

AFFIRMATIVE ACTION

"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

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. Women and minorities hold less than 5% of the senior management positions in the nation's largest companies. The federal government received more than 90,000 complaints of employment discrimination based on race, ethnicity and gender in 1994. Hate crimes and violence are still ugly realities in the lives of many Americans.

President Clinton believes there is still a need for affirmative action that is done right -- we need to mend it, not end it. 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. 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.

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 minimal investment -- about 40 cents of every \$1,000 in student aid.
 - The affirmative action program administered by the Department of Labor, that was enhanced by President Nixon, has prevented discrimination and fostered equal employment for all Americans including women, minorities, the disabled and veterans -- without quotas or mandated outcomes.
 - Affirmative action has helped build up firms owned by minorities and women, who were historically excluded, and has 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 principles must be eliminated or changed.

The Administration has already suspended programs that did not meet the Supreme Court's guidelines in Adarand and has proposed procurement reforms that:

- Safeguard against fraud and abuse to ensure that the benefits of affirmative action go only to individuals and businesses that are deserving;
- Require the use of race-neutral means such as outreach and technical assistance to increase minority opportunity and participation in federal procurement;
- Ensure that race will not be relied upon as the sole factor in procurement decisions -- only qualified businesses will receive federal procurement awards;
- Provide a set of market driven benchmarks for each industry-- not quotas -- to ensure that race-conscious procurement is not used unnecessarily;
- Continue the use of several race-conscious contracting mechanisms to promote minority procurement, including the Small Business Administration's 8(a) program;
- Avoid any undue burden on nonbeneficiaries of the program.

- **Employment Guidance:** The Clinton Administration issued detailed guidance on the proper use of race in federal employment under Adarand.
- **Litigation:** The Clinton Administration is continuing to defend the use of affirmative action contracting under the 8(a) program in several court cases brought since Adarand. President Clinton also instructed the Justice Department to file a brief in support of the state of Texas' petition to the Supreme Court in the Hopwood case to uphold the University of Texas Law School's interest in promoting racial diversity of its student body. The Administration strongly opposes federal and state initiatives such as the Dole-Canady bill and the California Civil Rights Initiative that would turn back the clock on the federal government's historic, bipartisan commitment to equal opportunity and eliminate affirmative action in California for minorities and women.
- **Helping Distressed Communities:** President Clinton has issued an Executive Order launching the Empowerment Contracting program that provides a supplement, not a replacement, to existing federal procurement programs. Under the Empowerment Contracting Order, the program will offer incentives for government contracting awards to businesses in distressed communities that hire a significant number of residents and that generate significant economic activity in low-income areas.

THE CHALLENGES AHEAD:

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, many racial and ethnic groups live and work together in harmony -- an achievement unmatched in human history. President Clinton believes we have a responsibility to renew and strengthen the ideals that foster that unity.

May 1996



Briefing Paper

Affirmative Action in Employment: An Overview

Affirmative action in the employment arena refers to two types of government-ordered programs. The first is the federal contract compliance program (enforced by the Office of Federal Contract Compliance Programs, or OFCCP, in the US Department of Labor) in which a presidential executive order (E.O. 11246) requires firms with federal contracts to develop goals and timetables for hiring women and minority men for occupations in which they are underrepresented and to make annual reports on the progress they have made. The OFCCP requires that approximately 200,000 federal contractors (who employ one quarter of the civilian workforce) file affirmative action plans, which generally compare the proportion of women and minorities in a firm with the proportion of women and minorities in the labor force (OFCCP data, FY 1994).

The second type of government program includes a variety of steps employers (private firms, state and local governments, and federal governmental agencies) are required to take as the result of court involvement in the resolution of discrimination suits (brought under Title VII of the Civil Rights Act). Compliance with Title VII falls under the jurisdiction of the Equal Employment Opportunity Commission (EEOC) for private employers and the Department of Justice for state and local governments. Federal employees must first bring a complaint to their department's equal employment opportunity office, but they may also file a complaint through the EEOC if they are unhappy with the outcome of their own offices' processes.

The EEOC received 91,189 complaints in 1994 from employees who felt they had been victims of

discrimination. Twenty-six percent of these complaints were instances of alleged race discrimination, and 21 percent involved alleged sex discrimination. After dismissing the complaints that they believed did not have sufficient proof of discrimination, the EEOC was left with 3 to 4 percent of the original 91,189. They litigated 418 of these "sufficient cause" cases.¹

In addition to implementing required affirmative action steps, employers may engage in voluntary programs for a variety of reasons: because they want to attract the best qualified workforce they can find; because they value diversity; because they are responding to concerns raised by employees, unions, and community members; because they wish to avoid charges of discrimination. The extent to which voluntary affirmative action exists is difficult to measure because there is neither an enforcement agency collecting data on these programs nor a court system in which these voluntary affirmative action steps are recorded.

In order to determine the overall prevalence of affirmative action programs in the workplace, both voluntary and involuntary, Professors Konrad and Linnehan of Temple University recently asked 138 public and private employers in the Philadelphia area if they had implemented any of several affirmative steps in hiring, promoting or firing, and found that 37 percent had implemented one or more steps that take into account the race or gender of an employee, while 58 percent had adopted race- or gender-neutral policies also designed to improve the fairness and openness of personnel procedures.²

¹ EEOC data, cited in Arndt, 1995.

² Konrad and Linnehan, 1995.

THE PROGRESS OF WOMEN AND MINORITIES IN THE WORKPLACE

How successful has affirmative action been in helping women and minorities achieve greater equality in the workplace? In order to measure its success, we must first look at the gains made by these groups in the workforce during the time period in which affirmative action programs (both voluntary and required) were implemented.

Growth in the Labor Force

As Table 1 shows, women increased their share of the total labor force dramatically between 1965 and 1994, from 35 percent to almost 46 percent. In the past decade, between 1985 and 1994, neither black nor white women's share grew rapidly, although the female workforce of other racial and ethnic groups did. One group in particular, Asian women, has experienced higher rates of immigration in the recent past, which may at least partially account for the increase in the number and proportion of Asian women in the labor force. However, black and white women have recently increased their share in some specific occupations--for example, accountants and lawyers, as illustrated in Table 2.

Table 1.
Civilian Labor Force by Sex and Race/Ethnicity, 1965-1994
(Persons 16 Years and Older, Numbers in Thousands)

	1965		1975		1985		1994		%Change 1965-1994	%Change 1985-1994
	Number	Percent	Number	Percent	Number	Percent	Number	Percent		
Total Labor Force	74,455	100.0	93,800	100.0	115,500	100.0	131,000	100.0	75.9	13.4
Women	26,200	35.2	37,500	40.0	51,000	44.3	60,200	45.9	129.8	18.0
White	22,736	30.5	32,500	34.6	43,500	37.7	50,300	38.4	121.2	15.6
Black	3,464	4.7	4,200	4.5	6,100	5.3	7,400	5.6	113.6	21.3
Other	N/A	N/A	800	0.9	1,500	1.3	2,500	1.9	N/A	66.7
Hispanic	N/A	N/A	N/A	N/A	3,000	2.6	4,800	3.7	N/A	60.0
Men	48,255	64.8	56,300	60.0	64,400	55.8	70,800	54.0	46.7	9.9
White	43,400	58.3	50,300	53.6	56,500	48.9	60,700	46.3	39.9	7.4
Black	4,855	6.5	5,000	5.3	6,200	5.4	7,100	5.4	46.2	14.5
Other	N/A	N/A	1,000	1.1	1,700	1.5	3,000	2.3	N/A	76.5
Hispanic	N/A	N/A	N/A	N/A	4,700	4.1	7,200	5.5	N/A	53.2

Note: Hispanics may be of any race. Data for Hispanics are not available before 1980. For 1965, Black also includes Other Races. Source: U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract(s)* 1976:571, 1989:627, 1995:627.

By nearly all measures, women's earnings have improved relative to men's (although it should be kept in mind that part of the improvement in the ratio is due to the fall in men's real wages, which have still not recovered to their peak in 1973). Yet relative to the progress women have made in other countries, women in the United States could be expected to have done better, given our strong national commitment to equal opportunity and affirmative action.

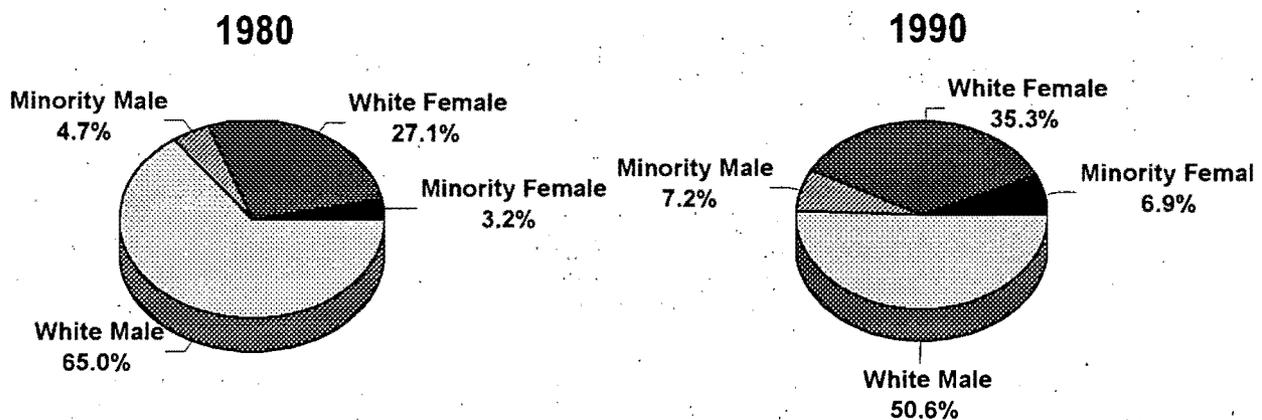
Different groups of women have fared differently in the United States. Although the pay gaps between white men and women of color and between white men and white women have narrowed, especially in the 1980's, differences persist between white women and women of color. An IWPR

study based on data from the Survey of Income and Program Participation (SIPP) found that minority women are four times as likely as white men to work in low wage jobs, while white women are three times as likely to work in these types of jobs.³

Growth in Specific Occupations

The number of women in management-level jobs has increased enormously, particularly in the 1980s. Contrary to popular belief, this progress has not come at the expense of minorities, who enjoyed even greater increases than did white women during this time period. As Figure 1 shows, women and men of color, on average, doubled their representation in management jobs (from 3.2 percent to 6.9 percent for women of color and from 4.7 percent to 7.2 percent for men of color), while white women's share of all management jobs increased more slowly, by about one-third (an 8.2 percentage point increase, from 27.1 to 35.3 percent). However, although minorities have significantly increased their share of management jobs, they are still underrepresented in that occupational area (unlike white women, who are now proportionately represented).

Figure 1.
Distribution of Managers by Race/Ethnicity and Sex



Source: Lois Shaw, Dell Champlin, Heidi I. Hartmann, and Roberta Spalter-Roth, The Impact of the Glass Ceiling on Minorities and Women. Washington, DC: Institute for Women's Policy Research, 1993.

Table 2 shows a selected number of male-dominated and mixed occupations (all with less than a 70 percent female workforce) in which women have generally increased their representation during the past decade, as well as two female-dominated occupations in which, overall, women have decreased their representation. The mixed or male-dominated professional occupations listed (e.g., administrators, accountants, lawyers) show increased shares for both white women and women of color, except for physicians, where black women's share decreased and Hispanic women's share remained static between 1983 and 1994. Several other occupations (e.g., computer equipment operators, general office supervisors, private guards, and bus drivers) show decreases in the occupational share for white women, increases for black women, and little or no change for Hispanic women. Several other occupations such as police, scheduling clerks, and mail carriers show healthy growth for all groups of women. In the two female-dominated occupations shown, white women have decreased their share, while the representation of black and Hispanic women has generally grown.

³ Institute for Women's Policy Research, 1989.

Table 2.

Percentage of Employed Women in Selected Occupations by Race and Ethnicity, 1983 and 1994

	ALL		WHITE		BLACK		HISPANIC	
	1983	1994	1983	1994	1983	1994	1983	1994
TOTAL LABOR FORCE	44	46	38	38	5	5	2	3
MALE-DOMINATED & MIXED OCCUPATIONS								
Administrators, Education & Related	41	62	35	53	6	8	1	3
Accountants	39	51	33	42	3	5	1	2
Lawyers	15	24	14	21	1	2	0	1
Physicians	16	20	13	17	3	2	1	1
Social Workers	64	69	50	51	13	15	4	5
Teachers, Secondary	52	55	47	50	4	4	1	2
Teachers, Colleges and Universities	36	42	32	37	2	3	0	1
Computer Equipment Operators	64	64	54	49	8	9	4	4
Supervisors, General Office	66	66	57	55	7	10	3	3
Clerks, Scheduling and Distribution	38	44	33	37	4	5	2	3
Mail Carriers, Postal Service	17	34	15	31	2	3	0	1
Police	9	16	7	11	2	5	0	1
Guards, Private	21	23	18	17	3	5	1	1
Bus Drivers	45	47	38	36	7	10	2	3
FEMALE-DOMINATED OCCUPATIONS								
Administrative Support	79	78	71	67	7	9	5	6
Registered Nurses	96	93	85	80	6	9	2	2

Note: Hispanics may be of any race.

Source: U.S. Bureau of Labor Statistics, Unpublished data from the Current Population Survey, 1983 and 1994.

These figures show that women of diverse racial and ethnic backgrounds have entered different occupations at varying rates. Women of color remain underrepresented in most of the professions shown in Table 2, except social work, where both black and Hispanic women are overrepresented (relative to their share of the labor force as a whole). Black women are also overrepresented as educational administrators, computer equipment operators, general office supervisors, and bus drivers.

Occupational Segregation

Occupational segregation is still a problem facing working women, with women being overrepresented in some occupations and underrepresented in others. The amount of occupational segregation observed in the labor market can be measured by an index that quantifies the lack of equality in the occupational distributions between two groups; its value ranges from 0 (perfect equality) to 100 (perfect inequality). In 1990, the index of sex segregation was 53, meaning that 53 percent of women or men would have to change occupations in order for women and men to have equal representation across all occupations in the economy. Race-based segregation is less pervasive in employment than sex-based segregation when measured on a national level (30 for black and white men in 1990 and 26 for black women and white women)⁴.

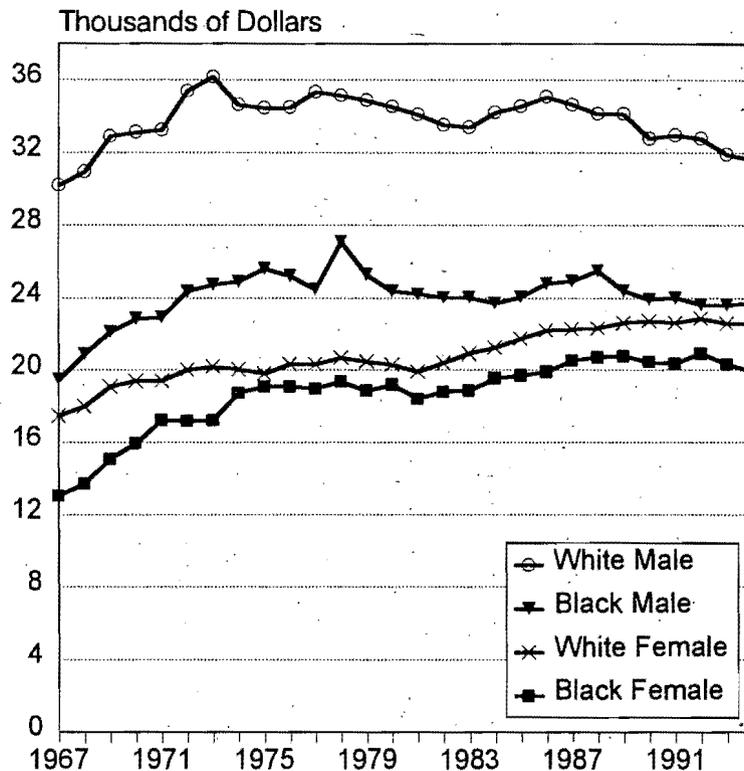
⁴ Reskin, 1994.

Although both race- and sex-based occupational segregation have declined significantly, and substantial occupational growth is predicted in the coming years, allowing opportunity for further change, there are still many job markets in which there is virtually no competition between blacks and whites or men and women.⁵ This is precisely why we have affirmative action and equal opportunity legislation; it promotes fair employment opportunities so that people can compete for all jobs on a more level playing field.

Earnings Growth

Figure 2 shows median annual earnings in constant dollars for full-time, year-round workers over the past three decades. The graph shows that, consistently from 1967 through 1994, women have earned less than men. However, the graph also shows a fairly continuous increase in black and white women's earnings, with no such increase for men. Real wages have been generally falling for both black and white men since the early- to mid-seventies, while real earnings gains for black and white women have been relatively steady. Black men have also partially closed the gap with white men, although most of the gains occurred prior to 1978. The graph shows that, in 1994, black women still earn, on average, \$4,000 less than black men annually, while white women's earnings fall somewhere between those of black men and women. Averaged together, all three groups still earn about \$10,000 less per year than white men, despite the progress that has been made in closing the gap.

Figure 2.
Annual Median Earnings by Race and Gender,
in 1994 Dollars, of Full-Time, Year-Round Workers



Source: U.S. Bureau of the Census, Unpublished data from the Current Population Survey of various years.

⁵ Bielby and Baron, 1984.

ACCOUNTING FOR PROGRESS – SOURCES OF CHANGE

It is clear that women and minority men have experienced some substantial gains in the labor market, in terms of their earnings and their representation in certain occupations. But can all these gains be attributed to affirmative action efforts? Changes in other social and economic factors, in addition to laws and regulations, also affect employment and earnings.

The Impact of Other Factors

Both white women and minorities, particularly blacks of both sexes, enjoyed an increase in educational attainment during the time period in which affirmative action programs developed. Table 3 shows that the proportion of black adults with at least a high school education has more than tripled since 1960; for whites, the proportion approximately doubled. Although black men and women have near-equal levels of education, a larger proportion of adult white men has completed four or more years of college, as compared to white women. Currently, however, more women are graduating from college than men; eventually all women, white as well as black, are likely to “catch up” to men in college completion.

Table 3.
Educational Attainment by Race and Gender, 1960 to 1993

YEAR	ALL RACES		WHITE		BLACK	
	Male (percent)	Female (percent)	Male (percent)	Female (percent)	Male (percent)	Female (percent)
Completed Four Years of High School or More						
1960	39.5	42.5	41.6	44.7	18.2	21.8
1965	48.0	49.9	50.2	52.2	25.8	28.4
1970	51.9	52.8	54.0	55.0	30.1	32.5
1975	63.1	62.1	65.0	64.1	41.6	43.3
1980	67.3	65.8	69.6	68.1	50.8	51.5
1985	74.4	73.5	76.0	75.1	58.4	60.8
1990	77.7	77.5	79.1	79.0	65.8	66.5
1991	78.5	78.3	79.8	79.9	66.7	66.7
1992	79.7	79.2	81.1	80.7	67.0	68.2
1993	80.5	80.0	81.8	81.3	69.6	71.1
Completed Four Years of College or More						
1960	9.7	5.8	10.3	6.0	2.8	3.3
1965	12.0	7.1	12.7	7.3	4.9	4.5
1970	13.5	8.1	14.4	8.4	4.2	4.6
1975	17.6	10.6	18.4	11.0	6.7	6.2
1980	20.1	12.8	21.3	13.3	8.4	8.3
1985	23.1	16.0	24.0	16.3	11.2	11.0
1990	24.4	18.4	25.3	19.0	11.9	10.8
1991	24.3	18.8	25.4	19.3	11.4	11.6
1992	24.3	18.6	25.2	19.1	11.9	12.0
1993	24.8	19.2	25.7	19.7	11.9	12.4

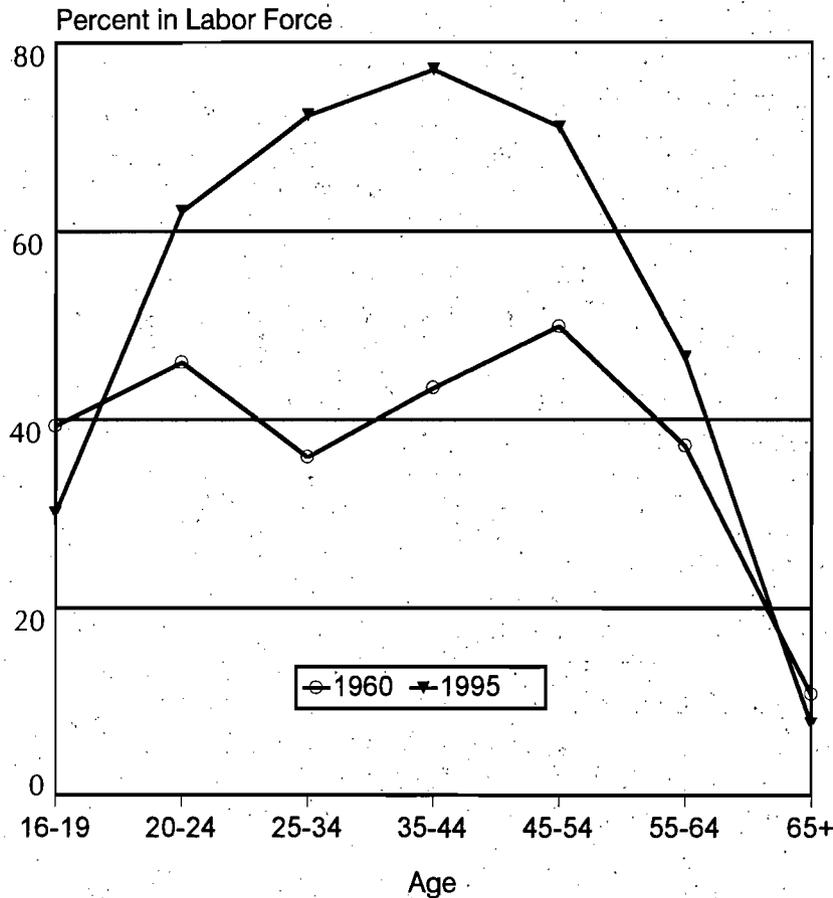
Note: Population 25 years and older.

Source: U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract 1994:157*.

Employment success for women and minorities can be partially attributed to the increased levels of education they have attained. Education is the single most important factor affecting earnings--those with more education receive higher salaries, on average, than those with less. Improved access to education is most likely due to other federal civil rights legislation, as well as to a generally rising standard of living that has enabled people to invest more in education.

Economic factors have also affected the labor market experiences of women and minorities. For women, the most important change has been a dramatic increase in their labor force participation, as shown in Figure 3.

Figure 3.
Trends in Labor Force Participation Rates of Women, 1960 and January 1995, by Age



Source: U.S. Bureau of Labor Statistics, Employment and Earnings, February 1995 and U.S. Bureau of Labor Statistics, Handbook of Labor Statistics, August 1989.

On the demand side, the economy has grown in the areas in which women are concentrated, occupations known as “pink collar jobs.” These include clerical work, retail sales jobs, teaching, health care, and social work. The growth in these fields enabled many black women to leave domestic service jobs, in which they were highly concentrated before 1960, and enter a wide range of occupations with better pay.

On the supply side, women’s increased education is also associated with increased labor force participation; as women achieve higher levels of education, they are more likely to participate in the labor force in order to use their hard-earned skills. Also, changing cultural mores regarding child rearing and family size, as well as changing consumption standards, affect women’s labor force decisions. In addition, improved methods of birth control have likely affected women’s decisions regarding their labor force participation. The Pregnancy Discrimination Act of 1978 has also led to further increases in work after childbirth, particularly for white women.

The Impact of Affirmative Action and Title VII Enforcement Efforts

The number of empirical studies attempting to measure the effects of affirmative action efforts by employers has been limited by the general lack of data. One recent review of the research literature, by Lee Badgett and Heidi Hartmann, published by the Joint Center for Political and Economic Studies, found that enforcement by the OFCCP (representing that portion of affirmative action that is required of federal contractors) has shown modest effects in the intended direction. Contract compliance increased the employment of women and minorities in contractor firms by more than would have occurred anyway without these policies, but the effects were generally small. The authors attributed the small effects to weak enforcement efforts. Hartmann and Badgett also reviewed the effects of Title VII enforcement on the earnings and employment of women and minorities relative to white men and found a strongly positive correlation between enforcement efforts and gains for women and minorities in the workforce (enforcement efforts were measured by the number of investigations of charges and the number of settlements).⁶ An IWPR study analyzing the effects of the Pregnancy Discrimination Act (PDA) of 1978 found that the PDA led to increases in labor force participation of women of child-bearing age and greater access to temporary disability insurance for pregnant women workers with positive impact on the earnings of women.⁷

THE CONTINUING NEED FOR AFFIRMATIVE ACTION

Because affirmative action remedies are controversial, and women and minority males have made substantial progress, we must ask whether these programs are still needed. Have the gains that these groups enjoyed in the eighties and nineties, because of the success of affirmative action and changes in other factors, reached their conclusion? Or is further progress required? Are affirmative action policies the best way to achieve further gains?

The evidence clearly suggests that women and minorities still face discrimination in the labor market. The index of sex segregation is substantially greater than it would be if all barriers to occupational choice for women and men were removed, and earnings of women and men are still far from equal. In addition, some of the "natural" opportunities that women experienced as the demand for their labor grew are likely to decline in the future. Jobs in services, health care, and education are not expected to grow as quickly as they have for the past several decades.

And while the pay gap between men and women has been closing, men's real wages are likely to rise again as productivity increases at a faster rate. The result is likely to be a widening wage gap between women and men, absent all other factors which narrow the gap. Women's wages will have to increase at an even faster rate than they have in order to continue to close the wage gap.

Without strong anti-discrimination and affirmative action policies, the progress of women in the labor market is likely to slow. In their survey of Philadelphia firms, Konrad and Linnehan found that most of the employers surveyed would not have implemented affirmative action programs had the government not required them to do so. The reluctance of employers to voluntarily implement these programs emphasizes the need for continued government action.

⁶ *Badgett and Hartmann, 1995.*

⁷ *Spalter-Roth et al., 1990.*

Written by:
Jodi Burns
Design and Graphics by Jill Braunstein
Institute for Women's Policy Research
(202) 785-5100

January 1996

REFERENCES

- Arndt, Michael. 1995. "Overworked, Ineffective, EEOC Can't Keep Up." Chicago Tribune. February 12, 1995, p.1.
- Badgett, M.V. Lee, and Heidi Hartmann. 1995. "The Effectiveness of Equal Employment Opportunity Policies." Pp. 55-83 in Margaret Simms, editor. Economic Perspectives on Affirmative Action. Joint Center for Political and Economic Studies. Washington, DC.
- Bielby, William T. and James N. Baron. 1984. "A Woman's Place is with Other Women: Sex Segregation Within Organizations," Pp. 27-55 in Barbara F. Reskin, editor. Sex Segregation in the Workplace: Trends, Explanations, Remedies. National Academy Press, Washington, D.C.
- Hartmann, Heidi. Forthcoming. "How Much Have Women Benefitted From Affirmative Action?" In George Curry, editor, The Affirmative Action Debate. Addison-Wesley Publishing, Inc. Reading, MA.
- Hartmann, Heidi, and Roberta Spalter-Roth. 1991. "Improving Employment Opportunities for Women." Testimony concerning H.R.1 (Civil Rights Act of 1991) before the U.S. House of Representatives Committee on Education and Labor, February 27, 1991. Institute for Women's Policy Research. Washington, DC.
- Institute for Women's Policy Research, and Displaced Homemakers Network. 1989. Low Wage Jobs and Workers: Trends and Options for Change, Final Report. Prepared for the U.S. Department of Labor, Employment and Training Administration. Institute for Women's Policy Research. Washington, DC.
- Konrad, Alison, and Frank Linnehan. 1995. "Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices." Academy of Management Journal, 38(3): 797-820.
- Reskin, Barbara. 1994. "Segregating Workers: Occupational Differences by Race, Ethnicity, and Sex." Presented at the Annual Meetings of the Industrial Relations Research Association, January 4. Boston, MA.
- Spalter-Roth, Roberta, Claudia Withers, and Sheila R. Gibbs. 1990. Improving Employment Opportunities for Women Workers: An Assessment of the Ten Year Economic and Legal Impact of the Pregnancy Discrimination Act of 1978. Institute for Women's Policy Research. Washington, DC.

Support IWPR with your annual membership in the IWPR Information Network

Join the IWPR Information Network at the *special introductory rate*:

INDIVIDUAL MEMBERSHIPS

Individual Sustaining Members* receive

Research News Reporter, a monthly compilation of research in the news which includes full citation and ordering information;

Quarterly Products Mailings including all current IWPR briefing papers, fact sheets, and working papers;

20 percent discounts on major reports and all previously issued publications; and a

50 percent discount on one registration to IWPR's biennial **Women's Policy Research Conference**.

Regular Rate \$150. **Introductory Rate \$125**

Individual Supporting Members* receive

Quarterly Products Mailings including all current IWPR briefing papers, fact sheets, and working papers;

20 percent discounts on major reports and all previously issued publications; and a

20 percent discount on one registration to IWPR's biennial **Women's Policy Research Conference**.

Does not include *Research News Reporter*.

Regular Rate \$50. **Introductory Rate \$35**

Individual Members* receive

Announcements of IWPR activities and publications;

20 percent discounts on all IWPR publications; and a

20 percent discount on one registration to IWPR's biennial **Women's Policy Research Conference**.

Does not include Quarterly Products Mailings or *Research News Reporter*.

Introductory Rate \$30

ORGANIZATIONAL MEMBERSHIPS (for non-profit organizations and libraries)

Organizational Affiliates receive

Research News Reporter, a monthly compilation of research in the news which includes full citation and ordering information;

Quarterly Products Mailings including all current IWPR briefing papers, fact sheets, and working papers;
IWPR major reports;

20 percent discounts on all previously issued publications; and

a **50 percent discount** on one registration to IWPR's biennial **Women's Policy Research Conference** and

a **20 percent discount** on conference registration fees for additional organizational attendees.

Regular Rate \$245 **Introductory Rate \$195**

Organizational Members receive

Quarterly Products Mailings including all current IWPR briefing papers, fact sheets, and working papers;

20 percent discounts on major reports and all previously issued publications; and

a **50 percent discount** on one registration to IWPR's biennial **Women's Policy Research Conference** and

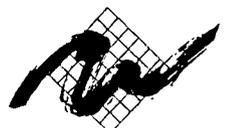
a **20 percent discount** on conference registration fees for additional organizational attendees.

Does not include *Research News Reporter*.

Regular Rate \$125 **Introductory Rate \$100**

* not available to organizations or individuals whose membership is paid by institutional check.

Send a check or use your credit card by phone or fax:
IWPR, 1400 20th Street, NW, Suite 104, Washington, DC 20036
phone (202) 785-5100; fax (202) 833-4362





A Conversation on Race and Affirmative Action

Robert H. Bork, AEI's John M. Olin Scholar in Legal Studies, and Roger Wilkins, Clarence J. Robinson Professor of History and American Culture, George Mason University, met at AEI on April 11, 1995, to discuss the theory and practice of affirmative action. The session, moderated by Ben J. Wattenberg, senior fellow, was part of AEI's Amgen Forum, a series of public policy debates, lectures, and conferences sponsored by Amgen, Inc. An edited summary of the discussion follows.

Robert H. Bork

Preferential policies for groups said to be disadvantaged or discriminated against have been tried all over the world. Almost everywhere they have the same results: the policies are announced as temporary, but not only are they not temporary, they endure and expand to include more and more groups. In the United States today, affirmative action programs actually apply to two-thirds of the American population.

Preferential policies also create group hostilities. Some societies that have employed these policies have had bloody riots and, in at least one case, a civil war. Certainly, group hostilities between the races are rising in some segments of the U.S. population, most notably in our universities.

Affirmative action harms both blacks and whites. Whites are obviously harmed when someone who has never discriminated against anyone loses a chance for a job or a place in college to someone who has never

been discriminated against on a criterion other than merit.

But blacks and Hispanics are harmed as well, as when top universities competing for minority students admit applicants who are not fully qualified for a particular institution. Seventy percent of the black students who matriculate at the University of California at Berkeley, for example, fail to graduate. Many of these students would have gotten a fine education and graduated had they gone to less demanding schools. Minorities also suffer when their legitimate accomplishments are rendered suspect by the existence of affirmative action.

Of all the groups seeking to benefit from affirmative action programs, I believe that black Americans are the only ones with anything approaching a legitimate claim. I would therefore abolish affirmative action for women and other ethnic groups right now and phase it out gradually for blacks in some way that does not cause excessive pain and suffering.

Roger Wilkins

Let me stipulate at the outset that affirmative action is not always practiced perfectly. There have been occasions where, for racial reasons, a black person was placed in some job or position where a qualified white person might otherwise have been placed. If that were not the case, why would Judge Bork be a scholar here at AEI and Clarence Thomas a justice on the Supreme Court? George Bush gave affirmative action a bad name!

Nonetheless, I am a strong proponent of affirmative action—not as an African American or, obviously, as a woman or an Asian American—but as an American who has lived here for sixty-three years and whose family helped to build this country as slaves and as free people. I support affirmative action because it is good for my country.

I was born in a segregated America. I remember the enormously talented people of my parents' and grandparents' generations whose lives were stunted by a culture thick with racism. Over the past thirty years, a more meritocratic America than the one into which I was born has begun to develop and to utilize a broader array of the talents of all its citizens.

America is not a perfect country, and affirmative action is not a perfect program. But Lord knows, when I look at women working on telephone lines, blacks editing major newspapers, other minorities serving on the faculties of distinguished universities, and even an integrated Detroit police force in place of the all-white police that we feared when I was a student at the University of Michigan in the 1940s and 1950s, I know I am seeing a better America.

Affirmative action did not drop down out of the sky to punish white men. Americans developed affirmative action because we had significant problems of exclusion, denial, unfairness, and limited opportunity for a whole range of people. Blacks have had 346 years of negative action and denied opportunities, while for whites those opportunities accumulated across the generations. We have not come near to correcting the damage done in the first 346 years in the past 31, but we are making progress.

It is unfortunate that racial conversations in the United States are so rarely civil. There is a lot of mythology and ignorance about race in America, and more than a few politicians who are flat-out demagogues on the subject. They say the most outrageous things in the most pleasant tones and expect you to reply in a civil way to outrageous falsehoods.

A few weeks ago, the Speaker of the House of Representatives—a man with a

Ph.D. in history—was asked whether he did not think that the centuries of oppression suffered by black people in the United States made affirmative action justified in the case of blacks. This most famous former history professor in the United States said, "No. What happened to blacks could be said of any number of Americans—for instance, the Irish, who were discriminated against by the English."

That is not civil. That is not truthful. That is not a responsible use of the great megaphone that this man has. So if black people get upset, it is not because we are inherently mean, but because we feel abused and brutalized by such terribly irresponsible uses of power.

Mr. Bork

Professor Wilkins referred to the fact that many more blacks, women, and others are now working in certain desirable occupations than they were in the past. In fact, if one examines the trend lines in blacks' and women's employment starting well before the major civil rights laws of the 1960s, as such scholars as Thomas Sowell and Charles Murray have done, one could have predicted that blacks and women would be pretty much where they are today without any government action. It might have taken a bit longer without the laws, but it is clear that the old barriers were already breaking down.

On the negative side, I have seen two separate estimates that the gross national product is 4 percent lower than it would be otherwise because of affirmative action. If that is so, then we have paid an enormous price, both in money and in increased social hostility, to accomplish not much at all.

Mr. Wilkins

I just do not believe that. If you look at the dramatic improvements in the lives of blacks and women in this country since 1965, you cannot deny that the laws and policies of the past thirty years have had a tremendous impact.

With respect to affirmative action making the accomplishments of minorities somehow suspect, do you really think whites look down on a black college graduate with a good job who was helped by some affirmative action program more than they look down on a poor black who is not even working?

Mr. Bork

I must cite Thomas Sowell again, because he says it best: "Prejudice is free, but discrimination has costs." One of the reasons that discrimination was breaking down in this country is that, as businesses discovered how much it really costs to discriminate, they stopped doing it.

One example Sowell gives is that of the bus companies in the South that opposed government decrees requiring them to segregate their passengers—not because they were good-hearted folks, but because it cost them customers. Discrimination costs money to businesses that engage in it. That—not affirmative action—is why it was breaking down steadily.

Mr. Wilkins

So far we have been discussing affirmative action as if it somehow began to operate in a society where everyone was equal. Well, that is just not true. Affirmative action was developed in order to combat real fears and tenacious racism and sexism, all of which still exist in this society today. As Justice Harry Blackmun said in the *Bakke* case, in overcoming racism we have to take race into account.

Many argue that when you take race into account, then somehow white people are deeply harmed. I think that is wrong. What has really happened has been that white men, who enjoyed wonderful advantages in many aspects of American life up to 1965, are now forced to compete with women and minorities for all kinds of good things, and they do not like that. I do not believe that affirmative

action, properly applied and used, is reverse discrimination.

Finally, blacks in America know darn well that affirmative action has not caused people to be upset with each other racially. There have been racial problems in America since 1619, when the first blacks were delivered here; there were racial problems in the 1930s, 1940s, and 1950s; and there are going to be racial problems through the next century: not because of affirmative action, but because racism is a deep and permanent part of American culture.

Mr. Bork

I am not so sure about racism being a deep and permanent part of American society, but I agree that there will be color-consciousness for as long as this country exists. I do wish to point out, however, that affirmative action has almost nothing to do with discrimination. This country is thick with laws and agencies designed to root out discrimination, such as the EEOC and the Civil Rights Division of the Department of Education. We have all sorts of contract compliance boards monitoring employment. Discrimination can be wiped out by these and other statutes and agencies and by private lawsuits. Therefore, anybody who gets a job today because of affirmative action is someone who *cannot* show that he was discriminated against. The only way affirmative action benefits somebody who has actually been discriminated against is by sheer coincidence.

Mr. Wilkins

Let me tell you how it used to work in the days before affirmative action. As far back as the days of President Franklin Roosevelt, there were federal agencies with names like the Fair Employment Practices Commission that investigated complaints about discrimination by companies that received government contracts. When asked why they did not have any black employees, these compa-

nies would always say, "We tried, but we couldn't find any." And since these agencies had no teeth, no enforcement authority, nothing was ever changed. That is why we need goals and timetables: because in dealing with some people, relying on good faith is not enough.

Affirmative action does not help just black people, it helps white people as well. When youngsters from different backgrounds come together in a university and learn that much of the awful stuff they hear about each other is not true, all of us benefit.

On the issue of the permanence of preferential policies, I believe we are not near the point where we can think of getting rid of them now. But there is nothing wrong with setting up a procedure whereby they are reviewed every fifteen years or so to see where we are.

There is no escaping the fact that blacks and whites have different perspectives on American society. We blacks have had experiences in America that most whites will never have. I have had the Los Angeles Police Department point loaded guns at me as they pulled me from a car in which I was riding

with a white man. I was dressed in a coat and tie, and in fact was at the time an employee of the federal government. Well, that does give a person a certain attitude about the LAPD and about the police in other places that white Americans would have a hard time understanding.

It is difficult to have civil conversations when people refuse to admit the solid evidence you bring to the table from the experiences of your life. It is difficult for white Americans to deal with these things, because it is a part of this culture to dismiss the experiences of black Americans and to superimpose on us the preconceived notions that many—not all, but many—white Americans hold.

Every white American who opposes affirmative action is not a racist. But some of the white Americans who oppose affirmative action are most definitely deep-in-the-bone racists.

[This conference summary was prepared by
Lynn-Marie Luffman.]

5265

Testimony:

S. 1085, Equal Opportunity Act of 1995

Senate Labor and Human Resources Committee

April 30, 1996

Packet Includes:

- ▶ **Witness List**
- ▶ **All testimony submitted prior to 6 p.m. on April 29, 1996**

**PHOTOCOPY
PRESERVATION**

Senate Labor and Human Resources Committee Hearing

**Affirmative Action, Preferences and
the Equal Employment Opportunity Act of 1995, S. 1085**

SD-430

April 30, 1996

First Panel

Rep. Tom Campbell (R-CA)
Rep. Charles Canady (R-FL)
Del. Eleanor Holmes Norton (D-DC)

Second Panel

The Honorable Deval Patrick
Assistant Attorney General for Civil Rights
U.S. Department of Justice
Washington, DC

Third Panel

Jorge Amselle
Center for Equal Opportunity
Washington, DC

Marcia Greenberger
National Women's Law Center
Washington, DC

**TESTIMONY OF CONGRESSMAN TOM CAMPBELL OF CALIFORNIA IN
SUPPORT OF S. 1085 "THE EQUAL OPPORTUNITY ACT OF 1995"
BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
April 30, 1996**

Chairwoman Kassebaum, members of the Committee, thank you for inviting me to testify before you today in favor of S.1085, "The Equal Opportunity Act of 1995."

I would like to focus my comments on the general proposition that S. 1085 addresses; namely, that it is morally wrong for the government to discriminate between its citizens on the basis of their race. Everything else is secondary. I can give you examples showing that affirmative action has been counterproductive, and the supporters of it can point to people they claim who have benefited from it. But if we never depart from the fundamental issue of whether it is right or wrong, we will have the guidance we need to answer this question.

I had the exceptional honor to clerk for Justice Byron White in 1987, the year California v. Bakke was decided. Because I was the only unmarried law clerk, I was given the task of reading the entire history of the 1964 Civil Rights Act. It took me over three months. Then I briefed the Justice on what I found. What I found was a commitment to the principle I have stated today -- that the government must not discriminate against its citizens on the basis of race. No one argued that you can use race provided, on balance, it did more good than harm in creating role models. No one said that you can use race to distinguish among its citizens if it creates a diverse work place and mirrors the diversity of America. Hubert Humphrey, Senator Clifford Case, Congressman Morris Udall -- heroes of the civil rights movement to a person argued that it was morally wrong for the government to distinguish among citizens on the basis of race. That is why Title VI was put into the Civil Rights Act in 1964, and which was at issue in Bakke.

Let me turn to the Bakke decision. Do you recognize how very narrowly we decided to go down this path? It was a four-to-one-to-four decision. Four Justices said it was acceptable for the University of California at Davis to use racial considerations in its admission policy. Four Justices said it was never acceptable to use racial considerations, and only one, Justice Powell said it was acceptable to race, but just a little bit; an intellectually indefensible position, rejected by the eight other Justices. Among the four who rejected the use of race were Justices Stewart, Stevens, Chief Justice Burger and Rehnquist, now Chief Justice. Our liberal friends tend to dismiss decisions by Burger and Rehnquist; they are wrong to do so. But to them I point to Justices Stewart and Stevens. No one accuses the late Justice Stewart as being a far-right conservative. And Justice Stevens is probably the most liberal member of the Supreme Court today.

When I was reading the legislative history of the Civil Rights Act, I was also given the task of reading all of the briefs in the Bakke case. They go uncommented upon today, but if you go back and look at those who submitted amicus curie briefs and read them you get a strong sense of the danger many felt at the notion of the government using race. For example, B'nai B'rith submitted a brief which said that is all well and good for the University of California at Davis Medical School to create 15 places for blacks only, which they did, until you realize that the those who don't get into this pool of applicants even to be considered were more likely to be Jewish than gentile.

The Bakke case held that you could use racial considerations, a little bit, five-to-four. If one Justice had held to the principle the other four Justices did, we would have never gone down this road, and what we would have had is a pragmatic and effective program to help those people

in need regardless of their race. Had this happened, I'm convinced that the history of race relations in our country over the last 20 years would have been changed for the better.

Because of the position I take, I do not devote much time in my remarks as to how affirmative action has done harm. There are many others who can make this case very well. And there are others who can come back and say it does good. Abstract from that: You cannot do good by doing bad. But in my State of California I had one experience as a Congressman that I thought I would conclude with.

When I first served in the House of Representatives, I received a letter in my office from a constituent who had applied to Boalt Hall, the University of California's Law School at Berkeley. She had received a response from the University of California saying that, "you are number 43 on the Asian waiting list." This is not 1949, not 1899, this is 1989 when I was a freshman congressman. There was a blank in the letter where the number "43" was written in and another blank where the word "Asian" was written in before the words "waiting list" to tell her where she stood in the eyes of the state. Is there is any purported good that can justify that? To tell her that she is viewed by her state as number 43 for an Asian? This state that did not give Chinese-Americans the right to sue in civil court until the later part of the Century? My state that went along with the internment of Japanese-Americans purely on the basis of their race during the Second World War? My state that coined the hideous phrase, "Chinaman's chance" because it was the Chinaman who was sent to put the explosives in the Sierra Nevada when building the railroads, and if the Chinaman came back after the explosives went off, that was alright, but if he did not, well, that was the "Chinaman's chance"? My state told a citizen that she was number 43 on the Asian waiting list. You can't do right by doing wrong.

I believe S. 1085 successfully addresses this proposition by seeking to do away with preferences, set-asides and quotas of any kind in federal contracting. That is why I am happy to testify in favor of this bill today.

Thank you Chairwoman Kassebaum for the opportunity to testify before you today. I will be happy to answer any questions you or the Committee members may have.

###

Charles T. Canady

Representing Florida's 12th District



1222 Longworth House Office Building • Washington, D.C. 20515 • 202-225-1252

HEARING ON S. 1085 – THE EQUAL OPPORTUNITY ACT

Testimony of
REPRESENTATIVE CHARLES T. CANADY (R-FL)

Senate Committee on Labor and Human Resources
Tuesday, April 30, 1996
Room 430, Dirksen Senate Office Building

Chairman Kassebaum and Members of the Committee, I thank you for the opportunity to testify at this important hearing. As you may know, I am the lead sponsor of the Equal Opportunity Act, the legislation we will discuss this morning. Senator Dole and I introduced the bill last summer on July 27. This legislation will, if enacted, end the use of race and gender preferences by the federal government in federal employment, federal contracting, and in the administration of other federal programs.

The principles of equal treatment and nondiscrimination on which this legislation is based are principles which are the heart of the American experience. They embody an ideal which generations of Americans have honored and sought to realize -- an ideal to which we as a people have long aspired, but an ideal which we have never fully attained in our life as a nation.

In just over two weeks from today -- on May 18 -- we will mark the 100th anniversary of the Supreme Court's decision in Plessy v. Ferguson -- the decision which represents the culmination of disappointment in the struggle for equality before the law during the 19th Century.

In Plessy by a seven to one majority, the Supreme Court held that Louisiana's law requiring railroads to provide racially separate accommodations did not violate either the 13th or the 14th Amendments. Justice Henry Billings Brown, in delivering the Court's opinion, explained the difference between a distinction based on race and prohibited discrimination:

A statute which implies merely a legal distinction between the white and colored races...has no tendency to destroy the legal equality of the two races, or to reestablish a state of involuntary servitude.

Brown went on to observe that "in the nature of things" the 14th Amendment "could not have been intended to abolish distinctions based upon color..." According to Brown, the 14th Amendment challenge in Plessy "reduces itself to the question whether the statute of

Louisiana is a reasonable regulation." Brown then concluded: "we cannot say that a law which authorizes or even requires the separation of the races is unreasonable..."

Although the segregationist doctrine embodied in Plessy has been rejected by the Courts -- most strikingly in Brown v. Board of Education -- the case itself has never been directly overruled. Indeed, the core holding of Plessy that government may make reasonable distinctions in the treatment of its citizens based on their race remains the law of the land.

Although Justice Harlan's dissent in Plessy has been vindicated by history, the principle so eloquently articulated in that dissent has not finally been accepted by the courts. In words that would often be cited by those seeking to overthrow the Jim Crow system, Justice Harlan pronounced:

Our Constitution is color blind...The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the Supreme law of the land are involved.

Harlan found the Louisiana statute unconstitutional because "the Constitution of the United States does not...permit any public authority to know the race of those entitled to be protected in the enjoyment of "their civil rights." Simply put, government may not "have regard to the race of citizens when the civil rights of those citizens are involved."

The color-blind ideal was the touchstone of the American civil rights movement until the mid-1960s. In 1947, Thurgood Marshall representing the NAACP Legal Defense and Educational Fund, in a brief for a black student denied admission to the segregated University of Oklahoma law school, stated that principle unequivocally:

Classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws...

In the face of the vociferous opposition to the Equal Opportunity Act and any other proposal to end the use of preferences, we would do well to remember the long battle that was fought to establish a legal order based on the principle set forth in Justice's Harlan's dissent.

Professor Andrew Kull in his admirable history The Color-Blind Constitution identifies the centrality of the color-blind principle to the civil rights movement:

The undeniable fact is that over a period of some 125 years ending only in the late 1960s, the American civil rights movement first elaborated, then held as its unvarying political objective a rule of law requiring the color-blind treatment of individuals.

In 1964, the United States Congress took a great stride forward toward the realization of that objective. With the passage of the Civil Rights Act of 1964, the Congress established a national policy against discrimination based on race and sex. It is the supreme irony of the modern civil rights movement that this crowning achievement was soon followed by the creation of a system of preferences based on race and gender -- a system contrived first by administrative agencies and the federal courts; and then accepted and expanded by the Congress.

The 1964 Civil Rights Act constituted an unequivocal statement that Americans should be treated as individuals and not as members of racial or gender groups -- an unequivocal statement that no American should be subject to discrimination, which Sen. Hubert Humphrey -- the chief Senate sponsor of the legislation -- defined as a "distinction in treatment given to different individuals because of their different race."

Yet the ink was hardly dry on the 1964 law when a process of equivocation began, and the system of preferences was erected piece by piece. This took place not because Congress had failed to express its intention clearly, but because of a court system and an administrative structure determined to pursue their own purposes despite the clearly expressed purpose of the Congress.

Since the issue of imposing quotas or granting preferences based on race to compensate for historical wrongs had been the subject of controversy during the year preceding Congressional consideration of the 1964 Act, Congress was careful to directly address the issue in the text of the law. Section 703(j) of the Act stated that nothing in Title VII of the Act "shall be interpreted to require any employer...to grant preferential treatment to any individual to any group because of the race...of such individual or group..." in order to maintain a racial balance. The managers of Title VII, Senator Clark of Pennsylvania and Senator Case of New Jersey, had submitted a joint memorandum on the subject, where they stated:

...[A]ny deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited to any individual.

It is hard -- I think, impossible -- to imagine a clearer, more unambiguous statement of congressional intent on the subject of racial preferences. In the face of this directly expressed purpose in the law, the bureaucracy and the courts decided to chart their own course. In place of the principles of individual rights, equal opportunity and nondiscrimination embodied in the 1964 Civil Rights Act, the Courts and the bureaucracy moved forward with the establishment of a system based on the concepts of proportional representation, group entitlement, and guaranteed results.

This approach was adumbrated by Judge John Minor Wisdom of the 5th Circuit in United States v. Jefferson County where he upheld school desegregation guidelines promulgated by the Office of Education under Title VI of the 1964 Act and stated:

The Constitution is both color blind and color conscious... The criterion is the relevancy of color to a legitimate governmental purpose.

The concepts of proportional representation, group entitlement, and guaranteed results found full-blown expression in the Nixon Administration's Labor Department Order No. 4, which was first issued in November of 1969 and was aimed at the activities of all federal contractors. That Order stated: "The rate of minority applicants recruited should approximate or equal the rate of minorities to the applicant population in each location." A more direct conflict with the provision of Section 703(j) of the 1964 Civil Rights Act would be impossible to devise.

After a minor flap over Order No. 4, a revised order was issued by the Department of Labor in February of 1970. No substantive changes were made. The revised Order No. 4 provided that the affirmative action programs adopted by contractors must include "goals and timetables to which the contractor's good faith efforts must be directed to correct... deficiencies" in the "utilization of minority groups." This construct of goals and timetables to ensure the proper utilization of minority groups clearly envisioned a system in which group identity would be a factor -- often the decisive factor -- in hiring decisions. Distinctions in treatment would be made on the basis of race.

The concept of proportional representation embodied in Order No. 4 not only defied the intent of Section 703(j) of the 1964 Act, but also contravened the express nondiscrimination provisions of the Executive Order it was issued to implement. The course was set by the bureaucracy, and the courts did little to interfere.

With few exceptions, until the Supreme Court decided the Adarand case last year, the color-blind ideal was in eclipse. Year after year the system of preferences granted or imposed by the federal government grew -- with the active support of the Congress itself.

The dominant attitude was captured in 1978 in the opinion of Justice Blackmun in the Bakke Case, which dealt with a California medical school's policy of preferential admissions for minority students. Justice Blackmun distilled the rationale for preferential policies. He said:

"In order to get beyond racism, we must first take account of race...In order to treat some persons equally, we must treat them differently."

In the face of the provision of Title VI of the 1964 Civil Rights Act that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

program or activity receiving Federal financial assistance," the closely divided Court in Bakke recognized that race could at least be a factor in determining eligibility for admission to an educational institution receiving federal financial assistance.

The system of preferences is based on the notion that we can only overcome our history of discrimination by practicing discrimination. To guarantee the equitable apportionment of opportunities, Americans must be divided, sorted and classified by race and gender. It is the responsibility of government not to create a level playing field for all Americans but to determine outcomes based on race and gender. Rather than dealing with its citizens as unique individuals who are equal in the eyes of the law, the government of the United States must treat everyone as group members -- as people whose biological characteristics determine the scope of their claims on government.

The Equal Opportunity Act rejects this vision of America. It would overturn the status quo of race and gender preferences and return to the principles on which the Civil Rights Act of 1964 was based. In place of group rights it would establish respect for individual rights.

It is very important to focus on the specific provisions of the Equal Opportunity Act. Simply stated, S. 1085 would prohibit the federal government from intentionally discriminating against, or granting a preference to, any person or group based in whole or in part on race, color, national origin, or sex, in three areas: federal contracting, federal employment, and the administration of other federally conducted programs. In addition, it would prevent the federal government from requiring or encouraging federal contractors to discriminate or grant preferences based on race or sex.

Let me elaborate on a few key points. First, the bill applies only to federal programs and activities; it therefore does not affect programs or policies administered by state and local governments, the private sector, or colleges and universities.

Second, the Equal Opportunity Act does not affect our comprehensive regime of antidiscrimination laws. All forms of racial and sex-based discrimination that are illegal under current law would remain so under the Equal Opportunity Act. In addition, all remedies currently available to individuals who have been discriminated against will remain completely unaffected under this bill. Though you will hear claims to the contrary, it is simply not the case that this bill "weakens," "undermines," or otherwise affects laws that make it illegal to discriminate on the basis of race and sex.

Third, the bill draws an important distinction between preferential treatment and affirmative action; the former is prohibited, and the latter, properly understood, is permitted and expressly protected. I think we all recognize that the term "affirmative action" has come to describe a whole range of measures, from casting a wider net at the recruiting and outreach stage, to outright quotas, set-asides, and other numerical preferences. Section 3 of the Equal Opportunity Act expressly provides that the government may continue all nonpreferential forms of affirmative action. Steps taken to increase the size of the applicant

pool for a contracting or employment opportunity -- even steps targeted at women and minorities -- are permissible, so long as, at the decision stage, all applicants are judged in a nondiscriminatory manner without regard to race or sex.

If the bill does not affect antidiscrimination laws or nonpreferential forms of affirmative action, then what does it do? It would, in short, put an end to all federal programs that require the government to take into account the race or sex of American citizens, and to treat them differently based on what group they belong to. There is frustrating unwillingness on the part of many people to acknowledge what we all know -- namely, that there are many, many such programs and policies currently being administered by the federal government. Contracting set asides and bid preferences, grant programs targeted solely at women and minorities, and hiring and personnel systems that are driven by numerical goals and timetables -- these are all preference programs that, on their face, discriminate on the basis of race and sex. And these are the programs that would be eliminated under S. 1085.

The heart of the Equal Opportunity Act is found in its definition of preference. The bill, as introduced last summer, defines the term "grant a preference" to mean the "use of any preferential treatment and includes but is not limited to any use of a quota, set-aside, numerical goal, timetable, or other numerical objective." (I should note that this definition was slightly amended in the version of the bill recently passed by the House Subcommittee on the Constitution. In the amended version, the bill provides that the "term 'preference' means an advantage of any kind, and includes a quota, set-aside, numerical goal, timetable, or other numerical objective.") These functional definitions make clear that it is not what we call a policy, a practice or a program that determines its appropriateness. The test is how that policy, practice, or program operates. If the policy, practice, or program gives an advantage of any kind to individuals because of their race or gender it is unlawful.

Those who oppose the Equal Opportunity Act have the burden of explaining why anyone should receive "an advantage of any kind" based on race or gender. The supporters of preferences realize that this burden is indeed a heavy one. They understand that the American people are opposed to the system of preferential treatment that has been created over the years since 1964. They know the power of the principles of equal treatment and nondiscrimination. They know that Americans have an instinctive respect for individual rights.

The defenders of the status quo of preferential treatment have chosen not to meet this challenge. They have decided that a principled defense of group rights and proportional representation would not be successful since it is so clearly at odds with values that are central to the American experience. So rather than attempting such a principled defense of preferences, they have launched a campaign of confusion and distortion. The recent barrage against the Equal Opportunity Act is just the most recent phase of the long-standing effort to conceal the realities of the preferential system from the American people.

I could cite many examples of the distortions used to defend the status quo and to attack the Equal Opportunity Act. But the remarks delivered by President Clinton at the National Archives on July 19, 1995 -- the President's famous "mend it, don't end it" speech -- stands as the epitome of distortions in defense of the status quo of preferences. The President's speech is a handy compendium of the rhetorical devices used to obscure the issues and to mislead the American people.

The core of the President's speech is found in the four so-called "standards of fairness" for affirmative action programs. The President summarized these standards as follows:

No quotas in theory or practice; no illegal discrimination of any kind, including reverse discrimination; no preference for people who are not qualified for any job or other opportunity; and as soon as the program has succeeded, it must be retired. Any program that doesn't meet these four principles must be eliminated or reformed to meet them.

This statement represents an attempt to redescribe and redefine reality; in it words are stripped of their ordinary, commonly understood meaning, and infused with a new meaning.

When the President says "no quotas," he means that the totally unqualified should not be hired simply because of their race or gender under a system that has a hard and fast requirement that an established number or percentage of a particular group be hired. More fundamentally, when the President says he is against "quotas," he signals his recognition that the American people are against quotas, and that some other terminology must be used to describe the system of preferences based on race and gender, a system which apportions benefits based on group membership.

When the President says "no preferences for the unqualified," he conveniently glosses over the fact that individuals who are more qualified are systematically denied jobs and other opportunities solely because they belong to the wrong racial or gender group.

When the President says that "as soon as a program has succeeded, it must be retired," he fails to specify the standards for success; and he fails to tell us when we can expect these supposedly temporary programs to end. When the President says we should have "no illegal discrimination of any kind," he fails to explain how the system of counting by race and gender can be reconciled with either the letter or the spirit of the Civil Rights Act of 1964.

The President and the other defenders of preferential policies have constructed a fictitious world, a world where discrimination pure and simple is called just.

The Equal Opportunity Act rejects that fictitious world. It rejects the false descriptions of the programs, policies and practices of the federal government which have been foisted on the American people by the defenders of the status quo.

The Equal Opportunity Act is based on an understanding of the flaws of the system of preferences based on race and gender.

It recognizes that the system of preferences unfairly places burdens on and denies opportunities to those who have been guilty of no wrongdoing -- simply because of their race or gender -- while granting benefits to individuals who are not victims of discriminatory conduct.

The Equal Opportunity Act is based on an understanding that the existence of the system of race and gender preferences unfairly casts a cloud over the accomplishments of individuals who are members of favored groups -- and deprives those individuals of the full measure of respect they are due for their individual achievements.

Finally, and most importantly, the Equal Opportunity Act is based on the recognition that the system of race and gender preferences sends a message from government to the American people that we should think along racial and gender lines -- a message which only reinforces prejudice and discrimination in our society.

With that, I would like to thank the Committee again for permitting me to testify, and I look forward to receiving any questions you might have about the Equal Opportunity Act.

ELEANOR HOLMES NORTON
DISTRICT OF COLUMBIA

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE

SUBCOMMITTEES
PUBLIC BUILDINGS AND
ECONOMIC DEVELOPMENT
WATER RESOURCES AND
ENVIRONMENT



COMMITTEE ON
GOVERNMENT REFORM AND
OVERSIGHT

SUBCOMMITTEE
RANKING MINORITY MEMBER,
DISTRICT OF COLUMBIA

Congress of the United States
House of Representatives
Washington, D.C. 20515

TESTIMONY OF
CONGRESSWOMAN ELEANOR HOLMES NORTON
ON
AFFIRMATIVE ACTION, PREFERENCE, AND
THE EQUAL OPPORTUNITY ACT OF 1995, S.1085

UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES
APRIL 30, 1996

For more than three centuries, in one form or another, race has been both this country's deepest flaw and its cheapest shot. Each period has produced its own version of each, depending upon the quality of its leadership and the shape of events. The nation's leadership is once again being tested on race, and the events include a Presidential campaign, pervasive evidence of severe racial polarization and daily reports of overt racism.

Race is so resilient a temptation in American life that it often crowds out other phenomena. The emerging debate on affirmative action presents an especially ironic case. Race has animated and energized the controversy. However, because affirmative action in employment today primarily assists those with education and training, the largest group of these beneficiaries, not only numerically but proportionately, is women. This, of course, is because women's life chances are similar to those of men and are unlike the lives of minorities, many of whom are still struggling with poverty and disadvantage. This particular irony is compounded by S. 1085, the so called Equal Opportunity Act of 1995 or the Dole-Canady bill to abolish all affirmative remedies. Though the controversy about affirmative action has always been driven by the race of the minority rather than the gender of the majority, gender is treated more harshly and arbitrarily in this bill in ways I will mention later. This result would seem to drive home the oldest lesson about group harmony and toleration -- that action motivated by racial fear or politics cannot be contained, but inexorably spreads to first one group and then the next.

You have asked me to discuss the Dole-Canady bill and its potential effects on affirmative action. I think that I could be most useful if I did so by bringing to bear my own experience as a former chair of the Equal Employment Opportunity Commission and a former chair of the New York City Commission on Human Rights. While I was at the EEOC, we developed Affirmative Action Guidelines for the purpose of helping employers avoid discriminating against some while eliminating discrimination against others. These Guidelines are attached to this testimony. The EEOC, of course, has jurisdiction over employment discrimination. Today affirmative action, as developed in employment, often is used or is being

815 15TH STREET, N.W., SUITE 100
WASHINGTON, D.C. 20005-2201
(202) 783-5065
(202) 783-5211 (FAX)

1424 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515-5101
(202) 225-8050
(202) 225-3002 (FAX)
(202) 225-7829 (TDD)

2041 MARTIN LUTHER KING AVENUE S.E.
SUITE 300
WASHINGTON, D.C. 20020-6734
(202) 678-6880
(202) 678-6884 (FAX)

are attached to this testimony. The EEOC, of course, has jurisdiction over employment discrimination. Today affirmative action, as developed in employment, often is used or is being incorporated into other areas, such as procurement. Affirmative action in employment, which has been developed and ratified by the courts, is the generic model and the most instructive in discussing this subject in other areas.

The New York City law encompassed all forms of discrimination. In New York, I worked not only to remedy discrimination but, in doing so, to use mechanisms that avoided racial preference, polarization, and tension among New York City's numerous and extraordinary array of racial and ethnic groups. As chair of the New York City Commission, I used strong and effective affirmative action, including goals and timetables, in the city where the major Jewish organizations are headquartered. My experience in New York is noteworthy because American Jews have been perhaps the group most victimized by quotas. Virtually all the Jewish groups supported my affirmative action work, including goals and timetables, and later supported my candidacy when President Carter nominated me to chair the EEOC. This experience, as well as the documented testimony of most of the major Jewish organizations supporting affirmative action in general and goals and timetables in particular, is persuasive evidence that goals and timetables do not generally lead to quotas.

I would prefer to simply pass on the self evident question of the need for strong remedies to end discrimination against people of color and women in this country. Even opponents of affirmative action, I believe, would have to concede that equal treatment is not nearly a reality for many minorities and women, that discrimination against them persists, and that the discrimination they face is far more prevalent than discrimination against white males based on their race and gender. Rather, I would like to spend most of this testimony examining the Dole-Canady bill in light of extremely restrictive existing safeguards against abuse of affirmative action that make the bill punitive and unnecessary except as a partisan political vehicle.

In passing, however, I would like to catalogue by simple reference three perverse consequences that alone should discredit the bill. Among them are: (1) a lack of definition for the term "preferential treatment," a boundless term that invites delegitimation of whatever modest remedies the bill would retain, and a term that will certainly promote litigation; (2) a specific exemption allowing historically black colleges and universities to engage in discrimination against whites, an insult to their historic leadership and tradition of non-discrimination (other predominantly black institutions, such as the University of the District of Columbia, not so classified, as well as Hispanic institutions, presumably could not discriminate); and (3) an exemption allowing discrimination against women for national security or privacy reasons, loopholes so large and untenable that they have long been discredited and would disqualify many women from jobs they now hold.

Today, far from being a threat, affirmative action is surrounded by a plethora of proven safeguards, daunting new Supreme Court restrictions, and administrative limitations that should lead this Committee to inquire whether the nation's antidiscrimination effort has not already been

severely undermined. Without any showing that affirmative action is no longer needed or that it in fact has been significantly abused, the Dole-Canady bill disarms legitimate efforts to eliminate discrimination. What the bill leaves is a small number of benign outreach mechanisms that have almost a century of documented failure.

The courts led in requiring affirmative remedies, such as numerical indicators of progress, because they found that the methods in use (such as outreach, the central feature of Dole-Canady) had produced almost no progress. Today, no one who is serious about eliminating ancient and recalcitrant patterns of discrimination would return to the remedies of the 1950s, as this bill does. The 1964 Civil Rights Act, in succeeding the benign 1957 Civil Rights Act, deliberately opened the way for the modern remedies now in use. Nothing would increase the cynicism of blacks more than to be told to repair to the old remedies that kept their fathers and grandmothers in the backwaters of the labor force. Nothing would punish women and their families more than outreach techniques that allow employers to recruit women to a pool but continue to hire as before.

The careless and undocumented assertion that quotas result from goals and timetables has no basis in fact. The bill's authors have not even tried to meet the burden of demonstrating the extent of abuse. They cite no statistical evidence. The usual anecdotal evidence is unpersuasive, especially when measured against the countless millions of instances of legitimate and systematic use of affirmative action in the workplace and the great strides women and minorities have made only as a result of strong affirmative action.

The same courts that are chiefly responsible for developing affirmative remedies have also built strong safeguards. The Supreme Court has required that neutral measures be considered before using race or sex based remedies; that remedies not be used to maintain a balance, even if layoffs immediately undo remedial hiring or promotion; that remedies be time-limited; that remedies be tightly tailored to the particular problem; that remedies be flexible; that numerical remedies reflect the number of qualified minorities and women in the applicable pool; that race or sex can be one but not the exclusive factor; that remedies not "unnecessarily trammel" on others or discharge them from their positions, even if the existing workers received their positions because of discriminatory practices; and that only good faith efforts, not actual hiring of excluded individuals be required, even where there has been deliberate segregation.

Beyond the safeguards developed by courts are others that operate as a matter of law. For example, because goals are remedial, they automatically become illegal once the employment system is operating effectively to bring in members of the excluded groups on its own, even if the employer has not fully corrected discrimination. This stage normally is reached when a critical mass of individuals from the excluded group has been recruited because, then, the system can revert to word of mouth recruitment. Particularly after the system is corrected, the use of numerical remedies is itself discriminatory. For example, when Title VII of the 1964 Civil Rights Act was enacted, the majority of real estate agents were men; today the majority are women. Affirmative action, therefore, would not only be inappropriate but illegal. Moreover,

goals and timetables play an important role in protecting against "reverse discrimination." An employer who engages in the appropriate outreach and makes a good faith effort to find minorities and women may cite these efforts for not hiring individuals who do not meet its qualifications.

This may be one of the reasons that business and the most successful user, our own Armed Forces, have long embraced affirmative action, including goals and timetables, quite apart from the more farsighted desire to do the right thing we see from business and the Services today. And there are other reasons. The Executive Order 11246 program of goals and timetables initiated by President Richard Nixon at the Office of Federal Contract Compliance Programs (OFCCP) has served business as well as government and excluded groups. Business has been spared billions of dollars in litigation because goals and timetables have encouraged self-remediation, the best and most cost efficient law enforcement. Government has pursued its constitutional obligation to avoid spending public money with firms that discriminate. Women and minorities have broken through patterns of exclusion that had resisted all other efforts until goals and timetables were used by the courts and agencies.

Business support of affirmative action has been largely responsible for its survival since 1980. When the Reagan administration tried to eliminate affirmative action, it was the business community and, ironically, Senator Dole, who saved goals and timetables. Business had come to rely on the OFCCP assessments which led to goals and timetables to help identify and correct exclusionary but often unintentional practices, an early warning that has saved countless amounts of money and time that would otherwise have gone into litigation. Goals have been essential to understanding whether discriminatory practices and tests are actually being eliminated. For example, if an employer is using a new test or advertising in new sources, goals that result in employees from new groups tell him that the new techniques are removing exclusionary barriers and protecting him from litigation.

Finally, let me offer perhaps the most persuasive evidence that white males are not victims of affirmative action. At the EEOC, white men filed only 1.7% of discrimination complaints on average between 1987 and 1994 alone. Yet, neither at the EEOC or in other administrative or court procedures have white males showed a reluctance to pursue their rights. White men file the great majority of age discrimination cases at EEOC -- 6,541 of 8,026 age complaints filed in 1994. The reason, of course, is that age discrimination is the most common form of discrimination white men face -- and they pursue their rights with a vengeance. They are objects of age discrimination, in particular, because employers often seek to eliminate experienced and management level employees because of the cost of their wages and benefits. The experience with age discrimination shows that white males understand discrimination. Their record of failing to pursue other forms of discrimination, including "reverse discrimination," is compelling evidence that affirmative action has not significantly discriminated against them.

If there were any doubt that the restrictions in place are sufficient, surely the Supreme Court decision in Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995), applying strict

scrutiny to these remedies, has tied the knot as tightly as anyone in good faith could desire. This decision caused the Clinton Administration to undertake a review of all affirmative action programs. As a result the only set-aside program (a sheltered program at the Department of Defense) has been eliminated.

Particularly after Adarand, it is fair to ask what possible purpose could the Dole-Canady bill serve? If anything, the catalogue of existing safeguards, tight restrictions, potential liability for abuse, and a daunting new strict scrutiny standard threaten most remaining affirmative action and leave little room or need for Congressional action.

What remains is an old and deeply imbedded part of our culture -- the political temptation to manipulate race. Yet President Clinton has taken the responsible course. At some political risk and cost to himself, he has noted the patently unfinished business of eliminating race and sex discrimination that necessitates affirmative action and issued the order "to mend it, not end it."

On the other hand, Senator Dole has embarked on a course at odds with his own long and uninterrupted support of affirmative action until recently. Even if he believed that the remedies he so recently supported were no longer universally needed, we might have expected a corrective approach rather than a sudden 180 degree reversal and authorship of a bill to entirely eliminate a program which he has strongly defended against others who sought total elimination. Instead, a House Small Business Committee investigation found Senator Dole eager to make use of affirmative action. For two years, according to the Committee, Mr. Dole vigorously pursued and got a \$26 million set-aside contract for John Palmer, a former black aide, who had failed to get a food service contract because his business had a negative net worth, no sales experience, and an office only in Palmer's home. The Committee investigation also raised concern that Palmer might be a "front" for a white businessman and Republican operative.

Mr. Dole's personal experience is a classic case in need of mending but it hardly makes out an argument for ending all affirmative action. What must be ended is the chronic American need to lead with race, especially in tough times. What must be ended are premature declarations of victory on race and sex discrimination when the army is still fighting an uphill battle in the field. What must be ended is the use of race in Presidential campaigns. What I hope we can begin is a period of studied and uninterrupted pursuit of equal treatment so that we can soon lay affirmative action remedies to rest and say well done.

In paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees looked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes

that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either a minimum or maximum voluntary standard that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

Harold R. Tyler, Jr.,
Deputy Attorney General and Chairman
of the Equal Employment Coordinating
Council.

Michael H. Moskow,
Under Secretary of Labor.
Echel Bent Walsh,
Acting Chairman, Equal Employment
Opportunity Commission.

Robert E. Hampton,
Chairman, Civil Service Commission.
Arthur E. Flemming,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1978.

Richard Albrecht,
General Counsel,
Department of the Treasury.

§1607.16 Citations.

The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Op-

portunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission. The official citation is:

Section — Uniform Guidelines on Employee Selection Procedure (1978); 43 FR — August 26, 1978).

The short form citation is:

Section — U.G.E.R.P. (1978); 43 FR — August 26, 1978).

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation of the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR part 1607

Department of Labor
Office of Federal Contract Compliance Programs

29 CFR part 60-3
Department of Justice
29 CFR 50.14

Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows:

Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR — (August 26, 1978); 29 CFR part 1607, section 6A.

PART 1608—AFFIRMATIVE ACTION
APPROPRIATE UNDER TITLE VII OF
THE CIVIL RIGHTS ACT OF 1964,
AS AMENDED

- Sec.
- 1608.1 Statement of purpose.
- 1608.2 Writer interpretation and opinion.
- 1608.3 Circumstances under which voluntary affirmative action is appropriate.
- 1608.4 Establishing affirmative action plans.
- 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.
- 1608.6 Affirmative action plans which are part of Commission conciliation or settlement agreements.

1608.7 Affirmative action plans or programs under State or local law.

1608.8 Adherence to court order.

1608.9 Reliance on directions of other government agencies.

1608.10 Standard of review.

1608.11 Limitations on the application of these guidelines.

1608.12 Equal employment opportunity plans adopted pursuant to section 717 of Title VII.

AUTHORITY: Sec. 717 the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 76 Stat. 205.

SOURCE: 41 FR 4423, Jan. 19, 1976, unless otherwise noted.

§1608.1 Statement of purpose.

(a) Need for Guidelines. Since the passage of title VII in 1964, many employers, labor organizations, and other persons subject to title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor organization, or other person subject to title VII, or as a result of conciliation efforts under title VII, action under Executive Order 11246, as amended, or under other Federal, State, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of title VII. Any uncertainty as to the meaning and application of title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement.

Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of title VII litigation. The Commission believes that it is now necessary to clarify and harmonize the principles of title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of title VII.

(b) *Purposes of title VII.* Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.² The Legislative Histories of title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women.³ The purpose

² Congress has also addressed these conditions in other laws, including the Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (1963), as amended; the other titles of the Civil Rights Act of 1964, Pub. L. 88-364, 78 Stat. 241 (1964), as amended; the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965), as amended; the Fair Housing Act of 1968, Pub. L. 90-284, title VII, 81 Stat. 81 (1968), as amended; the Educational Opportunity Act (title IX), Pub. L. 92-318, 86 Stat. 173 (1972), as amended; and the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972), as amended.

³ Equal Pay Act of 1963: S. Rep. No. 176, 86th Cong., 1st Sess., 1-2 (1963). Civil Rights Act of 1964: H.R. Rep. No. 914, pt. 2, 86th Cong., 1st Sess. (1971). Equal Employment Opportunity Act of 1972: H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971). See also, Equal Employment Opportunity Commission, *Equal Employment Opportunity Report—1975, Job Patterns for Women in Private Industry* (1977); Equal Employment Opportunity Commission, *Minorities and Women in State and Local Government—1975* (1977); United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978).

of Executive Order No. 11246, as amended, is similar to the purpose of title VII. In response to these economic and social conditions, Congress, by passage of title VII, established a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin. In addition, Congress strongly encouraged employers, labor organizations, and other persons subject to title VII (hereinafter referred to as "persons," see section 701(a) of the Act) to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action. Conference, conciliation, and persuasion were the primary processes adopted by Congress in 1964, and reaffirmed in 1972, to achieve these objectives, with enforcement action through the courts or agencies as a supporting procedure where voluntary action did not take place and conciliation failed. See section 706 of title VII.

(c) *Interpretation in furtherance of legislative purpose.* The principle of non-discrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII.⁴ Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices,

⁴ Affirmative action often improves opportunities for all members of the workforce, as where affirmative action includes the posting of notices of job vacancies. Similarly, the integration of previously segregated jobs means that all workers will be provided opportunities to enter jobs previously restricted. See, e.g., EEOC v. AT&T, 419 F. Supp. 1022 (E.D. Pa. 1976), *aff'd*, 656 F. 2d 187 (3rd Cir. 1977), *cert. denied*, 96 S.Ct. 3145 (1978).

or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII. Correspondingly, title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against title VII liability which the Commission is authorized to provide under section 713(b)(1).

(d) *Guidelines interpret title VII and authorize use of section 713(b)(1).* These Guidelines describe the circumstances in which persons subject to title VII may take or agree upon action to improve employment opportunities of minorities and women, and describe the kinds of actions they may take which are consistent with title VII. These Guidelines constitute the Commission's interpretation of title VII and will be applied in the processing of claims of discrimination which involve voluntary affirmative action plans and programs. In addition, these Guidelines state the circumstances under which the Commission will recognize that a person subject to title VII is entitled to assert that actions were taken "in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission," including reliance upon the interpretation and opinion contained in these Guidelines, and thereby invoke the protection of section 713(b)(1) of title VII.

(e) *Review of existing plans recommended.* Only affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines can receive the full protection of these Guidelines, including the section 713(b)(1) defense. See § 1608.10. Therefore, persons subject to title VII who have existing affirmative action plans, programs, or agreements are encouraged to review them in light of these Guidelines, to modify them to the extent necessary to com-

ply with these Guidelines, and to readopt or reaffirm them.

§ 1608.2 Written interpretation and opinion.

These Guidelines constitute "a written interpretation and opinion" of the Equal Employment Opportunity Commission as that term is used in section 713(b)(1) of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1), and § 1601.33 of the Procedural Regulations of the Equal Employment Opportunity Commission (29 CFR 1601.30; 42 FR 56,394 (October 14, 1977)). Section 713(b)(1) provides:

In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that . . . after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect

The applicability of these Guidelines is subject to the limitations on use set forth in § 1608.11.

§ 1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) *Adverse effect.* Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) *Effects of prior discriminatory practices.* Employers, labor organizations, or other persons subject to title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially

identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited labor pool.* Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 8 and 8, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30290; 38297; 38299 (August 28, 1978));

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

§ 1608.4 Establishing affirmative action plans.

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) *Reasonable self analysis.* The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self analysis. The employer may utilize techniques used in order to comply with Executive

Order 11246, as amended, and its implementing regulations, including 41 CFR part 60-2 (known as Revised Order 4), and related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies. An employer may use an analysis similar to that required under other Federal, State, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to title VII should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. See *Griggs v. Duke Power Co.*, 421 U.S. 424 (1971).

(b) *Reasonable basis.* If the self analysis shows that one or more employment practices:

(1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited,

(2) Leave uncorrected the effects of prior discrimination, or

(3) Result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate.

It is not necessary that the self analysis establish a violation of title VII. This reasonable basis exists without any admission or formal finding that the person has violated title VII, and without regard to whether there exists arguable defenses to a title VII action.

(c) *Reasonable action.* The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the ad-

verse impact or disparate treatment or which perpetuated past discrimination.

(1) *Illustrations of appropriate affirmative action.* Affirmative action plans or programs may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 FR 28214 (September 13, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FR 38290; 38300 (Aug. 28, 1978). That statement reads, in relevant part:

"When an employer has reason to believe that its selection procedures have '... exclusionary effect' . . . it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:

The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

A recruitment program designed to attract qualified members of the group in question;

A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees looked into dead end jobs; and

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) *Standards of reasonable action.* In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(1) The plan should be tailored to solve the problems which were identified in the self analysis, see § 1608.4(a), and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(2) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

(d) *Written or unwritten plans or programs—*

(1) *Written plans required for 713(b)(1) protection.* The protection of section 713(b) of title VII will be accorded by the Commission to a person subject to title VII only if the self analysis and the affirmative action plan are dated and in writing, and the plan otherwise meets the requirements of section 713(b)(1). The Commission will not require that there be any written statement concluding that a title VII violation exists.

(2) *Reasonable cause determinations.* Where an affirmative action plan or program is alleged to violate title VII, or is asserted as a defense to a charge of discrimination, the Commission will investigate the charge in accordance with its usual procedures and pursuant to the standards set forth in these Guidelines, whether or not the analysis and plan are in writing. However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

§ 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.

Under title VII, affirmative action compliance programs adopted pursuant

to Executive Order 11246, as amended, and its implementing regulations, including 41 CFR part 60-2 (Revised Order 4), will be considered by the Commission in light of the similar purposes of title VII and the Executive Order, and the Commission's responsibility under Executive Order 12067 to avoid potential conflict among Federal equal employment opportunity programs. Accordingly, the Commission will process title VII complaints involving such affirmative action compliance programs under this section.

(a) *Procedures for review of Affirmative Action Compliance Programs.* If adherence to an affirmative action compliance program adopted pursuant to Executive Order 11246, as amended, and its implementing regulations, is the basis of a complaint filed under title VII, or is alleged to be the justification for an action which is challenged under title VII, the Commission will investigate to determine whether the affirmative action compliance program was adopted by a person subject to the Order and pursuant to the Order, and whether adherence to the program was the basis of the complaint or the justification.

(1) *Programs previously approved.* If the Commission makes the determination described in paragraph (a) of this section and also finds that the affirmative action program has been approved by an appropriate official of the Department of Labor or its authorized agencies, or is part of a conciliation or settlement agreement or an order of an administrative agency, whether entered by consent or after contested proceedings brought to enforce Executive Order 11246, as amended, the Commission will issue a determination of no reasonable cause.

(2) *Program not previously approved.* If the Commission makes the determination described in paragraph (a), of this section but the program has not been approved by an appropriate official of the Department of Labor or its authorized agencies, the Commission will: (1) Follow the procedure in §1608.10(a) and review the program, or (2) refer the plan to the Department of Labor for a determination of whether it is to be approved under Executive Order 11246, as amended, and its implementing regula-

tions. If the Commission finds that the program does conform to these Guidelines, or the Department of Labor approves the affirmative action compliance program, the Commission will issue a determination of no reasonable cause under §1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action compliance program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of title VII and of §1608.10(b), of this part, may be asserted by the contractor.

§ 1608.8 Affirmative action plans which are part of Commission conciliation or settlement agreements.

(a) *Procedures for review of plans.* In adherence to a conciliation or settlement agreement executed under title VII and approved by a responsible official of the EEOC is the basis of a complaint filed under title VII, or is alleged to be the justification for an action challenged under title VII, the Commission will investigate to determine:

(1) Whether the conciliation agreement or settlement agreement was approved by a responsible official of the EEOC, and

(2) Whether adherence to the agreement was the basis for the complaint or justification.

If the Commission so finds, it will make a determination of no reasonable cause under §1608.10(a) and will advise the respondent of its right under section 713(b)(1) of title VII to rely on the conciliation agreement.

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of title VII and of §1608.10(b), of this part, may be asserted by the respondent.

§ 1608.7 Affirmative action plans or programs under State or local law.

Affirmative action plans or programs executed by agreement with State or local government agencies, or by order of State or local government agencies, whether entered by consent or after contested proceedings, under statutes or ordinances described in title VII, will be reviewed by the Commission in

light of the similar purposes of title VII and such statutes and ordinances. Accordingly, the Commission will process title VII complaints involving such affirmative action plans or programs under this section.

(a) *Procedures for review of plans or programs.* If adherence to an affirmative action plan or program executed pursuant to a State statute or local ordinance described in title VII is the basis of a complaint filed under title VII or is alleged to be the justification for an action which is challenged under title VII, the Commission will investigate to determine:

(1) Whether the affirmative action plan or program was executed by an employer, labor organization, or person subject to the statute or ordinance,

(2) Whether the agreement was approved by an appropriate official of the State or local government, and

(3) Whether adherence to the plan or program was the basis of the complaint or justification.

(1) *Previously approved plans or programs.* If the Commission finds the facts described in paragraph (a) of this section, the Commission will, in accordance with the "substantial weight" provisions of section 706 of the Act, find no reasonable cause where appropriate.

(2) *Plans or programs not previously approved.* If the plan or program has not been approved by an appropriate official of the State or local government, the Commission will follow the procedure of §1608.10 of these Guidelines. If the Commission finds that the plan or program does conform to these Guidelines, the Commission will make a determination of no reasonable cause as set forth in §1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) and §1608.10(b), of this part, may be asserted by the respondent.

§ 1608.8 Adherence to court order.

Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether en-

tered by consent or after contested litigation, in a case brought to enforce a Federal, State, or local equal employment opportunity law or regulation, is the basis of a complaint filed under title VII or is alleged to be the justification for an action which is challenged under title VII, the Commission will investigate to determine:

(a) Whether such an Order exists and

(b) Whether adherence to the affirmative action plan which is part of the Order was the basis of the complaint or justification.

If the Commission so finds, it will issue a determination of no reasonable cause. The Commission interprets title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under title VII.

§ 1608.9 Reliance on directions of other government agencies.

When a charge challenges an affirmative action plan or program, or when such a plan or program is raised as justification for an employment decision, and when the plan or program was developed pursuant to the requirements of a Federal or State law or regulation which in part seeks to ensure equal employment opportunity, the Commission will process the charge in accordance with §1608.10(a). Other agencies with equal employment opportunity responsibilities may apply the principles of these Guidelines in the exercise of their authority.

§ 1608.10 Standard of review.

(a) *Affirmative action plans or programs not specifically relying on these guidelines.* If, during the investigation of a charge of discrimination filed with the Commission, a respondent asserts that the action complained of was taken pursuant to an in accordance with a plan or program of the type described in these Guidelines, the Commission will determine whether the assertion is true, and if so, whether such a plan or program conforms to the requirements of these guidelines. If the Commission so finds, it will issue a determination of no reasonable cause and, where appropriate, will state that the determination constitutes a written interpretation or opinion of the Commission

under section 713(b)(1). This interpretation may be relied upon by the respondent and asserted as a defense in the event that new charges involving similar facts and circumstances are thereafter filed against the respondent, which are based on actions taken pursuant to the affirmative action plan or program. If the Commission does not so find, it will proceed with the investigation in the usual manner.

(b) *Reliance on these guidelines.* If a respondent asserts that the action taken was pursuant to and in accordance with a plan or program which was adopted or implemented in good faith, in conformity with, and in reliance upon these Guidelines, and the self analysis and plan are in writing, the Commission will determine whether such assertion is true. If the Commission so finds, it will so state in the determination of no reasonable cause and will advise the respondent that:

(1) The Commission has found that the respondent is entitled to the protection of section 713(b)(1) of title VII; and

(2) That the determination is itself an additional written interpretation or opinion of the Commission pursuant to section 713(b)(1).

§ 1608.11 Limitations on the application of these guidelines.

(a) *No determination of adequacy of plan or program.* These Guidelines are applicable only with respect to the circumstances described in § 1608.1(d) of this part. They do not apply to, and the section 713(b)(1) defense is not available for the purpose of, determining the adequacy of an affirmative action plan or program to eliminate discrimination. Whether an employer who takes such affirmative action has done enough to remedy such discrimination will remain a question of fact in each case.

(b) *Guidelines inapplicable in absence of affirmative action.* Where an affirmative action plan or program does not exist, or where the plan or program is not the basis of the action complained of, these Guidelines are inapplicable.

(c) *Currency of plan or program.* Under section 713(b)(1), persons may rely on the plan or program only during the time when it is current. Currency is re-

lated to such factors as progress in correcting the conditions disclosed by the self analysis. The currency of the plan or program is a question of fact to be determined on a case by case basis. Programs developed under Executive Order 11246, as amended, will be deemed current in accordance with Department of Labor regulations at 41 CFR chapters 60, or successor orders or regulations.

§ 1608.12 Equal employment opportunity plans adopted pursuant to section 717 of Title VII.

If adherence to an Equal Employment Opportunity Plan, adopted pursuant to section 717 of title VII, and approved by an appropriate official of the U.S. Civil Service Commission, is the basis of a complaint filed under title VII, or is alleged to be the justification for an action under title VII, these Guidelines will apply in a manner similar to that set forth in § 1608.5. The Commission will issue regulations setting forth the procedure for processing such complaints.

PART 1610—AVAILABILITY OF RECORDS

Subpart A—Production or Disclosure Under 5 U.S.C. 552

- Sec.
- 1610.1 Definitions.
 - 1610.2 Statutory requirements.
 - 1610.3 Purpose and scope.
 - 1610.4 Public reference facilities and current index.
 - 1610.5 Request for records.
 - 1610.6 Records of other agencies.
 - 1610.7 Where to make request; form.
 - 1610.8 Authority to determine.
 - 1610.9 Prompt response.
 - 1610.10 Responses; form and content.
 - 1610.11 Appeals to the Legal Counsel from initial denials.
 - 1610.13 Maintenance of files.
 - 1610.14 Waiver of user charges.
 - 1610.15 Schedule of fees and method of payment for services rendered.
 - 1610.16 Payment of fees.
 - 1610.17 Exemptions.
 - 1610.18 Information to be disclosed.
 - 1610.19 Predisclosure Notification Procedures for Confidential Commercial Information.
 - 1610.20 Deletion of exempted matters.
 - 1610.21 Annual report.

Equal Employment Opportunity Comm.

Subpart B—Production in Response to Subpoenas or Demands of Courts or Other Authorities

- 1610.30 Purpose and scope.
- 1610.31 Production prohibited unless approved by the Legal Counsel.
- 1610.34 Procedure in the event of a demand for production or disclosure.
- 1610.36 Procedure in the event of an adverse ruling.

AUTHORITY: 42 U.S.C. 2000e-12(a), 5 U.S.C. 552, as amended by Pub. L. 92-502 and Pub. L. 93-397; for § 1610.15, nonsearch or copy portions are issued under 51 U.S.C. 9701.

Subpart A—Production or Disclosure Under 5 U.S.C. 552

§ 1610.1 Definitions.

(a) *Title VII* refers to title VII of the Civil Rights Act of 1964, as amended by Public Law 92-281, 42 U.S.C. (Supp. II) 2000e et seq.

(b) *Commission* refers to the Equal Employment Opportunity Commission.

(c) *Freedom of Information Act* refers to 5 U.S.C. 552 (Pub. L. 90-23 as amended by Pub. L. 93-502).

(d) *Commercial use* refers to a use or purpose by the requester of information for the information that furthers the requester's commercial, trade or profit interests. Requests for charge files by profit-making entities, other than educational and noncommercial scientific institutions and representatives of the new media, shall be considered for commercial use unless the request demonstrates a noncommercial use.

(40 FR 8171, Feb. 24, 1975, as amended at 68 FR 19430, Apr. 27, 1997)

§ 1610.2 Statutory requirements.

5 U.S.C. 552(a)(3) requires each Agency, upon request for reasonably described records made in accordance with published rules stating the time, place, fees, if any, and procedure to be followed, to make such records promptly available to any person. 5 U.S.C. 552(b) exempts specified classes of records from the public access requirements of 5 U.S.C. 552(a) and permits them to be withheld.

(40 FR 8171, Feb. 24, 1975)

§ 1610.3 Purpose and scope.

This subpart contains the regulations of the Equal Employment Opportunity Commission implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all organizational units within the Commission. Official records of the Commission made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. Officers and employees of the Commission may continue to furnish to the public, informally and without compliance with the procedures prescribed herein, information and records which prior to the enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties. To the extent that it is not prohibited by other laws, the Commission also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

§ 1610.4 Public reference facilities and current index.

(a) The Commission will maintain in a public reading area located in the Commission's library at 1801 L Street NW., Washington DC 20507, the materials which are required by 5 U.S.C. 552(a)(2), and 552(a)(6) to be made available for public inspection and copying. The Commission will maintain and make available for public inspection and copying in this public reading area a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and which is required to be indexed by 5 U.S.C. 552(a)(2). The Commission in its discretion may, however, include precedential materials issued, adopted, or promulgated prior to July 4, 1967. The Commission will also maintain on file in this public reading area all material published by the Commission in the FEDERAL REGISTER and currently in effect.

(b) Each of the Commission's field offices listed in paragraph (c) of this section, including the District Offices, the Washington Field Office, the Area Of-

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

<i>Part</i>		<i>Page</i>
1600	Employee responsibilities and conduct	147
1601	Procedural regulations	163
1602	Recordkeeping and reporting requirements under title VII and the ADA	185
1604	Guidelines on discrimination because of sex	198
1605	Guidelines on discrimination because of religion ...	208
1606	Guidelines on discrimination because of national origin	212
1607	Uniform guidelines on employee selection proce- dures (1978)	215
1608	Affirmative action appropriate under Title VII of the Civil Rights Act of 1964, as amended	241
1610	Availability of records	248
1611	Privacy Act regulations	258
1612	Government in the Sunshine Act regulations	264
1613	Equal employment opportunity in the Federal gov- ernment	270
1614	Federal sector equal employment opportunity	314
1616	Enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by the Equal Employment Opportunity Commission	343
1620	The Equal Pay Act	349
1621	Procedures—The Equal Pay Act	364
1625	Age Discrimination in Employment Act	365
1626	Procedures—Age Discrimination in Employment Act	378
1627	Records to be made or kept relating to age: notices to be posted: administrative exemptions	383
1630	Regulations to implement the equal employment provisions of the Americans with Disabilities Act	390



Department of Justice

STATEMENT

OF

DEVAL PATRICK

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

CONCERNING

S. 1085, THE "EQUAL OPPORTUNITY ACT OF 1996"

PRESENTED ON

APRIL 30, 1996

Madam Chairman and Members of the Subcommittee, I appreciate the opportunity to appear today to present the views of the Administration regarding S.1085, titled the "Equal Opportunity Act of 1995." While legislative titles are not generally matters of great import, this one is quite troubling, because aside from its promising title, this bill does nothing to address the enormous problems that face the overwhelming majority of people who are denied equal opportunity. It ignores those who, because of centuries of discrimination -- discrimination that continues to persist today -- have been denied opportunities to obtain a decent education, to compete equally for jobs, to participate in the political process, to form businesses and generally partake fairly of the bounty of this magnificent nation.

This Congress has yet to hold a hearing to address the serious problems discrimination causes daily in the lives of minorities and women. Rather, some in Congress propose to eliminate one of the few measures that has been utilized effectively to help eliminate discrimination and its effects and to create the level playing field that has been promised to all Americans but denied to many. While the issue of affirmative action has been debated in this Congress, it has yet to be considered in the context in which it was intended to perform; as a limited means to remedy the undeniable effects of decades of discrimination.

Compelling need for affirmative action.

The history of discrimination has denied minorities and women an equal opportunity to enjoy the riches and opportunities this country has offered the rest of its citizens. Congress has repeatedly examined the effects of that discrimination and consistently has concluded that affirmative action is a legitimate and necessary way to seek to undo the effects of that discrimination.

I would like to remind the Committee of just a few of the many pieces of evidence that indisputably establish the continuing need for affirmative action programs.

Discrimination in business and industry. Congress has repeatedly reviewed and supported the SBA's programs, as well as those of some other agencies, such as the Department of Transportation, to aid small and disadvantaged businesses. In doing so, Congress recognized the need to help such firms combat the effects discrimination has had on their ability to develop in our economy. A few facts demonstrates Congress's wisdom.

While minorities make up over 20 percent of the population, minority-owned businesses are only 9 percent of all U.S. businesses (U.S. Commission on Minority Business Development, Final Report 2-6 (1992)). The minority-owned firms that do exist have, on average, gross receipts that are only about one-third those of nonminority firms (id. at 4). Similar inequities apply to women-owned businesses. Women own nearly 20 percent of all businesses with employees and a third of all small businesses but

received less than 3 percent of federal procurement contract dollars in 1994 (Expanding Business Opportunities for Women, The 1995 Report of the Interagency Committee on Women's Business Enterprise, at 3, 11, January 1996; see also 1992 Survey Of Women-Owned Businesses, U.S. Department of Commerce, Bureau of the Census (1996)).

Discrimination in the critical ability to secure necessary capital persists; white business owners in the construction industry receive over 50 times as many loan dollars per dollar of equity capital as African American owners with identical borrowing characteristics (Grown & Bates, Commercial Bank Lending Practices and the Development of Black Owned Construction Companies Journal of Urban Affairs, Vol. 14, No. 1, 34 (1992)). Recent studies have shown that limited access to capital has had a similarly negative affect on firms owned by women, and that due to that lessened access to capital more women than men finance businesses out of their own resources (Expanding Business Opportunities for Women at 8).

Discrimination occurs in both private and public contracting. Disparity studies completed by state and local governments after the Croson decision routinely found that minority-owned businesses are locked out of public contracting markets. After the Croson decision, many states suspended affirmative action business programs, with a devastating effect on minority business. In Richmond, in the absence of affirmative action, minority participation in construction dropped from 40

percent of all contracts to less than 3 percent (U.S. Commission on Minority Business Development, Final Report at 99 (1992)). Similar falloffs occurred in Philadelphia (97% decline), Tampa (99% decline for African American-owned businesses and 50% for Hispanics), and San Jose (minority participation fell from 6 percent to 1 percent in prime construction contracts) (ibid).

In private industry, discrimination is even more pronounced. Both minority and women-owned firms report that they are routinely unable to secure subcontracts on private work where there are no affirmative action requirements, and that white owned prime contractors even reject minority or women-owned firms that offer the lowest bid.

Discrimination in employment. Discrimination in employment clearly persists. Testing studies completed by the Urban Institute in 1990 and 1991 found that white males received 50 percent more job offers than minorities with the same characteristics applying for the same jobs. The Federal Glass Ceiling Commission reported that African Americans with professional degrees earn only 79 percent as much as white males with the same degrees in the same job categories, and 97 percent of senior managers in Fortune 1000 industrial and Fortune 500 companies are white. Discrimination against minorities by trade unions, depriving minorities of a broad range of critical employment opportunities, was legion in the 1960s and 1970s. Indeed, for most years since 1973, employment rates for recent white dropouts have been higher than those for recent black high

school graduates not enrolled in college (U.S. Department of Labor, Bureau of Labor Statistics, Labor Force Statistics Derived from the Current Population Survey: 1940-1987, and tabulations based on the October Current Population Surveys).

The effects of discrimination in employment based on sex, as well as race or national origin, continue to be felt as well. For example, EEOC reports that, in the federal sector, men hold over 86% of all SES positions, while women, who are over 41% of the workforce, hold 13.4% of SES positions. The Civil Rights Division continues to have a significant caseload involving discrimination against minorities and women by state and local law enforcement agencies.

Discrimination in education. Despite gains in education for both African American and white students, African Americans continue to trail whites in educational achievement. Minority children continue to lag behind white children in the rate at which they graduate from high school, the rate at which high school graduates go on to college, and the rate at which students enrolled in college graduate. The overall effect of these trends is devastating to minorities; in 1991, while 30 percent of whites had completed four or more years of college, only 13 percent of African Americans and 11 percent of Hispanics had done so (U.S. Department of Education, National Center for Education Statistics, IPEDS/HEGIS surveys of degrees conferred).

Indeed, Time magazine, in its recent cover story on segregation in our nation's schools, found that a third of black

public school students attend schools where the enrollment is 90% to 100% minority. As the Supreme Court's historic Brown decision told us over 40 years ago, separate educational facilities are inherently unequal. But it is against the backdrop of this unequal educational base that S.1085 would eliminate even the most benign and limited use of race to attempt to equalize opportunities for minorities.

The effect of discrimination on minorities is felt throughout educational systems. In 1992-1993, African Americans, about 12% of the population, received only 7% of the bachelors' degrees conferred that year, and Hispanics, about 9% of the population, received 4% of the degrees. In 1992-1993, African Americans received 4.4% of the Ph.Ds., and Hispanic students received only 2.7% (U.S. Department of Education, National Center for Education Statistics, IPEDS/HEGIS surveys of degrees conferred). At that same time, only 3 percent of all full time faculty members at American institutions of higher learning are African American and only 2 percent were Hispanic (S. Rep. No. 204, 102d Cong., 1st Sess. 94-95 (1991)).

Just recently, the Fifth Circuit Court of Appeals issued Hopwood v. State of Texas, Nos. 94-50569, 94-50664 (March 18, 1996), an opinion startling in its short-sightedness in light of these human realities that underlie these statistics. The court decreed that institutions of higher learning may no longer use race, even as a plus factor, as a means to insure that minorities are represented in higher level educational programs. The court

essentially took it upon itself to overrule the Supreme Court's holding in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), that race could be used as a "plus" factor in admissions to insure a diverse educational mix. The court went on to virtually eliminate a college's ability to use race even as a remedial objective. The Fifth Circuit held that the school could seek to remedy only its own discrimination, and could not even attempt to create a remedy to address discrimination in the state educational system as a whole.

Not only is the Fifth Circuit's narrow construction of what the law school can remedy at odds with Supreme Court precedent, its impact on the aspirations of minority students, if it is implemented through legislation like S.1085, will be devastating. Regardless of the extent or history of discrimination in a public educational system, a college may address only its own actions, and not those of other parts of the state's educational system, regardless of the breadth of the effects that discrimination has on minority students' ability to secure admission to institutions of higher learning.

Minorities and women certainly are not operating on a level playing field. Behind these national realities are personal realities: Minorities and women struggle upstream against discrimination and its effects in education, employment and business efforts.

Remedial use of affirmative action.

Rather than addressing these disparities, S.1085 would eliminate remedies that the Congress and prior Administrations, as well as this one, have tried to implement to overcome this nation's history of exclusion based on race, ethnicity and gender. By prohibiting otherwise lawful and flexible affirmative action and categorically rejecting several decades of Supreme Court precedent imposing reasonable limits on affirmative action, this bill attacks remedies that have evolved as a modest mechanism to eliminate the effects of past discrimination. This bill would set our nation back at a time when racial and ethnic minority groups and women still lag far behind, when studies demonstrate that enforcement of the antidiscrimination laws alone still has not leveled the playing field for all our citizens, and when affirmative action represents one sensible, restrained tool available to help our society achieve its goal of integration. The Administration strongly opposes this bill.

There is a tendency to speak of affirmative action as if it is a single thing. I want to make sure that my terms are understood. Affirmative action encompasses a range of remedies. At one end of the spectrum are efforts to reach out to traditionally excluded individuals -- whether women or minorities -- and to recruit talent broadly in all American communities. This might include reaching out to minorities and women and providing technical assistance to enable them to take advantage of opportunities. Affirmative action in the military after the

Vietnam War -- the very initiative that helped Colin Powell display his many talents -- is an example of this sort of measure. Hardly anyone opposes efforts to cast a broad net, and offer training. Nevertheless, S.1085 would prohibit even outreach if its success or value was in any respect measured against a numerical goal.

At the other end of the spectrum, masquerading as affirmative action, lie quotas: hard and fast numbers of places in schools or the workplace specifically reserved for members of certain groups, regardless of qualifications. This Administration opposes quotas. Federal courts have rejected such measures and Federal law -- both in Executive Order 11246 and by statute -- makes quotas unlawful. To the extent that S.1085 purports to prohibit "quotas," it adds nothing that does not already exist in Federal Law.

In the middle between these extremes lies a range of activities that might be called "affirmative consideration," in which race, ethnicity or gender is one factor that is considered among others in evaluating qualified candidates. This form of consideration does not guarantee success based on race, ethnicity or gender. Rather, it emphasizes a full range of qualifications and is characterized by flexibility. This is the form of affirmative action that was supported by early proponents and has consistently received bipartisan support. Indeed, no Federal law of any kind mandates that anyone make decisions on the sole basis of race or gender.

The Supreme Court has consistently supported "affirmative consideration." From its first examination of an affirmative action program on the merits, in Bakke, the Supreme Court has consistently permitted consideration of race as one factor among many in contrast to reliance on race as the sole basis for a decision. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (contracting program failed strict scrutiny in part because it made "the color of an applicant's skin the sole relevant consideration"). The same has been true with respect to gender. See Johnson v. Transportation Agency, 480 U.S. 616 (1987) (upholding an affirmative action plan in employment under which a state agency considered the gender of applicants for promotion as one factor in the decision).

In Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), the Court extended strict judicial scrutiny under the Constitution to federal programs that use racial or ethnic criteria as a basis for decisionmaking. It did not, however, invalidate affirmative action. It simply held that consideration of race or ethnicity in decisionmaking must be narrowly tailored to serve a compelling interest, imposing on Federal initiatives the same exacting analysis the Court imposed on state and local initiatives some years ago.

Courts have set forth a series of factors to use in evaluating affirmative action programs, in order to ensure that consideration of race, ethnicity or gender is narrowly tailored to achieve its purpose: (1) whether race-neutral measures were

considered and would prove equally effective; (2) whether the program is properly limited in scope and flexible, as demonstrated, for example, by the existence of a waiver provision; (3) whether race is relied upon as a necessary factor in eligibility or whether it is used as one factor among others in the eligibility determination; (4) whether any numerical target is related to the number of qualified minorities in the applicable pool; (5) whether the duration of the program is limited and whether the program is subject to periodic review; and (6) whether the program burdens nonbeneficiaries inappropriately.

Last July, in his speech at the National Archives, President Clinton reaffirmed his commitment to the eradication of invidious discrimination and its persistent effects. He recounted movingly the enormous changes that he has witnessed since his childhood in Arkansas, but he concluded, as we all must, that the job is not close to completion. As the President stated, affirmative action was born as a compromise -- as a middle course between simply declaring discrimination unlawful and proclaiming victory (a course that would have accomplished little) and the imposition of draconian penalties on employers and others for failure to achieve rigid and inflexible quotas. Instead, the President opted for a middle ground that permits affirmative action where it is flexible, respects merit and does not unnecessarily burden the expectations of nonbeneficiaries.

As a matter of policy and law, the President committed to mend, but not end affirmative action. He directed federal agencies to review programs and to reform or eliminate any program that:

- (1) creates a quota;
- (2) creates preferences for unqualified individuals;
- (3) creates reverse discrimination; or
- (4) continues after its equal opportunity purposes have been achieved.

He is also committed to root out fraud and abuse in Federal procurement programs, such as where white-owned companies get minority-owned firms to front for them.

Since the President's address and the release of the White House's Affirmative Action Review in July, the Department of Justice, under the Direction of Associate Attorney General John Schmidt, has been spearheading an effort to review federal affirmative action programs to ensure their compliance both with the law and the President's policies. That careful review continues. In our view, this deliberate, intensive focus on each federal affirmative action program, during which the actual operation and practical effects of the program can be assessed, is a far more responsible way to proceed than to declare an end to any effort whatsoever, as S.1085 does, whether it is legal under current law or not.

As you are aware, our review has resulted in the termination of a significant program in the contracting area -- the use of

the so-called "Rule of 2" by the Department of Defense. We are also, during the review, continuing to work with various agencies as they evaluate their programs to insure that they are being conducted in a manner that satisfies strict scrutiny. Changes will be required by Adarand, and the President's policy.

We have also issued a comprehensive memorandum addressing the manner in which strict scrutiny affects affirmative action in federal employment programs. That memorandum not only showed federal agencies how to bring their employment activities into compliance with Adarand, but also reminded them that the use of race must be predicated on a firm and provable basis, be it remedial or operational. We expect that agencies may have to modify some present practices to bring employment actions fully in line with this guidance.

Procurement reform. We have also been hard at work developing a proposal to reform the use of race in federal procurement. One of the most important tools the government uses to provide minorities a full and fair opportunity in business is affirmative action in federal procurement. We have been reviewing federal procurement for some months, and are developing a proposal that we feel will satisfy the rigorous demands of Adarand, meet legitimate and reasonable contracting objectives, and treat both minorities and nonminorities equitably.

Unlike the misguided approach of S.1085 that simply eliminates the use of race and declares compliance with constitutional standards, crafting a mechanism to permit race to

be used in a manner to satisfy Adarand is a complex undertaking. While this proposal is not yet final, I can discuss the approach we intend to take.

First, under the proposal the government will only use affirmative action where the judgment is made that race neutral measures, such as training programs and outreach, would fail adequately to extend opportunities to disadvantaged firms. Second, where affirmative action is used, less drastic measures will be employed first. This means that affirmative action programs will seek to maximize competition by limiting the use of set asides and relying instead on measures that allow full competition among all qualified firms yet take disadvantage into account as one factor.

The government's proposal would establish a system of market-sensitive benchmark limitations to govern the implementation of affirmative action in federal procurement. Where race-neutral efforts such as outreach and technical assistance fail to extend disadvantaged businesses a fair opportunity to participate in procurement markets, our proposal would allow the flexible consideration of the disadvantaged status of the business along with the other factors used in selecting a contractor. Certification requirements will be tightened to ensure that affirmative action is only used to assist firms that need it. Firms that are too big, too wealthy, or operating as fronts and shams will be expelled, and

individuals who engage in intentional misrepresentations and abuse the system will be prosecuted.

This proposal will show that efforts can be made to tailor narrowly the use of race to meet constitutional standards, and still keep this nation's promise to minorities that discrimination and its effects will be eliminated. The effort to keep that promise, as the President said, is difficult. What is unacceptable is the approach of S.1085 that totally eviscerates that promise.

Where problems exist, we all have to face them without flinching and correct them. But problems in the management or design of this or that program should no more require us to abandon the principle of affirmative action than problems in defense procurement should require the Air Force to stop buying airplanes. This careful process, rather than the approach of S.1085 to eliminate all consideration of race, will eliminate any serious inequities and inefficiencies in specific affirmative action programs.

Overview

Turning to the legislation that is the immediate subject of this hearing, S.1085 is not only misdirected as a matter of priorities, but it is such a blunt and extreme measure that it would work substantial harm. It is inconsistent with principles developed over decades by the Supreme Court, would eliminate numerous federal statutes and executive orders and curtail the battle against discrimination on the basis of race, gender and

ethnicity. It would do all of this without a deliberate and intensive examination of affirmative action programs.

S.1085 seeks broadly to limit federal affirmative action programs. The bill's operative provision states that "[n]otwithstanding any other provision of law," no entity of the federal government "may intentionally discriminate against, or may grant a preference to, any individual or group based in whole or in part on race, color, national origin, or sex, in connection with" federal contracting or subcontracting, federal employment, or "any other federally conducted program or activity." The bill also prohibits the federal government from "requir[ing] or encourag[ing] any Federal contractor or subcontractor to intentionally discriminate against, or grant a preference to, any individual or group based in whole or in part on race, color, national origin, or sex," id. at § 2(2), and it prohibits the federal executive branch from "enter[ing] into a consent decree that requires, authorizes, or permits" any of those forbidden activities. Id. at § 2(3). Under the bill, "preference" includes "use of any preferential treatment and includes but is not limited to any use of a quota, set-aside, numerical goal, timetable, or other numerical objective." Id. at § 8(3).

The bill incorporates several specific exceptions to its broad provisions. Most notably, the bill exempts certain outreach and recruitment efforts. Specifically, the bill does not purport "to prohibit or limit any effort by the Federal Government * * * to recruit qualified women or qualified

minorities into an applicant pool for Federal employment or to encourage businesses owned by women or by minorities to bid for federal contracts or subcontracts, if such recruitment or encouragement does not involve using a numerical objective, or otherwise granting a preference, based in whole or in part on race, color, national origin, or sex, in selecting any individual or group for the relevant employment, contract or subcontract, benefit, opportunity, or program." Section 3(1). A similar safe harbor allows the federal government to encourage federal contractors or subcontractors to engage in the same kinds of recruitment efforts. Id. at § 3(2). However, this exemption does not apply if a recruitment or outreach program uses any kind of numerical benchmark, even for hortatory or tracking purposes; its value, therefore, is substantially limited.

The bill would also limit current protections for women. The bill expands the current definition of "bona fide occupational qualification." The bill also permits the use of sex-based classifications if the classification "is designed to protect the privacy of individuals" or if the classification is dictated by national security. Id. at § 4(c).

As the above description indicates, the reach of S.1085 is quite broad and would work significant change. The bill's prohibitions would apply retrospectively; they would invalidate any existing law or regulation that does not comply with the bill's requirements. The substantive provisions of the bill would apply to any federal contracting or subcontracting, federal

employment, or "federally conducted program[s] or activit[ies]." Because this last category does not appear elsewhere in the law, its meaning and breadth are unclear. The bill that was reported in the House, however, clarified the extreme breadth of the provision, as the House bill extended the bill to "any * * * Federal financial assistance," and extended the prohibitions to any "recipient of that assistance," broadly extending the prohibitions on affirmative action to even a private contractor who receives any federal aid on a contract.

On the other hand, the bill's prohibition against intentional discrimination, taken at face value, is quite unnecessary and, in reality, potentially counterproductive. Such discrimination is already prohibited by the Constitution and numerous federal statutes. Significantly, the bill actually explicitly cuts back on existing protections against sex discrimination by introducing a series of new exceptions including a vague and open-ended exception "to protect the privacy of individuals."

Analysis

S.1085's flat prohibition against affirmative action is a rejection of the compelling need to remedy the effects of past and present discrimination. It is inconsistent with principles developed by the Supreme Court and with numerous enactments of Congress and executive branch orders. Furthermore, it will turn back the clock to an era when the law denied women equal opportunities in employment.

Just last Term, in Adarand Constructors, Inc. v. Peña, supra, the Court recognized the appropriateness of race-based affirmative action as a means of overcoming our nation's continuing legacy of discrimination. As Justice O'Connor, writing for the Court, stated: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Id. at 2117. The Court rejected a flat constitutional prohibition of the consideration of race. Rather, the Court held that reliance on race would be subjected to strict judicial scrutiny. That standard permits consideration of race where it is justified by a compelling interest and is narrowly tailored to serve that interest. This bill would prohibit all such action, even if it comports with strict scrutiny.

In short, S.1085 goes well beyond the standards for affirmative action articulated by Justice O'Connor for a majority of the Court in Adarand. It would be inconsistent with the principle recognized long ago by Justice Powell that government has a "substantial interest that legitimately may be served by a properly devised * * * program involving the competitive consideration of race and ethnic origin." Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978). S.1085 would severely disable government in its ability to address the practice and lingering effects of racial discrimination.

Similarly, the Court has held that consideration of sex is appropriate if it "serves an important governmental objective" and is "substantially related to the achievement of those objectives." J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). S.1085 would prohibit consideration of sex, regardless how important the governmental objective in doing so might be. S.1085 would curtail efforts to address discrimination against women.

The provisions of S.1085 addressing sex-based classifications are particularly troubling. S.1085 would significantly weaken current protections against gender discrimination and would have the effect of legalizing discriminatory practices that are currently prohibited. The bill significantly expands the use of sex as a "bona fide occupational qualification" by using language much broader than "bfoq" language in any existing law, including Title VII. The bill also creates a "privacy" exception which will be used to deny women important employment opportunities. In addition, it creates a national security exception to the prohibition of discrimination based on sex, without any indication of how gender can possibly be linked to national security.

The bill's assault on the use of numerical goals is an extreme reaction to an overstated danger. By defining "grant a preference" to include "any use of a * * * numerical goal, timetable, or other numerical objective," the bill would reject

principles developed by the Supreme Court, eliminate federal statutes and overturn Executive Order 11246, none of which mandate decisionmaking on the basis of race or gender.

Goals and timetables have been used as measures to cure discrimination since the Nixon Administration. Their use has been approved by the Supreme Court as a proper means of overcoming imbalances in traditionally segregated job categories. See Johnson v. Transportation Agency, 480 U.S. 616 (1987). They are indispensable as measures of progress in eliminating discrimination and, contrary to the fears of some, the use of goals and timetables does not lead inexorably to quotas.

Indeed, quotas -- rigid and inflexible measures that look only to race or gender in disregard of qualifications -- are already unlawful. They have been firmly and repeatedly rejected by the President. Executive Order 11246 rejects the use of quotas, as does the Civil Rights Act of 1991. Likewise, the law does not tolerate quotas. Consideration of race or ethnicity can survive court scrutiny only if it is properly tailored. That tailoring includes consideration whether it is flexible and respects qualifications. Indeed, even though the Supreme Court has approved strong race-conscious relief, it has never approved relief that depended solely and inflexibly on race. See United States v. Paradise, 480 U.S. 149 (1987) (upholding requirement that Alabama Department of Public Safety promote one black state trooper for every white trooper promoted, noting that the relief

was flexible because it could be waived in the absence of qualified candidates).

Unlike quotas, goals and timetables represent a flexible and sensitive approach to curing traditional exclusion. They leave discretion with the employer to select means including outreach, recruitment, and, where appropriate, the competitive consideration of race or gender as one factor. In all instances, they must be achieved without unduly burdening others.

In many areas of life, we use numbers to measure progress toward success. Whether it is in tracking sales, profits or success in batting a baseball, we look to numbers to measure how well we are doing and to establish our aspirations. It should be no different in measuring equal opportunity. Indeed, the use of goals and timetables can be an important component in tailoring programs narrowly, as required by the Supreme Court. It is essential to use numerical measurements in determining when there has been sufficient affirmative action and programs must end.

A principal example of the importance of goals and timetables in combatting discrimination is Executive Order 11246, which would be eliminated by S.1085. Under the Executive Order, federal contractors and subcontractors with contracts of at least \$50,000 must maintain a written affirmative action program. The contractor's plan must include goals for the hiring of minorities and women if there is a problem with the contractor's employment practices. The goals, however, must not operate as quotas -- indeed, the Executive Order expressly prohibits the use of quotas

-- and contractors are not required to engage in any form of preferential hiring. Contractors are required only to make a good faith effort to meet the goals, and they can satisfy that requirement by a variety of strategies, including recruitment and outreach. S.1085 prohibits even this limited use of a "numerical objective" as a way of measuring progress. It would, therefore, eliminate one of the most successful measures ever adopted to promote equal opportunity in employment. The use of numerical goals in the Executive Order dates back to the Nixon Administration and has received bipartisan support ever since. Elimination of Executive Order 11246 would curtail the fight against discrimination and strike a devastating blow to the achievement of equal opportunity.

The bill's fear of goals would also result in elimination of the affirmative action program that has proved successful in expanding employment and promotion opportunities in the military. Affirmative action in the military focuses on outreach, recruitment and training. By directing its efforts at assuring that a qualified pool of minority and female candidates for promotion exists, the military's program serves the objective of equal opportunity. Although the services set numerical goals for promotions, they do not set up those goals as rigid requirements, and they do not sacrifice merit criteria to meet those goals. As a result, minority and female promotion rates often diverge considerably from the numerical objectives. But because S.1085 treats any use of a numerical objective as a "preference," even

the military's merit-based affirmative action program would be invalidated.

Current law sets government-wide overall national goals for minority and female participation in government procurement. Specifically, the law sets a goal of 5% for small disadvantaged businesses and 5% for women-owned businesses. These goals are flexible; they establish an objective rather than a requirement. S.1085 would eliminate these goals. Because the bill eliminates any affirmative recruitment program that contains a numerical objective, it would also invalidate any outreach program tied to the government-wide procurement goals.

The bill would exempt "any act that is designed to benefit" Historically Black Colleges and Universities. Thus, the government-wide program of promoting cooperation with these institutions (see Executive Order 12876) would appear not to be eliminated by the bill. However, the exemption's limitation to "any act" designed to benefit historically black colleges may prevent administrative initiatives to aid these institutions; specific statutory authorization may be required.

The bill contains no similar exemption for minority-serving educational institutions, which also are the focus of statutory and Executive Branch programs of support. See Executive Order 12900. At least 13 federal agencies currently administer programs that target aid to these institutions.

Neither the judicial process, nor the antidiscrimination enforcement machinery escapes the sweep of S.1085. It would

prohibit the federal government from entering into a consent decree that "requires, authorizes, or permits any activity prohibited by" the substantive provisions of the first section of the bill. Thus, neither the Civil Rights Division of the Department of Justice, nor the Equal Employment Opportunity Commission could enter into even a court-approved consent decree to prohibit discrimination by a private employer who was a federal contractor if that decree contained numerical relief. Even if that relief were limited to a goal in bringing excluded minorities or women into a pool from which applicants would be selected without regard to race or gender, the decree would be prohibited under S.1085. This provision would strip the federal government of a significant tool for enforcing the laws that prohibit discrimination on the basis of race, ethnicity and gender.

This same provision would also promote litigation and curtail the enforcement of antidiscrimination laws by prohibiting the federal government from entering consent decrees containing numerical relief in suits filed against it. Unfortunately, the federal government occasionally finds itself in the position of a defendant and must have the ability -- when it recognizes its own errors -- to settle litigation in a manner that provides full relief for a class of victims. This bill would strip the federal government of that ability.

Many other beneficial statutes and programs would be eliminated by S.1085's blunderbuss approach to affirmative

action. It is not our purpose to catalogue them. Rather, the point is that the approach of S.1085 is flawed. There is no justification for eliminating programs wholesale, particularly without knowing what many of them do or how they do it. The Administration is in the midst of a very thorough, searching examination of affirmative action programs that has already shown results. That process should be allowed to run its course without interference.

More fundamentally, the impact of S.1085 would be to devastate the federal government's efforts to redress discrimination and promote inclusion of members of excluded groups. This bill represents a full-fledged retreat from our national commitment to achieve an integrated society. That would be a fundamental and disastrous change.

We all share the goal of ending discrimination, but it is not enough to profess opposition to discrimination based on race, ethnicity or gender. These professions of opposition to discrimination are important, but they must be backed up by tools that can redress the problem fairly.

Madam Chairman, in the eagerness of some to curtail the remedies for discrimination, many have lost sight of the problems that created the need for remedies. We should move forward to tackle the difficult and more pressing problems that continue to deny equal opportunity to minorities and women in this country:

- o Minorities routinely suffer blatant discrimination in retail establishments and in the provision of basic services. In a

particularly blatant, recent incident, a cab company in Springfield, Illinois, posted a notice advising drivers not to pick up black males. There is no federal remedy for this outrage, or for the plight of the black youth who recently was forced to take off the shirt that he had previously purchased at an Eddie Bauer store and leave the store in his undershirt. Only when he returned to the store with a receipt was he allowed to have his shirt.

- o Hate crimes continue to terrorize our citizenry. Recently, we obtained convictions in our prosecution of three men in Texas who talked about how good life would be without blacks and then drove into a predominantly black section of town "hunting" African Americans with a sawed-off shotgun, eventually shooting three African Americans at point-blank range.
- o Unlawful segregation persists and minority children remain trapped in impoverished and segregated schools that deny them a decent chance in life. Over 50% of African American children and 44% of Hispanic children live in poverty, compared to 14% of white children. And over one-half of all African Americans live in inner-city neighborhoods where schools are starved for basic resources. And yet, in 1993, a cash-poor district spent a million dollars to expand an all-white elementary school rather than send white students to a predominantly black school that was one-third empty and only 800 yards away from the white school. In a recent case

that we handled, school buses were travelling down the same roads, one bus picking up white children and taking them to the white school and one bus picking up black children and taking them to the black school.

- o The doors to housing continue to be slammed shut in the faces of minority applicants across the country.

Discrimination in housing continues to limit not only housing opportunities for minorities, but suppresses job opportunities and contributes to school segregation. In a recent investigation, we discovered that a 300 unit apartment building in Ohio simply refused to rent to African Americans, in spite of numerous qualified applicants. In one recent case, we found that blacks were being steered to an all black section in the back of the building.

- o Discrimination continues against minority and women applicants for employment. In one case in Florida, we found that a police department had not hired a single black officer in 30 years. The police department threw applications from African Americans in the trash and was led by a chief who routinely referred to African Americans as "niggers." In a Louisiana correction center, we found a policy that required women to score 15 points higher on a written test to qualify for employment and a practice that resulted in the hiring of a man who scored 29 points below a woman applicant and had a prior arrest record and no high school diploma. The report of the Glass Ceiling Commission,

which was created at the initiative of Senator Dole, documents the near exclusion of African Americans, Hispanics, Asians and women from advancement in many of the corporations of this nation.

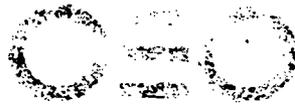
- o The manner in which justice is administered has created resentment and alienation in too many jurisdictions. While we all owe a deep debt of gratitude to the women and men who serve in law enforcement, recent incidents such as the beating of Rodney King and the revelations regarding the racism of Mark Fuhrman, highlight a deep seated problem in the way that many minority communities and law enforcement officials relate to each other.

I ask you to give the Department of Justice, the Equal Employment Opportunity Commission and other agencies the support they need to address these problems. Join us in attacking these problems and we can transform our statements of opposition to discrimination and our commitment to equal opportunity into actions and results.

But S.1085 is a giant step in the wrong direction. Should it be presented to the President for signature, the Attorney General would strongly recommend that he veto it.

Thank you.

Linda Chavez,
President



CENTER FOR EQUAL
OPPORTUNITY

TESTIMONY

OF

JORGE AMSELLE
COMMUNICATIONS DIRECTOR
CENTER FOR EQUAL OPPORTUNITY

BEFORE

THE SENATE COMMITTEE ON LABOR
AND HUMAN RESOURCES

APRIL 29, 1996

“AFFIRMATIVE ACTION”

A PROJECT OF THE EQUAL OPPORTUNITY FOUNDATION

815 Fifteenth Street, NW, Suite 928, Washington DC 20005
phone: 202 639-0803 | fax: 202 639-0827

I am Jorge Amselle, Communications Director for the Center for Equal Opportunity, a non-profit research and education project specializing in issues related to race, ethnicity and assimilation. It is an honor to be with you today to testify on affirmative action, an issue of profound importance in the current national policy debate on race and the role of government.

We are here today to discuss whether the government should continue to provide preferential treatment to people for no reason other than their race, ethnicity, or sex. Treating people differently because of the color of their skin used to be called discrimination, but today it is called affirmative action. Racial discrimination is abhorrent enough when practiced by the private sector, but when it becomes the official practice of government it becomes completely inexcusable and repugnant.

This policy of racial and ethnic favoritism makes it possible for immigrants to receive preference in hiring, government contracts and college admissions over American citizens by government mandate. The result of this policy is clear. A 1993 survey of 1200 Republican primary voters in California found that the use of racial preference programs by Latinos significantly raised concerns over immigration¹, and increased support for Proposition 187 and other anti-immigration legislation in California and elsewhere.

These programs only serve to provide an excuse to question the accomplishments of all minorities and women, whether they benefited from affirmative action or not. These preferences, which are intended to benefit minorities, are only serving to divide society by race and ethnicity to the detriment of minorities.

Proof of the harm done to society by racial preferences can be seen in a survey by Professors Paul Sniderman of Stanford and Thomas Piazza of Berkeley². They found that whites were far more likely to view blacks negatively if they were first asked a question regarding affirmative action. According to the authors: "Certainly some whites dislike affirmative action because they dislike blacks, but it is unfortunately also true that a number of whites dislike the idea of affirmative action so much and perceive it to be so unfair that they have come to dislike blacks as a consequence."³

In the area of public contracting large, successful minority contractors are often the prime beneficiaries of state, local, and federal programs aimed at "disadvantaged" minorities.⁴ This racial spoils system has allowed some minority contractors to become millionaires, while truly disadvantaged minority and non-minority contractors are left on the sidelines.⁵

The *Wall Street Journal* reported on a Government Accounting Office study which found that some successful companies were "cooking" their books to remain eligible for the Small Business Administration's 8(a) disadvantaged business set-asides. One

company, I-Net, received \$62 million in set-aside contracts for which it was not eligible.⁶

A recent study by University of Minnesota economist Samuel L. Myers, Jr., found that minority set aside programs in public contracting in New Jersey between 1985 to 1993 "did not necessarily benefit minority owned firms, nor did it reduce discrimination." The study also showed that the success rate for the average minority firm in getting state awards did not increase. In fact, large white-owned companies that subcontracted to minorities were given preference over minority-owned companies and may have benefited to a greater extent.⁷

Wayne State University economist Timothy Bates in a study of the Small Business Administration 8(a) minority set aside program noted that: "The most successful minority businesses in the 8(a) program are run by individuals who are not particularly disadvantaged; the truly disadvantaged entrepreneurs who receive assistance, in contrast, fail in droves."⁸

Disparity studies are often used to justify set-aside and preference programs at the state and local levels. However, research suggests that disparity studies are not to be trusted. According to George La Noue, a professor of political science at the University of Maryland, "There is a tendency for cities to commission these studies when they want, or already have, a minority program." According to his research, "most [disparity studies] have sought only to justify these [MBE] programs by scraping together and magnifying every piece of data pointing to discrimination without applying any of the conventional social-science tests to determine validity."

One case in point is that of KPMG Peat Marwick's disparity study for Miami. When this study failed to find clear evidence of discrimination against blacks or Hispanics in Miami, the city commission rejected the study and ordered a new one with more acceptable results.⁹ According to La Noue, "many studies are methodologically flawed because they depend on Census data to show disparity rather than basing their study on the actual conditions of minority contractors in a particular area." Peat Marwick's failure to rely on "flawed" data shut them out of the disparity study business in Miami.

Preference programs also discourage many contractors from submitting bids or dealing with government agencies. According to Mike Kennedy of the Associated General Contractors of America, "any program that applies pressure to government contractors to base decisions on race is discriminatory. People use the word 'goal' to try and suggest that their program is inspirational, but if you meet the 'goal' you don't have to demonstrate good faith efforts. You are pressured to just meet the goal." Mr. Kennedy also felt that, "regardless of how easy it is to meet the 'goal' it is still preferences and discriminatory."

Governments can and should, however, help those who are truly disadvantaged, but not by holding them to a lower standard. We must provide them with the tools necessary to compete on an equal basis and insure that they are not held to a different standard. There are successful programs that help the economically disadvantaged without regard to race.

The National Council of Contractors Association (NCCA) in Houston, TX, runs such a program. A race-neutral alternative for small businesses that has put millions of dollars into the hands of minority-owned companies. One of the biggest barriers new companies face when they want to bid for public contracts is obtaining surety bonding. It is this difficulty in getting bonded that prevents most small, minority and non-minority contractors from bidding on, or receiving public contracts.

The NCCA program helps them clear this hurdle--without resorting to preferences or set-asides. It provides small businesses with training and supervision, subsidizes visits with accountants and lawyers, and offers other kinds of professional advice. Most important, it actually issues bonds to its participants--with the help of the Standard Group of Companies, a national surety bond underwriter. Even though the program is race, and gender-neutral, 85 percent of the participants are either minorities or women.

Since 1994, NCCA has assisted 83 small contractors in Austin, it has issued 171 bonds worth over \$31 million, and has not suffered a single default. NCCA helped its participants receive \$6.3 million in public works contracts, and small company participation in municipal contracts has shot up 600 percent. By contrast, the city government abandoned its racial set-aside program after issuing only one bond to a minority-owned small business in 1993.

In addition, the NCCA program actually saves tax dollars. By making small companies eligible to bid for public contracts,

instead of guaranteeing them contracts on a set-aside basis, NCCA increases competitiveness instead of decreasing it. When a participant wins a contract--based entirely on offering the lowest bid--the difference in cost between that bid and the next lowest is a hard dollar savings. Since its inception less than two years ago, NCCA has saved the Austin community over \$1 million.

This program proves that affirmative action can be used for positive efforts to increase minority participation without dividing people by race. There need not be a backlash against minorities. Recent polls show that it is not too late to stop the harm that has been done by racial preferences.

An NBC News\Wall Street Journal poll, from January 1995, found that 61 percent of people want to eliminate race as a factor in employment, university admissions, and public contracting decisions. Yet, a CNN\USA Today poll conducted in September 1995 showed that 49 percent of Americans supported stronger affirmative action laws. Similarly, a Los Angeles Times poll from January 1996 showed that 55 percent of the public is either satisfied with current affirmative action laws or wants them strengthened.

The reason for the opposing viewpoints in these polls becomes clear when we realize that the definition of affirmative action is unclear. The good news is that a CNN\USA Today poll found that 56 percent of whites would support race-neutral, need-based affirmative action programs.

If we are to salvage our dream of a color blind society, we need more of these types of programs and an end to racial preferences. Yet, some would argue that as long as race continues to matter in America, we must have public policy that recognizes that fact and uses race-based solutions. These people claim that as long as society is not color-blind, government cannot afford to be color-blind either. They are wrong. We will never have a race-neutral society as long as government continues to categorize people by race for the purpose of disparate treatment.

We can not wait on the judiciary to eliminate racial preferences either. Despite some promising rulings from the Supreme Court limiting the use of preferences, the Court stopped short of eliminating them altogether. It is going to take decisive action from the legislature to eliminate racial discrimination for and against all Americans.

¹ Ron K. Unz. Policy Review, Fall 1994. No. 70. Pg. 38.

² Paul M. Sniderman and Thomas Piazza, The Scar of Race, (Belknap Press 1993.)

³ Ibid., Pg. 8.

⁴ *Availability and Utilization of Minority Business Enterprises at the City of Richmond, Virginia, Richmond School Board and Richmond Redevelopment and Housing Authority*. National Economic Research Associates, Inc. July 18, 1991. Pg. 29 and 75.

⁵ *The Set-Aside Charade*. Berman, P. and Alger, A. Forbes Magazine. March 13, 1995. Pp. 78-86.

Who Benefits From Minority Business Set-Asides? The Case of New Jersey. Meyers, S. University of Minnesota and Chan, T. University of Maryland. June 28, 1995.

An Analysis of the SSBIC Program: Problems and Prospects. Bates, T. Wayne State University. December, 1995.

⁶ *SBA Minority Program is Under Attack in GAO Report*. Barrett, P. Wall Street Journal. October 6, 1995.

⁷ The Wall Street Journal. June 7, 1995. Page B1.

⁸ Timothy Bates, "Minority Business Set-Asides: Theory and Practice." Selected Affirmative Action Topics in Employment and Business Set-Asides (Washington: U.S. Commission on Civil Rights, 1985) Vol. 1, p. 142.

⁹ *City of Miami Minority/Women Business Enterprise Utilization Study*. Peat Marwick. October 1991.



NATIONAL WOMEN'S LAW CENTER

TESTIMONY OF MARCIA D. GREENBERGER

CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER

BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES

U.S. SENATE

ON

S. 1085, THE "EQUAL OPPORTUNITY ACT"

APRIL 30, 1996

TESTIMONY OF MARCIA D. GREENBERGER
CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER
BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE
ON
S. 1085, THE "EQUAL OPPORTUNITY ACT"

April 30, 1996

Madame Chairman and members of the Committee, I am Marcia Greenberger, Co-President of the National Women's Law Center. Thank you for the invitation to appear before you today. With me is Judith Appelbaum, Senior Counsel and Director of Legal Programs at the Center.

The Center is a non-profit organization that has been working since 1972 to advance and protect the legal rights of women across the country. The Center focuses on major policy areas of importance to women and their families, including employment, education, and income security -- with particular attention paid to the concerns of low-income women.

We are pleased to have this opportunity to comment on S. 1085, and the impact it would have on affirmative action, and specifically on affirmative action for women.

I will also address the impact of the legislation on basic prohibitions against sex discrimination. In the first part of my testimony, I will outline why affirmative action programs are as important today as ever for women, as well as for members of racial and ethnic minorities, as a means of combatting and preventing discrimination. I will then turn to a detailed discussion of the extreme nature of S. 1085 and the ways in which it would turn the clock back for women by completely abolishing a variety of critical and effective

affirmative action programs. Finally, I will explain how the bill -- in a set of provisions buried in Section 4(c) that are separate from its affirmative action provisions -- also threatens to undermine equal opportunity for women by creating a set of unprecedented and potentially far-reaching new loopholes in our longstanding federal protections against sex discrimination.

I. WHAT AFFIRMATIVE ACTION MEANS FOR WOMEN

Barriers to Advancement for Women Remain Pervasive

Much attention has been given recently to affirmative action in the context of race. It is important not to overlook, at the same time, the critical role that affirmative action programs have played and continue to play in opening up opportunities for women.

Discrimination against women is deeply rooted in our society. Just last year we commemorated the 75th anniversary of women's suffrage -- reminding us that for the first 150 years of the Republic, American women lacked the most fundamental right of citizenship, the right to vote. Throughout most of our history, laws that barred women from engaging in certain occupations, from the practice of law to bartending, were upheld. Many of the nation's premier colleges and universities were once completely closed to women. Not long ago, the "want ads" listed openings for women and for men separately, and some employers told women (but not men) with young children they need not apply at all. Sex discrimination in employment has been prohibited by federal law only since enactment of the Civil Rights Act of 1964, and in education only since the Education Amendments of 1972.

Of course, much has changed for the better in recent years. It would be premature, however, to declare that discrimination against women, on the basis of their sex, is no longer

prevalent in our society. A few statistics are revealing:

- * According to the March 1995 report of the Glass Ceiling Commission, 95 to 97% of the senior managers of Fortune 1000 industrial and Fortune 500 companies are male. In the Fortune 2000 industrial and service companies, only 5% of senior managers are women (and virtually all of these are white).¹
- * An earnings gap exists between women and men across a wide spectrum of occupations. In 1991, for example, women in sales occupations earned only 59.5% of the wages of men in equivalent positions.² In 1993 women still earned, on average, only 71.5 cents for every dollar earned by men.³
- * While women are over half the adult population⁴ and nearly half the workforce in this country,⁵ women remain disproportionately clustered in traditionally female jobs with lower pay and fewer benefits.⁶ For example, in 1991 one in four working women worked in an administrative support job,⁷ and 82% of administrative workers in all industries are women.⁸
- * While the gender gap in higher education has narrowed, and women now earn roughly half of all bachelor's and masters degrees, they still lag behind in many respects. Women earn less than 38% of doctorate and 40% of first professional degrees, and remain underrepresented in many areas not traditionally studied by women. In 1993, women received only about 16% of undergraduate engineering degrees, 9.6% of doctorate degrees in engineering, and less than 24% of doctorate degrees in mathematics and the physical sciences.⁹
- * Women remain severely underrepresented in most non-traditional professional occupations as well as blue collar trades. For example, women are only 8.6% of all engineers; 3.9% of airplane pilots and navigators; less than 1% of carpenters; 18.6% of architects; and just over 20% of doctors and lawyers. Women are over 99.3% of dental hygienists, but are only 10.5% of dentists.¹⁰
- * 65% of the 62 million working women in the United States earn less than \$20,000 annually, and 38% earn less than \$10,000.¹¹
- * Even where women have moved into occupations and professions in significant numbers, they have not moved up to the same degree. Women are 23% of lawyers, but only 11% of partners in law firms.¹³ Women are 48% of all journalists, but hold only 6% of the top jobs in journalism.¹⁴ Women are 72% of elementary school teachers, but only 29% of school principals.¹⁵

- * Minority women have lagged particularly far behind in both employment and education. In 1993, for example, Black women earned a median income of \$19,816, compared to \$22,023 for white women and \$31,089 for white men. Hispanic women earned a median income of \$16,758.¹⁶ Even in sectors where women have made inroads into management, minority women continue to be underrepresented. In the banking industry, only 2.6% of executive, managerial and administrative jobs were held by Black women, and 5% by Hispanic women, compared to 37.6% by white women. In the hospital industry, Black and Hispanic women each held 4.6% of these jobs, while white women held 50.2%.¹⁷ Minority women also earn fewer college degrees than white women. In 1992, white women made up 42.3% of college undergraduates and 48.1% of graduate students; minority women were only 13.4% of undergraduates and 8.4% of graduate students.¹⁸
- * Although white men constitute a minority of both the total work force (47%)¹⁹ and of college educated persons (48%)²⁰, they dominate the top jobs in virtually every field.²¹ Moreover, white males' median weekly earnings in 1993 were 33% higher than those of any other group in America.²² The earnings of non-Hispanic white men were 49% higher than those of any other group.²³

How, then, can these disparities be explained? The notion that women lag behind because they want to -- that is, because they would rather work less, or in lower-paying jobs, or not at all -- is simplistic and demonstrably wrong. While some women, for a variety of reasons, may choose to devote themselves to family concerns or to jobs with lower pay, such choices simply do not explain the disparities. A study cited in the Glass Ceiling Commission report found that women in senior management worked the same number of hours per week as their male counterparts.²⁴ Another recent study shows that after about 11 years on medical school faculties, 23% of men but only 5% of women had achieved the rank of full professor -- and the gap persisted when the researchers held constant the numbers of hours worked per week.²⁵ Yet another study, of graduates of the University of Michigan Law School from 1972 through 1975, revealed significant wage differentials between men and women lawyers after 15 years of practice, even when hours of work, family responsibilities, and other variables

were held constant.²⁶

These studies show that women who make the same career choices as men and work the same hours as men often still advance more slowly and earn less. The clear inference to be drawn is that sex discrimination remains a major barrier to the advancement of women. Indeed, there is abundant additional evidence that sex discrimination, including sexual harassment, continues to be a fact of life in our society. In 1995, nearly 50,000 sex discrimination complaints were filed with the Equal Employment Opportunity Commission and the state and local fair employment agencies with which it contracts.²⁷ A report issued by the Merit Systems Protection Board in 1995, based on questionnaires completed by 8,000 federal workers, found that nearly half the women who responded said that they had experienced unwanted, uninvited sexual attention on the job in the previous two years.²⁸

In a 1994 survey by the Labor Department, 61% of women surveyed said they had little or no likelihood of advancement; and 14% of white women and 26% of minority women reported losing a job or promotion because of sex or race.²⁹ The Glass Ceiling Commission report cites another study finding that 25% of the women surveyed felt that "being a woman/sexism" was the biggest obstacle they had to overcome, and 59% said they had personally experienced sexual harassment on the job.³⁰

Statistics and surveys tell a part of the story, but individual cases also can be instructive. Here are just a few very recent examples from our files.

An article in the newspaper a few months ago entitled "Young White Men Only, Please" described a complaint filed with the EEOC against a brokerage firm called Olde Discount Corporation, the third largest discount brokerage firm in the country. According to

the article, the complaint and former employees who were interviewed allege that the chairman of Olde directed company managers to recruit "young, good-looking, studly males" and not to hire "broad." Each regional manager was told, in private, not to hire Blacks or women. African-Americans were referred to by racial epithets such as "monkeys" and women were demeaned for having menstrual cycles. One of the women who filed the complaint claims that she was demoted and stripped of most of her customer accounts -- after becoming one of the firm's top producers -- because her boss said she needed to spend more time with her daughter.³¹

A lawsuit filed by a group of female and Black employees of Lucky Stores, a supermarket chain in California, revealed that the company had routinely segregated women into dead-end jobs, and steered them into part-time rather than full-time positions. Notes from a meeting of store managers presented at trial included comments such as "men do not want to compete with women or have a woman as their boss," "women prefer working at the cash register," and "women do not have the drive to get ahead."³²

And last August, Del Laboratories, a Long Island cosmetics and pharmaceutical maker, agreed to settle for over \$1 million an EEOC complaint filed on behalf of 15 female employees who claimed they were sexually harassed by the company's chief executive officer. The executive was alleged to have indulged for years in lewd and abusive behavior toward the women, mostly members of a secretarial pool. His behavior reportedly included grabbing one woman's breast and other crude acts. The secretaries also claimed that the company tried to coerce them into lying about what they had experienced.³³

These stories are all too commonplace. Even in 1996, the sad fact is that women

continue to be sexually harassed on the job, passed over for jobs and promotions based on stereotypes about what they can and cannot do or outright prejudice against their advancement, paid less than men for equal work, and disadvantaged in numerous other ways based not on their abilities or their qualifications but on their gender.

How Does Affirmative Action Help Women?

If it is clear that the playing field is not yet level for women, it is fair to ask: how does affirmative action help? First, however, it is important to be clear about what affirmative action is -- and what it is not.

In employment, examples of affirmative action programs are recruitment and outreach efforts to include qualified women in the talent pool when hiring decisions are made; training programs to give all employees a fair chance at promotions; and in some cases the use of flexible goals and timetables (not quotas) as benchmarks by which to measure progress toward including qualified women in job categories from which they have been excluded.

In education, affirmative action programs for women include a variety of programs to prepare and motivate female students for study in nontraditional fields, such as outreach programs for high school and junior high girls to encourage them to consider careers in engineering, math and the physical sciences, as well as financial assistance and graduate fellowship programs aimed at helping women move into fields where their participation has been discouraged.

For women business owners, affirmative action programs include laws that encourage government agencies and contractors to do business with qualified women-owned companies, as well as programs providing financial, management and technical assistance to women

business owners.

Affirmative action is not "quotas" or the substitution of numerical dictates for merit-based decisions. Some affirmative action plans include the management tools of numerical goals or targets for representation of women or minorities, and timetables for meeting those objectives. But the courts have held that these goals and timetables must be flexible and take into account such factors as the availability of qualified candidates. They may not constitute "blind hiring by the numbers"; if they do, they are unlawful.

Thus, it is erroneous to attack affirmative action as somehow inconsistent with "merit" principles, as some have done. The fact is that affirmative action is a way to break down barriers and let merit shine through.

A case decided by the Supreme Court in 1987, Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987), is a good illustration of how an affirmative action plan using flexible goals typically works in the employment context. The employer, a county agency, employed no women -- not one -- in its 238 "skilled craft worker" positions, which included road dispatchers. Under its affirmative action plan, the agency set a target for increased employment of women in this category (and others from which they had been excluded). In its effort to meet the goal it took gender into account in deciding to promote a woman, rather than a man with substantially equal qualifications, when a road dispatcher position opened up. Gender was only one factor among many considered, and the woman who received the promotion was fully qualified for the job. The Supreme Court ruled that this constituted a reasonable approach to eliminating an obvious gender imbalance in the workforce.

The Johnson case illustrates not only how an affirmative action plan works, but also why such plans are needed. The position that was open in that case, for road dispatcher, was one that no woman had ever held. The initial interviews were conducted by three white male supervisors, one of whom had previously derided the woman applicant, Diane Joyce, as a "skirt-wearing person." Not surprisingly in these circumstances, they recommended the male candidate. Had it not been for the intercession of higher-ups in the agency and their application of the affirmative action plan, Diane Joyce would have been passed over by men who assumed she couldn't do the job. As it turns out, Diane Joyce is still successfully performing her duties as a road dispatcher for Santa Clara County.

What happened in the Johnson case before application of the affirmative action plan is what happens all the time. Supervisors making hiring or promotion decisions, procurement officers, and other decision-makers rarely engage in the purely objective, scientific exercise that is sometimes imagined. They are human beings making subjective judgment calls, and these judgments are inevitably influenced by the natural tendency we all have to feel most comfortable with people like ourselves. The Glass Ceiling Commission's report is replete with illustrations of how feelings of "kinship" or "chemistry" contribute to holding women and minorities back. It also documents the myriad ways in which racial, gender, and ethnic stereotyping remain pervasive in the corporate world. It found that women, for example, were variously stereotyped as not wanting to work, unwilling or unable to make decisions, too emotional, not aggressive enough, and too aggressive.³⁴

Affirmative action programs work because they are an effective way to neutralize and counteract these kinds of biases, stereotypes and prejudices. Affirmative action programs

force employers to reach out beyond the "old boys network" to which they would naturally gravitate, and to give fair consideration to candidates who are qualified but who don't fit their preconceptions. In other words, they function as a preventive approach to discrimination -- instead of forcing the victims of discrimination to take the daunting and expensive route of going to court to challenge biased acts after they occur, affirmative action keeps discrimination from occurring in the first place.

Thus, affirmative action programs are slowly making an impact. A government study showed that women made greater gains in employment at companies doing business with the federal government, and therefore subject to federal affirmative action requirements, than at other companies: female employment rose 15.2% at federal contractors, and only 2.2% elsewhere. The same study showed that federal contractors employed women at higher levels and in better paying jobs than other firms.³⁵

Many individual companies that have adopted affirmative action plans have demonstrated the impact on women. For example, after IBM set up its affirmative action program, its number of female officials and managers more than tripled in less than ten years.³⁶

Litigation against police and fire departments and the construction trades has resulted in affirmative action plans that have produced dramatic increases in the employment of women (and minorities) in those fields as well.³⁷ In 1983, for example, women made up 9.4% of the nation's police, and 1.0% of firefighters. By 1993, women were 16% of police, and 3.7% of firefighters.³⁸

It is clear, then that affirmative action programs have made a real difference for

women, and remain critical today. It is important to note, in addition, that our whole society stands to gain in numerous ways from programs that increase opportunities for women and minorities. For example:

- * Affirmative action programs that help women advance in the workplace are helping their families to make ends meet. Most women, like men, work because of economic need; indeed, many women are the sole source of support for their families.³⁹
- * Replacing the "old boys network" with job postings, outreach and training ensures that all workers -- women and minorities, but white males, too -- have a fair shot at advancing in the workplace.
- * Affirmative action programs expand the talent pool for employers to draw on, and many companies report that a diverse workforce has led to enhanced performance and productivity. DuPont Co. set -- and exceeded -- higher goals than any affirmative action regulations required, and the company reports that it has been rewarded by the development of new ideas and markets.⁴⁰
- * Diversity in our colleges and universities improves the learning process for everyone. As Justice Powell wrote in the Bakke case, "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."⁴¹
- * Enrollment and scholarship programs that promote diversity in professional schools indirectly serve the public in dramatic ways. For example, it is surely no accident that the advancement of women in fields of medical science has been accompanied by increased attention to women's health issues such as breast cancer and expanded research in those areas.
- * Communities benefit from affirmative action in myriad other ways. For example, increased recruitment and training of women police officers, prosecutors, judges and court personnel has been accompanied by an improvement in the handling of domestic violence cases and the treatment of domestic violence like the crime that it is -- which benefits women, children and all other members of the family and the community who are affected by violence in the home.

With this background, I will now turn to an analysis of S. 1085.

II. S. 1085: "THE EQUAL OPPORTUNITY ACT OF 1995"

In our view, Madame Chairman, the enactment of S. 1085 would constitute a severe setback in the ongoing struggle to eliminate sex and race discrimination and ensure equal opportunity for all. This bill, while called "The Equal Opportunity Act," actually would undermine, not enhance, equal opportunity. Indeed, it is extreme in scope and effect. It would wipe out a broad range of essential and effective programs aimed at opening the doors of opportunity for women and minorities in employment, in education, and in contracting. To do this would be, in our view, to slam the doors of opportunity shut for millions of Americans, to deprive all of us of the talents and contributions of all of those we shut out, and, finally, to send a signal to the American people that we are turning back the clock and that equal opportunity no longer matters to policymakers in Washington.

Inconsistent With Adarand and Other Precedents

It is important to note, first, that this bill goes far beyond the principles enunciated by the Supreme Court last June in Adarand Constructors v. Peña, 115 S. Ct. 2097 (1995). In Adarand, the Court made clear that while federal race-based classifications must be subject to strict judicial scrutiny, this does not mean that all such programs are automatically unlawful. Rather, Justice O'Connor wrote: "We wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.'" Id. at 2117 (citation omitted). Justice O'Connor specifically noted that affirmative action programs can be sustained when they are narrowly tailored to achieve a compelling government interest -- for example, to eliminate past or continuing discrimination. "The unhappy persistence of both the practice and the lingering effects of racial discrimination

against minority groups in this country," she wrote, "is an unfortunate reality, and government is not disqualified from acting in response to it." Id.

Under S. 1085, however, all federal affirmative action programs apparently would be absolutely prohibited, wiped off the books in one fell swoop. No matter how compelling the justification for a given program, and no matter how precisely tailored it is, the government would be disqualified from acting. This is an extreme approach, and was soundly rejected by seven of the nine Justices of the Supreme Court in Adarand.

Moreover, the legislation would eliminate not only affirmative action programs for racial minorities, but also affirmative action programs for women, which Adarand did not even address, much less outlaw. Under current caselaw, gender-based classifications -- including those discriminating against women -- are upheld when they are substantially related to an important government interest.⁴² But under this legislation, it appears that all federal affirmative action programs designed to benefit or assist women would be unlawful. This is a result that is hard to reconcile with logic or with sound equal protection principles.

Sweeping in Scope

The legislation is particularly problematic because of its undefined, but apparently sweeping, scope. It eliminates any program that "grant[s] a preference" based on race, color, national origin or sex. (Sec. 2.) "Grant a preference" is defined in Sec. 8(2) as follows: "The term 'grant a preference' means use of any preferential treatment and includes but is not limited to any use of a quota, set-aside, numerical goal, timetable, or other numerical objective." (The term "preferential treatment" is nowhere defined.) Given the circularity of the language ("grant a preference" means "preferential treatment") and its open-endedness

("includes but is not limited to . . ."), it is impossible to know how, if at all, the range of activities and programs it encompasses would be limited.

For example, would the bill's ban on "preferential treatment" mean that government decisionmakers would be barred from ever taking race, national origin or gender into account in any way, even as one factor among many? If so, the legislation is inconsistent not only with Adarand, but also with a long line of precedents including Johnson v. Transportation Agency and Regents of the University of California v. Bakke, 438 U.S. 265, 318 (1978).

Would targeted recruitment be illegal? For example, could federal law enforcement agencies make any kind of concerted effort to hire and promote more minorities and women? Could a federal agency with few African-American attorneys on its staff make a special effort to recruit at predominantly-African American law schools, or an agency with high-tech positions but few women recruit at a women's college? Or would these practices be considered prohibited "preferential treatment"? Section 3(1), which purports to create some sort of exception for recruitment, turns out, on inspection, to be of no help in answering this question. Section 3(1) allows recruitment of qualified minorities or women into an applicant pool for federal employment, but only if such recruitment "does not involve . . . granting a preference," a term which, as I noted, is not defined or limited in any meaningful way.

Eliminates Aspirational Goals

One thing that is clear is that the bill would abolish any use by the federal government of numerical goals based on race, national origin or sex, since the definition of "grant a preference" in Section 8(2) expressly includes goals, timetables, and other numerical objectives. There is no justification for such a draconian measure. Numerical goals, as I

noted earlier, are not the same as "quotas." Numerical goals are targets. They are aspirations. No sanctions are imposed for failure to meet them. Goals and timetables function as benchmarks by which to measure our progress toward a more inclusive society, one that is free of artificial barriers to equality of opportunity.

If a numerical measure functions like a quota rather than a goal -- if it is inflexible, or fails to take into account the availability of qualified applicants -- it is already unconstitutional under a series of Supreme Court cases. The Court has had no difficulty acknowledging and approving the distinction between goals and quotas. For example, in Johnson v. Transportation Agency of Santa Clara County, discussed earlier, the Court noted, in upholding a public employer's hiring goals, that the employer's affirmative action plan stated that the goals were to be used as "reasonable aspirations" and to take into account factors such as the availability of women and minorities "in the area work force who possess the desired qualifications or potential for placement." 480 U.S. at 635; see also id. at 654-57 (O'Connor, J. concurring); United States v. Paradise, 480 U.S. 149 (1987); Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986). Indeed, in Paradise -- a decision expressly approved in Adarand -- the Court recognized that without a goal, there would have been no effective remedy in light of the defendant's longstanding recalcitrance.

The legislation before us, however, ignores these well-established principles and would flatly prohibit all numerical measures at the federal level.

One specific example of a federal goal that S. 1085 would eliminate, of particular interest to women, is a provision passed by Congress in 1994 without opposition, adopting a goal aimed at increasing federal procurement opportunities for qualified women-owned

businesses. The Federal Acquisition Streamlining Act of 1994 amended Section 15 of the Small Business Act to set a federal government-wide target for the award of federal contracts to small business concerns owned and controlled by women; the goal is a modest five percent of the total value of all prime contract and subcontract awards for each fiscal year.⁴³

Congress adopted this goal in recognition of the fact that women-owned businesses, despite being a large and growing force in our economy,⁴⁴ have been virtually shut out of government procurement activities, and in the hope that the goal would result in greater contracting opportunities for them.⁴⁵ Indeed, modest though the five percent goal may seem, reaching it would constitute significant progress: the latest data we have seen puts the share of federal procurement by women-owned firms at a mere 1.6 percent.⁴⁶ It would be a shame, to say the least, to eliminate the new five percent goal before it has even had a chance to begin to make an impact. And that is just one example of a numerical goal that would be nullified by this legislation.

Eviscerates the Executive Order Program

One of our most serious concerns about S. 1085 is the destructive impact it would have on the federal contract compliance program.

Executive Order 11246 and the federal contract compliance program establish and implement the proposition that government funds -- taxpayer dollars -- should not support illegal discrimination against women and minorities. The program covers over 25% of the U.S. workforce, helping to break down barriers to equal opportunity for some 26 million Americans. It has been supported by every Administration for over three decades.

The Executive Order program achieves its objectives by requiring that a clause be

included in government contracts in which the contractors assure that they will not discriminate against any employee on the basis of race, color, religion, sex, or national origin. The Executive Order further requires that businesses and institutions (over certain size thresholds) that choose to contract with the federal government develop and implement affirmative action plans. As part of this requirement, contractors must analyze their own workforces, identify job categories from which qualified women and minorities have been excluded, set their own goals and timetables for improved hiring and promotion of qualified female and minority workers, and make a good faith effort to meet them. 41 C.F.R. Part 60-2.

The regulations implementing this program expressly state that "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work." 41 C.F.R. § 60-2.12(e). Nor are federal contractors subject to sanctions in any way for simple failure to meet their goals. 41 C.F.R. § 60-2.15. All that is required is a good faith effort. The Director of the Office of Federal Contract Compliance Programs (OFCCP), which administers the Executive Order program, issued a new directive just last summer reaffirming that goals are not to be used as quotas, and that contractors are in compliance if they make a good faith effort, whether or not they have met their goals.⁴⁷

Indeed, the contractor community itself has confirmed that the Executive Order program does not require "preferential treatment" or "quotas" in employment decisions. As the President of the Equal Employment Advisory Council has testified, "Executive Order 11246, as . . . enforced by the Office of Federal Contract Compliance Programs (OFCCP),

does not require contractors to grant preferential treatment to any employee or applicant on the basis of race, gender, or ethnic background."⁴⁸ This association of some 300 major corporations that do business with the federal government has stated, further, that the affirmative action requirements of E.O. 11246 place no quotas or setasides on employers, nor do they require an employer to place an unqualified person in a job.⁴⁹ The EEAC concludes, "We believe there is no place for reflexive changes in the program simply because some people have misunderstood or mischaracterized its nature and effectiveness."⁵⁰

S. 1085, however, would cut the heart out of the federal contract compliance program by eliminating its goals and timetables component. The legislation expressly provides that the federal government may not "require or encourage any Federal contractor or subcontractor to . . . grant a preference" (Section 2(2)), and, as noted earlier, "grant a preference" is defined to include "use of a . . . numerical goal, timetable, or other numerical objective" (Section 8).

This evisceration of the Executive Order program would render it meaningless. Goals and timetables were added to the program during the Nixon Administration in 1970 precisely because they were shown to be necessary for the program to work. The early years of the program demonstrated that passive nondiscrimination clauses alone did not ensure equal opportunity for minorities (sex was not added to the prohibited categories in the Order until 1967), so an affirmative action requirement was added.⁵¹ In 1968, the Comptroller General ruled that the affirmative action obligation was too vague to fulfill the requirement that minimum contract standards be made clear to prospective bidders.⁵² Contractors urged the government to define their obligations under the Order and to establish a standard to measure their compliance with the affirmative action requirement. Use of such standards, which in

fact is all that goals and timetables are, is the way business operates in all other spheres.

With its affirmative action component, the Executive Order program is an essential complement to the enforcement of Title VII's prohibition against discrimination in employment. While the EEOC and individual victims of discrimination can bring suit under Title VII once a violation has occurred, the contract compliance program operates to prevent discrimination. By developing an affirmative action plan, and measuring its own progress toward meeting its goals, a federal contractor is taking steps to ensure that discrimination and unfair barriers to advancement are eradicated. The contract compliance program, in short, is indispensable as a systemic approach to rooting out discriminatory practices.

There is abundant evidence that the Executive Order program works. I have already cited studies showing that women have made greater gains in employment at companies doing business with the federal government than at other companies.⁵³ The program has also changed entire industries. In 1978, the Office of Federal Contract Compliance Programs reviewed the employment practices of the five largest banks in Cleveland, pursuant to its authority under Executive Order 11246. Three years later, the percentage of women officers and managers at these institutions had risen more than 20%. When OFCCP first looked at the coal mining industry in 1973, there were no women coal miners. By 1980, 8.7% were women.⁵⁴

One of the most successful enforcement efforts under Executive Order 11246 came as a result of an administrative complaint against the Chicago-based Harris Bank, filed by Women Employed. After years of conciliation efforts failed, OFCCP brought an enforcement action, in which the National Women's Law Center represented Women Employed. Two

separate hearings yielded findings of serious sex and race discrimination in the Bank. Ultimately, in 1989, OFCCP, the Bank and we agreed to a settlement of \$14 million in back pay -- the largest award ever under the Executive Order -- and the Bank revised its affirmative action plan, to include enhanced training programs and career development opportunities. Just last year, in fact, Harris Bank named its first woman vice chairman -- who is believed to be the highest-ranking woman among the country's largest banks -- and announced that it now has 15 women in positions representing 25% of senior vice presidents and above at the bank. Clearly, the Executive Order program has made a difference.

It is also instructive, perhaps, to consider what can happen in the absence of this program. The Olde brokerage firm, for example -- the subject of a discrimination complaint I described earlier -- is not covered by the Executive Order because it has no federal contracts. Do we really want to destroy the Executive Order program and eliminate the tools it provides to ensure that at least those companies who are benefiting from federal, taxpayer-funded contracts do not behave as Olde reportedly has?

Undermines Enforcement of Civil Rights Laws

We are also deeply concerned about the harm S. 1085 would do to enforcement by the federal government of all of our civil rights and anti-discrimination laws. Section 2(3) of the bill would prohibit any federal agency from "enter[ing] into a consent decree that requires, authorizes or permits" any of the activity prohibited in Section 2(1) or 2(2) -- *i.e.*, any use of numerical objectives or anything else that the bill labels as "granting a preference." Under this provision, the ability of our civil rights enforcement agencies, such as the Justice Department and the EEOC, to enter into any new consent decree that includes numerical

remedies, would be severely limited. This prohibition would apply even though by definition a consent decree is entered only when the defendant itself has agreed to the relief.

This means that no matter how egregious the discriminatory and unlawful conduct of a defendant, no matter how important it is to have an effective way to monitor the defendant's future compliance with nondiscrimination requirements, no matter how flexible and carefully drawn the proposed remedy, and no matter how willing the defendant is to go along with it -- the government would be prohibited from entering into a consent decree that includes any kind of goal or timetable, or anything else that might fall within the undefined reaches of this bill's prohibition on "preferential treatment," when the prohibition applies.

While S. 1085 purports to cover only the executive and legislative branches of the federal government (see definition of "federal government" in Section 8(1)), it thus indirectly constrains the courts too, by preventing any federal agency from entering a court-approved consent decree. This is another example of the radical and extreme nature of this proposed legislation. It is astonishing, frankly, that it does not contain any exception for court-approved consent decrees along with all other court orders. Even the bill introduced by Senator Helms early in this Congress, S. 496 -- an extreme anti-affirmative action measure similar to S. 1085 in many respects -- provides that nothing in it is to be interpreted as forbidding a court to order appropriate relief to redress past discrimination. Not so S. 1085.

Moreover, given the general and imprecise language of S. 1085, and the absence of clear definitions limiting its reach, there is room for confusion and future challenges to federal agency enforcement authority that cannot even be catalogued today. The federal government may be forced to spend precious enforcement resources on defending its ability to carry out

virtually any of its civil rights responsibilities by those resisting compliance against discrimination.

New Limitations on Prohibitions Against Sex Discrimination

In addition to abolishing critical affirmative action programs, this bill to turn the clock back for women in another way as well. Buried in Section 2 of a section its sponsors, not surprisingly, avoid calling attention to -- is a provision that would permit discrimination against women in a wide variety of circumstances. Such discrimination is now against the law.

While Section 2 of the bill ostensibly prohibits the federal government from intentionally discriminating on the basis of race, sex or national origin, it carves out a series of exceptions to the prohibition on sex discrimination. These exceptions would create a set of unprecedented and potentially far-reaching new exceptions that would exclude women from job openings in the federal government or participation in certain programs.

For example, there is a wholly new exception allowing women to be excluded from certain jobs altogether based on "privacy" concerns. Not only is the term "privacy" undefined, but in addition Section 4(c)(2) would permit sex discrimination in facilities "designed to" protect someone's privacy -- even if the asserted need for privacy is not or if there are ways to protect privacy without discriminating against women. Can we see an employer argue that it can exclude women because, for example, there are no locker rooms or other facilities for them? If this applied to the U.S. Senate, would elected women Senators have been prevented from taking office on the Senate floor chambers once lacked women's restrooms?

The bill would also, under Section 4(c)(1), allow gender to be a "bona fide occupational qualification" (BFOQ) which could exclude women from federal jobs or programs. This concept exists now in very limited form in Title VII, but would be significantly broadened if this bill is enacted. This is especially dangerous because, when sex is found to be a BFOQ, an employer can legally announce that no woman need apply regardless of her skills or abilities.

Section 4(c)(3) would permit the wholesale exclusion of women from any federal job or program that is subject to a "national security" requirement, regardless of whether or not an individual woman candidate poses any security risk. It is hard to imagine a rational for this.

Finally, Section 4(c)(3) also would authorize the exclusion of women from whole classes of positions in the Armed Forces where women are now serving effectively and courageously. One of our nation's proudest recent accomplishments has been the elimination of some of the artificial barriers to military service by women. U.S. servicewomen in the Persian Gulf and other dangerous posts have emerged as heroes as they have served in combat support positions, faced hostile fire, flown into enemy territory, and overcome extreme hardship. Yet this legislation would allow the resurrection of the very restrictions that these brave servicewomen have shown -- and the military itself has recognized -- to be unwarranted.

That this legislation, while described as addressing affirmative action, also introduces wholly new and potentially wide-open loopholes in the laws against sex discrimination, and thus would strip women of many hard-won gains, is especially dangerous and unwarranted.

* * *

Conclusion

Along with racial and ethnic minorities, women of all races are a long way from having an equal opportunity to compete on a level playing field. Affirmative action programs make a huge difference. Thus, by eliminating federal affirmative action programs across the board, and creating new loopholes in federal anti-discrimination laws, H.R. 1085 would not only halt the forward progress that women, as well as racial and ethnic minorities, have been able to achieve; it would mark a giant leap backward in this nation's progress toward equal opportunity for all. Until the day when we can say with confidence that we have reached that goal, we simply cannot afford to throw away the means we have for getting there.

Thank you.

REFERENCES

1. Federal Glass Ceiling Commission [FGCC], Good For Business: Making Full Use of the Nation's Human Capital, iii-iv (1995).
2. U.S. Department of Labor, Women's Bureau, Women Workers: Trends and Issues 35 (1993).
3. National Committee on Pay Equity, "The Wage Gap: 1993," citing U.S. Dept. of Commerce, Census Bureau, "Current Population Reports," Series P-60.
4. U.S. Dept. of Commerce, Census Bureau, Statistical Abstract of the United States 13 (1994).
5. Id. at 396. See also, U.S. Dept. of Labor, Women's Bureau, "Working Women Count!" at 10 (1994).
6. Employee Benefits Research Institute, Sources of Health and Characteristics of the Uninsured, Analysis of the March 1993 Current Population Survey, Issue Brief No. 145, at 61 (Jan. 1994) (women are heavily concentrated in jobs paying under \$20,000 where 82% of the uninsured workers are also located).
7. 9 to 5, "Profile of Working Women," at 1 (1992-93 edition) (data compiled from United States Bureau of Labor and Census Bureau statistics).
8. Equal Employment Opportunity Commission [EEOC], Job Patterns for Minorities and Women in Private Industry, table 1, at 1-36 (1993).
9. U.S. Department of Education, National Center for Education Statistics, "Digest of Education Statistics," table 239 (1994).
10. U.S. Dept. of Commerce, supra note 4, at 407-409.
11. U.S. Bureau of the Census, Current Population Reports, "Money Income of Households, Families, and Persons in the United States: 1992," Series P-60, No. 184, Table 31.
12. U.S. Dept. of Commerce, supra note 4, at 407.
13. Curran and Carson, American Bar Foundation, "The Lawyer Statistical Report" (1994).
14. "A Long Way To Go," Newsweek, April 24, 1989, at 74.
15. Commission on Professionals in Science and Technology, Professional Women and Minorities: A Total Human Resource Data Compendium 142, Table 5-11 (1994).
16. Institute for Women's Policy and Research, "The Wage Gap: Women's and Men's Earnings," (1995) (citing unpublished data of the U.S. Bureau of the Census, Current Population Reports).
17. FGCC, supra note 1, at 79.
18. U.S. Department of Education, supra note 9, at table 203.
19. Cheryl Russell & Margaret Ambry, American Incomes 155, 158, 163 citing, Bureau of the Census Current Population Reports, "Money Income of Households, Families, and Persons in the United

- States: 1991," Series P-60, No. 180' (in 1991, 133,836,000 people over age 15 worked 47%, of these were white men).
20. U.S. Bureau of the Census, Current Population Reports, "Poverty in the United States: P-60, No. 181, table 11 (of the 34,025,000 people aged 25 or older who completed college, 16,578,000, or 48%, were white males).
 21. FGCC, supra note 1, at iii-iv. See also, EEOC, supra note 8 (showing that women are severely underrepresented in, among many other industries, the mining, construction, and women's clothing industries).
 22. U.S. Dept. of Commerce, supra note 4 at 429.
 23. Id. (computed from Bureau of Labor Statistics, "Employment and Earnings," Jan. 1995).
 24. FCGG, supra note 1, at 151.
 25. Tesch, et al., "Promotion of Women Physicians in Academic Medicine," Journal of the Medical Association, April 5, 1995.
 26. Wood, et al., "Pay Differentials Among the Highly Paid: The Male-Female Earnings Gap and Salaries," Journal of Labor Economics, July 1993.
 27. Unpublished computerized data compiled by EEOC field offices.
 28. Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges, Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board, October 1995.
 29. U.S. Dept. of Labor, Women's Bureau, supra note 5, at 7.
 30. FGCC, supra note 1, at 148.
 31. Susan Antilla, "Young White Men Only, Please," New York Times, April 26, 1995.
 32. Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992).
 33. Carey Goldberg, "Company to Pay Record Amount in L.I. Sexual Harassment Case," New York Times, August 13, 1995.
 34. FGCC, supra note 1, at 148.
 35. Citizen's Commission on Civil Rights, Affirmative Action to Open the Doors of Job Opportunity, 123-129 (1984).
 36. Id.
 37. Id.
 38. U.S. Dept. of Commerce, supra note 4, at 409.
 39. Department of Labor, Women's Bureau, supra note 2, at 11. See also Whirlpool Found

"Women: The New Providers," a study prepared by the Families and Work Institute with Louis Harris and Associates, Inc. (May 1995).

40. Jonathan Glater & Martha Hamilton, "Affirmative Action's Corporate Converts," *Washington Post*, March 19, 1995 at H1.
41. Regents of University of California v. Bakke, 438 U.S. 265, 313 (1978) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).
42. See, e.g., J.E.B. v. Alabama, 114 S. Ct. 1419 (1994).
43. P.L. 103-355, 108 Stat. 3243, 3374 § 7106 (1994).
44. Women-owned businesses have increased since 1982 by more than 57%. Today there are some 7.7 million woman-owned businesses, employing more people than all of the Fortune 500 companies combined. National Foundation for Women Business Owners, "Research Highlights" (1995).
45. H.R. Conf. Rep. No. 103-712, 103rd Cong., 2d Sess., reprinted in 1994 U.S.C.C.A.N. 2607, 2654.
46. "Affirmative Action Review: Report to the President," July 1995, table following p. 62.
47. U.S. Department of Labor, Office of Federal Contract Compliance Programs, Notice of Transmittal No. 206, August 2, 1995.
48. Statement of Jeffrey A. Norris before the Employer-Employee Relations Subcommittee, Economic and Educational Opportunities Committee, U.S. House of Representatives, June 21, 1995, at pp. 1-2; see also Equal Employment Advisory Council "Special Memorandum -- Special Issues In the Affirmative Action Debate: Executive Order 11246," March 17, 1995.
49. EEAC Special Memorandum, supra note 48, at 2, 3, 25.
50. Id. at 25.
51. E.O. 10925, 26 Fed. Reg. 1977, 3 C.F.R. 1959-63 Comp. 448 (Mar. 6, 1961). E.O. 10925 was the precursor to E.O. 11246, which was signed by President Johnson in 1965.
52. 48 Comp. Gen. 326 (1968).
53. Citizens Commission on Civil Rights, supra note 35.
54. Id.

WOMEN'S
BUSINESS



DEVELOPMENT
CENTER

JUL 25 1996

FAX 202-307-2572

July 22, 1996

JUL 25 1996

Mark Gross
Assistant Attorney General for Civil Rights
U. S. Department of Justice
P. O. Box 65808
Washington DC 20035-5808

Subject: Proposed Reforms to Affirmative Action in Federal Procurement

As a Presidentially appointed member of the National Women's Business Council, a federal advisory council on women's business issues; a gubernatorially appointed member of the Illinois Women's Business Ownership Council, a state advisory council advising the Governor of Illinois and the state legislature on women's business issues; and as Co-Director of the Chicago-based Women's Business Development Center, a small business development center and procurement technical assistance and women's economic development advocacy organization and provider of programs and services for tens of thousands of women owned businesses; and as one called upon to advise the President and the Office of Civil Rights of the U. S. Department of Justice, I am pleased to submit comments on the public notice and invitation for reactions and views published in the Federal Register on May 23, 1996, entitled "Proposed Reforms to Affirmative Action in Federal Procurement."

I am submitting my comments on behalf of the more than 8 million women business owners in the United States.

We have been pleased to advise the President and the Department of Justice on affirmative action issues and understand the necessity for complying with the constitutional standards established by the Supreme Court in *Adarand vs. Peña*. We commend the administration for its continuing commitment to affirmative action and its "mend don't end" philosophy and believe that the statement by President Clinton in July 1995 was meant to address the need to **increase opportunities** rather than limit them further.

Revision and expansion of the federal government's affirmative action policies and programs are critical to the overall success and health of women and minority owned small businesses, indeed to that of all small businesses in the U.S.

page two

We are concerned that the critical issues of women owned businesses are not addressed in the proposed policies and programs. Instead, the Department of Justice has elected to address only those small and disadvantaged business programs and policies which refer to ethnic minority populations. The definition and the programs **MUST** be expanded to include women owned businesses who are still only receiving just over 3% of federal contracts and are, by federal definition, economically and socially disadvantaged, which is not addressed in the proposed reforms. It is critical that a broader definition of disadvantaged, utilizing language that promotes the enhancement of opportunity. We are pleased that the percentages have grown from just 1% of contracts to women owned businesses to 3%. However since 8 million businesses in this country are women-owned and that half of all businesses will be women owned by the end of the century, the share of federal government procurement from women-owned businesses is minuscule compared to our growing capacity. . This is a percentage certainly not reflective of the number of women owned businesses who have the capacity to do federal subcontracting and contracting.

Competitive opportunities in federal contracting and subcontracting for women owned businesses must be extended and the proposed reforms to affirmative action are the window of opportunity to address this crucial issue. Your proposed reforms do not address this.

In 1994, We were pleased to have the opportunity to work with Illinois Senator Carol Moseley Braun to support the 5 percent goal for women as part of the Federal Acquisition Streamlining Act. Since that legislation was enacted, women business enterprises received significantly increased percentages of the federal market, a 27% increase from 1992.

Legislation and administrative guidelines such as the overall 5% goal and goals enacted at such agencies as Transportation, EPA, NASA and Department of Energy have had a significant impact on access to federal contracts for women owned businesses. Therefore, inclusion of certified women owned businesses in the current proposed reforms are necessary.

We agree with the recommendations provided by the National Women's Business Council and recommend that **the proposal be revised to specifically include women owned businesses.** As was recommended by NWBC the proposal should describe the programs in existence that were enacted or implemented to provide opportunities for women to compete for federal prime and subcontracts.

Certification Issues

We commend the U. S. Department of Justice for recognizing the solution to fraud and abuse in contracting and subcontracting is the requirement of certification for women and minority and small disadvantaged businesses. This tightened eligibility and certification requirement must be applied to all federal agencies and granted as well as prime and sub-contractors. There should be a certification requirement for all small businesses who participate in federal procurement contracting.

It would be more efficient to determine economic and social disadvantage as well as ownership and control issues in a single certification process rather than the two separate certification processes discussed in the proposal.

We agree that the certification process be decentralized and privatized. The certification could be implemented through state, municipal and private certification entities with federal regulations as guidelines. As indicated in previous meetings with the U. S. Department of Justice, I will be pleased as Director of the Women's Business Development Center and as an acknowledged national leader on women's business and certification issues and the only private sector certifying agency for women business enterprises in the U.S., to consult and advise the U. S. Department of Justice, Office for Civil Rights and the U. S. SBA on certification criteria and requirements and implementation.

The certifying entities contracted with by the federal government must comply with agreed upon universal and uniform certification standards and these entities must be periodically monitored for compliance with rigorous standards set forth by the federal government with the assistance of the key national women and minority certifying agencies.

We request that the Department of Justice explain how the proposal will establish uniform federal contracting standards and certification procedures for women-owned small businesses as well as to increase competitive opportunities for the women's business sector.

We agree that the eligibility of the certification program include both social and economic disadvantage, gender and race.

We also propose that technical assistance programs should be developed for nongovernment agencies in order to assist the SDBs with the certification process and that experienced private sector agencies and consultants should assist that SBA with training seminars on certification and eligibility to other certifying and other agencies, both government and nongovernment.

page four

On the issue of the certification period for a firm, we disagree that the certification of a firm be valid for three years. Instead, it should be shortened to one year with a prescribed renewal process. Smaller firms have historically experienced frequent changes in business structure that could affect operations, control and ownership.

Regarding certification appeal and challenge...a defined process for challenges must be developed that includes an appeal to the certifying agency of the firm being challenged. The process of challenging the certification of a firm should include a review of the certifying agency in order to identify any problematic issues. We also propose that there be an avenue for appeal through the private certifying organizations.

Preaward review of potential federal contractors

We strongly encourage that preaward review of potential federal contractors be mandatory, NOT discretionary.

Benchmarks

On the issue of benchmarks and benchmark limits, again we reiterate that gender as well as race be considered on an industry-by-industry, market-by market basis and that representatives of women owned business organizations such as the National Women's Business Council, the National Association of Women Business Owners and the Women's Business Development Center be involved in the oversight and determination of these benchmarks and the crafting of the regulatory details of affirmative action reform.

Race Neutral Programs--Outreach and Technical Assistance

We are also concerned that the federal pursuit of race-neutral programs utilized by agencies including training, outreach and technical assistance programs as a way of increasing Small Disadvantaged Business participation have commensurate funding.

Currently agencies use a variety of outreach activities on federal contracting. The procurement technical assistance networks across the nation, funded by the Department of Defense, are a wise investment for a federal government initiative to promote greater procurement among small minority and women owned businesses. In Illinois, the expenditure of \$675,000 in state and federal funds resulted in procurement technical assistance center clients securing more that \$225 million in contracts, representing a return of more that 333 to 1 for government dollars expended. Since the program began a few years ago, Illinois PTAC clients have secured government contracts worth nearly \$2 billion.

page five

There is currently little funding of these programs and no consistent direction for federal agencies. We agree with most of the recommendations in the proposed reforms but recognize that directories of certified firms be developed and consistently updated; that the PASS system be regularly updated with more extensive information collected and verified; that national lists of assistance organizations be supported and given responsibility to further disseminate contracting opportunities; that technical assistance initiatives be enhanced and that agencies form alliances with credible recognized assistance organizations; that financing initiatives that assist firms with federal contracts and subcontracts be made available.

Application to Subcontractors as well as to Contractors

The proposed reforms must apply not only to federal government grantees but also to subcontractors. All proposed changes to affirmative action programs should be applicable to subcontractors as well.

Subcontracting is a major interest of women business owners. By proposing that only direct procurement is affected by these reforms, the Department of Justice limits opportunities for women business enterprises.

page six

Conclusion

Women business owners and their interests and concerns MUST be addressed in the proposed reforms. Over 40% of the business sector of the U.S. economy cannot and will not be ignored. Women are changing the face of the American economy but recognition and guidelines by the federal government on the role of women owned businesses and the discrimination they face must be recognized and addressed. The Affirmative Action reform proposal should be revised to reflect the women's business interests. Affirmative action is an economic and gender issue as well as a racial issue. The Affirmative Action reforms MUST be inclusive.

Sincerely,



Hedy M. Ratner
Co-Director
Women's Business Development Center
FAX 312-853-0145

cc: Harold Ickes, Deputy Chief of Staff to the President
Dr. Laura Tyson, Chairperson, National Economic Council
Carol Rasco, Assistant to the President for Domestic Policy
Alexis Herman, Director of Public Liaison,
Hillary Rodham Clinton, First Lady
The White House
Betsy Myers, Deputy Assistant to the President, White House Women's Office of
Women's Initiatives and Outreach
Amy Millman, Executive Director, National Women's Business Council
Ginger Lew, Deputy Administrator, U. S. Small Business Administration
Jere Glover, Chief Counsel for Advocacy, U. S. Small Business Administration
Sherrye Henry, Office of Women's Business Ownership, U. S. SBA
Joan Parrott-Fonseca, Director, Minority Business Development Agency, U. S.
Department of Commerce
John Schmidt, Deputy Attorney General, U. S. Dept. of Justice
Duval Patrick, Deputy Atty Gen., Dept. of Civil Rights, U. S. Dept. of Justice
Isabelle Katz Pinzler, Dept. of Civil Rights, U. S. Dept. of Justice

Discussion Draft
2/20/96

Outline of SBA's 8(a) Reform Proposal

In Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), the Supreme Court extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. Under strict scrutiny, any federal programs that make race a basis for contract decisionmaking must be narrowly tailored to serve a compelling government interest.

The purpose of the 8(a) program--as defined by Congress--is to assist the development of businesses owned by socially and economically disadvantaged individuals. This has been, and remains, a compelling government interest. Evidence demonstrates that there still are great disparities in minority business ownership and in minority participation in federal contracting. In fact, disadvantaged owned businesses currently receive only 6.2 percent of total federal contract dollars, while disadvantaged individuals, as defined by the Small Business Act, constitute a full 26 percent of our population.

SBA is now proposing to reform the 8(a) program to ensure that it is narrowly tailored and that it fully conforms to Adarand. This outline sets forth SBA's proposals for reforming the 8(a) program in this manner.

Term of the program

Under the current 8(a) program, individuals are admitted to the program for a limited period of time--nine years. Under the proposal, the term of the program will continue to be nine years, comprising a developmental and a transitional stage. Significantly, SBA will review each individual's performance throughout the term.

With emphasis on comprehensive business development rather than just the award of contracts, the four year developmental stage will focus on building the infrastructure of participating firms. During this stage, a participant would be eligible for both sole source and competitive awards. SBA will make better use of its resource partners to enhance the business and management expertise of 8(a) participants.

During the five year transitional stage, SBA will emphasize the need for private sector and non-8(a) federal marketing. In this stage, firms would be limited to awards issued through sole source and competitive 8(a) procedures. SBA will work with the

Discussion Draft
2/20/96

private sector to increase access to both capital and markets.

Entry and eligibility

To enter the program, members of designated groups will continue to maintain their presumption of social disadvantage, as provided by statute. Individuals who are not members of these groups will be able to qualify under a modified standard. They will be considered socially disadvantaged upon demonstrating by a preponderance of the evidence that they have been subjected to ethnic prejudice or cultural bias because of their membership in a particular group. This new standard eases the current clear and convincing standard, and is likely to increase the entry of certain groups (e.g., non-minority women, disabled individuals) in the 8(a) program.

In considering economic disadvantage for individuals applying to the 8(a) program, SBA will impute the financial assets of their spouses and dependent children, if any. Eligibility at program entry will be limited to those individuals whose net worth does not exceed \$250,000, excluding personal residence, qualified retirement monies, and ownership interest in the business, and whose total assets do not exceed \$750,000, excluding qualified retirement monies and ownership interest in the business.

Eligibility is currently limited to those individuals whose net worth does not exceed \$250,000, excluding personal residence and ownership interest in the business (and not imputing any family assets). There is no current limitation on total assets.

Procurement goals

SBA and procuring agencies will establish procurement goals that help promote the business development of participating firms. The agencies particularly need to emphasize distributing contract opportunities to a broader base of 8(a) firms. The goals should address the following factors: dollar value of contract awards; number of awards; number of contractors receiving awards; geographic distribution of awards; and distribution of awards in industries with unmet benchmarks.

Capping awards

Contract awards will be subject to a cap to assure broader and more equitable distribution among program participants. Non-manufacturing firms entering the program will be eligible for maximum aggregate 8(a) contract awards in an amount equal to three times the SBA size standard for their primary SIC code at

Discussion Draft
2/20/96

time of entry.

Existing non-manufacturing participants will be eligible for maximum aggregate new 8(a) contract awards in an amount equal to three times the SBA size standard for their primary SIC code at the time of implementation of this proposal. For purposes of applying this aggregate standard, the dollar value of 8(a) contracts under the small purchase threshold of \$100,000 will not be counted.

No cap will be estimated for manufacturing firms because of the relatively small number of 8(a) manufacturing firms and the need to encourage development of a broader manufacturing base.

Graduation and other program limitations

SBA may limit use of the program in specific industries if it determines that a sheltered market is no longer needed to ensure adequate disadvantaged individual participation in such industries. In this regard, SBA will use one or more of the following techniques: (1) limiting entry into the program in such industries; (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 dollar amount and/or the number of 8(a) contracts awarded in particular industries or geographic areas in which 8(a) firms do not require such assistance.

An individual may be required to leave the program prior to the nine year graduation period if a review reveals that the individual is no longer economically disadvantaged or the firm meets graduation criteria determined by SBA.

SBA will also strictly enforce competitive business mix requirements to assure that the program is working to help firms develop their capacity to contract outside the 8(a) program on a competitive basis. This will help to prepare firms for success once they leave the program.

Additional reforms

Using 8(a) graduates as a resource, SBA will establish a mentor/protege program to assist developing firms in their business development. Participating mentors would qualify for certain subcontracting and joint venture opportunities.

To give developing firms greater flexibility, SBA no longer will require them to obtain approval before operating with additional SIC codes.

Discussion Draft
2/20/96

SBA will pursue efforts to delegate contracting authority to procuring agencies, although full implementation of this reform will require legislation.

SBA will further explore the feasibility of privatizing its 8(a) certification function. Some progress can occur administratively, although full implementation of this reform would require legislation.

SBA plans to shift more operational resources to field offices, allowing headquarters staff to concentrate on policy development and program monitoring. In addition to improving service, this will allow SBA to design better performance measures and new approaches to meet the needs of program participants.

THE WHITE HOUSE

WASHINGTON

**Affirmative Action Working Group Meeting
February 22, 1996**

I. White House Legislative Affairs Update

II. Justice Department Update

-- Goals/Grant Directives

-- Vetting

III. SBA Update

IV. DOD Update

V. Other

-- Legal

-- Canady's request for information.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO: Steve Kelman	Take necessary action	<input type="checkbox"/>
Kumiki Gibson - OVP	Approval signature	<input type="checkbox"/>
Steve Warnath	Comment	<input type="checkbox"/>
John Thompson	Prepare reply	<input type="checkbox"/>
Matt Blum	Discuss with me	<input type="checkbox"/>
Janet Himler	For your information	<input checked="" type="checkbox"/>
Jim Jukes	See remarks below	<input type="checkbox"/>

FROM: Ingrid Schroeder

DATE: July 15, 1996

REMARKS

According to WHLA (Jacoby), Rep. Canady is going to offer the attached amendment in the nature of a substitute at tomorrow's markup of H.R. 2128 - Equal Opportunity Act.

The amendment would limit the bill's coverage to Federal contracting (deleting the provisions dealing with Federal hiring).

7

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 2138
OFFERED BY MR. CANADY OF FLORIDA**

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Equal Opportunity Act
3 of 1996".

**4 SEC. 2. PROHIBITION AGAINST DISCRIMINATION AND
5 PREFERENTIAL TREATMENT.**

6 Notwithstanding any other provision of law, neither
7 the Federal Government nor any officer, employee, or
8 agent of the Federal Government may intentionally dis-
9 criminate against, or may grant a preference to, any per-
10 son or group based in whole or in part on race, color, na-
11 tional origin, or sex, in connection with a Federal contract
12 or subcontract.

13 SEC. 3. AFFIRMATIVE ACTION PERMITTED.

14 This Act does not prohibit or limit any effort by the
15 Federal Government or any officer, employee, or agent of
16 the Federal Government to encourage businesses owned
17 by women and minorities to bid for Federal contracts or

F:\MDB\88COMM\06JUD101.DOC

E.L.C.

2

1 subcontracts if such recruitment or encouragement does
2 not involve granting a preference, based in whole or in
3 part on race, color, national origin, or sex, in selecting any
4 person or group for the relevant contract or subcontract.

5 **SEC. 4. EXEMPTIONS.**

6 (a) **HISTORICALLY BLACK COLLEGES AND UNIVERS-**
7 **SITIES.**—This Act does not prohibit or limit any act that
8 is designed to benefit an institution that is a historically
9 Black college or university on the basis that the institution
10 is a historically Black college or university.

11 (b) **INDIAN TRIBES.**—This Act does not prohibit or
12 limit any action taken—

13 (1) pursuant to a law enacted under the con-
14 stitutional powers of Congress relating to the Indian
15 tribes; or

16 (2) under a treaty between an Indian tribe and
17 the United States.

18 **SEC. 5. COMPLIANCE REVIEW OF POLICIES AND REGULA-**
19 **TIONS.**

20 Not later than 1 year after the date of enactment
21 of this Act, the head of each department or agency of the
22 Federal Government, in consultation with the Attorney
23 General, shall review all existing policies and regulations
24 that such department or agency head is charged with ad-
25 ministering, modify such policies and regulations to con-

F:\MDF\SSCOMM\08JUD101.DOC

H.L.O.

1 form to the requirements of this Act, and report to the
2 Committee on the Judiciary of the House of Representa-
3 tives and the Committee on the Judiciary of the Senate
4 the results of the review and any modifications to the poli-
5 cies and regulations.

6 **SEC. 6. REMEDIES.**

7 (a) **IN GENERAL.**—Any person aggrieved by a viola-
8 tion of section 3 may, in a civil action, obtain injunctive
9 or equitable relief. A prevailing plaintiff in a civil action
10 under this section shall be awarded a reasonable attorney's
11 fee as part of the costs.

12 (b) **CONSTRUCTION.**—This section does not affect
13 any remedy available under any other law.

14 **SEC. 7. EFFECT ON PENDING MATTERS.**

15 (a) **PENDING CASES.**—This Act does not affect any
16 case pending on the date of enactment of this Act.

17 (b) **PENDING CONTRACTS AND SUBCONTRACTS.**—
18 This Act does not affect any contract or subcontract in
19 effect on the date of enactment of this Act, including any
20 option exercised under such contract or subcontract before
21 or after such date of enactment.

22 **SEC. 8. DEFINITIONS.**

23 In this Act, the following definitions apply:

24 (1) **FEDERAL GOVERNMENT.**—The term "Fed-
25 eral Government" means the executive and legisla-

04/12/83 PRI 15:50 FAX
SENT BY:53437

H-14-25 : MIZEN : LEGISLATIVE COUNSEL

005

F:\MDB\SECORD\108JUD101.DOC

H.L.C.

4

1 tive branches of the Government of the United
2 States.

3 (2) PREFERENCE.—The term "preference"
4 means an advantage of any kind, and includes a
5 quota, set-aside, numerical goal, timetable, or other
6 numerical objective.

7 (8) HISTORICALLY BLACK COLLEGE OR UNI-
8 VERSITY.—The term "historically Black college or
9 university" means a part B institution, as defined in
10 section 822(2) of the Higher Education Act of 1966
11 (20 U.S.C. 1061(2)).

Affirmative Action Roll-Out
(Updated: 2/19/96; 4:00 PM)

I. Final Vetting

Week of February 19 through February 23:

- **Wednesday, February 21:**
 - Draft briefing materials for SBA/Justice proposals: 1-2 page description of proposals; 5-10 page fact sheet/Q&As; impact estimates and talking points.
 - White House Legislative Affairs notify Hill Members about Empowerment Contracting Executive Order.
 - White House notify minority business men about about Empowerment Contracting Executive Order.
- **Thursday, February 22:**
 - White House/OMBstaff comments on proposals due COB: Elaine Kamarck, Sheryll Cashin, Bob Litan, Paul Diamond, Bruce Reed, Michael Waldman, Ellen Seidman, Kitty Higgins, Mike Schmidt, Jennifer Maine.
 - Justice Department one-on-one meetings with selected Hill staff (Conyers, Frank, Gephardt, Pastor, Becerra, Mink).
 - Additional calls to be made by Deval: Payne, Holmes-Norton; Jackson-Lee; Jefferson.
 - Meeting with Civil Rights Groups on 8(a) and procurement reform proposals: Wade Henderson (NAACP); Elaine Jones (NAACP Legal Defense & Educational Fund); Barbara Arwine (Lawyers' Committee for Civil Rights Under Law); Marcia Greenberger/Judy Applebaum (National Women's Law Center); William Taylor (Leadership Conference on Civil Rights); Judith Lichtman (Women's Legal Defense Fund); Helen Norton (Women's Legal Defense Fund); Laura Murphy (ACLU); Ralph Neas; and Cassandra Butts for Penda Hair.
 - Affirmative Action Working Group Weekly Meeting
- **Friday, February 23:**
 - Selected Congressional meetings with key staff of Black/Hispanic Caucus, Minority Leader, Small Business and Judiciary committees: Marshall Grisby (Ed and Labor; Ronald Stroman (Government Relations); Ester Aguilera (Hispanic Causus), Faith Rivers (Minority Leader), Dorothy Jackson (CBC), Yelberton

Watkins (Rep. Clayburn); Robert Raben (Judiciary); Laura Efurd (Asian Caucus); Sharon Levin (Women's Caucus); Melanie Sloan (Judiciary); Jean Roslanowick (Small Business); Broderick Johnson (Ed and Labor); Charles Stephenson (Dellums); Julie Tippens (Democratic Caucus), Henry Contreras (Roybal-Allard)

- Technical/data review with economists (John Bishop, Steven Caldwell, Ray Marshall, William Dickens, Larry Orr, Alan B. Krueger, John Donahue, Larry Katz, Robert Lerman, Isabelle Sawhill, Harold Beebout, Myles Maxfield, Barbara Bergman, Bill Spriggs)

Week of February 26 through March 1:

■ Monday, February 26:

- Selected Senate and House meetings with key members and staff

■ Tuesday, February 27:

- Minority business representative meeting (Weldon Lathan, Steve Sims, Wade Henderson, Cobbie DeGraf, Tony Robinson, Melvin Clark, Sam Carradine, 4 - 5 others)
- Selected Senate and House meetings with key members and staff

■ Wednesday, February 28:

- Women Groups meeting (Barbara Wooley/Betsy Meyer with representatives from Affirmative Action Coalition)
- Hispanics (Susana Valdez with National Council of La Raza, League of United Latin American Citizens, National Puerto Rican Coalition, and Latin American Management Association)
- Asians (Doris Matsui/Ann Eder with Organization of Chinese Americans, National APA Labor Alliance, and National APA Legal Consortium)
- African Americans (Ben Johnson with representatives of black organizations and Civil Rights groups)
- Business (Kate Carr with Washington representatives and business owners)

■ Thursday, February 29:

- Core Federal agencies meeting with Jack Quinn and general counsels Transportation, Defense, Commerce, SBA, Labor, Agriculture, Education, HHS, HUD, GSA, EPA, NASA)
- Core Federal agencies meeting with agency procurement staff (Transportation, Defense, Commerce, SBA, Labor, Agriculture, Education, HHS, HUD, GSA, EPA, NASA)
- Feminist Majority briefing on Affirmative Action

■ Friday, March 1:

- White House Working Group meeting: Final decision made on what/how to roll-out affirmative action decisions
- DOD assessment of comments on proposed rule changes (10% price preference; evaluation preference in construction; evaluation of past subcontracting performance, notification of subcontracting substitutions); decide next steps
- Finalize Justice/SBA briefing materials
- Draft rollout/communications strategy

WHITE HOUSE STAFFING MEMORANDUM

9:00 a.m.

DATE: 7/15/96 ACTION/CONCURRENCE/COMMENT DUE BY: 7/16/96

SUBJECT: Draft letter in opposition to Canady Substitute on affirmative action

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	McCURRY	<input type="checkbox"/>	<input type="checkbox"/>
PANETTA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	McGINTY	<input type="checkbox"/>	<input type="checkbox"/>
McLARTY	<input type="checkbox"/>	<input type="checkbox"/>	NASH	<input type="checkbox"/>	<input type="checkbox"/>
ICKES	<input checked="" type="checkbox"/>	<input type="checkbox"/>	QUINN	<input type="checkbox"/>	<input type="checkbox"/>
LIEBERMAN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	RASCO	<input checked="" type="checkbox"/>	<input type="checkbox"/>
LEW	<input type="checkbox"/>	<input type="checkbox"/>	REED	<input type="checkbox"/>	<input type="checkbox"/>
BAER	<input type="checkbox"/>	<input type="checkbox"/>	SOSNIK	<input type="checkbox"/>	<input type="checkbox"/>
CURRY	<input type="checkbox"/>	<input type="checkbox"/>	STEPHANOPOULOS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
EMANUEL	<input type="checkbox"/>	<input type="checkbox"/>	STIGLITZ	<input type="checkbox"/>	<input type="checkbox"/>
GIBBONS	<input type="checkbox"/>	<input type="checkbox"/>	STRETT	<input type="checkbox"/>	<input type="checkbox"/>
HALE	<input type="checkbox"/>	<input type="checkbox"/>	TYSON	<input type="checkbox"/>	<input type="checkbox"/>
HERMAN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	HAWLEY	<input type="checkbox"/>	<input type="checkbox"/>
HIGGINS	<input type="checkbox"/>	<input type="checkbox"/>	WILLIAMS	<input type="checkbox"/>	<input type="checkbox"/>
HILLEY	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Richard Hayes</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
KLAIN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Peter Jacoby</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
LAKE	<input type="checkbox"/>	<input type="checkbox"/>	<u>Angell</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
LINDSEY	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: Comments to this office.

RESPONSE: _____

July 16, 1996

Dear (Committee Members and Leadership):

The House Judiciary Committee will soon consider H.R. 2128, the Equal Opportunity Act of 1996, legislation that would eliminate all Federal affirmative action programs. I am writing to express my opposition to H.R. 2128, and to the substitute version of the bill that I understand Representative Charles Canady plans to offer.

According to the draft circulated by the Committee Republicans, the substitute bill would prohibit any consideration of race, gender, or national origin in the award of Federal contracts or subcontracts. As a result, it would eliminate a wide range of Federal programs designed to prevent discrimination against qualified minority-owned and women-owned businesses, and ensure them a fair opportunity to compete for Federal contracting opportunities. Abolishing these programs across the board would turn back the clock on the Federal government's historic, bipartisan commitment to equal opportunity.

Almost exactly one year ago, on July 19, 1995, I spoke to the nation at length about why affirmative action is still necessary to help us move as a nation toward a truly nondiscriminatory society. I stressed that we must not become the first generation of Americans since the end of Reconstruction to narrow the reach of equal opportunity, and I offered an alternative -- to mend affirmative action where necessary, but not to end it. I directed all Federal agencies to comply with the U.S. Supreme Court's decision in Adarand v. Peña, and to apply four standards to ensure that all affirmative action programs are fair: no quotas; no reverse discrimination; no preferences for unqualified individuals; and, no continuation of programs that have met their goals.

Since that time, my Administration has suspended the Department of Defense's "Rule of Two" set aside program, and issued detailed guidance to agencies addressing the manner in which strict scrutiny affects affirmative action in Federal employment programs. We have also proposed government procurement reforms that safeguard against fraud and abuse; ensure that race is not relied upon as the sole factor in procurement decisions; provide a set of market driven benchmarks for each industry to ensure that race-conscious procurement is not used unnecessarily; and avoid undue burden on nonbeneficiaries of the program.

We are on the right track. I believe that the vast majority of Americans want us to continue working to ensure equal opportunity. Because H.R. 2128, including the draft substitute, is inconsistent with that national goal, I would be compelled to veto this legislation if the Congress were to send it to me.

SUMMARY

JUSTICE DEPARTMENT PROPOSED REFORM OF AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT

May 22, 1996

- This document summarizes a proposal for reform of race-conscious affirmative action measures in federal procurement that target assistance to minority-owned businesses through programs that aid small firms that are owned by socially and economically disadvantaged individuals ("SDB's"). The proposal is designed to ensure that such programs comport with the Supreme Court's ruling last June in Adarand Constructors, Inc. v. Peña, which held that federal race-conscious based affirmative action programs are subject to the constitutional standard of strict scrutiny.

I. CERTIFICATION AND ELIGIBILITY

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

II. RACE-NEUTRAL MECHANISMS

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

III. ESTABLISHMENT OF BENCHMARK LIMITATIONS

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

IV. APPLICATION OF BENCHMARK LIMITATIONS

- Where minority participation falls below the benchmark, a price or evaluation credit -- not set-asides -- 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.

TALKING POINTS

DEPARTMENT OF JUSTICE PROPOSED REFORM OF AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT

May 22, 1996

- **The Department of Justice today released a proposal to be published in Thursday'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 directly 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.

President Defends Affirmative Action, Calls for Reforms
Wednesday, July 19, 1995

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

President Clinton, Wednesday, July 19, 1995

Our Central Challenge. As we approach the 21st century, the President believes we must:

- o Restore the American Dream of opportunity.
- o Find Common Ground: bring the American people together into a stronger community.

Commitment to Equal Opportunity. Today, President Clinton will discuss a central part of that challenge: strengthening our basic American commitment to equal opportunity for all.

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

- o A true black middle class is emerging.
- o Women have become major breadwinners and helped their families with new earnings.
- o We have revolutionized higher education. Women, racial and ethnic minorities now attend schools that once were predominantly white or all-male.
- o Police departments across the country better reflect the diversity of their communities. New professionals are role models for young women and minority youth.

We Cannot Retreat. 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.

Discrimination Continues. America cannot afford to waste a single person as we confront the challenges of the global economy. Affirmative action has helped close many gaps in economic opportunity, but we still have a long way to go:

- o The unemployment rate for African-Americans remains about twice that of whites.
- o Women have narrowed the earnings gap, but make only 72 percent as much as men.
- o An 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 only 3 to 5 percent of senior management posts. African-Americans, Hispanic and Asians hold less than 1 percent each of those positions.
- o The Federal government received more than 90,000 complaints of employment discrimination based on race, ethnicity and gender last year.
- o Hate crimes and violence are still ugly realities in the lives of many Americans.

Done Right, Affirmative Action Works. The President decided it was time to review the effectiveness of affirmative action, in place now for nearly a generation. His review found affirmative action is still an effective tool to expand economic and educational opportunity, giving talented people new chances to contribute to America:

- 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 under-represented 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 historically have been excluded from the old boy network. They have helped a new generation of entrepreneurs to flourish, fostering self-reliance and economic growth.

Committed to Fighting Abuses of Affirmative Action. Our review showed that we must reform affirmative action, reinventing yesterday's government to meet tomorrow's challenges:

- o **Crack Down on "Set-Aside" Fraud and Abuse.**
 - o Ensure set-asides go to businesses that need them most.
 - o Tighten requirements that businesses out of programs once they have had a fair opportunity to compete. No permanent set-asides for any company.
- o **Comply with the Supreme Court's Adarand decision.**
 - o Limit set-asides to areas where the serious problems of discrimination remain.
 - o Ensure expeditious compliance with the stricter standards of Adarand.
- o **Help Disadvantaged People and Distressed Communities.**
 - o Government must be a better partner for urban America and places caught in a cycle of poverty. The private sector must be the driver of economic growth.
 - o The President has directed the Vice President to develop new ways to use government contracting to help businesses that locate in distressed areas or hire workers from these areas.

Presidential Directive to Ensure Affirmative Action is Fair. Affirmative action must be made consistent with our ideals of personal responsibility and merit. Today, the President will direct all federal agencies to comply quickly with the Supreme Court's Adarand decision and to apply four standards of fairness to all affirmative action programs:

- 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 reformed.

Those Who Would Divide Us Threaten America's Future. Those who prey on our worst instincts and sow division cannot succeed. America cannot survive and prosper as a society if we are suspicious, fearful and divided. The growing pains of the new global economy invite a "blame game," but the challenge and the enemy are not our fellow Americans.

America Must Remain of Beacon of Hope for the World. Today in America, 150 racial and ethnic groups co-exist in harmony -- an achievement unmatched in all of human history; it makes us the envy of the world. The people of the world know that the American way works. We have a responsibility to renew and strengthen that ideal.

Wannath
FYI -
Dubois
Fine
(From Robert)

**QUESTIONS AND ANSWERS ABOUT
THE "CALIFORNIA CIVIL RIGHTS INITIATIVE" (CCRI)**

I. What is CCRI?

- * CCRI is an initiative on the November ballot in California.
- * CCRI would amend the California State Constitution to prohibit state and local government agencies from "discriminating against, or 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." (CCRI, section (a))
- * CCRI does not prohibit classifications based on sex that are "bona fide qualifications . . . reasonably necessary to normal operation of public employment, public education or public contracting." (CCRI, section (c)).

While on its face this section appears to exclude women from the impact of CCRI, it actually raises the specter of increased discrimination against women and girls if CCRI passes. [Specific points on this issue are set forth in section IV below.]

II. What is the President's position on CCRI?

- * President Clinton opposes CCRI, and has stated so publicly.
- * Senator Dole is a proponent of CCRI.

III. What does the State of California say about CCRI?

According to the staff of the California Joint Legislative Budget Committee (JLBC), the passage of CCRI would have the following **programmatic and fiscal** effects. These effects appear to be based on an interpretation of CCRI, section (a) only.

In **public employment and contracting**, CCRI would eliminate:

- * any affirmative action programs used to promote the hiring and advancement of women and minorities for state and local government jobs, to the extent that these programs involve "preferential treatment"
- ** prohibition would not apply to government agencies that receive money under certain federal programs requiring affirmative action

- * any programs promoting the awarding of public contracts to business firms owned by women or minorities
 - ** except for contracts funded by the federal government that require affirmative action measures
 - ** affected contracts could include, for example, "contracts for construction projects and purchases of office supplies"

JLBC estimates savings of "tens of millions of dollars" annually. JLBC letter to Attorney General Dan Lundgren, Sept. 12, 1995 (all quotes in original).

In public schools and community colleges, CCRI would eliminate:

- * some or all voluntary desegregation programs operated by school districts.
 - ** would not affect court ordered desegregation programs
- * a variety of public school (K-12) and community college programs
 - ** such as counseling, tutoring, student financial aid, and financial aid to selected school districts, where these programs are targeted based on race, sex, ethnicity or national origin.

Under California law, any savings realized from these programs must be spent for other public school and community college programs. JLBC estimates savings of "tens of millions of dollars" which "would most likely become available for other education programs." JLBC letter to Attorney General Dan Lundgren, Sept. 12, 1995 (all quotes in original) Proponents can argue that not only will CCRI save a lot of money, but that money can be used for other educational programs.

In the University of California (UC) and California State University (CSU) systems, CCRI would eliminate a variety of programs, "such as outreach, counseling, tutoring and financial aid" used by UC and CSU to admit and assist students from "under-represented groups." JLBC estimates savings of "up to \$50 million" annually. JLBC letter to Attorney General Dan Lundgren, Sept. 12, 1995 (all quotes in original).

IV. What else should we be concerned about?

A. Section (a)

Based on a legal analysis prepared by USC Professor Erwin Chemerinsky, section (a) would do the following.

In **public employment**, CCRI would eliminate:

- * hiring and promotion goals and timetables for women and minorities in public sector jobs
- * outreach and recruiting programs designed to encourage women and minorities to apply for public sector jobs

In **public contracting**, CCRI would eliminate state and local goals and timetables for public contracting -- such as the goal that 5% of public contracts be awarded to women-owned business and 15% of public contracts be awarded to minority-owned business.

In **public education**, CCRI would eliminate:

- * goals for admitting women and minorities to colleges and universities -- including graduate programs -- except where required by federal law.
- * girls' math and science programs at the elementary and secondary school levels.
- * Women's Resource Centers on college campuses.

B. Section (c)

Based on Professor Chemerinsky's analysis, section (c) would:

First, **lessen the State Constitutional protection against sex based discrimination in public employment, contracting and education.** Under the California Constitution, gender discrimination is only constitutional if it is necessary to meet a compelling government purpose, and therefore meets the strict scrutiny test.

CCRI would amend the California Constitution to allow gender discrimination in public employment, contracting and education if "reasonably necessary" to achieve a "bona fide qualification."

Essentially, this would lessen the standard of review so that gender discrimination is constitutional if it has a rational basis. Such a standard is much more deferential to the governmental entity making the decisions, and would allow many decisions discriminating

against women to stand.

Second, **raise the specter that the "bona fide" qualification language will actually increase discrimination against women and girls.** Current federal law allows narrowly tailored "bona fide occupational qualification" based on gender in employment. There are no assurances that California courts will interpret this standard as narrowly as federal courts.

In addition, there is no current state or federal law allowing gender to be used as a "bona fide" occupational qualification in the areas of public education or contracting. CCRI expands the ability of state government to discriminate against women in public education and public contracting areas. This could, for example, lead to disparities in awarding contracts or the funding of sports programs.

V. **Are there similar efforts in other states?**

There are efforts ongoing in four other states to put anti-affirmative action initiatives on the ballot:

- * Colorado (ballot initiative; signatures in the process of being gathered; deadline August 5, 1996)
- * Florida (ballot initiative; signatures in the process of being gathered; deadline August 6, 1996)
- * Oregon (ballot initiative; signatures in the process of being gathered; deadline July 5, 1996)
- * Washington (possible ballot initiative; first attempt failed to gather sufficient signatures; if second attempt made, deadline is July 5, 1996)

A anti-affirmative action initiative failed to qualify for the ballot in Massachusetts.

LCCR Affirmative Action Steering Committee List

<u>First Name</u>	<u>Last Name</u>	<u>Organization</u>	<u>Phone</u>	<u>Fax</u>
Richard	Womack	Leadership Conference on Civil Rights	466-3311	466-3435
Ralph	Neas	Leadership Conference on Civil Rights	778-2340	778-2330
Karen	McGill Lawson	Leadership Conference on Civil Rights	466-3311	466-3435
Andrew	Goldfarb	The Neas Group	778-2386	778-2330
Brian	Komar	Leadership Conference on Civil Rights	466-3311	466-3435
Norman	Hill	A. Philip Randolph Institute	289-2774	289-5289
Mary	Ramadan	American Arab Anti-Discrimination Committee	244-2990	244-3196
Ismael	Rivera	American Association for Affirmative Action	336-5520	336-5501
James	Guitard	American Association for Higher Education	293-6440 ext. 57	293-0073
Marsha	Nye Adler	American Association of University Professors	737-5900 ext.3029	737-5526
Nancy	Zirkin	American Association of University Women	785-7720	872-1425
Caroline	Head	American Association of University Women	785-7767	872-1425
Robert	Tiller	American Baptist Churches, USA	544-3400	544-0277
Denise	Cardman	American Bar Association	662-1761	662-1762
Gene	Guerrero	American Civil Liberties Union	675-2307	546-0738
Laura	Murphy	American Civil Liberties Union	544-1681	546-0738
Sarita	Brown	American Council on Education	939-9395	785-8056
Donna	Shavlik	American Council on Education	939-9390	833-4760
Herbert	Blinder	American Ethical Union	301-229-3759	301-229-2592
Kitty	Peddicord	American Federation of Government Employees	639-6417	639-6490
Jane	O'Grady	American Federation of Labor- Congress of Industrial Organizations	637-5393	508-6963
Cynthia	McCaughan	American Federation of Labor- Congress of Industrial Organizations	637-5272	637-5058
Cynthia	Bradley	American Federation of State, County & Municipal Employees, AFL-CIO	429-1196	223-3413
Esther	Conrad	American Friends Service Committee	483-3341	232-3197
Richard	Foltin	American Jewish Committee	785-4200	785-4115
Simi	Kaplan	American Jewish Congress	332-4001	387-3434
Rose	Gonzales	American Nurses Association	651-7098	554-0189
June	Willenz	American Veterans Committee	(301) 229-5671	(301) 320-6490
Darryl	Fagin	Americans for Democratic Action	785-5980	785-5969
Matthew	Finucane	Asian Pacific Labor Alliance	842-1263	842-1462
Kristine	Benero	Association of Junior Leagues	393-3364	
Jin	Lee	Center for Women Policy Studies	872-1770	296-8962
Anne	Delorey	Church Women United	544-8747	563-1297
Bill	Taylor	Citizens' Commission on Civil Rights/LCCR	659-5565	223-5302
Corrine	Yu	Citizens' Commission on Civil Rights	659-5565	223-5302
Leslie	Watson Davis	Citizenship Education Fund	296-6726	466-4871
Mary	Mays Carroll	Communications Workers of America	434-1100	434-1467
M.E.	Nichol	Communications Workers of America	434-1147	434-1467
Sara	Wells	Federally Employed Women	898-0994	898-0998
Alice	Cohan	The Feminist Majority	703-522-2214	703-522-2219
Elenora	Giddings Ivory	General Assembly of the Presbyterian Church (U.S.A.)	543-1126	543-7755
Hilary	Shelton	General Board of Church and Society of the United Methodist Church	488-5658	488-5663

LCCR Affirmative Action Steering Committee List

<u>First Name</u>	<u>Last Name</u>	<u>Organization</u>	<u>Phone</u>	<u>Fax</u>
Daniel	Zingale	Human Rights Campaign	628-4160	347-5323
Julio	Abreau	Human Rights Campaign	628-4160	347-5323
Eula	Booker Tate	International Union of United Automobile, Aerospace and Agricultural Implement Workers of America	828-8500	293-3457
Leigh-Ann	Miyasato	Japanese American Citizens League	223-1240	296-8082
Susan	Finkelstein	Jewish Women International	857-1370	857-1370
Frank	Parker	Joint Center for Political and Economic Studies	789-3518	789-6391
Rochanda	Hiligh	Joint Center for Political and Economic Studies	789-3557	789-6391
Alfredo C.	Montoya	Labor Council for Latin American Advancement	347-4223	347-5095
Barbara	Arnwine	Lawyers' Committee for Civil Rights Under Law	662-8600	783-0857
Gary	Flowers	Lawyers' Committee for Civil Rights Under Law	662-8333	783-0857
Laura	Campos	MANA/A National Latina Organization	833-0060	496-0060
Christa	Eshleman	Mennonite Central Committee	544-6564	544-2820
Antonia	Hernandez	Mexican American Legal Defense and Educational Fund	628-4074	393-4206
Georgina	Verdugo	Mexican American Legal Defense and Educational Fund	628-4074	393-4206
David	Kamer	Mexican American Legal Defense and Educational Fund	628-4074	393-4206
Shoshana	Riemer	NA' AMAT- USA	362-0923	
Elaine	Jones	NAACP Legal Defense and Educational Fund, Inc.	682-1300	682-1312
Penda	Hair	NAACP Legal Defense and Educational Fund, Inc.	682-1300	682-1312
Jacqueline	Tollett	National Alliance of Postal & Federal Employees	939-6325	939-6389
Karen	Narasaki	National Asian Pacific American Legal Consortium	296-2300	296-2318
Bea	Pace Smith	National Association for Equal Opportunity in Higher Education	543-9111	543-9113
Wade	Henderson	National Association for the Advancement of Colored People	638-2269	638-5936
Eddie	Hailes	National Association for the Advancement of Colored People	638-2269	638-5936
Ruth	Granados	National Association of College Admissions Counselors	703-836-2222	703-836-8015
Lawrence	Moore III	National Association of Social Workers	336-8289	336-8311
Ronald	Jackson	National Association of Social Workers	336-8262	336-8311
John	Crump	National Bar Association	842-3900	289-6170
Charles	Bremer	National Black Caucus of State Legislators	624-5457	508-3826
Cheryl	Kravitz	The National Conference	678-9400	610-1624
JoAnn	Chase	National Congress of American Indians	466-7767	466-7797
Lisa	Wright	National Council of Churches	544-2350	543-1297
Deena	Margolis	National Council of Jewish Women	296-2588	331-7792
Charles	Kamasaki	National Council of La Raza	785-1670	785-0851
Carmen	Lepe	National Council of La Raza	776-1753	776-1794
Dorothy	Height	National Council of Negro Women	628-0015	628-0233

LCCR Affirmative Action Steering Committee List

<u>First Name</u>	<u>Last Name</u>	<u>Organization</u>	<u>Phone</u>	<u>Fax</u>
Brenda	Girton	National Council of Negro Women	628-0015	628-0233
Joe	Ervin	National Council of Senior Citizens	624-9534	624-9595
Isabelle	Garcia	National Education Association	822-7331	822-7741
Claudia	Withers	National Employment Lawyers' Association	463-7088	463-7121
Mary	O'Melveny	National Employment Lawyers' Association/Coalition of Labor Union Women	434-1213	434-1219
Helen	Gonzales	National Gay and Lesbian Task Force	332-6483 ext. 3215	332-0207
Karen	Senter	National Jewish Community Relation Advisory Council	212-684-6950	212-686-1353
William	Reed	National Newspaper Publishers Association	588-8764	588-5029
Patricia	Ireland	National Organization for Women	331-0066	785-8576
Mea	Arnold	National Organization for Women	331-0066	785-8576
Jennie	Torres	National Puerto Rican Coalition, Inc.	223-3915	429-2223
Hilary	Weinstein	National Rainbow Coalition	728-1180	728-1192
Megan	Dowd Lambert	National Rainbow Coalition	728-1180	728-1192
Bob	McAlpine	National Urban League	898-1604	408-1965
Marcia	Greenberger	National Women's Law Center	588-5180	588-5185
Judy	Appelbaum	National Women's Law Center	588-5180	588-5185
Lisa	Castagnozzi	Network for Women's Employment	467-6346	467-5366
Selma	Maoulidi	NOW Legal Defense and Education Fund	544-4470	546-8605
Jay	Lintner	Office for Church in Society, United Church of Christ	543-1517	543-5994
H. Paul	Vali	Office for Church in Society, United Church of Christ	332-4010	332-4035
Sandy	Sorenson	Office for Church in Society, United Church of Christ	543-1517	543-5994
Vicki	Shu	Organization of Chinese Americans	223-5500	296-0540
Vi-ru	Chen	Organization of Chinese Americans	223-5500	296-0540
Elliott	Mincberg	People for the American Way	467-4999	293-2672
Paul	Thornell	People for the American Way	467-4999	293-2672
Judy	Marblestone	People for the American Way	467-2377	293-2672
Elenora	Giddings Ivory	Presbyterian Church (USA)	543-1126	543-7755
Barbara	Thompson	Project Equality, Inc.	547-2271	547-0358
David	Saperstein	Religious Action Center	387-2800	667-9070
Rachel	Smerd	Religious Action Center	387-2800	667-9070
Wyatt	Closs	Service Employees International Union	898-3354	898-3348
Ana	Aviles	Service Employees International Union	898-3354	898-3348
Rondalyn	Kane Haughton	Service Employees International Union	898-3362	898-3304
Flora	Crater	The Woman Activist Fund, Inc.	703-573-8716	703-573-8716
Jeanette	Galonis	United States Student Association	347-8772	393-5886
Meryl	Webster	United States Student Association	347-8772	393-5886
Jack	Sheehan	United Steelworkers of America	638-6929	347-6735
Joanne	Payne	Women First National Legislative Committee	703-522-6121	703-276-3583
Judy	Lichtman	Women's Legal Defense Fund	986-2600	986-2539
Jocelyn	Frye	Women's Legal Defense Fund	986-2600	986-2539
Helen	Norton	Women's Legal Defense Fund	986-2600	986-2539
Marjorie	Sims	Women's Policy Inc.	554-2323	554-2346

THE WHITE HOUSE
WASHINGTON

Texas, Louisiana &
Mississippi

Steve Warnath
Offc. Policy Development
Room 220 OE0B

THE WH
Office of th

For Immediate Release

Y 1, 1996

PRESS BRIEFING
BY MIKE MCCURRY

The Briefing Room

1:15 P.M. EDT

MR. MCCURRY: Good afternoon, ladies and gentlemen.
It's a quite day at the White House.

Q Early lid?

MR. MCCURRY: Let's keep it that way. Early lid we hear
from the camera crews here to my left, your right. We'd certainly
entertain that notion. Okay, see you later.

Q Mike, in the wake of Mr. Aldrich's book about what
he alleges to be life at the White House, I wondered if you had been
assured or if anyone at the White House has been assured of how the
current -- and I presume there still is a current team of FBI agents
-- view their job and whether you've had any discussion with the FBI
about the kinds of people that they send over here.

MR. MCCURRY: Not that I'm aware of, but the procedures
that are in place, because of the FBI's work on the question of how
background files are requested and managed, because of their report,
as you know, the White House legal counsel instituted new safeguards
and procedures that really professionalized this whole operation.
And we certainly would expect those who work on all aspects of
handling that type of sensitive material that must be protected,
because individuals are entitled to privacy, will be handled by
career professionals -- and professionals in every sense of the word.

Q No one here has called up to the FBI and said, gee,
it would really be nice if you might send somebody over here who
didn't consider themselves to be spying on us?

MR. MCCURRY: I'm not aware of any such conversation.

Q Can you tell us more about that the White House now
seems certain that it was Vince Foster who, in fact, hired Craig
Livingstone?

MR. MCCURRY: I got the same information that was
available to Mr. Stephanopoulos when he answered that question
yesterday. The best that we can reconstruct, based on the
information available to us, is what he outlined yesterday, and I
don't have anything further to add.

Q Where did you get that information from?

MR. MCCURRY: That was based in part on testimony that's
now been given on Capitol Hill and the recollection of some of the
people that we have either spoken to or who counsel has spoken to
other counsel about.

MORE

Q You didn't know it last week? I mean, this only recently became obvious?

MR. MCCURRY: It was able to -- we were in a better position to put some of these facts together in light of the testimony that was given on the Hill last week.

Q Has the President spoken to General Downing, and what -- anything in addition you can tell us about when Downing will report back to Perry on the security?

MR. MCCURRY: I'm Not aware that the President has talked directly to General Downing, Ret. But he's certainly had a lot of contact between the National Security Council and the Pentagon, Dr. Perry's office, and they have developed a very good charter for the assessment that will be drawn up by General Downing. It's specific, and it will look into a range of security issues.

Q Has he gone to the region or --

MR. MCCURRY: I'd have to refer you to the Pentagon on that. I know that they were going to get him up and running rather quickly, but they will be able to tell you more about what his plan is to execute the directive he has been given by the President and by the Secretary of Defense.

Q Mike, on that, what about the political aspect of Senator Specter's comments over the weekend about Perry continuing on in his position?

MR. MCCURRY: The White House gave a full vote of full confidence to the Secretary yesterday, and that stands.

Q What does he make of those kinds of comments, though?

MR. MCCURRY: Senator on a Sunday show in the middle of summer. (Laughter.)

Q Mike, I'm trying to square what George Stephanopoulos said with Livingstone's own testimony on Friday, which I would like to read to you:

Senator Hatch, to Livingstone: Did you have anybody at the highest levels of the White House advocating for this opportunity for you?

Livingstone: I'm sorry, the highest levels would mean

Hatch: Mr. Foster, that level or higher.

Livingstone: I didn't know Mr. Foster.

How can you expect us to believe that Foster was the guy who pushed for his --

MR. MCCURRY: Well, there was another individual present when Mr. Foster talked to Mr. Livingstone, so clearly they talked. They may not have known each other as friends, but that information that Mr. Stephanopoulos provided, as I said, is the best that we have got available to us at this time.

Q Mike, if I may follow up. I'm trying to understand -- is it your contention then that Foster didn't know Livingstone, but was so impressed by him on first meeting he decided to hire him?

MR. MCCURRY: My contention, as Mr. Stephanopoulos said yesterday, based on the information that we have got available to us, is that he was referred over by the Inaugural Committee. He came over. He had a meeting with Mr. Foster and with another associate counsel in the Counsel's Office. They had him temporarily in the security office and his employment arrangements were later finalized by William Kennedy. That's what we know.

Q And who at the Inaugural Committee referred him over?

MR. MCCURRY: Our understanding is that he may have been put on to the opening, or a job opening, by Christine Varney, as George said yesterday.

Q Mike, I know you addressed some of the Perry questions over the weekend, but do you rule out a resignation by Secretary Perry over Saudi Arabia?

MR. MCCURRY: It's so laughable it hasn't even been seriously considered.

Q Mike, can you run down the White House reasoning for attempting to convince ABC to keep Mr. Aldrich off the air?

MR. MCCURRY: Yes, because as ABC's questioner's thoroughly demonstrated yesterday, his book is not based on any fact; it is filled with lies and distortions and mischaracterizations and trash. And there ought to be some threshold for a major news organization putting such an individual on the air. But by putting him on the air yesterday, ABC certainly established for a fact he should never have been on the air in the first place.

Q With all the emphasis on the globalism at the Lyon conference and the presence of the gang of four in an honorary position, is this a change in the G-7 format; is this permanent? Will the four have permanent seats at the table and, if so, will they have an equal status with the governments, or what, actually, is the situation?

MR. MCCURRY: Well, the President, himself, found the participation by the leaders of these international lending institutions and some of the international organizations to be a very positive aspect of the G-7/8 discussions over the weekend. In fact, he complimented President Chirac on the idea of including them in the discussion.

President Chirac, as you know, had made the theme of this summit globalization, so it was very appropriate to have these heads of international organizations there. But the President thought they made a very useful contribution to the discussion and certainly is entertaining the notion that at the Denver summit in 1996, if he is hosting it, or as we prepare for it, that we consider having that type of contribution again from the leaders of those organizations.

Q Mike, has the White House been looking at the Supreme Court rulings that have come down today, the affirmative action ruling, the S&L ruling, and the tobacco billboard ban? And if so, what, if any, reaction?

MR. MCCURRY: They are. In fact, the Counsel's Office on all of those is making a review of each of the decisions the Court rendered. Today on the Hopewood case, involving the University of Texas, it's still not quite clear what the impact of that decision will be. Obviously, the opinions by Justices Ginsburg and Souter recognize the importance of the issue and don't rule out future consideration of the issue. But we understand now that, at least within the Fifth Circuit, there is going to be some level of uncertainty as they sort out the case law. And our counsel will be looking at that.

We were in that case, as you know, on an amicus brief. On the Penn Advertising case, we think that the ruling by the Court in no way jeopardizes the proposed rule that the Food and Drug Administration has promulgated. That rule, we have determined to the best of our opinion and legal review is fully consistent with the '44 liquor mart decision. And this case today is based on the same legal reasoning that applied in '44 liquor mart. So given that standard we believe that our own proposed rule would meet any First Amendment scrutiny that would be applied to it.

On the S&L case, that one is still being looked at because both the implications legally and also whatever it would mean in terms of federal expenditures -- I just don't have a thorough assessment yet of what the impact of that decision will be.

Q So you don't know who's going to foot the bill, especially in the S&L case, on up to \$10 billion?

MR. MCCURRY: We don't know, and that's exactly the type of question we're looking at now.

Q Are you disappointed in the affirmative action ruling?

MR. MCCURRY: Not necessarily. I think they just ruled that that would not be the case to test some of the underlying legal propositions, in part -- according to our best understanding at this point of the opinion -- because the state had discontinued aspects of that program already. So I think that a court may have been searching for a better test case. That appears to be part of the reasoning, but we'll be looking a lot more closely at the decision itself.

Q Could you please give a preview of what the President's going to tell the seniors tomorrow?

MR. MCCURRY: Yes, I will. He's going to go visit with the National Council of Senior Citizens tomorrow in Chicago. He will have a speech that really outlines for this audience the importance of the economic program that the United States has pursued since 1993, not only with respect to seniors, but how we are creating economic opportunity for all generations. He'll talk about things like the importance of raising the minimum wage; moving as quickly as we can to pass legislation that would expand health insurance availability, for example, the Kassebaum-Kennedy bill; talk about the importance of balancing the budget, but doing so in a way that protects the fundamental commitments we've made to the elderly in programs like Medicare and Medicaid.

He'll again call upon Congress to take advantage of the savings that have been agreed to in Medicare and Medicaid already in the elements that are in common in the proposals that have been advanced by the Republican Congress and by the administration, to do those things that will extend the solvency of the Medicare trust fund.

in the short-term -- since that's the smart thing to do -- while we work on long-term solutions.

Q Is there still a feeling that Medicare is a very potent issue for you to pursue?

MR. MCCURRY: The President continues to believe that is a very important program not only for the nation's elderly, but for those who worry about taking care of elderly parents, for those who wonder about their own health care arrangements in the future. And the structure of that program as it has existed for decades is something that the President intends to protect. That goes far beyond politics. It goes to the fundamental commitments that he has made to the nation in fighting for budget priorities that he thinks makes sense.

Q Does he still believe, though, that, as many congressional Democrats do, that there is this analogy that, you know, the Republican plan on Medicare means tax cuts for the wealthy -- I mean, that's how it's going to be paid for with the so-called savings on Medicare?

MR. MCCURRY: Well, there is no question, if you look back in the history of the Republican budget as advanced during 1995 by the Republican majority in Congress, that in order to get the very large tax cuts they were proposing that went disproportionately to the wealthiest Americans, you had to get about \$270 billion worth of savings out of the Medicare system. The only way you could do that was to trim back benefits and services available to the nation's elderly. And everyone by now, I think, knows that that is the fact of the Republican budget as it was debated, as it was discussed during Congress in the course of 1995 and early 1996.

Q But they came out with a new budget plan, and I'm just wondering if the White House has sort of pulled back on that kind of harsh position on the Republican's Medicare savings plan?

MR. MCCURRY: Well, there are some changes that they have made, I think in part probably reflecting the anger the American people felt about their budget, so they have made some new budget proposals. But the President is looking beyond that, says, you and we agree on a package of savings that can do some important things both to restructure Medicare in a way that protects beneficiaries and also achieves savings that advance our fundamental budget goals, so let's take advantage of that opportunity rather than going down the road of another gridlock debate that will not serve the American people well.

Q Is this event paid for by the campaign or by -- is this an official business event?

MR. MCCURRY: I know that the travel to and from Chicago will all be paid by the Clinton-Gore '96 Committee because there are political events in the evening. Is that correct? They're doing -- the President's doing a fundraiser for a candidate for Congress, and also, I think, raising money that will help our host committee in Chicago host the '96 Democratic Convention.

Q So do we know you classify the senior event?

MR. MCCURRY: I don't know --

MS. GLYNN: It's an official event, but all costs associated with it are political.

MR. MCCURRY: Yes, the costs -- the travel costs -- because one aspect of the President's appearance is political, the travel costs to and from are deemed political. There may be -- the appearance of the President at that specific event may be deemed official, but the large portion of the travel costs have to be paid for by the campaign.

Q Are you still looking for a statement from Senator Dole or his campaign that, I think, as you put it, somebody working for his campaign should not be helping to publicize this Aldrich book?

MR. MCCURRY: Well, it would be nice, but we're not holding our breath.

Q Now, is somebody working for the Dole campaign publicizing the book -- is that your contention?

MR. MCCURRY: Our contention is that Craig Shirley has done some work as an adviser for the Dole campaign. The Dole campaign has acknowledged that publicly, and he is -- has been identified as a person who's coordinating publicity for this book; indeed, was present at ABC yesterday.

Q But he's not anymore.

MR. MCCURRY: He's an adviser, and there are news articles in which he's been identified as a person who will be running a radio surrogate operation for the Dole campaign this fall. Now, maybe -- perhaps the Dole campaign would wish to disassociate themselves from that idea and discount those who have reported that he will have a role in their communications structure in the fall.

Q Mike, is there a written record of Vincent Foster having hired Craig Livingstone? Is there a piece of paper anywhere that would show that he actually did this and the date and the time and everything?

MR. MCCURRY: I don't directly know the answer to that, Mary. I do know that Mr. Clinger's committee has requested personnel records related to Mr. Livingstone, and I believe they have been delivered or are in the process of being delivered by the White House to Mr. Clinger.

Q But there was supposedly someone present, a person whose first name, I believe, is Cheryl.

MR. MCCURRY: Yes.

Q Who is she?

MR. MCCURRY: She is an associate counsel in the office of the White House legal counsel.

Q And her last name is?

MR. MCCURRY: Mills, M-i-l-l-s.

Q I know you weren't here at the time, Mike, but does the White House now recognize that maybe based on -- if it indeed happened that way -- based on a Lucy-Goosey recommendation from somebody on the Inaugural Committee you hire somebody for such a sensitive position in the White House, that's probably not the best way to conduct affairs here?

MR. MCCURRY: I think it is a tacit admission in the procedures that Mr. Quinn has now put in place, and acknowledged in a statement by Mr. Panetta issued about two weeks ago, that personnel security issues ought to be in the hands of career professionals. Clearly, the decisions taken related to personnel in 1993 did not make that happen. And by instituting new procedures and correcting this problem, it is more than safe to assume that we saw a need for much different handling of personnel questions related to individual privacy and security-related concerns, as they relate to White House staff and those who work for the Executive Office of the President.

Q Following the report Friday, human rights groups are calling for the release of more documents on Guatemala, the human rights abuses there. Is there going to be a response to that?

MR. MCCURRY: Well, there has been a very significant public release of information dating back to the government's work in Guatemala in the 1980s -- over 5,000 pages by the State Department alone. And then the Intelligence Oversight Board's report was made public last week, as you know.

That was a considerable piece of work. It shed a lot of light on events as best as they are known in the 1980s in Guatemala. But it also pointed to some important changes that need to be made, specifically with respect to the relationship between our intelligence community and those who serve as ambassadors or diplomats in individual posts around the world.

The White House credits Director of Central Intelligence John Deutch for doing a fabulous job instituting these procedures. He has already moved very swiftly to put a lot of these recommended procedures in place. And the President has a great deal of confidence that that type of abuse, given the ethic and direction and management of this CIA and this intelligence community under John Deutch -- he feels very confident the American people can be assured that that type of abuse is not occurring and will not occur.

Q And on their request, I think it's today, for more documents dating back --

MR. MCCURRY: Well, I don't -- it may be that whether it's Sister Ortiz or Jennifer Harbury or others, it will be hard to satisfy them because some fundamental things that they want to know as human beings may be unknowable, based on the record. But the report itself, which goes into exhaustive detail on what was known by representatives of the government and those who were assets of the United States government at the time presents the most compelling record that we believe can be assembled as to what happened in the 1980s with respect to those two cases and the other cases that were under the purview of the intelligence oversight board's review.

Q Mike, in Mr. Livingstone's personnel file, are there letters of recommendation either from Harry Thomason or from Peter Knight and Roy Neel, whom he specifically mentioned as people who might have pushed his candidacy?

MR. MCCURRY: That -- as you can imagine, I'm not at liberty -- partly for Privacy Act reasons -- to disclose the contents of his personnel records. But as I indicated earlier they are being made available to Chairman Clinger and his committee.

Q But if I could ask you to recap then -- the White House account is that even though Mr. Livingstone has said he didn't know Foster, that Foster alone made the prime hiring decision,

presumably based on a meeting with this very impressive figure, Mr. Livingstone?

MR. MCCURRY: No, not at all. As I said, he was referred by someone within the Inaugural Committee, who had also worked on the campaign or alerted to a job opening. At the time it was very common, because many people currently on the White House staff have said various people might pass on a good word or say that they know so and so or that they had seen so and so do good work during the campaign. So I'm not ruling out the possibility that others weighed in on behalf of Mr. Livingstone. That would have been a very common practice during the early period in 1993 when people who had been working in both the campaign and the Inaugural Committee were referred to and won employment on the White House staff. What I'm telling you, and what we've established is that after this job lead was given to Mr. Livingstone, he came here, he met with people in the Counsel's Office, and ultimately he was hired by the Counsel's Office.

Q Is it necessarily that a contradiction -- would it have been possible at that time for Vince Foster to have hired him without Livingstone knowing Vince Foster?

MR. MCCURRY: I mean, there were many people who were meeting each other, getting to know each other in the early and middle years in 1993. What is known is that he was temporarily put into an assignment by Mr. Foster. I don't think anyone's alleging that he was actually the formal hire, because the formalization of his employment, as Mr. Stephanopoulos said yesterday, based on the information we've been able to assemble, occurred later in 1993 and was largely completely by William Kennedy, the Associate Counsel.

Q And Kennedy said last Wednesday at the House hearing that Foster gave the okay, and that he just inherited Livingstone.

MR. MCCURRY: Well, I was out of the country during his testimony, so I didn't have an opportunity to review that. I don't dispute that if he, in fact, said that.

Q -- my question, though is, is it possible -- is it consistent or a contradiction, could Foster have signed off on Livingstone without knowing him?

MR. MCCURRY: What I've already think I've answered, the best of the recollection of people who are familiar with these details, he had met with Mr. Livingstone, at least at some point --

Q But I'm not clear if that's a yes or a no.

MR. MCCURRY: -- and that the employment -- the permanent employment was finalized by Mr. Kennedy. Is it possible that Mr. Kennedy finalized that employment arrangement without checking with Mr. Foster? That is possible. But if he has testified to it, his account would be more verifiable than the information I have. I can only report to you the information that's available to me.

Q When was that, Mike? When was he made a permanent hire?

MR. MCCURRY: It was during some time during the course of 1993, but I don't know the exact date. It will be reflected, mostly likely, in the personnel records that have been delivered now to the committee.

Q Back to Saudi Arabia -- what are the White House regrets that Saudi Arabia did not expand the buffer zone as we requested?

MR. MCCURRY: Well, for several days now the Pentagon has answered that question very direct. But we think important security precautions were put into place. The Pentagon reports those. They no doubt saved lives at Khobar Towers and in Dhahran. The need -- if there had been a need for additional security measures on the spot at the time based on what the assessment of the threat was, that information surely will be developed by General Downing as he does his review.

Q As of this morning, apparently all media access has been cut off at the base there in Dhahran. Is that a Pentagon decision, a Saudi decision and, if so, did the White House concur or --

MR. MCCURRY: I was not aware of that. I don't know about that. You should ask at Pentagon public affairs.

Q Is there any follow on the Bosnia, sort of back and forth over Karadzic, beyond what you talked about yesterday?

MR. MCCURRY: Nothing new on that that I am aware of, unless -- there hasn't been any follow up with Carl Bildt today that I have heard of reported.

Q Is there a worry here that, despite the fact, as you said, that Aldrich came off, I don't know, in a bad light yesterday -- or, as you said, he did enough damage to himself on ABC, is there still a worry that the book is out there and there's so much publicity on the story now that it's going to hurt the President and the White House?

MR. MCCURRY: Our chief fear is that news organizations that are less scrupulous than ABC news will not do as effective a job of discrediting him as ABC did.

Q And what would then be -- are you afraid that this new storm of allegations is --

MR. MCCURRY: It is -- I'm afraid, then, that the Republicans who have been a running a non-stop smear campaign against this President in an attempt to destroy his reputation will succeed by innuendo, rather than by a clear, accurate examination of fact.

Q What else would you categorize as a Republican smear against the President?

MR. MCCURRY: I'd say pretty much now a two-month period in which there have been non-stop daily assaults by everyone from the Speaker to Bob Dole to others on the President's character. It's a consistent pattern. They're now using various congressional committees consistent with the Speaker's orders to those committee chairs to attempt to find dirt on the President. This has been in print a directive given by the Speaker to the committee chairs.

Q Are you lumping the committee investigation into Filegate as a Republican smear, or is that --

MR. MCCURRY: No. Although, I will -- I'd say there are certainly legitimate questions there that need to be explored and they are being in a bipartisan way by Democrats and Republicans. But

there were some initial statements by people responsible for that investigation that were consistent with the effort to cast doubt, to spread innuendo before there were access to facts.

Q Mike, the President has received any report from the National Security Council about the new Mexican group on Friday, and what is the White House opinion of it?

MR. MCCURRY: I would have to check on that. Not that I'm aware of, but maybe the NSC guys will be able to help you with that.

Q Mike, on the Russian election, did the President have any chance to speak directly with the Russian officials over the weekend in Lyon about Mr. Yeltsin's health? And, if so, if he inquired can you tell us a little bit about that?

MR. MCCURRY: He did. That came up in the meeting he had with Prime Minister Chernomyrdin. As I reported, Prime Minister Chernomyrdin said to the President much of what he said to all of you in public on Saturday.

Q Can you just sort of give us some details of that?

MR. MCCURRY: What they have said and what subsequently our embassy has been told is consistent with what the Russian Federation officials are saying publicly, that he is suffering from some form of laryngitis or voice loss, that he is resting and that he expects soon to return to official duties. And beyond that, we don't have any other information available to us.

Q Did anything in Yeltsin's appearance strike you as odd? (Laughter.)

MR. MCCURRY: We met with Prime Minister Chernomyrdin not with President Yeltsin.

Q What are your plans for office hours on Fourth of July, the President's schedule?

MR. MCCURRY: We'll be maintaining a duty roster throughout the weekend, and we'll be treating Friday as if it was a typical Saturday.

Q Thursday he has travel?

MR. MCCURRY: Thursday we expect the President to be traveling. We expect him to be somewhere doing an environmental event in Maryland and then going to Youngstown, Ohio, to celebrate the 200th anniversary of that town's Fourth of July celebration. We'll go into more details on --

Q When would he be returning to Washington?

MR. MCCURRY: Returning early evening so he can be here in time for fireworks.

Q Back on the senior's speech tomorrow. Will the President level with the seniors in that even in a possible second Clinton administration that there will some cutbacks in the growth of Medicare and Medicaid?

MR. MCCURRY: He'll repeat some of the things I said just a little while earlier; that we've got to find ways to generate savings in the Medicaid system so that we can extend the solvency of

the trust funds, especially in the short-term. But we need to do so -- Medicare and Medicaid -- but we need to do so consistent with the obligations to our nation's citizens.

Q Do you consider this paving any new ground?

MR. MCCURRY: Absolutely. It's always paving new ground when the President is out there fighting for his budget priorities. Is there any big headline coming out of this? That's up to you.

Q Is this also going to be some kind of announcement about returning some land for an air base tomorrow in Chicago?

MR. MCCURRY: I don't know anything about that, but Mary Ellen might be able to help you on that.

Q Mike, you have issued a number of statements from officials challenging -- can you release anything from Livingstone challenging --

MR. MCCURRY: I wouldn't be because he is no longer employed by the White House, as you know.

Q But you released a statement from Mr. Kennedy, who is no longer employed here.

MR. MCCURRY: Yes, I don't -- I'm not aware of any statement like that, but I haven't -- I don't --

Q Could you check?

MR. MCCURRY: Could I check with him?

Q Oh, no. I can check with his lawyer, but can you double-check that there has been nothing released by the White House?

MR. MCCURRY: I'll check. I'm not aware of anything.

Q Mike, logistics of reaction to the Russian run-off election -- how will that be put forward by the White House?

MR. MCCURRY: We expect it will be Thursday at the earliest before we have a final -- at the absolute earliest it will Thursday or Friday. And I anticipate most likely a written statement. But we will keep you apprised of what are plans are.

Q On minimum wage, is there any indication that the Senate Republicans might back off of the amendments that would prompt a veto?

MR. MCCURRY: We sure hope so, because they know they're flirting with something that is not going to work, but it's a real simple -- raising the minimum wage is a pretty easy thing to do. It's just, you go in, you change the Fair Labor Standards amendments and get it done. And they have -- still looking at ways that they can bollix up the process by attaching additional amendments or provisions. And we just hope that don't so the American people can get the increase in the minimum wage that they think is justified and that will help millions of Americans who struggle to make ends meet day to day.

Q Mike, is the Lake trip to China firmed up? Who will he be meeting, and will he be talking about the possibility of a presidential trip to Beijing?

MR. MCCURRY: When are you guys going to get around to announcing that Lake trip to China? Why not get it done today?

MR. JOHNSON: Before it takes place.

MR. MCCURRY: Before it takes place. Any better word -- seriously, any better word on when we know?

Q Unlike the previous administration.

Q Thank you.

MR. MCCURRY: You're welcome.

END

1:45 P.M. EDT

#243-07/01



Leading the News

Affirmative Action

SUPREME COURT DECLINES TO EXAMINE TEXAS LAW SCHOOL AFFIRMATIVE ACTION PLAN

The U.S. Supreme Court has refused to examine a ruling that struck down an affirmative action program at the University of Texas Law School.

In an unusual word of explanation on the decision not to review the case, Justice Ruth Bader Ginsburg said that the 1992 admissions policy, challenged in the lower courts, has long since been disbanded and will not be reinstated (*Texas v. Hopwood*, US Sup Ct, No. 95-1773, 7/1/96).

Ginsburg, calling the issue one of "great national importance," added that the state of Texas no longer defends the constitutionality of the admissions program, but rather disputes only the rationale adopted by the appeals court—not the judgment itself.

"Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition," Ginsburg said in a one-paragraph statement in which Justice David Souter joined.

White House press secretary Mike McCurry said in response to a question at a July 1 briefing that the Clinton administration is reviewing the court's action. "It's still not quite clear what the impact of that decision will be," he said, adding that at least Ginsburg and Souter "recognize the importance of the issue and don't rule out future consideration."

He added, however, that at least within the Fifth Circuit, "there is going to be some level of uncertainty as they sort out the case law." The denial of review, he said, may reflect a need to look for a better case to address the question:

"I think they just ruled that that would not be the case to test some of the underlying legal propositions, in part—according to our best understanding at this point of the opinion—because the state had discontinued aspects of that program already. So I think that the court may have been searching for a better test case. That appears to be part of the reasoning, but we'll be looking a lot more closely at the decision itself."

The U.S. Court of Appeals for the Fifth Circuit had ruled that the state university's interests in achieving a racially diverse student body and in eliminating the present effects at the law school of

past discrimination in the state education system were not compelling enough to justify the use of race as a factor in the admissions process.

The appeals court rejected the university's argument that the law school had a compelling interest to desegregate its facilities through affirmative action (78 F.3d 932).

The case would have given the justices a chance to re-examine the landmark 1978 holding of *Regents of University of California v. Bakke* (438 US 265), which required the admission to medical school of a white applicant who claimed he was denied entrance because of an affirmative action plan. The *Bakke* decision, however, left the door open to consideration of race in college admissions under properly tailored affirmative action plans.

Texas Admissions Policy

In a petition for review, Texas authorities supported their program by citing continuing discrimination against blacks and Mexican-Americans. They warned that a race-blind admissions process would be effectively segregated, resulting in almost no minorities at the state's flagship law school.

Under the Texas admissions policy, American blacks and Mexican-Americans were given preferential treatment through lower admission-score thresholds. Of those Texas-resident applicants who fell within a range of scores that would warrant admission, 100 percent of blacks and 90 percent of Mexican-Americans received offers, but only 6 percent of whites received such offers, according to Fifth Circuit findings.

The presumptive admission score for whites and nonpreferred minorities was 199. The score for presumptive admittance of blacks and Mexican-Americans was set at 189. The score for presumptive denial of white applicants was 192, but for minorities it was set at 179.

The university's affirmative action program spoke in terms of an "aspiration" to admit a class of 10 percent Mexican-Americans and 5 percent blacks—the proportion of these groups graduating from Texas colleges. Applicants were asked to list their race, and applications were pooled according to race. Any applicant who failed to designate his or her race was treated as a nonminority not entitled to preference.

(MORE)

1/2

95-1773 TEXAS v. HOPWOOD
Admissions—Remedial racial considerations—
Eleventh Amendment—Damages—Article III
case or controversy requirement.

Ruling below (CA 5, 78 F.3d 932, 64 LW
2591):

State university law school's interests in
achieving racially diverse student body and in
eliminating present effects at law school of past
discrimination in state education system gener-
ally are not sufficiently compelling to justify
law school's use of race as factor in student
admissions process, and therefore any consider-
ation of race in such context violates Fourteenth
Amendment's Equal Protection Clause; district
court's reliance on *U.S. v. Fordice*, 505 U.S.
717, 60 LW 4769 (1992), in holding that law
school had compelling interest to "desegregate"

school through affirmative action is misplaced;
Fordice's central holding is that state must
repudiate continuing "policies or practices,"
tied to past, by which it continues to discrimi-
nate, but court in that case did not address
state's duty to counter present effects of past
discrimination that it did not cause; with re-
spect to which party bears burden of proof on
damages issue, scheme of *Mt. Healthy City
School Dist. Bd. of Educ. v. Doyle*, 429 U.S.
274 (1977), under which, upon plaintiff's proof
of discrimination, burden shifts to defendant to
show that violation was harmless and that it
would have taken same action even in absence
of protected conduct, is appropriate in this case;
accordingly, if law school shows that plaintiffs
would not have been admitted under race-blind
system, no individual plaintiff would be entitled
to injunction admitting him or her to school,
but school's inability to establish plaintiff's non-
admission would open up possibility of several
remedies, at discretion of district court; plain-
tiffs have shown likelihood that law school will
continue to take race into account in admissions
unless it is told that it may not do so for certain
purposes; but injunctive order is unnecessary at
this time, in confidence that school will heed
directives in this opinion.

Questions presented: (1) Should federal judi-
ciary discard teaching of *Regents of University
of California v. Bakke*, 438 U.S. 265 (1978),
and prohibit state institutions of higher learning
from even considering race, among other fac-
tors, in individualized admissions decisions, de-
spite institutions' long-settled educational inter-
est in promoting dialogue and learning by
selecting diverse student body with varied back-
grounds and experience? (2) When state's offi-
cials determine that they have sufficient eviden-
tiary basis for concluding that remedial race-
conscious action is needed at one of state's
graduate schools, which itself had practiced de
jure discrimination in past, and whose legacy of
having done so continues to affect its ability to
attract and educate best students of all races,
do Fourteenth Amendment and principles of
federalism permit federal judiciary: (a) to insist
that those officials disregard additional current
effects, on that graduate school's applicant
pool, of de jure discrimination in public educa-
tion of blacks and Mexican Americans in that
state at primary, secondary, and college levels,
and (b) to demand that those officials heed only
findings made by state legislature itself rather
than, as state law permits, acting on findings
made by governor and state Higher Education
Coordinating Board? (3) Are Texas higher edu-
cation admissions officials, following *U.S. v.
Fordice*, 505 U.S. 717, 60 LW 4769 (1992),
precluded from taking race into consideration
even though race-blind admissions process
would predictably re-create system that is effec-
tively segregated, with almost no minorities at
state's flagship law school and almost no white

students at law school that state created to
avoid integration? (4) Is Title VI of 1964 Civil
Rights Act, enacted under Spending Clause of
Article I, capable of abrogating state's Eleventh
Amendment immunity from suit in federal
court without its consent, in light of *Seminole
Tribe of Florida v. Florida*, 64 LW 4167 (US-
Sup Ct 1996)? (5) May federal court, consis-
tent with *Carey v. Phipps*, 435 U.S. 247
(1978), impose presumption of compensatory
damages for plaintiffs who complain of process

that was applied to them, but who have not
shown any likelihood that they would have
received different result under constitutionally
flawless process? (6) May federal court, consis-
tent with Article III, award prospective relief
against state and its officials regarding law
school admissions policy, when effects of that
policy are not before court and "case" or "con-
troversy" requirement is not met by any show-
ing of actual harm litigants would be likely to
suffer in future without such prospective relief?

Petition for certiorari filed 4/30/96, by Laur-
ence H. Tribe, Jonathan S. Massey, and Ran-
dall Kennedy, all of Cambridge, Mass., Dan
Morales, Texas Atty. Gen., Jorge Vega, First
Asst. Atty. Gen., Javier Aguilar, Spec. Asst.
Atty. Gen., and Deborah A. Verbil, Asst. Atty.
Gen., Charles Alan Wright, and Samuel Issa-
charoff, both of Austin, Texas, and Harry M.
Reasoner, Allan Van Fleet, Betty R. Owens,
Barry D. Burgdorf, and Vinson & Elkins, all of
Houston, Texas.

BUREAU OF NATIONAL AFFAIRS, INC., Washington, D.C. 20037
0418-2693/96/\$0+\$1.00

Justices Decline to Hear Campus Diversity Case

Ruling Against Race-Based Admissions Stands

By Joan Biskupic
Washington Post Staff Writer

AT

The Supreme Court yesterday let stand a lower court ruling that public universities may not in most circumstances consider a student's race as a factor in admissions decisions. By refusing to hear the high-profile case, the justices passed up an opportunity to resolve the uncertainty and turmoil surrounding affirmative action on the nation's campuses.

With no recorded dissent, the justices turned down the University of Texas's appeal of a decision rejecting a law school affirmative action plan intended to build up enrollment of blacks and Mexican Americans.

Texas officials and the Clinton administration had urged the court to

use the case to rule that public officials have a compelling interest in making sure state-run universities have a diverse student body. But yesterday's action produces no new clarity for affirmative action policies nationwide, and instead, college administrators said, it confounds the legal landscape.

The order casts doubt on all affirmative action programs in Texas, Louisiana and Mississippi—the three states covered by the 5th U.S. Circuit Court of Appeals, which last March said universities could not justify affirmative action policies based on the benefits of racial diversity. The appeals court said the Texas law school's policy of giving pref-

erence to minority applicants violated the Constitution's equal protection guarantee.

Two justices yesterday suggested that the court's refusal to review that ruling was based on procedural grounds and should not be interpreted as a sign of how the high court eventually would rule on whether it is constitutional for colleges nationwide to use race in deciding whom to admit.

"Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance," Justice Ruth Bader Ginsburg wrote in a statement signed by Justice David H. Souter. "... [W]e must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."

Ginsburg observed that the 1992 admissions policy challenged by a group of rejected white students had since been replaced. None of the other justices issued a public comment suggesting their reasons for refusing to review the case of *Texas v. Hopwood*.

While the high court in recent years has struck down race-based policies in government contracting and congressional voting districts, it has yet to revisit a landmark 1978 case standing for the proposition that universities have a compelling interest in educational diversity that justifies race preferences in admissions.

College administrators contacted yesterday said they believe they are still bound by the high court's 1978 decision, *Regents of the University of California v. Bakke*, endorsing racial diversity.

David Merkowitz, a spokesman for the American Council on Education, the nation's largest coalition of colleges and universities, said yesterday's action "creates another lev-

el of uncertainty" for colleges torn over affirmative action.

"We would hope that universities take this for what it is—a non-decision," Merkowitz said. "We're telling them to stay the course."

Yesterday's action marked the second time in two years that the justices had refused to review a lower court rejection of a college affirmative action policy. Last term, the justices let stand a 4th U.S. Court of Appeals ruling dismantling a University of Maryland scholarship program exclusively for blacks.

In the Texas case, the 5th Circuit said the high court's 1978 ruling allowing affirmative action based on the goal of racial diversity had been superseded by more recent high court decisions against race-based policies in other areas. The appeals court said an affirmative action plan would meet court standards only if it was narrowly drawn to remedy the present effects of past discrimination at a particular institution. That is a tough standard to meet.

"To believe that a person's race controls his point of view is to stereotype him" the 5th Circuit panel said, concluding, "the law school may not use race as a factor in law school admissions."

Yesterday the Supreme Court neither endorsed nor rejected that view. Ginsburg intimated that the 5th Circuit's statement that diversity never can justify using race in admissions was not squarely before the court and that the appeals court decision officially reflected only a judgment against a now-defunct policy.

(MORE)

2/2
 Texas officials "challenge the *rational* relied on by the Court of Appeals," Ginsburg said. "This court, however, reviews judgments, not opinions." She said the judgment of the lower court was that the particular admissions procedures used in 1992—evaluating white and minority applicants on two separate tracks and setting lower test score standards for minority applicants—were unconstitutional.

The law school has since replaced that program with a policy that considers race with several personal factors unique to a student. That policy has never been subject to challenge.

Theodore B. Olson, who represented Cheryl J. Hopwood and other white students who challenged the Texas policy, asserted yesterday that public colleges in Texas, Louisiana and Mississippi must abide by the appeals court ruling.

He said he considered the statement by Ginsburg, who has voted in the past for race-based remedies, "an effort to put a good face on things."

"What the 5th Circuit said is clear: If the law school continues to operate a disguised or overt program based on race, [school officials] will be subject to damages" to compensate students who were improperly turned down, Olson said.

Officials at Louisiana State University said the high court's order eventually could undercut affirmative action. But Raymond Lamonica,

vice chancellor and professor at LSU law school, said yesterday the school would continue to use a policy of admitting some African American students with below-standard test scores, under the terms of a lower court order in a race-discrimination lawsuit against Louisiana's higher education system.

Texas Attorney General Dan Morales said in a statement that UT's law school would continue its new program that makes race one of many considerations in the application process. "Cultural, ethnic and racial diversity in an academic or any other environment benefits all," Morales said. "Our universities should

strive for such diversity. However, as I have consistently indicated, it is simply wrong to give one applicant an automatic advantage over another applicant, based solely upon the color of one's skin."

Staff writer Rene Sanchez contributed to this report.

THE WALL STREET JOURNAL TUESDAY, JULY 2, 1996

BEWARE WHAT YOU E-MAIL: A Microsoft Corp. manager found that e-mail messages he forwarded to staffers were used against his company in a sex-discrimination case. The man had forwarded a parody of a play entitled "A Girl's Guide to Condoms" and a news report on a Finnish health official advocating sex to reduce stress.

SEXUAL HARASSMENT cases are valid only between opposite sexes, court says.

Oil-rig worker Joseph Oncale claims his supervisors held him down in a lunchroom and in a shower and sexually harassed him. But a federal three-judge panel of the Fifth U.S. Circuit Court of Appeals recently ruled that Mr. Oncale can't sue the company, Sun-downer Offshore Services Inc., for sexual harassment because he is the same sex as the alleged harassers.

The panel said it was legally bound by a Fifth Circuit panel decision that banned same-sex harassment claims. Mr. Oncale's lawyers have asked the entire appeals court, which covers Louisiana, Mississippi, and Texas, to hear the case. Two other federal appeals courts have ruled that same-sex sexual-harassment cases can be legitimate.

Mr. Oncale filed charges first with the Equal Employment Opportunity Commission, but the case got caught in its massive backlog. Once he hired a lawyer, it was too late to file an assault charge.



Americans with Disabilities Act MANUAL

Accommodating Psychiatric Disabilities Is EEOC Concern

DETROIT—Accommodations for workers with psychiatric disabilities to enable them to perform their jobs effectively is the issue involved in at least two ADA cases the Equal Employment Opportunity Commission is litigating, according to Andy Imparato, attorney adviser to EEOC Commissioner Paul Steven Miller. Imparato spoke May 21 at a pre-conference session of the President's Committee on Employment of People with Disabilities' 49th annual conference.

One case, *EEOC v. Union Carbide* (DC ELA, No. 94-0103, filed 1/10/94), involves an employee with a mental disability who was unable to work rotating shifts. In the other case, *EEOC v. Amego* (DC Mass, CA No. 94-11967-RWZ, filed 9/29/94), an employee received excellent performance evaluations, but was hospitalized after two suicide attempts. Her second attempt was caused by an overdose of drugs prescribed by a psychiatrist, Imparato said. In the lawsuit, the EEOC contends that the employer could have made an accommodation that would have enabled the employee to continue working.

For purposes of assessing whether an employee who is on medication has a disability, Imparato said, the employer should base its determination on how the employee would function without the medication. However, for purposes of judging whether the employee is "qualified," the employer should judge the worker's performance while on medication. Nevertheless, Imparato said, if the employee fails to take the medication and performance deteriorates, the employer has the right to take disciplinary action.

Imparato suggested several accommodations for employees with psychiatric disabilities, including:

✓ schedule modifications, such as eliminating rotating shifts;

✓ extra time off at lunch or at some other time for therapy sessions;

✓ job modifications, such as reassignment of marginal tasks to other workers; or

✓ reassignment to vacant positions.

In addition, Imparato said, employers might make "environmental" modifications for employees who cannot tolerate noise or distractions, such as putting up partitions or providing offices with doors.

In some cases, he said, employees respond well to written instructions on how to perform job tasks.

Some employers, with good results, have allowed employees with mental disabilities to bring job coaches to work with them, Imparato said.

All these accommodations are, of course, subject to the employer's "undue hardship" defense, Imparato reminded the audience.

Whether to disclose a psychiatric disability is always a dilemma for the employee, because of the stigma attached to such a condition, Imparato said. However, employers are required to accommodate only known disabilities. If an employee tells a supervisor he or she has a disability, this should not mean "disclosure to the whole world," Imparato said. This information is confidential, he warned, and should be revealed only to those who "need to know."

Responding to a question involving an employee in a telephone company sales job who requested that she be accommodated by not having to face sales quotas, Imparato said a "strong argument can be made" that sales quotas are an essential function of the job. In a situation like this, he said, the employer should negotiate with the employee about what tasks the employee can perform. □

WHETHER ETHICS GO HAND IN HAND WITH AGE RULED TOO DUBIOUS TO PROVE AGE-BIAS CLAIM

The correlation between age and ethical behavior is too dubious to establish that a 46-year-old executive was discharged because a 31-year-old replacement was less likely to poke his nose into an alleged multimillion dollar cover-up, a federal appeals court ruled (*Rothmeier v. Investment Advisers Inc.*, CA 8, No. 95-2562, 6/7/96).

The U.S. Court of Appeals for the Eighth Circuit affirmed that Steven G. Rothmeier failed to show his employer's reasons for discharging him—poor performance of a fund and differences in management styles—were a pretext for job bias in violation of the Age Discrimination in Employment Act.

As evidence of an ADEA violation, Rothmeier argued that his employer discharged him because he was less easily controlled and more likely to speak out than a less savvy, younger executive.

"Rothmeier has tried to bootstrap his way into an age-discrimination claim by making an argument premised on a highly dubious correlation (and one for which he has offered no supporting evidence) between age and ethical behavior," Judge Pasco M. Bowman wrote for the court.

According to the Eighth Circuit, Rothmeier began working for IAI in 1989 at age 43 and was discharged in 1993. He was hired by Noel P. Rahn to serve as president of IAI Capital Group. IAI, Bowman wrote, "is an investment advisor and makes money by procuring investment funds, which are managed for a fee by the various IAI divisions."

In March of 1993, Rothmeier was told by the chief financial officer of a venture capital group he was overseeing that a wholly owned subsidiary of IAI "perhaps was not in compliance with Securities and Exchange Commission (SEC) registration rules." The information "suggested that the financial exposure resulting from the registration problem was in excess of \$1.1 million," according to the court.

'Greater Sensitivity To Ethics'

Rothmeier began investigating and, by March 15, 1993, told Rahn that he believed the subsidiary was violating SEC rules. Rothmeier requested certain documents, but he alleged that "Rahn and IAI's in-house lawyers stonewalled because they wanted to 'cover-up' the SEC problem," according to the Eighth Circuit.

Rothmeier was "fired" either on March 15 or 17, 1993, although he never received a negative performance review and had received a \$50,000 bonus two weeks before the discharge, Bowman wrote. He was replaced with a 31-year-old.

A federal judge granted summary judgment to IAI on the age bias claim, finding the record "bereft of any suggestion that there was any age based animus involved in the decision of IAI and Rahn to terminate Rothmeier."

The court noted that IAI rebutted the presumption of age discrimination by proffering nondiscriminatory reasons for Rothmeier's discharge, including the poor performance of a fund and Rothmeier's "purported insubordination and differences in management style." In response, Rothmeier failed to show that those reasons were a pretext to discriminate, the Eighth Circuit ruled.

The court rejected Rothmeier's argument that because of his age, "he has attained greater sensi-

tivity to ethical problems than his younger colleagues at IAI and, for this reason . . . he was able to confront Rahn and to refuse to participate in the purported cover-up of the alleged SEC violations. His younger colleagues, on the other hand, because of their youth and inexperience in the business world, were supposedly unable to stand up to Rahn when the alleged cover-up scheme was hatched," the court wrote.

The decision was joined by Judges James B. Loken and William W. Schwarzer.

**OFFICIAL IMMUNITY DEFENSE REQUIRES
DETAILED PROOF, APPEALS COURT RULES**

AUSTIN, Texas—A move by state officials to end a discrimination suit against them was thwarted when the Texas Court of Appeals for the Third NEWS

(DLR) 7-2-96

District ruled June 26 in an unpublished opinion that an affirmative defense of official immunity must be based on more than sketchy information, (*Trimble v. Robinson*, Texas CtApp, No. 03-95-00707-CV, 6/26/96).

Upholding a trial court ruling, the appeals court refused to grant summary judgment to a group of state agency supervisors who had tried to use the official immunity defense to get the suit thrown out.

John Robinson sued the Texas Department of Human Services and five supervisors, alleging they discriminated against him on the basis of age and disability and retaliated against him for filing official complaints.

Robinson, who had been with the department 21 years, was 54 years old and had dyslexia. His employment problems began in 1986 when he was downgraded because of a reduction in force, according to the court. He filed an informal complaint of discrimination with the department's civil rights director.

Over the next several years, Robinson was downgraded two more times, switched to temporary status, and denied a computer that could accommodate his learning disability.

Although his temporary position was made permanent, Robinson sued the department and his supervisors in January 1992, alleging discrimination and retaliatory acts and claiming damages for infliction of emotional distress.

Robinson voluntarily retired in September 1993, one month after everyone in his work unit received a new computer except him. He said that he felt forced to leave because of the frustration of working at a job that was very difficult because he did not have an adequate computer.

The supervisors and the agency moved for summary judgment, but the trial court denied the motion. Then the supervisors—but not the state agency—appealed, asserting that the trial court erred in denying their motion for summary judgment based on the affirmative defense of official immunity as employees of the state.

The appeals court said that the purpose of official immunity is to insulate the functioning of government from harassment of litigation so that employee efficiency is not harmed by the cost of defending frivolous suits.

The court said that government employees are entitled to official immunity only from suits arising from the performance of their discretionary duties, in good faith, while acting within the scope of their authority. "Because official immunity is an affirmative defense, summary judgment is proper only

if the movants establish conclusively each element of the defense," the court said.

However, the court said that the summary judgment evidence did not contain "enough details" about the supervisors' actions and decisions to be able to determine whether they were discriminatory or illegal.

A review of the summary judgment proof showed there was "simply not enough information to conclude" that the supervisors were entitled to summary judgment against Robinson's various claims, the court said. The defendants "have not presented sufficient summary judgment proof to conclusively satisfy each of the elements of the official immunity defense."

The court cited examples of how the superintendents responded in "too sketchy" a fashion to Robinson's allegations. In the most extreme example noted by the court, one defendant, Barry Fredrickson, did not even submit an affidavit in response to Robinson's allegations that Fredrickson admitted discriminating against him because of his complaints to the civil rights office. "We have virtually no information at all about the nature or context of his [Fredrickson's] actions," the court said.

2 guards accuse prisons of allowing harassment

Associated Press

TALLAHASSEE — Two women who used to be prison guards have sued the state for \$2.4 million, alleging administrators routinely ignored complaints about sexual harassment and retaliation by supervisors.

The trial in the lawsuit brought by Connie Yon and Delores Bryant against the Department of Corrections is scheduled to begin July 29 in Tallahassee.

The case may open old wounds in a department still recovering from a sex discrimination lawsuit filed against it by the U.S. Justice Department.

That earlier suit was settled in 1993 after officials agreed to distribute \$3.7 million in extra pay to several hundred women either denied work or unable to advance in the department.

About one in four correctional

The case may open old wounds in a department still recovering from a sex discrimination lawsuit.

officers is a woman.

In the new suit, the women allege they were forced to have sex with a supervisor, humiliated by other officers and threatened by inmates at Liberty Correctional Institution in Bristol.

"The unwritten code of honor in the prison system is that officers all stick together," said Rick Johnson, an attorney representing the two women. "Victims often get punished."

The correctional officer Yon and Bryant accuse of harassing them is Maj. Steve Comerford, a 19-year veteran.

Yon and Bryant each said they let Comerford have sex with them once in 1990 because they feared he might try to get them fired.

Comerford was fired in 1993 after Yon, Bryant and three other female officers accused him of regularly groping and fondling them on duty during a three-year period.

Attorneys for DOC, meanwhile, say the state is not liable for Comerford's actions, and they maintain that officials moved swiftly when harassment allegations were made.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1602

Elementary-Secondary Staff Information Report EEO-5

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: This final rule is based on a Notice of Proposed Rulemaking ("NPRM") published on December 8, 1995. It amends the school filing requirement in subpart M of 29 CFR Part 1602, by discontinuing the EEO-5 report (EEOC Form 168B) for individual schools and annexes. The Commission takes this action in order to reduce the reporting burden on respondents and to streamline the collection of information required for enforcement purposes while maintaining sufficient data to meet the Commission's program needs. The recordkeeping requirements in Subpart L of 29 CFR Part 1602 are unchanged.

EFFECTIVE DATE: July 29, 1996.

FOR FURTHER INFORMATION CONTACT: Joachim Neckere, Director, Program Research and Surveys Division, at (202) 363-4958 (voice) or (202) 663-7063 (TDD) (these are not toll free numbers).

SUPPLEMENTARY INFORMATION: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-8(c), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed and to make reports therefrom as required by the Commission. Accordingly, the Commission has issued regulations setting forth the reporting requirements for various kinds of employers. Elementary and secondary public school systems and districts have been required to submit EEO-5 reports to the Commission since 1974 (biennially in even numbered years since 1982). Two types of EEO-5 reports have been used: EEOC Form 168A, covering the entire public school system or district; and EEOC Form 168B, covering each individual school and annex within the system or district. On October 5, 1995, the Commission voted to discontinue the EEO-5 report (EEOC Form 168B) for individual schools and annexes. Starting with the 1996 survey year, public school systems and districts will be required to file only EEO-5 reports (EEOC Form 168A) covering the entire school system or district.

The Office of Management and Budget (OMB) approval of the current EEO-5

collection of information, OMB Control Number 3046-0003, expired on January 31, 1996. In order to comply with the new information collection clearance procedures that OMB has instituted pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. 3502(1), and set forth at 29 CFR Parts 1320.8, .9, and .11, the Commission solicited public comment in the Federal Register on December 8, 1995, concerning the proposed change in the EEO-5 collection and the Commission's request for an extension of OMB's approval of the collection. The Commission received three public comments in response to the NPRM. Each comment recommended that the Commission not implement the proposed rule and continue to collect information for individual schools and annexes. We point out that even though the data for individual schools and annexes will not be submitted on survey forms, schools still will be required to keep the same records that they formerly kept at the local level to complete the EEO-5 as a part of the recordkeeping requirements contained in Subpart L of 29 CFR Part 1602. Thus, the information will be available upon request. The Commission has determined that this change not only will substantially reduce reporting burden without reducing overall employment coverage or the number of responding school systems and districts, but that it will be more cost effective for the Commission to request the individual school data when necessary for enforcement purposes than to continue with the current collection.

Regulatory Flexibility Act

This amendment will result in substantially reduced expenses and reporting burdens for public school systems and districts. The Commission also has determined that the elimination of reporting requirements for individual schools and annexes will not adversely affect the utility of the information being collected. Thus, the Commission certifies pursuant to 5 U.S.C. § 605(b), enacted by the Regulatory Flexibility Act, Public Law No. 96-354, that the amendment will not result in significant impact on small employers or other entities because it involves elimination of reporting requirements, and that a regulatory flexibility analysis therefore is not required. The Commission hereby publishes this final rule for public information. The rule appears below.

List of Subjects in 29 CFR Part 1602

Reporting and recordkeeping requirements.

Dated: June 17, 1996.
For the Commission,
Gilbert F. Casellas,
Chairman.

Accordingly, 29 CFR Part 1602 is amended as follows:

PART 1602—[AMENDED]

1. The authority citation for part 1602 continues to read as follows:

Authority: 42 U.S.C. 2000e-8, 2000e-12, 44 U.S.C. 3501 *et seq.*; 42 U.S.C. 12117.

§ 1602.41 Requirement for filing and preserving copy of report.

2. Section 1602.41 is amended as follows:

(a) In the introductory text, in the first sentence, delete the phrase "and individual schools within such systems or district".

(b) In the concluding text, in the first sentence, delete the phrase, ", or the individual school which is the subject of the report where more convenient,".

3. Section 1602.43 is revised to read as follows:

§ 1602.43 Commission's remedy for school systems' or districts' failure to file report.

Any school system or district failing or refusing to file report EEO-5 when required to do so may be compelled to file by order of a U.S. district court, upon application of the Commission or the Attorney General.

4. Section 1602.44 is revised to read as follows:

§ 1602.44 School systems' or districts' exemption from reporting requirements.

If it is claimed that the preparation or filing of the report would create undue hardship, the school system or district may apply to the Commission for an exemption from the requirements set forth in this part by submitting to the Commission or its delegate a specific proposal for an alternative reporting system prior to the date on which the report is due.

[FR Doc. 96-16056 Filed 6-27-96; 8:45 am]
BILLING CODE 6750-01-M

Table of Contents

- **AFFIRMATIVE ACTION**
 Supreme Court refuses to examine a Fifth Circuit ruling that struck down an affirmative action program at the University of Texas Law School; Justice Ginsburg declares that the policy challenged in 1992 has long since been disbanded and will not be reinstated *AA - 1, E - 1
- **AFL-CIO**
 Sixty-five staff at AFL-CIO accept retirement package offered by federation A - 12
- **AGE DISCRIMINATION**
 Correlation between age and ethical behavior is too dubious to show a 46-year-old executive was discharged because a 31-year-old replacement was less likely to probe an alleged multimillion dollar cover-up, a federal appeals court rules *A - 10
- **ARBITRATION**
 Failure to challenge an arbitration award within the statutory time limit renders the award final, Seventh Circuit says in affirming award of delinquent fringe benefit contribution payments against former and current owner of plumbing contracting firm ... A - 4
- **COLLECTIVE BARGAINING**
 Philadelphia and city employee unions reach tentative four-year agreements providing first-year bonus followed by general wage increases totaling 10 percent over three years A - 8
 IBEW reaches swift accord with Pacific Gas & Electric on three-year pacts providing wage increases for 13,500 utility workers A - 9
- **CONSTRUCTION**
 Construction spending fell 0.9 percent in May as increase in publicly funded construction was more than offset by decline in private building, Commerce Department reports A - 11
- **CORPORATE CAMPAIGNS**
 United Steelworkers announce support from Saturn and United Auto Workers for its "Don't Buy" campaign against Bridgestone/Firestone, but Saturn calls claim "misleading" A - 6
- **DISCRIMINATION**
 Texas court thwarts effort by state officials to end discrimination suit against them, by ruling that an affirmative defense of official immunity must be based on more than sketchy information A - 3
- **ECONOMIC OUTLOOK**
 Manufacturing picked up steam in June, with production, new orders, and order backlogs pointing to a resurgence in the sector, National Association of Purchasing Management reports *A - 7
 Economists surveyed by BNA believe U.S. economy is in the process of slowing after surprisingly robust first half of 1996; expect Federal Reserve to raise interest rates *C - 1
- **ERGONOMICS**
 Two government agencies to hold joint conference on musculoskeletal disorders sometime between October and January 1997, NIOSH director says A - 12
- **HEALTH CARE INDUSTRY**
 Following resolution of a dispute over union representation for interns and residents, officials in Boston approve merger of Boston City Hospital with Boston University Medical Center A - 2
- **MANUFACTURING**
 Administrative law judge rules Caterpillar Inc. violated a now-deceased United Auto Workers official's free expression rights when it suspended him for wearing a button lampooning the company's chief executive officer A - 1
- **MINIMUM WAGE**
 President Clinton notifies Senate leaders that he will veto legislation to raise minimum wage by 90 cents to \$5.15 an hour if it includes any one of three GOP amendments *A - 8, E - 3
- **NEW PUBLICATIONS**
 BNA Books publishes *1996 Supplement to Employee Duty of Loyalty: A State-by-State Survey* A - 13
- **PENSIONS**
 Labor Department agency releases final rule removing from the federal code 28 obsolete regulations and guidance issued under ERISA A - 5

* Also digested in Today's Summaries

■ PERSONAL INCOME

Total personal income increased 0.4 percent seasonally adjusted in May, but the pace of consumer spending picked up to 0.8 percent advance, reports Commerce Department's Bureau of Economic Analysis D - 1

■ RETAIL FOOD STORES

UFCW members vote to accept proposal offered by Colorado's two largest grocers A - 13

■ SAFETY AND HEALTH

Evaluation of comprehensive program survey expected in early September, OSHA official says A - 13

Business coalition takes Reich to task for unfairly criticizing 'modest' House GOP job safety reforms and polarizing debate over revamping OSHA A - 3

■ SERVICE EMPLOYEES

Janitors who have staged rolling strikes for a month are voting on a master contract to replace three separate Service Employees International Union agreements A - 11

■ UTILITIES

Members of independent International Union of Gas Workers vote to affiliate Washington, D.C.-based union with International Brotherhood of Teamsters A - 1

TEXT IN THIS REPORT

Summaries of labor and employment law cases in which U.S. Supreme Court denied review on July 1, 1996 E - 1

President Clinton's letter on minimum wage legislation E - 3

TABLE OF CASES

Caldwell v. American Basketball Association Inc. (US SupCt) E - 1

J & T Coal Inc. v. U.S. (US SupCt) E - 1

Rothmeier v. Investment Advisers Inc. (CA 8) A - 10

Sullivan v. Gilchrist and Traynor (CA 7) A - 4

Texas v. Hopwood (US SupCt) AA - 1, E - 1

Trimble v. Robinson (Texas CtApp) A - 3

(For full details, see pages indicated in Section A)

PHOTOCOPY PRESERVATION

- 8:30



includes
50.00



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

July 28, 1995

Office of
the Chairman

The Honorable Leon E. Panetta
Chief of Staff
The White House
Washington, D.C.

LEON
Dear Mr. Panetta:

As we discussed during our May 19, 1995, meeting, the Equal Employment Opportunity Commission (EEOC) is planning a roundtable discussion focusing on diversity and equal employment opportunity issues as a part of our 30th Anniversary celebration. We believe the EEOC has an important role in facilitating a national discussion about the importance of diversity in the American workforce and the challenge of equal employment opportunity in the 21st century.

We would like to invite President Clinton to participate in the roundtable in whatever manner he desires. For example, he could give opening remarks, participate in the actual discussion, or give closing remarks. Two hours of the program will be devoted to a discussion among twelve to fifteen well-respected members of the civil rights, business, and legal communities. A moderator will guide the discussion of three basic questions -- what is diversity, why is it important to today's American workforce, and how can American society best meet the challenge of fully utilizing its increasingly diverse workforce in the 21st century. An EEOC reception for invited guests will follow the roundtable.

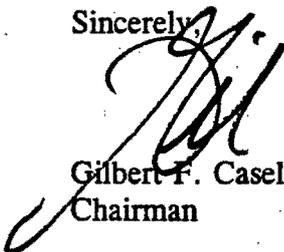
The EEOC believes that these issues are at the heart of America's current debate concerning affirmative action. A national dialogue designed to educate and inform the American populace will serve as a positive step toward dissolving the wedge of racial and ethnic anger that currently divides the country. We believe that this is an important event for the entire country and consistent with President Clinton's desire to engage the nation in a conversation about the importance of diversity as we move into the 21st century. To encourage the national dialogue, the audience will be comprised of invited guests from the communities served or affected by the EEOC, Members of Congress, and representatives from the administration. We further hope to secure televised coverage of the event by either C-Span or PBS to carry the roundtable discussion to an even broader public audience.

Currently, we are considering October 1995 for the roundtable and reception. As discussed, we would like to work with you to accommodate the President's schedule to insure his participation.

PHOTOCOPY
PRESERVATION

For more information or for further coordination on this matter, please have your staff contact Claire Gonzales, EEOC Director of Communications and Legislative Affairs, at 663-7199. Thank you for your assistance in this matter.

Sincerely,



Gilbert F. Casellas
Chairman

cc: Abner Mikva, Counsel to the President
George Stephanopoulos, Senior Advisor to the President
Alexis Herman, Director, Public Liaison
Kitty Higgins, Secretary to the Cabinet

PHOTOCOPY
PRESERVATION