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LEGISLATIVE REFERRAL MEMORANDUM

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(for) Assistant Director for Legislative Reference

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DEADLINE: ²pm Monday, April 29, 1996 -- FIAM

SUBJECT: JUSTICE Proposed Testimony RE: S1085, Equal Opportunity Act of 1995

Dawn Chirwa
Wendy White

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

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

COMMENTS: The attached Justice (Deval Patrick) testimony is for a Senate Judiciary Committee hearing scheduled for Tuesday, April 30th. Please note the previously cleared veto threat on the last page of the testimony. Therefore the above deadline is firm.

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LRM NO: 4237

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SUBJECT: JUSTICE Proposed Testimony RE: S1085, Equal Opportunity Act of 1985

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draft

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 ironic, if not distressing, because beneath 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 no reasonable person denies persists today -- have been denied opportunities to obtain a decent education, compete equally for jobs, participate in the political process, 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 caused daily in the lives of minorities and women. Rather, Congress proposes 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. The minority-owned firms that do exist suffer in comparison with white-owned firms; minority-owned firms have, on average, gross receipts that are only about one-third those of non-minority firms. Women suffer from similar inequities. 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 contract dollars in 1994.

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. Recent studies have shown that unfairly 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.

Discrimination occurs in both private and public contracting. Disparity studies completed by state and local governments after the Crosby decision routinely found that minority-owned businesses are locked out of public contracting markets. After the Crosby decision, many states suspended affirmative action business programs, with a devastating effect on minority business. In Richmond, minority participation in construction dropped from 40 percent of all contracts to less than 3 percent. Similar drastic 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).

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 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.

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 still has 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, only 13 percent of African Americans and 11 percent of Hispanics had completed four or more years of college.

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 E.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.D.s, and Hispanic students

received only 2.7%. Only 3 percent of all full time faculty members at American institutions of higher learning are African American and only 2 percent are Hispanic. See 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 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. While the court's decision ignored 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 limit severely a college's ability to use race even as a remedial objective. The Fifth Circuit held that the school could only seek to remedy its own discrimination, and could not even attempt to remedy 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.

While these statistics are hardly comprehensive, they highlight the fallacy of assuming that minorities are operating on a level playing field.

Remedial use of affirmative action.

Rather than addressing this discrimination, 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 completely 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, helpful response to the deep intransigence of institutions peopled by those who persist in viewing African Americans, Hispanics, Native Americans, Asians and women as less deserving of jobs, business opportunities and places in universities. When by every measure of social well-being members of racial and ethnic minority groups and women lag far behind white males, when study after study shows that enforcement of the antidiscrimination laws alone has not leveled the playing field between dominant white males and other citizens, when affirmative action -- done the right way -- represents one sensible, restrained tool available to help our society achieve its goal of

integration, this bill would set us all back. The Administration strongly opposes it.

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 expose Colin Powell's many talents -- is an example of this sort of measure. Hardly anyone opposes efforts to cast a broad net, and offer training -- or so I thought before S.1085. For it 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. Nearly everyone opposes quotas, including the President and me. Federal courts have rejected such measures and Federal law -- both in Executive Order 11246 and by statute -- makes quotas unlawful. To the extent that H.R. 2126 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 the support of Republicans and Democrats. Indeed, no Federal law of any kind mandates that anyone make decisions on the sole basis of race or gender.

The law 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 altogether such reliance. 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 developed a series of inquiries by which to evaluate 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 non-beneficiaries inappropriately.

In July, President Clinton spoke at the National Archives to reaffirm 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, we opted for a middle ground that permits affirmative action where it is flexible, respects merit and does not unnecessarily burden the expectations of non-beneficiaries.

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 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 has been spearheading an effort to review federal affirmative action programs to ensure their compliance both with

the law and the President's policies. Associate Attorney General John Schmidt testified before a joint hearing of this Subcommittee and its House counterpart in September to describe those activities. 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 have also, during the review, suggested to various agencies that they modify a number of existing programs to insure that they are being conducted in a manner that satisfies strict scrutiny. We are awaiting agency responses to some of those suggested modifications. We fully accept that changes are 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 fully expect that agencies may have

to modify some present practices to bring employment actions fully in line with strict scrutiny.

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 the use of race in federal procurement for some months and have developed a proposal that we feel will satisfy the rigorous demands of Adarand, meet legitimate and reasonable contracting objectives, and treat both minorities and non-minorities equitably.

Unlike the misguided approach of S.1085 simply to eliminate the use of race and declare compliance with constitutional standards, crafting a mechanism to permit race to be used in a manner to satisfy Adarand is a complex undertaking. While the document is still undergoing revision, I can discuss the approach we intend to take.

First, under the proposal the government will only use affirmative action where race neutral measures, such as training programs and outreach, 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 benchmarks to govern the implementation of provisions that permit race to be considered in making federal procurement contracts. The benchmarks would limit the use of race to those occasions in which race is necessary to insure that minority-owned firms have a fair opportunity to compete for federal contracts. Race-conscious means primarily will be price credits in prime contracting and price and evaluation credits in subcontracting. The benchmark will focus on the geographic areas in which contracting actually occurs; where federal contracting is regional, the benchmark will be regional, and where federal contracting is national, the benchmark will be national. Where minority participation is below the benchmark, race-conscious methods of contracting will be available. Where minority participation reaches a level that would be expected absent discrimination, consideration of race may be curtailed. The use of benchmarks will insure that affirmative action in federal contracting is not confined to one or two commercial activities, but rather spread throughout industrial areas, so no one type of non-minority business bears a disproportionate burden from affirmative action.

Finally, 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.

Clearly, this proposal will generate much comment, and may be amended before it is finally implemented for FY 1997. It shows, however, 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 also includes three other exceptions under the rubric of "rules of construction." First, the bill does not purport "to prohibit or limit any act that is designed to benefit an institution that is a historically Black college or university on the basis that the institution is a historically Black college or university." Id. at § 4(a). Second, the bill does not purport to limit action taken pursuant to Congress's powers relating to Indian tribes or pursuant to a treaty between the United States and an Indian tribe. Id. at § 4(b). Third, the bill does not purport to limit any sex-based classification if

sex is a bona fide occupational qualification, 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.

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.

S. 1085 would significantly weaken current protections against gender discrimination and could 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, and 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, the bill's prohibition against quotas, like its prohibition against intentional discrimination, is superfluous. Rigid and inflexible measures that look only to race or gender in disregard of qualifications are 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 caselaw 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 or benchmark 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. For example, the Department of Education's program of Grants to Hispanic-Serving Institutions would not be exempted from the bill's substantive provisions. Under this program, the Department provides grants to schools with a certain percentage of disadvantaged Hispanic students. See 20 U.S.C. 1059c. Because race is a factor in determining the beneficiaries of the "federally conducted" grant program -- and not merely in determining what the beneficiaries can do with the grant money -- the Grants to Hispanic-Serving Institutions would be eliminated by S.1085.

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 sue a private employer who was a federal contractor (presumably the suit would not have to relate to the contract) and enter into a consent decree based on the contractor's discrimination (which must be approved by a court) that would contain 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. 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. It would also promote litigation by making it necessary for the government to proceed to trial in order to obtain necessary remedies.

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. The federal government, to which minorities and women have had to turn for protection and redress, would no longer be the leader in promoting opportunities for its citizens. This bill represents a full-fledged retreat from our commitment to achieve an integrated society. That would be a fundamental and disastrous change. That has been a national commitment for only the latter half of my young life: give us the tools and we will finish the job.

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 actions.

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.