federal legislation which would enact similar bans on race and gender preferences in government-run programs at the federal level. Dole's legislation -- the Equal Opportunity Act of 1995 -- prohibits the federal government from granting preferences in three key areas: federal employment, federal contracting, and programs wholly administered by the federal government.

"We applaud Senator Dole's efforts to enact bans on race and gender preferences at the federal level," said Connerly. "But it is important that states take the steps necessary to ensure that people are judged on their abilities, not on their race or gender."

#

WARNING

Deceptive "Civil Rights" Initiative Legalizes Sex Discrimination

Sneak Attack on Women's Rights and Civil Rights

Deceptive "Civil Rights" Initiatives are being circulated in five states for the November 1996 general election ballot: California, Colorado, Florida, Oregon, and Washington. Similar *legislative* efforts have been introduced in at least 17 states under "Civil Rights" or "Equal Opportunity" titles. Also, with the backing of leaders in both houses of Congress, nine similar bills have been introduced at the Federal level.

These initiatives are neither "Civil" nor "Right" -- they are tricky. In fact, they actually amend the language of the Civil Rights Act of 1964 by changing a few key words in order to gut sex discrimination law and ban affirmative action programs for women and people of color. These dangerous initiatives could force women back to a day when educational, athletic and employment opportunities were severely restricted -- a day when women could be fired for being pregnant.

Only now, after years of struggle, have women become 22.7% of lawyers and judges, 11.8% of college presidents, 8% of police officers, 14.7% of college and university professors, and 34.8% of college athletes, *yet we are more than 50% of the population of this country.* No, we have not reached equality in the workplace, the academy or sports arena, but we have made gains -- gains which would not have been possible without the very programs opponents of women's rights seek to

destroy. We must not sit quietly as the right-wing funnels money -- BIG MONEY -- into a nationwide attack on women's rights -- our gains. If this rollback occurs, women will never shatter the glass ceiling and move into positions of respect and power in the American workforce, the academy or sports arena.

Don't be fooled -- this stealth attack not only bans affirmative action programs for women and people of color, but it is so devastating, **it actually guts sex discrimination law.** If these deceptive "Civil Rights" Initiatives pass, not only won't women be able to get a foot in the door, but when it is slammed on us, there will be no effective legal recourse!!

Clause "C": The "Skeleton" Clause

Buried within the text of many of these "Civil Rights" Initiatives exists Clause "C" -- the "Skeleton" Clause.

This clause legalizes government sex discrimination in public employment, education, and contracting. *The "Skeleton" Clause leaves the bare bones of sex discrimination law in place without the guts that make enforcement a reality.* Text such as "reasonably necessary to the normal operation..." are code



Clause "C":



The "Skeleton" Clause

"Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting."

words which relegate sex discrimination law from a high or medium level of scrutiny to the lowest standard of judicial review. In other words, any reason for discrimination against women and girls in employment, admittance, contracting, wages, promotion -- be it size of uniforms, availability of gender specific space or limited funding -- may be ruled acceptable.

The "Skeleton" Clause: Women's Pay Checks On the Line

These deceptive "Civil Rights" Initiatives allow public employers to exclude women from jobs. Traditionally, police departments kept many women out by instituting arbitrary requirements which could be deemed "reasonably necessary" for a police officer. The passage of the deceptive California "Civil Rights" Initiative will gut the existing strong constitutional and statutory protections which outlaw sex discrimination.

Unless we stop the California "Civil Rights" Initiative in its tracks, any cracks women have made in the Glass Ceiling will be sealed -- along with our fate. Women will be forced into low-paying, low-status jobs and will be discriminated against in the employment arena -- from high-level corporate positions to traditionally male blue-collar positions.

The "Skeleton" Clause: Women's Education and Sports On the Line

The educational and athletic opportunities for women and girls in public institutions will be severely restricted upon the passage of the deceptive California "Civil Rights" Initiative. Public school administrators and athletic directors will, once again, have a license to discriminate against women and girls. For example, they might claim it is "reasonably necessary" to

provide boys' teams with more funding and staff because boys' sports are more expensive. Unequal distribution of funding and staff time deprives women and girls of the resources needed for educational and athletic opportunities.

JOIN THE CAMPAIGN TO SAVE WOMEN'S RIGHTS AND CIVIL RIGHTS!

Supported by a coalition of committed women's rights and civil rights organizations including: YWCA of the USA, the Feminist Majority, the NAACP Legal Defense and Education Fund, MALDEF, NOW, Coalition of Labor Union Women, Asian Pacific American Legal Center and more than 80 women's rights, civil rights and student organizations, the Campaign is driven by the need to mobilize women's votes:

Our strategy is simple: We intend to get the truth out about this sneak attack on women's rights and opportunities, and mobilize women to fight back. Through television and radio, statewide field organizing, and voter registration drives on campuses and in communities, we will defeat the deceptive California "Civil Rights" Initiative.

To get involved with the effort to stop the deceptive California "Civil Rights" Initiative, call or write The Campaign To Save Women's Rights and Civil Rights!

Full Text of California "Civil Rights" Initiative A Proposed State-Wide Constitutional Amendment By Initiative

- (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (b) This section shall apply only to action taken after the section's effective date.
- (c) ***Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.***
- (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
- (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.
- (f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, special district, or any other political subdivision or governmental instrumentality of or within the state.
- (g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California anti-discrimination law.
- (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law and the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Status Report on State Initiatives Eliminating Affirmative Action & Making Sex Discrimination Legal

State	Title	1996 Ballot Deadline	Sponsor(s)	Synopsis	Status
California	California Civil Rights Initiative A Constitutional Amendment	Signature Deadline: Feb. 21, 1996 # signatures necessary: 690,000	Californians for Equal Opportunity Glynn Custred Tom Wood	Would eliminate all state and local programs that "grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Exempts gender classifications based on bona fide qualification reasonably necessary to normal operation of the government entity involved.	Filed over 1.2 million signatures on February 21, 1996
Colorado	Equal Opportunity/ Repeal of Affirmative Action A Constitutional Amendment	Signature Deadline: Aug. 5, 1996 # signatures necessary: 50,000	Scott Marian & John Nelson, Esq.	Prohibits the state & its political subdivisions from considering race, color, ethnicity, national origin, gender or religion as a factor in decision-making pertaining to public employment, public contracting, or public education. Exempts gender classifications based on bona fide occupational qualification reasonably necessary to normal operation of the government entity involved; or if the classification is designed to protect the physical privacy of individuals.	Currently Gathering Signatures.
Delaware	Delaware Civil Rights Initiative A Constitutional Amendment	Referendum by Act of General Assembly (HB114), introduced March 29, 1995	Rep. Wayne Smith	Prohibits discrimination against, and preferential treatment for, any person in public employment, contracting, and education.	Defeated in the State Legislature. Delaware Legislature temporarily adjourned June 30, and runs on a two-year session.
Florida	A Constitutional Amendment Restricting Discrimination by the State of Florida or any Political Subdivision Thereof	Signature Deadline: Aug. 6, 1996 # signatures necessary: 429,428	Campaign for Florida's Future Anthony R. Martin	The Constitutional amendment restricts "discrimination" by the State of Florida or its subdivisions.	Currently Gathering Signatures

Researched and Compiled by The Feminist Majority and The Service Employees International Union's Research Department

Status Report on State Initiatives Eliminating Affirmative Action & Making Sex Discrimination Legal

State	Title	1996 Ballot Deadline	Sponsor(s)	Synopsis	Status
Massachusetts	Title Unknown	Signature Deadline:	Larry Mack Citizens Against Reverse Discrimination	Anti-affirmative action language.	Failed to gain signatures
Oregon	Forbids Government Preferences Based on Race, Religion, Sex, National Origin A Constitutional Amendment	Signature Deadline: July 5, 1996 # signatures necessary: 97,681	Oregonians for Equal Rights Greg Selby and Michael Marselle	Measure would limit such programs by forbidding state, local government discrimination against, preference for citizens based on race, religion, color, sex, national origin. Applies in education, employment, contracting, public services. Exempts classifications based on sex or ability that are reasonably necessary to the normal operation of the state's system of public employment or public accommodations.	Currently Gathering Signatures.
Washington	Shall state and local government be prohibited from granting "preferential treatment" based on race, sex, ethnic or sexual minority status? A Constitutional Amendment	Failed to gather signatures to meet Dec. 29, 1995 deadline to submit to state legislature.	Fair Play for Washington Dr. Ron Taber	This measure would prohibit the state and political subdivisions from granting "preferential treatment" based on race, sex, color, ethnicity, national origin, or status as a sexual minority. Classifications based on sex would be allowed if reasonably necessary to public employment or public education.	No plans to re-enter initiative. If re-entered, deadline is July 5, 1996 to submit 181,667 signatures for the Nov. 96 ballot.

Researched and Compiled by The Feminist Majority and The Service Employees International Union's Research Department

Status Report on Federal Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

104 Congress	Title/Author	Sponsor(s)	Synopsis	Status
U.S. Senate	<p>S. 318</p> <p>Official Title: An act to amend the Civil Rights Act of 1964 to make preferential treatment an unlawful employment practice, and for other purposes.</p> <p>Brief Title: Civil Rights Restoration Act of 1995.</p> <p>Author: Helms</p>	No Information Available	See S. 26 above	Referred to Senate Committee on Labor and Human Resources.
U.S. Senate	<p>S. 829</p> <p>Official Title: An act to provide waivers for the establishment of educational opportunity schools.</p> <p>Brief Title: Educational Opportunity Demonstration Act.</p> <p>Author: Hutchison</p>	No Information Available	Provides waivers for the establishment of educational opportunity schools, in order to: (1) allow experimentation with same gender classes for low-income, educationally disadvantaged students; (2) determine whether such classes make a difference in the educational achievement and opportunities of such individuals; and (3) involve parents in the educational options and choices of their children. Directs the Secretary to waive for up to five years (but only to the extent the Secretary determines necessary to ensure the development and operation of same gender classes) any statutory or regulatory requirement of title IX of the Education Amendments of 1972.	Referred to Senate Committee on Labor and Human Resources.
U.S. Senate	<p>S. 1085</p> <p>Official Title: An act to prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex with respect to Federal employment, contracts, and programs, and for other purposes.</p> <p>Brief Title: Equal Opportunity Act of 1995.</p> <p>Author: Dole (R)</p>	McConnell, Simpson, Kyl, Brown, Nickles, Grassley, Shelby	Prohibits discrimination or preferences in Federal employment and contracting on the basis of race, color, national origin, or sex, or entering into a consent decree requiring, authorizing, or permitting any such discrimination or preference. Prohibits construing the Act to prohibit or limit: (1) employment recruiting or encouraging contract bidding or requiring or encouraging Federal contractors to so recruit or encourage, if the recruiting or encouraging does not involve a numerical objective or otherwise granting a preference; (2) any act designed to benefit historically Black colleges or universities; (3) any action under a Federal law or treaty relating to the Indian tribes; or (4) classifications based on sex if sex is a bona fide occupational qualification reasonably necessary to the normal operation of the Government, contractor, or subcontractor, the classification is designed to protect privacy, a U.S. national security interest is involved, or the classification is applied regarding an armed forces member on active duty in a theater of combat operations	Referred to Senate Committee on Labor and Human Resources.

Status Report on Federal Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

104 Congress	Title/Author	Sponsor(s)	Synopsis	Status
U.S. Senate	<p>S. 26</p> <p>Official Title: An act to amend the Civil Rights Act of 1964 to make preferential treatment an unlawful employment practice, and for other purposes.</p> <p>Brief Title: Civil Rights Restoration Act of 1995</p> <p>Author: Helms</p>	No Information Available	Amends title VII (Equal Employment Opportunities) of the Civil Rights Act of 1964 to make it an unlawful employment practice to grant preferential treatment on the basis of race, color, religion, sex, or national origin, except: (1) under existing provisions involving bona fide occupational qualifications and religion, sex, or national origin or involving employment by a religious educational institution; or (2) in recruiting applicants. (Current law, that would be replaced by this Act, declares that nothing in that title shall be interpreted to require preferential treatment on such basis on account of an imbalance in numbers or percentages.)	Referred to Senate Committee on Labor and Human Resources.
U.S. Senate	<p>S. 497</p> <p>Official Title: Act to End Unfair Preferential Treatment</p> <p>Brief Title: Act to End Unfair Preferential Treatment</p> <p>Author: Helms & Faircloth</p>	No Information Available	<p>Will amend Title VII, IX, section 15 of the Small Business Act (15 U.S.C. 644) or any other provision of law to prohibit the Federal Government from using race color, gender, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group; or in a manner that has the effect of requiring that employment positions be allocated among individuals or groups with respect to providing public employment, conducting public contracting, or providing a Federal benefit for education or other activities.</p> <p>Nothing in this chapter shall be interpreted as prohibiting classifications based on gender that are reasonably necessary to the normal provision of public employment, conduct of public contracting, or provision of a Federal benefit.</p> <p>The term 'Federal benefit' means -- (A) funds made available through a Federal contract; or (B) cash or in-kind assistance in the form of a payment, grant, loan, or loan guarantee, provided through any program administered or funded by the Federal Government.</p>	Referred to the Committee on Governmental Affairs.

Status Report on Federal Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

104 Congress	Title/Author	Sponsor(s)	Synopsis	Status
U.S. House of Representatives	<p>H.R. 1840 Official Title: A bill to ensure equal opportunity in employment, education, and contracting.</p> <p>Brief Title: American Action Act of 1995</p> <p>Author: Radanovich (R)</p>	Herger, Stockman, Packard, Seastrand, Doolittle, Wicker	Prohibits the use of race, sex, color, ethnicity, or national origin as a criterion for either discriminating against or granting preferential treatment to any individual or group in employment, education, or contracting.	Referred to Subcommittee on the Constitution 7-18-95
U.S. House of Representatives	<p>H.R. 1764</p> <p>Official Title: Act to End Unfair Preferential Treatment</p> <p>Brief Title: Act to End Unfair Preferential Treatment'</p> <p>Author: Funderburk</p>	No Information Available	<p>Will amend Title VII, IX, section 15 of the Small Business Act (15 U.S.C. 644) or any other provision of law to prohibit the Federal Government from using race color, gender, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group; or in a manner that has the effect of requiring that employment positions be allocated among individuals or groups with respect to providing public employment, conducting public contracting, or providing a Federal benefit for education or other activities.</p> <p>Nothing in this chapter shall be interpreted as prohibiting classifications based on gender that are reasonably necessary to the normal provision of public employment, conduct of public contracting, or provision of a Federal benefit.</p> <p>The term 'Federal benefit' means -- (A) funds made available through a Federal contract; or (B) cash or in-kind assistance in the form of a payment, grant, loan, or loan guarantee, provided through any program administered or funded by the Federal Government.</p>	Referred to House Committee on the Judiciary

Researched and Compiled by The Feminist Majority and The Service Employees International Union's Research Department

Status Report on Federal Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

104 Congress	Title/Author	Sponsor(s)	Synopsis	Status
U.S. House of Representatives	<p>H.R. 2128</p> <p>Official Title: A bill to prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex with respect to Federal employment, contracts, and programs, and for other purposes.</p> <p>Brief Title: Equal Opportunity Act of 1995.</p> <p>Author: Canady (R)</p>	<p>Hyde, Molinari, Fowler, Wicker, Sensenbrenner, Hoke, Smith (TX), Goodlatte, McCollum, Coble, Heineman, Bryant (TN), Bono, Barr, Rohrabacher, Istook, Herger, Norwood, Callahan, Cunningham, Chambliss, Hutchinson, Jones, King, Lightfoot, Packard, Paxon, Roberts, Roth, Stump, Young (AK), Burton, Dreier, Emerson, Schaefer, Miller (FL), Goss, Doolittle, McIntosh, Combest, Mica, Scarborough, Smith (NJ), Stockman, Walker, Weldon (FL), Everett, Lewis (KY), Vucanovich, Bilbray, Solomon, Seastrand, Bilirakis, Christensen, Cubin, Hastert, Laregent, Bunning, Clinger, Kolbe, Hancock, Roukema, Hostettler, Gramam, Radanovich, Oxley, Hoekstra, Barrett (NE), Bass, Dornan, Salmon, Ballenger, Archer, cooley, Chenoweth, Knollenberg, Shaw, Hilleary, Zelif. Bereuter.</p> <p>Fields (TX), Spence, DeLay.</p>	<p>Prohibits discrimination or preferences in Federal employment and contracting on the basis of race, color, national origin, or sex, or entering into a consent decree requiring, authorizing, or permitting any such discrimination or preference.</p> <p>Prohibits construing the Act to prohibit or limit: (1) employment recruiting or encouraging contract bidding or requiring or encouraging Federal contractors to so recruit or encourage, if the recruiting or encouraging does not involve a numerical objective or otherwise granting a preference; (2) any act designed to benefit historically Black colleges or universities; (3) any action under a Federal law or treaty relating to the Indian tribes; or (4) classifications based on sex if sex is a bona fide occupational qualification reasonably necessary to the normal operation of the Government, contractor, or subcontractor; the classification is designed to protect privacy; a U.S. national security interest is involved; or the classification is applied regarding an armed forces member on active duty in a theater of combat operations.</p>	<p>Passed House Judiciary Sub-Committee by an 8 - 5 vote 3-7-96.</p> <p>Being sent to full panel for consideration by the Judiciary Committee.</p>

Researched and Compiled by The Feminist Majority and The Service Employees International Union's Research Department

Status Report on Administrative Actions Eliminating Affirmative Action & Making Sex Discrimination Legal

State	Date Initiated/Type of Order	Sponsor	Synopsis
California	Executive Order June 1995	Governor Pete Wilson	Eliminated volunteer committees which oversaw how well the state was meeting its goals in awarding 15% of the money spent on state contracts to minority-owned businesses and 5% to women-owned businesses. The order also abruptly terminated business advisory councils in the Dept. of General Services, Caltrans and the Dept. of Corrections that were made up of representatives from minority and women's business groups.
California	Resolution SP-2 July 1995	University of California Regents led by Ward Connerly	Eliminated Affirmative Action in admissions, hiring and promotion of both faculty and staff.
California	Executive Order October 1995	Governor Pete Wilson	Reduces hiring level target goals in federal highway & road construction contracts for women and minorities from 20% to 10%.
Louisiana	Executive Order January 1996	Governor Mike Foster	Abolishes minority set-aside and affirmative action hiring programs based on race or gender.

Researched and Compiled by The Feminist Majority and The Service Employees International Union's Research Department

Status Report on State Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

State	Title	Introduction Date	Sponsor(s)	Synopsis	Status
California	AB 211	Introduced 1995 Session	Rep. Richter	<p>Would repeal the California Community Colleges, public schools, and State Civil Service affirmative action employment programs.</p> <p>Prohibits public officers and employees from giving any preference based on race, sex, color, ethnicity or national origin. Makes said employees and officers personally liable for violations. Repeals annual "glass ceiling" report on promotion and salaries of women and minorities in the state civil service.</p>	Failed in Committee on Higher Education
California	ACA 2	Introduced 1995 Session	Rep. Richter	<p>Would prohibit state and local governments, including all institutions of public higher education, from using race, sex, color, ethnicity, or national origin for discrimination or preferential treatment in the operation of public employment, public education, and public contracting. Exempts classifications based on sex that which are reasonably necessary to the normal operation of the State's system of public employment or public education.</p>	<p>Pending in Assembly Committee on Judiciary.</p> <p>ACA2 is identical to ACA 47 (Richter) from the 1993-94 Regular Session which failed passage in same committee.</p>
California	AB 727	Introduced 1995 Session	Rep. Richter	<p>Would prohibit public educational institutions from considering race in admissions, financial aid, or grading.</p>	Failed passage in Assembly Higher Ed. Committee, reconsideration granted.
California	AB 833	Introduced 1995 Session	Rep. Richter	<p>Would prohibit an public post secondary educational institution from using race, color, religion, sex, or national origin as a criterion for discrimination or preferential treatment in the appointment, retention, tenure, promotion, compensation, or other employment terms of a member of the faculty.</p>	Failed passage in Assembly Higher Ed. Committee, reconsideration granted.

Status Report on State Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

State	Title	Introduction Date	Sponsor(s)	Synopsis	Status
California	AB 384	Introduced 1995 Session	Rep. Richter	Would repeal requirements for state agencies to meet, or to make a good faith effort to meet, statewide contract participation goals for minority-owned business enterprises (MBE) and women-owned business enterprises (WBE).	Pending in Assembly policy committee.
California	SB 938	Introduced 1995 Session	Sen. Campbell	Would repeal requirements for state agencies to meet, or to make a good faith effort to meet, statewide contract participation goals for minority-owned business enterprises (MBE) and women-owned business enterprises (WBE).	Failed passage in Senate Committee on Governmental Organization, reconsideration granted
California	SCA 10-	Introduced 1995 Session	Sen. Kopp	Would prohibit the state and any of its subdivisions from using race, sex, color, ethnicity or national origin as a criterion for discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, public education, or public contracting. Exempts classifications based on sex that are reasonably necessary to the normal operation of the State's system of public employment or public education.	Failed passage in Senate Judiciary Committee. Reconsideration granted.
California	SB 939	Introduced 1995 Session	Sen. Campbell	Would repeal affirmative action requirements concerning minorities and women at state agencies, school districts, and community college districts. Would prohibit any public officer or employee from giving any preferences on the basis of race, sex, color ethnicity or national origin to any person for hiring or promotional purposes, except that socioeconomic factors may be considered when evaluating applicants for entry level jobs.	Failed passage in Senate P.E. & R committee.

Researched and Compiled by The Feminist Majority and The Service Employees International Union's Research Department

Status Report on State Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

State	Title	Introduction Date	Sponsor(s)	Synopsis	Status
California	SB 940	Introduced 1995 Session	Sen. Campbell	Would prohibit, except under court orders, public schools or institutions from considering a person's race with respect to a decision to admit that person to the education institution, a decision to provide financial assistance to that person, and an evaluation of that person's academic performance.	Failed passage in Senate Education Committee, reconsideration granted.
Colorado	SCR 8	Introduced 1995 Session	Sen. Coffman	A constitutional amendment prohibiting the use of preferential policies in state contracting.	Vetoed May 2 by governor.
Georgia	HR 154	Introduced 1995 Session	Rep. Earl Ehrhart	Prohibits the state from using race, sex, color, ethnicity, or national origin as a criterion for public employment, public education, or public contracting.	House Judiciary Committee Ehrhart predicted bill would make it out of committee in 1996. Failed
Georgia	SB 82	Introduced 1995 Session	Sen. Cheeks	Would ban the state and any of its political subdivisions from discriminating against or granting preferential treatment to any individual or group in employment, education, or contracting.	Failed to make it out of committee.
Illinois	SB 154	Introduced 1995 Session	Sen. Barkhausen	Provides that nothing in Human Rights Act shall be construed as requiring any employer, employment agency or labor organization to give "preferential treatment" or use other affirmative action based on sexual orientation; that discrimination against a person because of his or her sexual orientation constitutes unlawful discrimination under the Act.	Senate Rules Committee
Illinois	SB 1184	Introduced 1995 Session	Sen. Dudycz Sen. Lauzen	Prohibits the state, state agencies, schools and local units of government from using race, color, ethnicity, gender or national origin as criteria for discrimination or for granting preferential treatment to individuals or groups.	Failed in committee. Maybe reintroduce in Senate and introduced in House.
Illinois	HB 110	Introduced 1995 Session	Rep. Saltsman	Prohibits requiring affirmative action resolution from the employer before an airport police officer may become eligible for the sheriff's law enforcement employee formula.	House Rules Committee

Status Report on State Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

State	Title	Introduction Date	Sponsor(s)	Synopsis	Status
Louisiana	HB 155 HB 1024 SB 110	Introduced 1995 Session	Rep. Bowler Rep. Donelon Sen. Hainkel	Amendments to State Constitution to prohibit the state and its political subdivisions and agents from using race, sex, color, religion, ethnicity, or national to discriminate against or grant preferential treatment to persons or groups in public employment; education, and contracting, and from participating in federal or federally mandated programs that use such standards.	All failed in committee.
Michigan	HJRL	Introduced 1995 Session	Rep. David Jay	Modeled after the California Civil Rights Initiative. Proposal includes language opposing contracts earmarked for minority businesses and requires firms that receive tax breaks or grants from the state to cease all affirmative action plans or lose the "special arrangement."	House Judiciary Committee
Michigan	HB 4972	Introduced 1995 Session	Rep. McManus	Has the same language as above, but does not require voter approval.	House Judiciary Committee
Michigan	HB 4054	Introduced 1995 Session	Rep. Crissman	Would prohibit "race-norming" -- the practice of weighting tests for jobs or college admissions to favor minorities.	House Judiciary Committee
Mississippi	SC 548	Introduced 1995 Session	Sen. Tommy Robertson	A constitutional amendment prohibiting discrimination and "preferences."	Died in Committee during 1995 session.
Missouri	SJR 26	Introduced 1995 Session	Sen. Flotron	Prohibits the state or any of its political subdivisions or agents to use race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the state's system of public employment, education, or contracting.	Failed in committee
New York	AB 6466 SB 3506	Introduced 1995 Session	Rep. Kirwan Sen. Larkin	Would ban granting preferential treatment on account of race, sex, color, ethnicity, or national origin in public education, contracting, and employment.	Pending in legislature which adjourns Jan. 3, 1996.

Researched and Compiled by The Feminist Majority and The Service Employees International Union's Research Department

Status Report on State Legislation Eliminating Affirmative Action & Making Sex Discrimination Legal

State	Title	Introduction Date	Sponsor(s)	Synopsis	Status
North Carolina	HB 862	Introduced 1995 Session	Rep. Capps	Prohibits "preferences" based on race, sex, color, or ethnicity in public hiring, in the letting of public contracts, and in appointments to various authorities, boards, commissions, councils and agencies.	Judiciary #1 Committee
Oregon	HB 3394	Introduced 1995 Session	Rep. Bob Tiernan	Repeals provisions of state law requiring or encouraging affirmative action. Prohibits state and local governments from using affirmative action to remedy past discrimination based on race, religion, color, sex or national origin. Bill does not affect programs promoting employment of or assistance to veterans or for the disabled.	Died in House Judiciary Committee during 1995 session.
Pennsylvania	HB 360	Introduced 1995 Session	Rep. Gamble	Bars "preferential treatment" based on race, sex, or national origin in state hiring, contracting, or education.	State Government Committee
South Carolina	SB 856	Introduced 1995 Session	Sen. Thomas	Prohibits the state or any of its political subdivisions from using race, sex, color, ethnicity, or national origin as a criterion for either discriminating against or granting "preferential treatment" to any individual or group in the operation of the state's system of public employment, public education or contracting in order to create or implement an affirmative action program.	Judiciary Committee
Texas	SJR 45	Introduced 1995 Session	Sen. David Sibley	A constitutional amendment prohibiting state and local governments from discriminating against or granting "preferential treatment" to persons because of their race, sex, sexual orientation, color, ethnicity or national origin in public employment, education & contracting.	Defeated during 1995 session.
Washington	HB 1999 HB 1901	Introduced 1995 Session	Rep. Scott Smith	Prohibits the use of race, sex, color, ethnicity and national origin of an individual or group in the operation of public employment, education, or contracting.	Failed in Committee during 1995 session.

Researched and Compiled by The Feminist Majority and The Service Employees International Union's Research Department

Foes of Affirmative Action Are Gaining in Ballot Effort

NEW YORK TIMES
2/6/96
P.A.14

By B. DRUMMOND AYRES Jr.

LOS ANGELES, Feb. 5 — The once-faltering effort to eliminate California's affirmative action programs by putting them to a yes-or-no statewide vote in November is rapidly picking up momentum.

Faced with the embarrassing possibility that the petition drive to get the issue on the ballot might fail for lack of time and money, Gov. Pete Wilson, the state Republican Party and the Republican National Committee have taken over the signature-gathering process and are now confident that they have enough financing and petition teams to obtain the required 694,000 names by the Feb. 21 deadline.

But defenders of affirmative action are gathering strength, too, for what promises to be the most important political reading yet on the future of race- and sex-based preference programs in the United States.

Instead of fighting the petition process, supporters of affirmative action are concentrating on winning the November vote that they now assume will take place because of the reinvigorated petition drive.

Over the last month or so, more than 70 women's and civil rights groups in California and around the country have joined together in the struggle — not just to preserve programs that give preference in employment, state contracts and education to women and minorities, but also to keep the issue from dividing the Democratic vote in California, which is crucial to President Clinton's re-election prospects.

Polls taken in the last year have indicated that a majority of Californians no longer believe that affirmative action programs are a satisfactory way to eliminate discrimination and, given the opportunity, would vote to ban their use or to thoroughly rewrite them.

Polls also indicate considerable dissatisfaction with affirmative action programs in other parts of the country, with many people now seeing them as reverse discrimination.

The California initiative says that the state "shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." But proponents of affirmative action maintain that some subsections of the initiative are worded so loosely that it could be used to discriminate against women and minorities if it passes.

The past weekend marked important milestones for both sides in the California debate.

Opponents of affirmative action said they expected that one of the scores of paid and volunteer petition teams working the malls and street corners around the state had signed up the 694,000th voter over the weekend. That was a major numerical threshold, of course. Still, crossing it will not be the end of the signature-gathering process.

The rough rule in ballot petitioning is that at least one of every four signatures turns out to be invalid because of an incomplete name or address or other technicality. So the petition teams plan to gather about a million signatures in all.

Can they do it in the remaining 16 days?

"It's going to be a struggle, but I'm confident that we're going to make it all the way," said Ward Connerly, a Sacramento businessman and member of the California Board of Regents who, at Governor Wilson's urging, took over direction of the petition drive in December after he and the Governor led an effort to roll back affirmative action in the state university system.

The petition drive, originally begun by two professors in Northern California who contended that fixed quotas and mandates had replaced voluntary outreach in affirmative action efforts, faltered and drifted in the early going because of a shortage of money and leadership. Since Mr. Connerly took over, the drive has become more focused.

More than a million fund-raising letters have been sent out. And those letters, most carrying the signature of Mr. Wilson, one of the first leading public figures to endorse the professors' drive, have more than doubled the money collected for the petition campaign, to more than \$1 million.

For proponents of affirmative action, the past weekend was particularly important because women's groups from around the country gathered in Washington to discuss policy issues. The first item on their agenda was defending affirmative action from attack in California and at least half a dozen other states, including Colorado, Florida, Illinois, Oregon and Washington.

The defense of affirmative action in California is being led mainly by women's groups, in part because blacks, among the staunchest defenders of preferences in many states, account for only 7 percent of California's population, compared with a national average of 12.5 percent.

"Affirmative action is as much about sex discrimination as race discrimination," said Katherine Spillar, a national coordinator for the Feminist Majority, a leading women's group. "The Republican Party is walking on very thin ice on this. Women are at least half the vote in this country. And, believe me, we won't go back."

Still, defenders of affirmative action appear to have much catching up to do here. A campaign director has not yet been hired, and there is less than \$200,000 in the campaign treasury. They have given up on fighting the petition drive, but are already working on a fall strategy.

"Ultimately, this being California, you mostly fight things out on television and radio because the state is so huge and diverse," said Molly Munger, a California lawyer for the NAACP Legal Defense and Educational Fund Inc. "Our challenge is to get the truth out, that this ballot initiative is a Republican election wedge and a trick to set back women and minorities. We intend to meet that challenge."

Mr. Connerly, the leader of the petition forces, contends that "women trick themselves" if they support affirmative action.

"If a woman says affirmative action entitles her to a job, she in effect takes a job away from her husband," he says. "It's nothing less than reverse discrimination."

Last fall Mr. Connerly, who is black, joined with Governor Wilson, an old friend, in the successful but hotly contested effort to outlaw race and sex preferences in student admissions to state universities. Proponents of affirmative action accused Mr. Wilson and Mr. Connerly of stirring up the issue to focus attention on the ballot initiative effort, an accusation that both men vigorously denied.

Los Angeles Times

California and the West

TUESDAY, DECEMBER 12, 1995 ★

Women's Issues Added to Debate on Affirmative Action

■ **Ballot:** Seeking to rally bipartisan opposition, coalition says initiative would legitimize sex discrimination. Backers say it would maintain equal protection.

By CATHLEEN DECKER
TIMES POLITICAL WRITER

Seeking to broaden opposition to a proposed state constitutional amendment that would strike down affirmative action programs, a coalition of women's and minority groups is warning that the measure could be used to support widespread discrimination against women and girls.

At a news conference in Los Angeles today, the proposal's opponents will argue that a little-publicized clause in the "California civil rights initiative" could bar women from nontraditional jobs and allow schools to favor boys' programs over girls' programs.

The national YWCA will also announce today that it is joining the campaign against the initiative, marking the first time in its 176-year history that it has taken sides in a political campaign. The organization's 30 California offices will form the backbone of the anti-initiative field operation.

In a demonstration of the kind of bipartisan opposition they will

need to defeat the measure, the opponents are highlighting the views of Republican women business owners who consider the proposed initiative a death knell for their businesses.

"It literally licenses discrimination against women and girls where it has never been permitted in the laws until now," said Katherine Spillar, national coordinator for the Feminist Majority. "We could go back to the not-so-distant past where women were held out of police and firefighting jobs and girls were kept out of sports programs."

One of the GOP women who has joined the opposition to an initiative her party supports is Martha Diaz Aszkenazy, who has owned a San Fernando construction firm for 15 years. Her business has grown, she said, because affirmative action programs forced biased project managers to consider her for work.

"If it weren't for affirmative action, I would have been out of business a long time ago," said Diaz Aszkenazy, whose company grossed \$8 million this year. "The

law hasn't changed yet and people are already relaxing," she said.

University of California Regent Ward Connerly, who spearheaded the UC system's reversal of affirmative action programs and recently took over leadership of the financially troubled initiative effort, scoffed at the accusations leveled by the women's groups.

"This is a red herring," he said. "The only way they think the CCRI can be defeated is if they drive women from men and incite the fears of women."

State and national polls show that while men are more supportive than women of cutting back affirmative action, there has yet to be the full-scale breach between the sexes on which the initiative's opponents are counting. Opponents of the measure have long believed that if they are to defeat it, they will have to rally women—particularly white women—to their side.

The initiative, being prepared for the November ballot, would ban either preferential treatment or discrimination toward any individual or group "on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting."

Practically speaking, it would prohibit state and local governments from invoking everything from informal outreach programs that seek to draw qualified women and minorities to bid on state contracts to the more rigid efforts of public universities and schools to accept women or minorities. Gov. Pete Wilson and the state Republican Party are strongly behind the

INITIATIVE: Affirmative Action Battle

measure, and it formed part of the rationale for Wilson's sundered presidential campaign.

At issue now is the third clause in the initiative, which reads, "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education or public contracting."

Like everything else connected to the proposed initiative, the intent of that sentence and the way it would be interpreted by the courts are the subject of angry dissent.

Opponents of the initiative contend that the so-called "clause C" would allow any government agency to declare women ineligible for certain jobs or programs.

They suggest that women could, for example, be barred from jobs as firefighters or heavy equipment operators under the theory that they lack the strength to do the job. Or, they say, schools facing financial crises could decide to cut girls' athletic programs and leave money-making boys' programs in place.

Currently, women in California are protected by the state constitution's equal protection clause, which bars such bias in state education and contracting. Bias in

employment is allowed only if it solves a "compelling need."

What the CCRI would do, said NAACP western regional counsel Molly Munger, "is replace that incredibly strict standard that protects women against discrimination, and turn it into a very loose, very vague, very dangerous new standard."

"What they are trying to do is take away something that women have achieved in California," she said.

A legal advisor for the initiative's sponsors, however, paints a very different picture of the impact of the clause.

Eugene Volokh, an acting law professor at UCLA, said the clause was included in an effort to keep the initiative in line with existing law and allow exceptions for those compelling needs that the courts already recognize.

The clause, he says, "says that 'nothing shall be interpreted as prohibiting [sex-based qualifications].' It doesn't say these things are permitted.

"If the equal protection clause prohibits it, it stays prohibited," he added. "The equal protection clause has its own independent force."

Volokh added that federal law would also protect women against

undue discrimination. However, the initiative's sponsors have made clear that they hope to follow the California measure with a federal twin, leaving open the possibility that federal protections could be affected.

The initiative effort has encountered rocky fortunes since earlier this year, when it appeared to be a cinch to make the ballot. In recent weeks, the measure's former campaign manager detailed its financial foundering, and he later resigned.

A prominent Republican with ties to the initiative effort said that Connerly, a black businessman and Wilson appointee to the UC regents, took over the campaign with the understanding that more than \$500,000 would be donated to the cause by party donors and that Wilson would volunteer some political staffers to help shepherd it onto the ballot.

Connerly said in an interview that since he came aboard, about \$500,000 has been raised from donors, including big GOP givers. That will allow proponents to complete the signature-gathering effort by late February, he said.

As for Wilson forwarding political aides to the effort, Connerly said that although nothing is formalized, "I would suspect he would." He said he is already receiving informal political advice from Wilson colleagues who are friends of his.

Los Angeles Times

Women Could Lose What They Don't Realize They Have

ROBIN ABCARIAN

SECTION E • WEDNESDAY, FEBRUARY 28, 1996



You remember, of course, the Equal Rights Amendment? That bland but controversial proposal that went down in political flames when the required number of states failed to ratify it nearly 14 years ago:

"Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex."

So simple. So just. So threatening.

I always thought it was tragic that the ERA was not ratified, always considered it a shame that people who suffer from discrimination on account of their gender are not entitled to the same constitutional protections afforded people on account of their race or ethnicity or national origin.

Imagine my surprise when I learned last week that women in California have, in fact, the equivalent of the Equal Rights Amendment. In California, thanks to a 1971 state Supreme Court decision voiding a law prohibiting women from working as bartenders, it is illegal to discriminate against women unless it is necessary to achieve a *compelling* purpose. In federal law, the standard is lower. (For instance, in one federal case, an employer persuaded the court that refusing to hire a woman with small children was not illegal discrimination, because it was important to the business to employ someone who could work long hours unimpeded by family responsibilities. In California, say legal scholars, that employer would probably have been guilty of breaking the law.)

California's high standard of protection against sex discrimination could plunge in November, if the so-called California civil rights initiative is passed by voters. The measure is a naked attack on affirmative action—bad enough—but it also contains a little-publicized clause that could have dire consequences for the women of this state.

Clause C, as the passage is known, will permit sex discrimination as long as it is "reasonably necessary to the normal operation of public employment, public education or public contracting."

The operative phrase: "reasonably necessary." Not a compelling justification, as our state law requires now, just a reasonably necessary one.

That lower standard, say legal scholars, is easy to prove in court, whereas the higher one is almost impossible.

"This is a dramatic change in the law," says USC law professor Erwin Chemerinsky, who has written about the potential legal impact of the CCRI.

"California women have no idea," says Constance Rice of the NAACP Legal Defense and Educational Fund. "We have something most American women don't have. California women have the ERA! We have it by judicial fiat. . . . The court did it for us. . . . California women don't even know what they have got, let alone what they are about to lose."

I have no basis to judge whether Rice is overreacting, but I also have no reason to doubt her when she claims that, in the event that the initiative passes, "Twenty years from now, they will look back on this as the beginning of the end of civil rights laws."

Could be.

After all, several bills with similar language have been introduced in Congress. California, it has often been said, is a political bellwether. If the CCRI passes, you can bet it will fire up those in Congress who think the playing field for women and minorities was—contrary to available facts—leveled long ago.

Will women support this initiative if they truly understand what it means? Will they support it if they grasp that it could mean an end to women's centers on campuses, to

mentoring and outreach programs aimed at increasing the numbers of women and minorities in public agencies or academic specialties such as engineering or math?

Will they support it if it means that a public employer might be able to successfully argue in court that he doesn't have to hire a woman who has young children?

Last week in Los Angeles, a coalition of women's groups spearheaded by the Feminist Majority announced their counterattack on the CCRI, which continues to fare well in polls. These activists believe that if women understand what they could lose, they will put a stake through the heart of the CCRI in November. They are launching a voter registration drive this summer on college campuses with what they hope will be 2,000 student volunteers from California and other states.

"Freedom Summer '96" they call it, a potent and apt theft of the language used 32 years ago when more than 1,000 Northern college students poured into Mississippi to register black citizens to vote.

The heart of the matter is this: Do we believe that the world encourages everyone equally? Do we believe that black children have the same shot at professional, business and academic success as white children? Do we believe that women face no barriers, no discrimination as they rise through the professional and academic ranks?

And do we honestly believe that every white man who loses out on a promotion or a contract has been ripped off by someone of inferior talents?

Of course we don't. Not if we're living in the real world, anyway.

Vote your conscience in November.

■ Robin Abcarian's column appears Wednesdays and Sundays. Readers may write to her at the Los Angeles Times, Life & Style, Times Mirror Square, Los Angeles, CA 90053.

Los Angeles Times

METRO

SECTION

B

FRIDAY

FEBRUARY 23, 1996 CC*

Bid to Fight Affirmative Action Ban Announced

■ **Ballot:** Organizers hope 'Freedom Summer 1996' will draw 2,000 students from across U.S. to battle proposed initiative. Campaign will stress measure's impact on women as well as minorities.

By CATHLEEN DECKER
TIMES POLITICAL WRITER

Accelerating their counterattack now that a proposed initiative to ban affirmative action is winding its way toward the

November ballot, opponents of the measure Thursday announced a "Freedom Summer 1996" effort that they hope will bring college students from across the country to California to fight for the rights of women and minorities.

The campaign, which organizers hope will attract 2,000 students, is modeled after the 1964 effort in Mississippi, which occurred at the height of the civil rights era.

This one, however, will have a strong dose of gender rights attached to it as well. Strategists against the measure openly acknowledge that if the "California civil rights initiative" is seen only as a minority issue, it will win. If it is seen as a measure that dramatically affects laws governing treatment of women—as many legal scholars say it will—then, they believe, they have a good chance of beating it back.

The college effort is already being organized on 129 campuses nationwide, including more than 100 in California, according to Eleanor Smeal, president of the Feminist Majority and one of the leaders of the effort to defeat the initiative. The student drive began locally Wednesday night with a recruitment session at Occidental College.

"What happens here in California is a national issue," Smeal said during a Los Angeles news conference. "If we lose here, it could lose nationwide."

Smeal said petitions identical to the California measure are circulating in five other states—Florida, Colorado, Oregon, Washington and Illinois—and have been introduced as bills by legislators in 17 states. A separate effort to ban affirmative action at the federal level also has been presented to Congress.

The announcement of the summertime push against the initiative came one day after backers of the far-reaching measure turned in more than 1 million signatures collected in hopes of getting the initiative on the Nov. 5 ballot. Only 690,000 valid signatures were needed, making it probable that the measure will qualify.

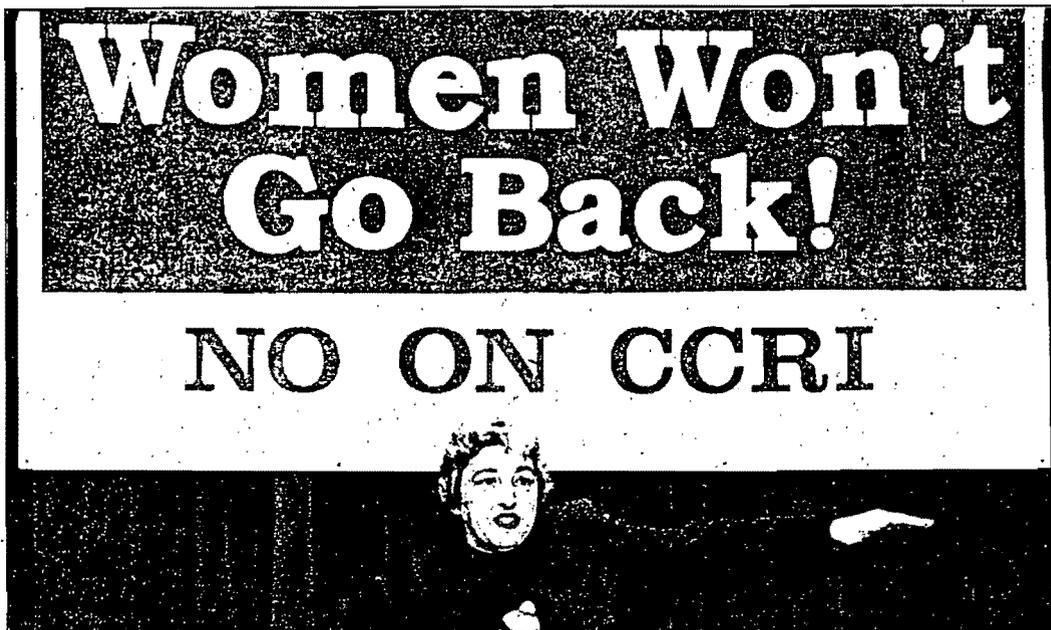
As the signatures were turned in, Gov. Pete Wilson argued that the measure was an effort "to restore fairness to California." The alliance against the initiative argues that it would do exactly the opposite.

According to legal scholars, the initiative would ban all manner of affirmative action programs or those that are tailored to a particular group, including mentoring programs for girls in math and science, or outreach efforts to attract women and minority business owners to bid for state contracts.

As troubling to the women's organizations, the measure also would strip from the state Constitution the current protections women have against sexual discrimination in the workplace. Under current law, women cannot be discriminated against unless there is a "compelling need." The initiative would allow a far lower level of scrutiny, allowing discrimination if it is "reasonably necessary."

Even as they announced their plans, organizers against the initiative acknowledged that voters have yet to understand their point of view. Public opinion surveys have repeatedly shown that voters favor the initiative.

To change that, opponents are counting on the students and on women's and minority organizations, which are marshaling their resources. The newly installed campaign manager for the effort against the initiative, Patricia Ewing, said television and radio ads explaining their position also are in the offing.



PATRICK DOWNS / Los Angeles Times

Eleanor Smeal, president of the Feminist Majority, denounces "California civil rights initiative."

Los Angeles Times

Commentary

WEDNESDAY, JANUARY 10, 1996

PYRIGHT 1996 / THE TIMES MIRROR COMPANY / CCI/78 PAGES

Sex Discrimination Made Legal

■ **Affirmative action:** The proposed civil rights initiative would loosen the government standard.

By ERWIN CHEMERINSKY
and LAURIE LEVENSON

For the next 10 months, there will be an intense public debate over affirmative action as California voters consider the proposed "California civil rights initiative." Assuming it gets the required signatures, the initiative will be on the November ballot. CCRI, as it is commonly called, will prohibit the government from granting "preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." It would eliminate all affirmative action, ranging from programs to encourage girls in math and science studies to efforts by the government to help minority-owned businesses.

As debate over this proposal heats up, there is a danger that its most insidious provision will be overlooked: a clause that allows government discrimination based on gender in public employment, education or letting contracts so long as there is reasonable justification.

No current state or federal law allows gender to be used as a qualification for public education or public contracting. The law does allow gender to be a factor in the area of employment if there is a bona fide occupational qualification. The Supreme Court has declared that this is an "extremely narrow" exception.

- It is unclear why the CCRI drafters felt it necessary to expand this exception to

education and contracting. For the first time in any law anywhere in the country, California will expressly say that its schools and its government can discriminate based on sex so long as the discrimination is reasonable.

Perhaps worst of all, this provision would alter and undermine the current protection against gender discrimination under the state Constitution. Since 1971, the California Supreme Court has held that government gender discrimination will be tolerated only if it is necessary to achieve a compelling government purpose. In other words, under current state law, the government can discriminate based on gender only if there is a truly important purpose and no other way to achieve it. This is exactly what the law should be. The long legacy of gender discrimination based on stereotypes about men and women requires that the government meet a heavy burden any time it seeks to use sex as a basis for its decisions.

But CCRI would amend the California Constitution to say that gender discrimination would be allowed if it was "reasonably necessary," a far less rigorous standard. Traditionally under constitutional law, a "reasonableness test" means that any reason is sufficient and it doesn't even have to be a good one.

In recent years, there have been many intense fights over initiatives in California. We can expect there will be such a battle over CCRI as the merits and drawbacks of affirmative action are debated. Amid all the rhetoric, it is important that one aspect of CCRI be recognized from the outset: Sex discrimination by the government will be expressly allowed.

Erwin Chemerinsky is a professor at the University of Southern California Law Center. Laurie Levenson is a professor of law at Loyola Law School.

THE WHITE HOUSE
OFFICE OF DOMESTIC POLICY

CAROL H. RASCO
Assistant to the President for Domestic Policy

To: Steve Felt

Draft response for POTUS
and forward to CHR by: _____

Draft response for CHR by: _____

Please reply directly to the writer
(copy to CHR) by: _____

Please advise by: _____

Let's discuss: _____

For your information: _____

Reply using form code: _____

File: _____

Send copy to (original to CHR): _____

Schedule ? : Accept Pending Regret

Designee to attend: _____

Remarks: _____

APR 22 1996

AFFIRMATIVE ACTION AD

18 East 16th Street, Rm 303, New York, NY 10003 (212) 929-9850

President Bill Clinton
Vice President Albert Gore
Members of Congress
Department & Agency Heads
Governors
State House Speakers & Minority Leaders
State Senate Presidents Pro Tem & Minority Leaders

April 22, 1996

Dear Honorable Ms/Mr:

Enclosed is an ad which appeared in the **NY Times** April 7, 1996. You have before you proposals to weaken and eliminate AFFIRMATIVE ACTION by legislative and/or administrative action. In California and elsewhere referenda to this effect will be on the ballot. Proponents of such action claim most people support them.

The ad argues why affirmative action is in the interests of our country, its people and of democracy. During the last 20 years only a handful of people have shown an affirmative action program hurt them. Its main effect has been to help move toward an occupational and income distribution more nearly in tune with the makeup of the country.

Our ad has 868 signatories from all 50 states and the District of Columbia, people influential at every level from the national to the community. Nearly every aspect of life is represented. The ad demonstrates there is a wide and deep base of existing and potential support for affirmative action.

Among the 72 religious leaders signing are Rev. Joan Campbell, General Secretary, National Council of Churches; H George Anderson, Presiding Bishop, Evangelical Lutheran Church in America; Rev. Richard Hamm, General Minister & President, Christian Church (Disciples of Christ); Bishop Thomas Gumbleton, Detroit Archdiocese; Rabbi Alexander Schindler, President, Union of American Hebrew Congregations; Rabbi Ismar Schorsch, Chancellor, Jewish Theological Seminary.

Among the 58 trade union signers are Linda Chavez-Thompson, Exec. Vice Pres., AFL-CIO; Elmer Chatak, Pres. Industrial Union Department, AFL-CIO; Morton Bahr, Pres. Communication Workers of America; Gerald McEntee, Pres. Amer.Fed. of State, County and Municipal Employees (AFSCME); Arturo Rodriguez, Pres. and Dolores Huerta, Vice Pres. United Farm Workers.

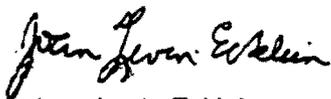
From academia there are 446 signers located at 187 universities and colleges. These include 5 Nobel Laureates - Hans Bethe, Cornell; Jerome Friedman, MIT; Leon Lederman, Dir. Emer. Natl Accelerator Laboratory; Toni Morrison, Princeton; and George Wald, Prof. Emer. Harvard; and the presidents of 5 institutions of higher learning, many deans and department and institute heads.

Among signers involved in the study of African American life, and/or in civil and legal rights of various minorities and women are Henry Gates, Dir. DuBois Institute, Harvard; Manning Marable, Dir, Institute of African American Studies, Columbia Univ.; Cornel West, Prof. of African American Studies, Harvard; Rev. Joseph Lowery Pres. Southern Christian Leadership Conference (SCLC); Juan Figueroa, Pres. Puerto Rican Legal Defense & Ed. Fund; Karen Narasaki, Exec. Dir. Asian Pacific American Legal Consortium; and Anne Bryant, Exec. Dir. Amer. Assn. of University Women.

Signers also include Prema Mathai-Davis, Exec. Dir. YWCA; Steve Portulis, Exec. Dir. National Council of Senior Citizens; farmers and business people, authors and artists, and 43 law professors.

In view of the support for affirmative action expressed here and in many other ways, we hope politicians intending to make opposition to it a tool of their election will reconsider and that affirmative action will be kept. It truly does "strengthen and build democracy!"

Yours truly,



Joan Levin Ecklein
Coll. of Public & Community
Service, U MASS (Boston) *
*(for identity only)



Mark Solomon
Ch. History Dept., Simmons Coll.*

Clinton Library Transfer Form

Case #, if applicable		Accession #			
Collection/Record Group	Clinton Presidential Records	Series/Staff Name	Stephen Warnath		
Subgroup/Office of Origin	Domestic Policy Council	Subseries	Civil Rights		
Folder Title	[Affirmative Action]	OA Number	9590	Box Number	1

Description of Item(s) Poster made from a full page ad in The New York Times, Sunday, April 7, 1996 titled "Affirmative Action Builds Democracy"

Donor Information

Last Name:		First Name:		Middle Name:		Title:	
Affiliation:		Phone (Wk):		Phone (Hm):			
Street:		City:		State (or Country):		Zip:	

Transferred to:	Other
Other (Specify):	Oversize Map Case (Drawer 2)

Transferred by:	Dana Simmons
Transfer Point	During Processing

Date of Tranfer 5/19/2005

AFFIRMATIVE ACTION AD
c/o SIDNEY J. GLUCK, Treasurer
18 E. 16th STREET
NEW YORK, NY 10003

NEW YORK, NY 100

NEW YORK, NY 100



PM

APR 18 1996

APR 18

INSPECTED
BY USA
FOR X-RAY

INSPECTED
BY USA
FOR X-RAY

Carol Rasco
Assist. to President Domestic Policy
Council
1600 Pennsylvania Ave
Washington, DC 20500