

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
--------------------------	---------------	------	-------------

001. notes	Meeting notes, re: Affirmative Action (3 pages)
------------	---

6/5/1995

P5

1

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9162

FOLDER TITLE:

Affirmative Action - 1995 - General [Folder 1] [1]

2008-0308-F

wr864

RESTRICTION CODES

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

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

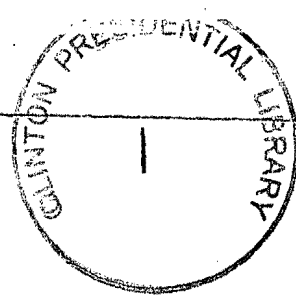
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



6/15/95 Rm 100 (Aft Act mtg.)

Policy → Constitutional issues

- Fact Finding Commission - Gephardt wants independent of adm. to satisfy marg. members & some R.
- DOJ → ^{prepus} in house

Our policy test must square with the Adarand test.

House → appropriations process
striking funding for Aff Act programs.

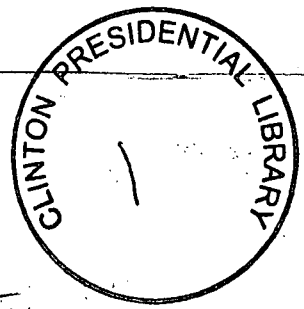
Meeting:

① Senate move on highway bill - NHS designation

② Commission (poorly appointed) -
- They (moc) need it to survive in their various '96 campaigns

moc feel we have [again] flopped in position because they think we now do not want a Commission. (We did seem to ^{have} wanted it on Monday.)

Gephardt folks should touch base w/



Daschle: Try to hold off letter

George wants meeting w/ Daschle + Sephardt
to set up discussion re leadership asking

Duval's concern re Commission

- we are stuck with their findings

the plus is - we have a fact-finding
mechanism to fall back on

After Commission -

- we can still make a cut
at our own review

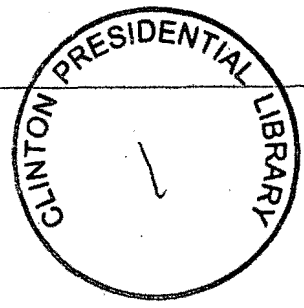
- evaluate the findings of the Commission

If you are trying to set up a scenario
when the Comm does an analysis - it
will take a long time
There's virtually no national data
available at the A+D's.

DOJ → will pre-empt part of Commission's
work.

- Re-do factual part in R

- programs which satisfy
POWIS screen + Adair's screen
- Elements need to be modified
- We don't know enough, POWIS
directs agencies to look further



POTUS should not ^{be} put in position of making judgment

Create Commission

- need internal process w/ DOS in lead
inter-agency steering comm. to

Review team finishes its review → give
its report to POTUS

DOS could be a commission.

Bipartisan -

non gov't

3-5 imminent pp.

? Statutory → NO

? Resolution supporting President's
appt of Comm.

State



Use model of

Comm on Ed. Pro in Arkansas

• forum for civil discourse

• public discussion

• POTUS can stand back

& others take moral high ground

Time certain needed (6 mos?)

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
--------------------------	---------------	------	-------------

001. memo	Jack Quinn to President Clinton, re: DOJ Brief in Hopwood Affirmative Action Case (2 pages)
-----------	--

4/23/1996

P5

2

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9162

FOLDER TITLE:

Affirmative Action - 1995 - General [Folder 1] [3]

2008-0308-F

wr865

RESTRICTION CODES

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

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

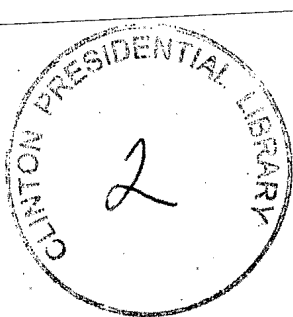
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



THE WHITE HOUSE
WASHINGTON

96 APR 23 AID: 111

COPY

April 23, 1996

Law -
what are we a this

MEMORANDUM FOR THE PRESIDENT

FROM:

JACK QUINN *JQ*
COUNSEL TO THE PRESIDENT

KATHY WALLMAN *KW*
DEPUTY COUNSEL TO THE PRESIDENT

CC:

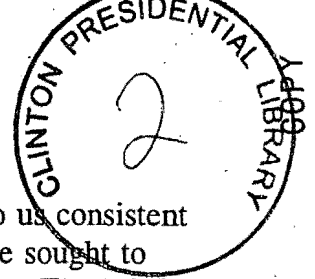
LEON PANETTA
GEORGE STEPHANOPOULOS
ALEXIS HERMAN
RON KLAIN

SUBJECT:

DEPARTMENT OF JUSTICE BRIEF IN *HOPWOOD*
AFFIRMATIVE ACTION CASE

As you know, on March 18, the Fifth Circuit struck down the affirmative action admissions plan of the University of Texas Law School in a case called *Hopwood v. Texas*. The program was predicated, in part, on the law school's asserted interest in promoting the racial diversity of its student body. As a means of achieving that objective, the law school employed a two-track admissions system: one standard for Blacks and Hispanics, and another for Whites. The Fifth Circuit did not address the constitutionality of the dual track system. Rather, in a sweeping ruling, the court held that promoting diversity can never be a permissible objective of affirmative action in higher education, no matter how a university implements that objective. In reaching that conclusion, the Fifth Circuit declared that the Supreme Court's 1978 decision in the Bakke case -- which upheld the consideration of race as a factor in higher education admissions to promote campus diversity -- was no longer the law of the land, in the wake of more recent Supreme Court decisions.

The State of Texas has announced that it will petition the Supreme Court for a writ of *certiorari*. To date, the United States has not been a party to this case. The Department of Justice considered filing an *amicus* brief in the Fifth Circuit, but decided not to do so in large part because of reservations about the lawfulness of the two-track admissions program. However, given that the Fifth Circuit's decision struck so broadly at the very use of diversity as a factor in admissions decisions, the Department now anticipates filing a brief in support of Texas' *certiorari* petition.



The position that the Department of Justice anticipates taking seems to us consistent with your views on affirmative action, and it is consistent with what you have sought to accomplish in the post-*Adarand* review of federal affirmative action programs. The brief would not support the two-track program itself, which, like the outright federal set-aside programs based solely on race that have been regarded as vulnerable after *Adarand*, essentially established a separate "minorities-only" admission pool. It would strongly defend, however, the principle that the law allows diversity to be taken into account, which is a critical underpinning of the Administration's post-*Adarand* review.

RECOMMENDATION

We recommend that you authorize the Department of Justice to file a brief in support of Texas' petition for *certiorari*, and on the merits if *certiorari* is granted.

_____ AGREE

_____ DISAGREE

_____ DISCUSS

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Speech, Review and Policy Decisions (12 pages)	5/27/1995	P5
~~-002. fax~~	~~Phone No. (Partial) (1 page)~~	~~06/21/1994~~	~~P6/b(6)~~

3

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9162

FOLDER TITLE:

Affirmative Action - 1995 General [Folder 2] [1]

2008-0308-F

wr449

RESTRICTION CODES

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

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

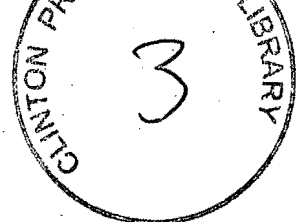
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



COPY

THE WHITE HOUSE
WASHINGTON

95 JUN 28 P7:11

June 27, 1995

118036

MEMORANDUM FOR THE PRESIDENT

From: George Stephanopoulos and Christopher Edley, Jr. *CAG*

Re: Affirmative Action -- Speech, Review and Policy Decisions

This memorandum reviews the four pieces of the Affirmative Action rollout:

- a major speech on July 19th -- we seek your decision on venue;
- release of the Review;
- a presidential Directive to agency heads creating a process coordinated by the Attorney General to ensure compliance with *Adarand* -- we seek your decision on whether and when to issue the Directive; and
- two key policy choices for immediate decision and, if you chose, announcement with the speech: *setasides* and the *Piscataway* issue of using race/gender as a factor in layoffs.

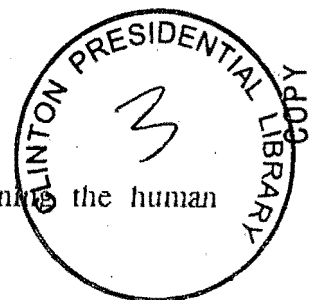
I. The Speech: Content and Venue

Content. Don Baer and Carolyn Curiel, with assistance from others, are conducting the broad outreach you requested. As we discussed, the speech will be a broadly thematic discussion of discrimination, exclusion, equal opportunity, and healing. It will include a strong defense of affirmative action when done the *right* way, and offer policy principles which will be made concrete with a few pointed programmatic examples of the good, the uncertain and the problematic.

Among the possible program examples are:

The good: Programs you confidently support include: the military; your judicial appointments; your Cabinet appointments; the OFCCP program of affirmative action in employment.

The uncertain: Programs you support but for which you want the Attorney General's confirmation of compliance with *Adarand* include: the several grant programs operated by the Departments of Education and HHS; NSF grant programs. The most common rationale for these grant programs is dramatic underrepresentation of historically excluded groups, plus



some context-specific public interest in inclusion (for example, broadening the human resource base for research scientists).

The problematic: Programs you believe need revisions include: Contracting set-asides; and USDA set-aside-like auctions of foreclosed farms. Although post-*Adarand* empirical studies might establish that these are constitutionally defensible, as a policy matter they in some instances are unfair.

For purposes of the speech and any supporting press materials, we can supplement these with state, local and private sector examples drawn from litigation and press accounts. We do not recommend a detailed rollout of how Federal programs sort into these three categories because most if not all of those judgments should now be deferred until the post-*Adarand* assignment is complete, as indicated in the discussion below of the Directive.

Venue. Listed below are venue options for your speech. As with any major address, your speech is what matters here. The venue's history and symbolism will provide secondary color. In this case specifically, the anticipation and coverage of the speech will be significant, and the location will create context and generate helpful side-bar stories.

- *Little Rock Central High School, Little Rock, Arkansas*

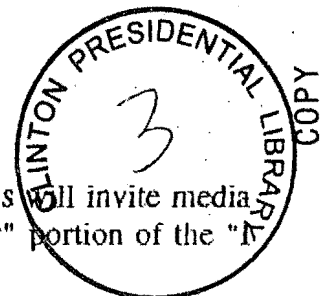
Recommended option. This site would allow your speech and the issues surrounding affirmative action to be framed within the larger context of the civil rights movement and the struggle for equal justice and opportunity. The media would use the school's history when covering the speech. When combined with your own experiences and battles against racism, this would make a powerful statement framing your remarks. Networks would perhaps contrast footage of you with scenes of Gov. Faubus. You might choose to mention contemporary problems at Central High to underscore the critical importance of the larger opportunity agenda, specifically quality education.

- *Constitution Hall, Washington, D.C.*

Alternative option. This site allows you to draw on the building's history in the fight against discrimination (Marian Anderson) as well as the footsteps-away history of events around the Mall and commemorated there. The Hall seats over 3,500 people -- a crowd we would build - which would inevitably create a serious, Presidential, high-energy environment. The crowd could be built thematically, for example: a multiracial assemblage of church congregations; young people.

- *Atlanta, Georgia--Site TBD*

By going to "The City Too Busy To Hate," a city essentially built on affirmative action, you could both draw on the history of Dr. King and early civil rights efforts while using the city as an example of the issue in contemporary times. We would locate a venue of historical



significance to Dr. King, such as a park where he used to preach, etc. This will invite media comparisons with King's speeches, including the "content of their character" portion of the "I Have a Dream" speech. This is both a plus and a minus.

▪ *Already-Scheduled Events*

There is a surprisingly small selection of events scheduled on or around July 19, none of which seem very promising:

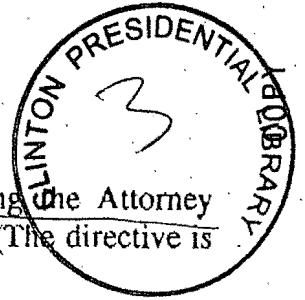
- *Presbyterian Church USA*, General Assembly, July 15-22, Cincinnati. Over 3,000 delegates. (No surrogate plans as yet.)
- *National Council of La Raza*, July 16-19, Dallas. (Current plan: possibly the First Lady or Leon Panetta.) Would be complicated by immigration concerns.
- *African-American Chamber of Commerce*, July 19, Oakland. Over 1,000 delegates. (Current plan: Rodney Slater.) Aggressive counter-scheduling; not recommended.
- *Business and Professional Women*, Convention, July 15-18, Tulsa. Expecting 1,500 participants. (No surrogate plans as yet.) Would aggressively position the issue as broader than a minority concern; relative emphasis on race would be criticized.

Decision

- | | |
|---|--|
| _____ Little Rock Central High School | |
| _____ Constitution Hall, Washington D.C.: | _____ Audience of church congregations |
| _____ Atlanta, (site TBD) | _____ Other |
| _____ Convention | _____ of Presbyterians |
| | _____ of La Raza |
| | _____ of black chamber of commerce |
| | _____ of Business and Professional Women |

II. *Adarand* Directive to Agency Heads; the Commission

Directive. The detailed empirical analysis and consideration of program revisions now required as a consequence of *Adarand* must be coordinated by the Department of Justice as regards the legal determination of whether a program is constitutionally defensible. The parameters for that analysis are detailed in formal guidance to agency general counsels issued today by Walter Dellinger, Office of Legal Counsel; you received a draft on Monday evening. You must decide



whether and when to issue a directive to agency heads formally establishing the Attorney General-led process, with a progress report from her to you within 90 days. (The directive is at Tab A.)

The process must also include some continuing White House participation to superintend interagency policy judgments about reforms that might be desirable to make certain programs *more* defensible or more consistent with your own non-constitutional policy views. The legal and policy choices are all but impossible to disentangle, and will in any case be attributed to the White House. Because there will be steady stream of such decisions, quiet White House participation in the interagency effort will be led by Judge Mikva and George Stephanopoulos. (The directive does not mention the White House role, lest we recreate pressure for White House documents and visible White House decisionmaking.)

What is the relationship of the Review to the Directive? We suggest:

? "The Review provided the President with basic factual information concerning various Federal programs and the background conditions of discrimination and exclusion. Early drafts provided a preliminary application of his policy principles to various programs. In light of *Adarand*, however, these preliminary policy judgments and the evidence underlying them are now subject to strict scrutiny by the courts, and must be reviewed by the Justice Department to ensure compliance with *Adarand*."

There are three options for the Directive:

OPTION 1: ISSUE NO DIRECTIVE; REST ON INFORMAL GUIDANCE BY THE CHIEF OF STAFF

Pro: By not issuing a presidential document we avoid making White House news, and leave this as a DOJ story about legal matters. Although we have a response to a question about the relationship to the Review, that response is best delivered at the time of the speech.

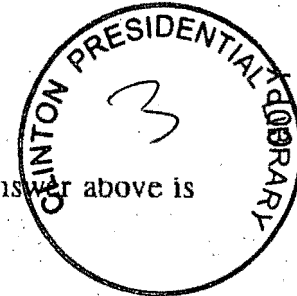
Con: Leadership; the speech is relatively far off. Meanwhile, the text of the directive simultaneously assures skeptics that there is high level concern about good faith compliance with *Adarand*, and assures the base that your overall framework is true to your principled support for affirmatively expanding opportunity.

OPTION 2: ISSUE THE DIRECTIVE NOW

Pro: Issuing a Directive demonstrates leadership; reassures Congress that they need not act precipitously because the Executive branch is fully engaged. Although House GOP leaders are reportedly putting affirmative action on a slow track, Senator Dole and Rep. Canady are shopping broad anti-affirmative action measures.

Con: Will lead to some news stories, though probably minor. Will trigger a question about the

status of the Review -- although that question is being asked anyway, and our answer above is solid.



OPTION 3: DEFER DECISION; PERHAPS ISSUING DIRECTIVE AT THE TIME OF THE SPEECH

Pro: There is little practical or political urgency, because agencies will begin their *Adarand* assignments, and formal presidential endorsement of the DOJ-led process is unlikely to make a meaningful difference in this summer's legislative process.

Con: DOJ believes that there will, eventually, be some sticking points in the interagency process, and that those will be minimized if there is a formal directive. Issuing a directive at the time of the speech creates an unnecessary distraction from a communications perspective. Moreover, since the Attorney General's process will be well underway, the directive will seem a fairly empty gesture rather than a timely exercise of leadership.

Decision:

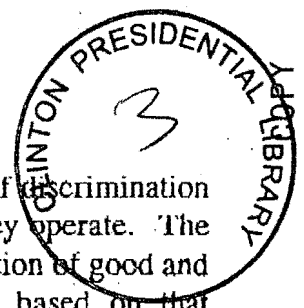
- ☐ Option 1: Issue no Directive; rest on informal guidance by the Chief of Staff
- ☐ Option 2: Issue the Directive now
- ☐ Option 3: Defer decision; perhaps issuing directive at the time of the speech

Commission. Congressional interest in a bipartisan commission has waned. Your advisers and the agencies all believe that a fact-finding commission on compliance with *Adarand* would not be helpful -- either as a practical matter of getting the empirical and legal work done, or as a matter of winning greater deference from Federal district court judges. Nor does it appear likely to create credibility that would cause swing Members of Congress to oppose anti-affirmative action amendments. Finally, civil rights advocates speak in terms of "presidential leadership," and oppose making affirmative action policy a "jump ball" in some unpredictable commission, with potentially dire consequences.

Your advisers therefore see little to gain and much to lose from going forward with a Commission concerning *Adarand* and specific Federal programs. Moreover, a commission with the alternative charter of framing a national conversation on opportunity seems a far less attractive strategy in the present environment than it might have been before *Adarand* and the more focused legislative risks now looming.

III. The Review

At a minimum, the Review will include a description of your policy framework, an analysis of

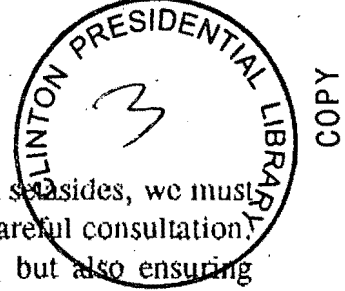


the *Adarand* case, a review of evidence documenting the continuing problem of discrimination and exclusion, and a description of the range of Federal programs and how they operate. The draft of the Review prepared prior to *Adarand* also included a balanced presentation of good and bad information collected on program performance, our "findings of fact" based on that information, and some policy conclusions and recommendations. In light of *Adarand*, however, and the certainty of both litigation and eventual legislative action, the Department of Justice and several agency general counsels have raised very serious objections to releasing these factual and policy matters. (Two suits have been filed already.) Judge Mikva is among those urging that even if an abbreviated document is released, it should come some days after the speech in order to maximize attention to the speech and minimize attention to the document. We are discussing these difficulties, and will have a recommendation for you next week.

IV. Decision on Procurement Setasides

Baseline -- Reform of Abuses: The Review has identified a number of areas of abuse or perceived abuse. As in all the other areas we examined, these abuses are far less common in reality than is generally assumed by critics. Nevertheless, addressing these is necessary as a matter of fairness and political circumstance; the reforms will also have a marginally helpful impact on the Attorney General's constitutional analysis. Some details of needed regulatory and statutory changes remain to be defined after the general parameters, noted below, are announced. (It would be impossible to develop sound details while maintaining confidentiality.) The five key elements and summary prescriptions are:

1. **Tighten the Economic Disadvantage Test.** Reform the asset test to count the value of the personal residence and to consider the spouse's assets (now excluded) in a manner analogous to treatment of a 49 percent owner of the enterprise.
2. **Tighten Requirements for Graduation.** Apply 8(a)'s 9 year graduation limit to all SDB programs, but then direct the NEC and SBA to establish objective industry-specific criteria for determining when any individual firm "develops" beyond need for sheltered competition. Direct the NEC and SBA to establish caps on the dollar value of contracts, plus a cap on total dollars a single firm can win through sheltered competition. These measures will also reduce the concentration of 8(a) awards among a few successful firms.
3. **Stringent Safeguards Against Fronts and Pass-Throughs.** Create a uniform, privatized certification process for all SDBs. Require certification audits at the time of the first contract and periodically thereafter to verify continuing eligibility and to monitor for "fronts" and "pass-through" companies. Increase civil and criminal penalties.
4. **Sunsets and Caps to Reduce Regional/Industry Concentrations.** Direct the NEC to formulate industry and regional caps/controls to prevent significant adverse burden on non-SDBs. Direct the NEC to determine industries/areas where sheltered competition programs may be *phased out* based upon successful inclusion.



Key agency officials agree that, unless you announce opposition to the current setasides, we must announce this minimum package, making clear that the details will require careful consultation. The package would be described not only in terms of combatting abuses, but also ensuring conformity with your policy test of fairness.

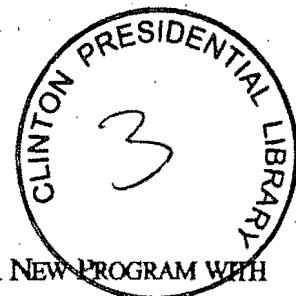
Further Steps -- Options for Broadening Eligibility: In light of your policy tests, and because of the shadow cast by *Adarand*, we offer these additional options to make minority status less of a defining and exclusive condition of eligibility for procurement preferences. The critical choice is whether you want to move to race/gender-neutral targeting, and whether you want to do so in your speech, in advance of the post-*Adarand* study process. The options are:

- (1) announce only the baseline anti-abuse reforms described above, leaving further reforms until after the DOJ-led review of *Adarand* compliance;
- (2) eliminate current SDB programs as being excessively rigid and exclusionary (although in DOJ's view defensible). Instruct agencies to develop a new program, consistent with *Adarand*, meeting broader objectives of antidiscrimination, entrepreneurial opportunity, and economic development;
- (3) the same as *option 2*, but with fewer specifics about the objectives and the type of mechanism to be developed as a replacement program; and
- (4) elimination of all race/gender preferences, with empowerment contracting only.

OPTION 1: ANNOUNCE ONLY THE "BASELINE" ANTI-ABUSE MEASURES DESCRIBED ABOVE

Pro: It would be prudent to complete the detailed empirical and program assessments required by the Supreme Court before rushing to judgment about broad program changes. If we rush, Congress will feel emboldened to rush. None of the broader policy options below could at this stage be accurately described as *constitutionally* compelled; they would be naked, controversial policy judgments. The Congressional Black Caucus, civil rights groups, MBE representatives and Assistant Attorney General Deval Patrick all believe you should defer specific policy judgments of this radical sort until after the Attorney General's process. The abuses identified are the seeds of much opposition to setasides, and constitute a meaningful reform step.

Con: The media and many others will not consider this option alone meaningful. The story will be "President Endorses Setasides, Offers Reforms." Especially after so long a Review, the public expects at least some significant policy judgment from the President -- in both the affirmative and negative -- as a measure of leadership as well as commitment to concrete fairness principles. Deferring all policy choices means completely collapsing the policy judgment into the constitutional analysis, and that amounts to ceding policy authority to Justice O'Connor. Because of the empirical work required by *Adarand*, and because of your strong basic support for the education programs, procurement setasides are the one opportunity available now for a



COPY

clear policy choice, up or down.

OPTION 2: REJECT CURRENT PREFERENCES; CHARGE AGENCIES TO DEVELOP A NEW PROGRAM WITH
BROADER ELIGIBILITY, TARGETING SOCIALLY OR ECONOMICALLY DISADVANTAGED INDIVIDUALS
& DISTRESSED AREAS

You would announce that the current programs, though constitutionally defensible and addressed to an important problem of unequal entrepreneurial opportunity, operate in a manner that is too rigid and, at times, racially exclusionary. The current minority-targeted preferences would be eliminated. You would direct the agencies to develop, through the NEC, a proposal consistent with *Adarand* for a new, single program with broader eligibility, focused on three objectives: (1) expand equal entrepreneurial opportunity by *combatting discrimination* and its effects where evidence (as required by *Adarand*) indicates the need; (2) support *emerging enterprises* through race/gender-neutral targeting of small firms new to federal contracting; and (3) use small business "*empowerment contracting*" to target job creation in severely distressed communities.

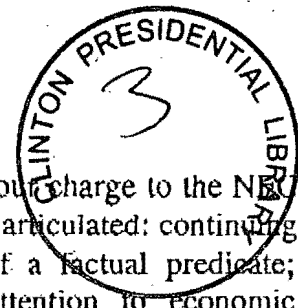
Pro: This incorporates the three key policy priorities you have expressed to us. Specificity of the objectives underscores the commitment to a follow on program, so that your critique of current programs does not signal abandonment of MBEs and WBEs. DOJ believes the resulting program design would be substantially more defensible than current programs, including that in *Adarand*. A more concrete proposal is impossible in advance of the DOJ post-*Adarand* analysis. Promising prospective conformity with *Adarand* will comfort moderates; hard opponents are unreachable anyway. Adding women to preferences is a major enhancement.

Con: Even at this level of generality, proposing greater eligibility for preferences (women, deserving white males) creates a risk being tagged as "hiding" minority preferences behind a raft of new preferences for other groups -- being all things to all people, instead of making a tough choice. Even the three objectives will be criticized for using race as a factor -- though in a far less exclusive way. Retaining the flexible MBE and WBE goals seems essential as a management and accountability tool, but the loose mischaracterization of the scheme will be that it perpetuates the old programs and simply adds *new* preferences on top.

OPTION 3: REJECT CURRENT PREFERENCES; CHARGE AGENCIES TO DEVELOP A NEW PROGRAM WITH
BROADER ELIGIBILITY; LEAVE OBJECTIVES AND DESIGN MORE GENERAL

As in *option 2*, you would criticize the current programs and direct agencies to develop a replacement. But the replacement would be described in a more open-ended way to avoid focused legal and policy objections at this stage. You would simply commit to: *opening up opportunities to entrepreneurship more broadly, consistent with Adarand, addressing not only disadvantages created by discrimination, but also the need to increase entrepreneurship and job creation in economically distressed areas.*

Pro: This option stops short of a concrete proposal in order to avoid criticism for adding *new* preferences on top of the current ones, and to avoid proposing something that will immediately



trigger (unjustified) criticism that we are flouting *Adarand*. However, your charge to the NEA and agencies would incorporate the three key policy preferences you have articulated: continuing to address discrimination, explicitly tied to *Adarand*'s requirement of a factual predicate; broadening preferences on some race-neutral basis; and explicit attention to economic development goals. A detailed proposal should await a full *Adarand* study of contracting issues. Meanwhile, you will have endorsed a continuing Federal commitment to Federal-level effort in this arena.

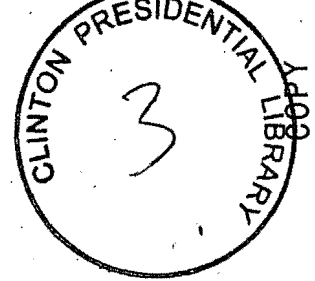
Con: With only a vague commitment about some future replacement, this option will be perceived by setaside supporters as an abandonment of minority and women entrepreneurship. More generally, the vagueness of the planned replacement will be criticized as a "dodge," and the asserted need to do careful policy study (as opposed to legal study) will raise questions about what the Review accomplished during its 100 days. By announcing dissatisfaction with the current programs but "punting" on the replacement, we invite immediate Congressional action to kill them, and greatly complicate the defense of them in court. If the intention is to kill them, we should go directly to *option 4* below.

OPTION 4: GEOGRAPHICAL TARGETING ONLY – ELIMINATE RACIAL AND GENDER PREFERENCES

This option would eliminate the current race-based setasides and create a sheltered competition program with eligibility based on performance of the contract by a small business in a designated distressed zone and/or hiring above a threshold level of employees from such a zone. Aggressive management measures will, we hope, prevent severe erosion of progress we have made in MBE/WBE participation; you should know, however, that this erosion is likely over the longer run.

Pro: Eliminates controversial and constitutionally sensitive racial targeting, while elevating and focusing on the message of jobs and economic development. There will be some disproportionate benefit to minority entrepreneurs, though far less effective than at present. Your discussions with William Julius Wilson reflect this emphasis, as do several major Administration initiatives in the broader realm of economic opportunity and investment. Some of our consultations with minority business leaders indicate that focusing on geography is more acceptable than using economic disadvantage alone, because means-testing (i) will sweep in a vast number of nonminorities and (ii) will aid the cause of those who, like Senator Gramm and Justices Scalia and Thomas, oppose all race-based measures.

Con: Will be viewed as abandoning any commitment to address directly the problem of discrimination-based denial of entrepreneurial opportunity, and doing so before any post-*Adarand* studies have indicated that such abandonment is constitutionally compelled. With this policy declaration, current programs would be easy prey in Congress and the courts.



Decision:

- ☐ Option 1: Anti-abuse reforms only; defer major program changes
- ☐ Option 2: Out with the old programs; announce *specific* policy objectives of expanded opportunity; direct agencies to formulate a proposal consistent with *Adarand*.
- ☐ Option 3: Same as *option 2*, but with less specificity on new program objectives.
- ☐ Option 4: Eliminate race- and gender-based preferences; use geography only.

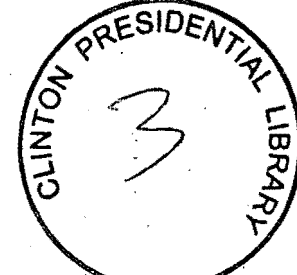
V. Decision on Use of Race or Gender in Layoffs: *Piscataway*

Background. The central issue in this area concerns race or gender as a consideration in layoffs. Under current law, two propositions are clear. First, layoffs cannot be used as a means to implement an affirmative action policy by "making room" for new, diverse employees. Second, race or gender cannot trump a *bona fide* seniority system.

The reach of this second principle is limited. While seniority systems are common in the public sector, the decline of unionism has reduced the private sector's reliance on such systems. Thus, reportedly, many large firms expressly consider diversity in their layoff policies, and with significant results: Illinois Bell recently cut 930 management jobs, but the proportion of minority managers rose from 25 to 27%; Baxter cut 20% of its 2000 employees, but the proportion of minority managers increased from 10 to 12%.

The narrow question of "tie-breakers" is thus most likely to arise in the context of a seniority system where layoff decisions are more structured. In the *Piscataway* case, the Justice Department has argued that Title VII does not prohibit the School Board from using race as a tie-breaking consideration in pursuit of a legitimate interest in diversity. In the context of the Federal civil service, OPM regulations are silent: the Justice Department's Office of Legal Counsel believes the Federal statutes and caselaw would, as in *Piscataway*, permit narrowly tailored consideration of race or gender.

More generally, In certain sectors, there is a sense that some job opportunities are limited to "diversity candidates" and that white males are thereby disadvantaged. Second, there are concerns that in a continuing era of corporate reengineering, women and minorities are, due to affirmative action, at less risk of being laid off. On the other hand, as you have noted, affirmative action is sometimes used cynically to justify decisions made for other reasons, legitimate and otherwise. Moreover, whatever the constriction of opportunities felt by nonbeneficiaries, this occurs against a backdrop of continuing underrepresentation of minorities and women in those sectors. (Otherwise, the affirmative action would be illegal.)



COPY

Options. The policy options include:

OPTION 1: AS A POLICY MATTER, WHEN NOT INCONSISTENT WITH A *bona fide* SENIORITY SYSTEM, DIVERSITY MAY BE CONSIDERED IN LAYOFFS, BUT ONLY IN A FLEXIBLE MANNER AND IN LIMITED CIRCUMSTANCES.

Pro: This option is close to the status quo, but does not lend itself to a simple rule. Instead, this approach would call for the common-sense balancing of the institution's general diversity interest and the burden on identifiable majority employees. Situations *are* different. Consideration of race or gender would be permissible only: when necessary for the institution's operation; when a manifest racial or gender imbalance exists; and when less race-intrusive considerations are not effective. This option is consistent with the DOJ position in the *Piscataway* case.

Con: Complex. Does not speak clearly to the anxieties of non-beneficiaries. As a plurality of the Supreme Court said in *Wygant*, race-based layoffs may impose a more substantial burden than race-based hiring and promotion goals, in that "denial of a future employment opportunity is not as intrusive as loss of an existing job." Layoffs *are* different.

OPTION 2: AS A POLICY MATTER, RACE OR GENDER SHOULD NOT BE CONSIDERED IN LAYOFF DECISIONS.

Pro: This option would issue a sharp and clear statement -- layoffs are different -- and would provide some comfort to whites, males, and their dependents, in a time of insecurity. (There would be a corresponding reinforcement of minority and women concerns about their marginality.) In the public employment context, this is likely to have little practical impact because seniority rules already limit the issue to rare tie-breaker-type situations.

Con: This absolute rule goes too far. It will rekindle the "last hired, first fired" resentment of minorities and women. It ignores the pressing diversity interests that may be at stake in particular situations -- especially where diversity is a *bona fide* consideration for organizational effectiveness. This option would send a loud signal to the private sector, chilling some diversity efforts and encouraging affirmative action critics. It would be criticized as a flip-flop from the Administration's litigation position in *Piscataway*.

Decision:

_____ Option 1: As a policy matter, when not inconsistent with a *bona fide* seniority system, diversity may be considered in layoffs, but only in limited circumstances.

_____ Option 2: As a policy matter, race or gender should *not* be considered in layoff decisions.



COPY

VI. Rollout Scenario More Generally

We are developing a coordinated communications and outreach effort. Finalizing the policy options, speech themes, date and venue will help. The goal is to manage expectations and shape the characterization of the speech before it is given, as well as to amplify it to the greatest extent possible afterwards.

The full rollout will involve members of the Cabinet and sub-Cabinet, and the Legislative Affairs, Public Liaison, Communications and Press offices and the White House and key agencies. In addition to the Administration's activities, outside/independent opinion leaders from the civil rights community, academia/education, women's community, economic/corporate and religious worlds will be integrated into the validation efforts.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review (5 pages)	6/19/1995	P5	4
002a. letter	G. Stephanopoulos to President Clinton, re: AA Strategy (1 page)	4/21/1995	P5	5
002b. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Policy Issues (10 pages)	4/20/1995	P5	6
002c. paper	Message with three different policy approaches (8 pages)	n.d.	P5	7

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9162

FOLDER TITLE:

Affirmative Action - 1995 - General [Folder 3] [1]

2008-0308-F

wr866

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

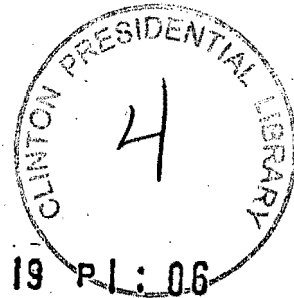
Freedom of Information Act - [5 U.S.C. 552(b)]

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

THE WHITE HOUSE
WASHINGTON

June 19, 1995

95 JUN 19 P 1: 06



COPY

MEMORANDUM FOR THE PRESIDENT

From: George Stephanopoulos and Christopher Edley, Jr.

Re: Affirmative Action: Decision on Post-*Adarand* Steps and Completion of the Review

Your advisers all recommend a broad, thematic speech, as soon as practicable, on equal opportunity, tolerance and community/economic strength. In conjunction with the speech, as a practical matter *Adarand* requires that we launch a Justice Department-led, detailed empirical and legal study to ensure compliance with the new standards. The remaining issues are what to do with the White House Review, and whether to have a commission.

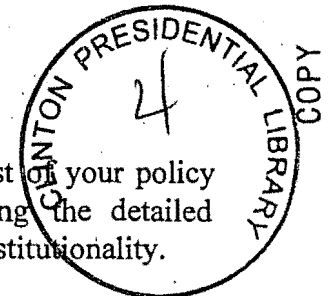
BACKGROUND: THE COURT, THE REVIEW AND THE HILL

The Supreme Court's 5-4 *Adarand* decision applies strict scrutiny to Federal race-conscious programs. The Court's 1989 *Croson* decision, on Richmond's setaside program, established the same heightened standard for state and local measures. All race-conscious government programs must be *narrowly tailored* to serve a *compelling interest*. *Adarand*'s constitutional test, at least with respect to "narrow tailoring," poses many of the same questions we have asked agencies as a matter of policy. But, the Court raised the hurdle in two key respects.

- **Justification:** First, the Court now requires a *compelling interest*, while we previously assumed that you (and the Congress) have broader policy flexibility to judge whether each program's purposes justify race- and gender-conscious decisionmaking. We must now take greater care demonstrating the justification for setasides, targeted graduate fellowships, etc. (Caselaw is unsettled about whether and when nonremedial purposes, such as diversity, meet the compelling interest test outside of the education context.)
- **Factual Predicate:** Second, in making *policy* judgments, you and the Congress were relatively free to accept whatever quantity of evidence and tightness of logic seemed, on balance, reasonably convincing. But now, courts applying strict scrutiny will insist on an unknown but surely much more substantial factual showing. They will probe for the factual predicate establishing prior discrimination (or other compelling interest), and for the facts related to narrow tailoring.

In sum, while the Review has asked many of the same questions, *Adarand* requires far more rigor. In this light, can we state policy conclusions at this time? Your policy judgment *must*

conform with the constitutional requirements; but that in turn means that most of your policy judgments on these programs must be preliminary or provisional, pending the detailed empirical work that is necessary to reach and defend a conclusion about constitutionality.



Meanwhile, we expect some GOP members of Congress to move legislatively as early as this week, but no later than early July. For example, Rep. Istook may offer an "anti-preference" appropriations amendment modeled after the California ballot proposition, and the Senate may face an anti-setaside amendment to the highway bill now on the floor.

House Democrats are divided on how best to counter a GOP anti-preference measure. Most tactical discussions focus on a commission of some kind to conduct a fact-based review of whether current programs satisfy *Adarand*. Under this theory, moderate members would be able to vote to table or otherwise suspend a GOP move pending the commission's report. The Democratic leadership favors this approach, while the Black Caucus is generally opposed to a commission.

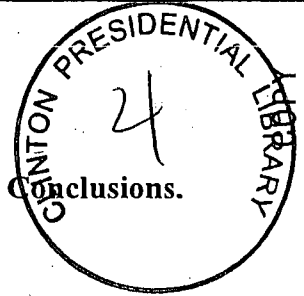
The consensus of your advisers, however, is that a tabling strategy is more likely to succeed in the Senate. There, Democratic leaders are interested in a commission, but may accept an Administration-led process with a date-certain for reporting.

FIRST ISSUE: THE REVIEW AND A DIRECTIVE TO THE ATTORNEY GENERAL

To satisfy strict scrutiny after the 1989 Richmond setaside case, over 80 state and local jurisdictions have conducted contracting "disparity studies" to establish the factual predicate of discrimination and to analyze alternative program designs. In virtually all cases, officials used consultants and commissions to gather and analyze data, and each telephone-book-like report took months to complete. While much of the methodology is settled, the work takes time. Comparable Federal studies will be needed for litigation, and not only for procurement setasides. Such studies will likely be demanded by Congress as well, *and indeed they will be necessary before the Attorney General can confidently advise you concerning the constitutionality of a specific program.*

Your advisers agree that, with the speech, you should issue a Directive instructing the Attorney General to conduct an expanded and more detailed study, as required now by *Adarand*, to address the issues raised preliminarily by the White House Review and by *Adarand*. Working with the relevant agencies, and with consultants as needed, the Justice Department would coordinate preparation of the kind of empirical work likely to be required by federal courts and by the Congress.

There are three options for linking the speech and Directive with the White House Review:



Option 1: Finish the Review Now, With Policy Principles and Preliminary Conclusions.
The Review could be released containing:

- a detailed policy framework, as sketched in your framework speech;
- descriptions of key programs, providing helpful explanatory material;
- for a few programs -- with substantial evidence already available -- preliminary conclusions using your policy test (which includes conformity with *Adarand*); and
- for most programs -- those where evidence is too meager for a confident *constitutional* estimate -- a reservation of judgment pending further analysis in light of *Adarand*.

The materials and preliminary conclusions from the Review would be turned over to the Attorney General's process for further work.

Option 2: Issue Abridged Review, Reserving Judgments on Facts and Policies.
Alternatively, the Review document would be substantially shortened to:

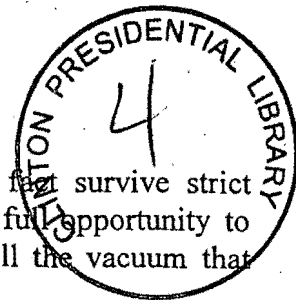
- Eliminate the recitations of positive and negative facts concerning specific programs, and factual conclusions based on those facts.
- Eliminate preliminary policy conclusions about fairness or the need for program reforms, on the theory that such judgments should not be offered in a preliminary way; in light of *Adarand*, judgments should await the results of the Attorney General's work.

The abridged Review document would be an elaboration of the speech's framework, background material on discrimination, plus descriptions of several programs.

Option 3: Issue no Review; Rely on Directive to the Attorney General. Finally, we could announce that in light of the more stringent standard of evidence and documentation now constitutionally required by *Adarand*, the work of the Review has been suspended and turned over to the Attorney General to continue in a manner consistent with what will be required in litigation. The Presidential Directive to the Attorney General would include any needed elaboration of the policy framework. In conjunction with the speech, and as a service to Members of the Congress and journalists, we would repackage sections from the draft Review into a short document summarizing the key programs, the evidence on continuing discrimination, and the law of affirmative action.

Analysis:

Favoring Option 1: Complete the Review. We promised that the review would answer the tough questions you asked, and some observers will equate reserving judgment with "punt." Even if the constitutional test now makes definitive answers impossible, critics will say that surely *something* can be said by now. In particular, disparity studies may establish a strong factual predicate of prior discrimination in contracting, sufficient to justify the current, modest, racially-targeted goals and sheltered competition. Recall that the Justice Department argued



COPY

forcefully to the Supreme Court that the setaside in *Adarand* would in fact survive strict scrutiny; that argument will be joined on remand. Still, this option allows full opportunity to demonstrate leadership by stating your policy judgments, and may help fill the vacuum that would otherwise be filled by hostile legislative initiatives.

Favoring Option 2: Abridged Review, Reserving Judgments: Stripping out the facts and conclusions bearing on "what works and what doesn't" avoids a formal document containing statements that might compromise the government's position in later litigation. More detailed study is now constitutionally required; reserving policy judgments avoids controversial pronouncements that may, in the end, not be constitutionally compelled. (On the other hand, there may be some policy changes you would embrace regardless of any "disparity study," and whether or not constitutionally compelled.)

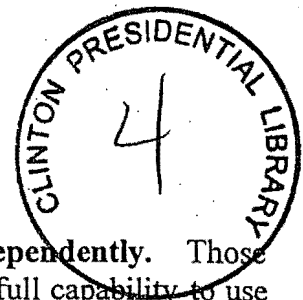
Favoring Option 3: Defer Decisions: Preliminary or tentative decisions about particular programs, without the kind of careful empirical scrutiny required under the new constitutional standard, will only confuse the debate and invite second-guessing by members of Congress eager to score political points by rushing to action. Moreover, a policy choice to abandon or reform programs without being able to indicate whether such changes are constitutionally required will draw substantial fire. If you speak before the new homework assignment is complete, all you can do is either surmise that certain programs are acceptable (when the full facts may eventually show otherwise) or volunteer that you want to reform them even though a full development of the facts might ultimately prove the changes constitutionally unnecessary.

SECOND ISSUE: CHARTER OF THE COMMISSION

A commission seems necessary. The question is how broad to make its mandate. Your advisers are agreed that if there is to be a commission its membership should not require Senate confirmation; its fact-finding would supplement rather than supplant the work to be done within the Administration under the overall leadership of the Attorney General; the Commission's charter would in no way compromise the authority of the President and the Attorney General to set policy for the Executive branch and define the position of the United States in litigation. We also believe that, given the views of Democratic leaders in Congress, a commission of some sort is the best option for holding marginal Democrats off of a GOP amendment. Even still, a tabling strategy is more likely to succeed in the Senate than in the House.

Option 1: Narrow mandate -- review and supplement agency fact-finding. This approach poses the least risk to Presidential and agency prerogatives. Agencies, led by Justice, will do most of the work. The Commission would comment on methodology, act generally as interlocutor, review agency findings of fact, and conduct hearings to supplement the "record." Although a commission with the inevitable independence will stray into policy territory, starting with a narrow mandate will help. Moreover, it is the fact-finding role that is of most

practical value in completing the empirical work required after *Adarand*.



COPY

Option 2: Broader mandate to develop evidence and findings independently. Those skeptical about agency objectivity may argue that the commission needs a full capability to use consultants and other methods to develop evidence on its own.

Option 3: Broadest mandate -- facts and general policy debate. This approach, analogous to the consensus-building model you employed as Governor to tackle education reform, would create the greatest threat to traditional Executive prerogatives, but would also create a vehicle to sustain a national conversation. Civil rights activists now believe that such a broad discussion will be perceived as a poor and unpredictable substitute for Presidential leadership on the issue. Moreover, protracted policy debate by a commission would interfere with effective and timely completion of the factual inquiry needed to defend programs in litigation or on the Hill.

DECISIONS

Review: _____ Finish now, offering policy views; issue directive for DOJ-led process

_____ Issue abridged review, reserve judgment; issue directive

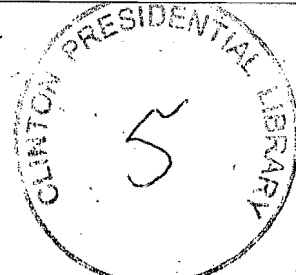
_____ No review; issue directive

Commission: _____ Narrow fact-supplementing mandate

_____ Broader fact-finding mandate

_____ Broadest facts-and-policy mandate

Page 11A



10723 COPY

Mr. President:

Here is the options memo on the major choices in affirmative action. To put this in context, this memo assumes that we are not making any changes in the basic structures of affirmative action -- that we would affirm the basic principles where it works best: in the military, in college admissions and in employment (E.O. 11246). At the same time we would strongly reassert that when we do affirmative action we should never resort to quotas, that we should never give preferences to unqualified people, and that reverse discrimination is wrong.

We also assume that you want to maintain minority scholarship programs. Even though they may look like quotas, they can be justified because they "expand the pool of qualified applicants." We would also say that these scholarships should not come at the expense of financial aid for other disadvantaged students.

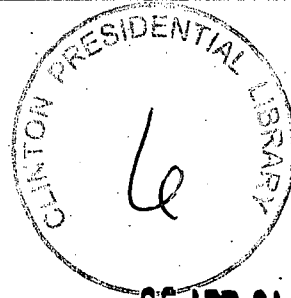
Two tough decisions require most of your attention:

- 1.) Hiring/Firing -- You know the arguments, and there is obvious political benefit in drawing a bright line here. On the other hand, drawing that line would beg the question: If you believe firing is different, why did you reverse course in the Piscataway case? Also the civil rights community will surely protest this bright line.
- 2.) Set-Asides -- Set-asides are the only remaining program for you to eliminate. You could call for eliminating set-asides based solely on race on the grounds that they are, in effect, quotas. Moving toward economic disadvantage could be combined with program reforms, expanding the overall set-aside, and developing empowerment zone-type initiatives. Still, we would expect significant protest from the Black Caucus, minority businesses and other civil rights groups. On the other hand, if you fail to move away from set-asides, you will face criticism for buckling to your base and failing to eliminate a single program after going through a top-to-bottom review. Keeping set-asides also conflicts with your anti-quota principles, despite the fact that these programs have been effective.

Attached is the policy memo along with a message memo prepared by Gene which fleshes out the communications and political arguments in greater detail. A much smaller group than normal should meet after you review these to finalize decisions. Let me know what else you need.

Gr

THE WHITE HOUSE
WASHINGTON



COPY

95 APR 21 P 1: 58

April 20, 1995

MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

From: George ^(GS) Stephanopoulos, Christopher Edley, Jr. & Peter Yu ^{CHW}

Re: Affirmative Action: Policy Issues ^{my}

This memorandum presents options regarding federal affirmative action policy. Part I outlines options in four areas: education, employment, procurement, and broadcast licenses. Part II offers three alternative, broader perspectives that may be useful in your deliberations. A subsequent memorandum will discuss the message, communications, and political dimensions of these policy choices.

I. AFFIRMATIVE ACTION IN
EDUCATION, EMPLOYMENT, AND PROCUREMENT

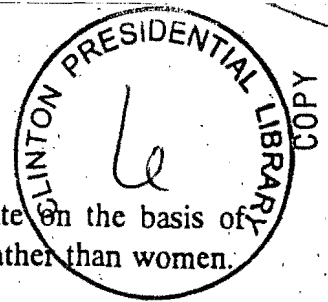
A. Education: Race- or Gender-Specific Scholarships

Background. The central issue in the area of education concerns scholarships for which race or gender is a condition of eligibility. This issue has two dimensions: (i) scholarships administered by universities receiving federal assistance and (ii) federal scholarship programs.

With regard to (i), the current Administration policy for enforcement of Title VI, announced by Secretary Riley in February 1994, permits the use of race as a condition of eligibility for financial aid in order (a) to remedy past discrimination or (b) to promote diversity, provided the measure is narrowly tailored and does not unduly restrict access to financial aid for nonminority students. A measure is "narrowly tailored" if (1) race-neutral means would have been ineffective; (2) a less extensive or intrusive use of race would have been ineffective; (3) the measure is of limited extent and duration, and is applied in a flexible manner; (4) the institution periodically reviews the continuing need for the measure; and (5) the effect on nonbeneficiaries is sufficiently small and diffuse so as not to unduly burden their opportunity to receive financial aid. These restrictions apply to university-administered aid, whether publicly or privately funded. Approximately 3.3% of all undergraduate financial aid, 4.3% of all graduate financial aid, and 12% of all professional-school financial aid is administered through such scholarships.

Current policy with regard to gender-specific scholarships provides that institutions may not discriminate on the basis of gender, but may administer privately-funded gender-specific

scholarships if the overall effect of such scholarships does not discriminate on the basis of gender. The majority of gender-specific scholarships are limited to men, rather than women.



The federal government also directly administers a number of race- or gender-specific scholarship programs. All of these are designed to increase diversity in professions or specialties in which racial or gender groups have been significantly underrepresented, either because such inclusiveness is deemed critical to the continued strength of that profession, or because inclusion will lead to greater attention for neglected communities and problems. Supporters of these programs emphasize that these scholarships are necessary to attract women and minorities to these areas. Examples include: NSF's Minority Graduate Fellowship Program designed to increase the number of minority scientist and engineers and NIH's Minority Clinical Associate Physician Program designed to increase the number of minority physicians.

Options. The policy options include:

Option 1: Maintain current policy, which requires "exhaustion" of alternatives to diversity-based use of race- or gender-specific scholarships.

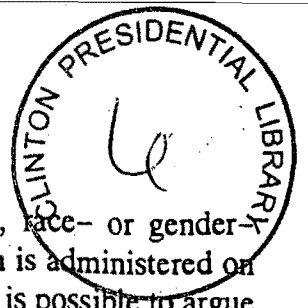
Option 2: "Tweak" current policy to require added analysis of alternatives.

Option 3: Bar use of such scholarships except as necessary to remedy past discrimination; otherwise, dilute exclusivity through broader eligibility.

Analysis. Education policies regarding admissions and scholarships are central to public concerns about affirmative action. Some view race- or gender-specific scholarships as a form of "set-aside" and thus reminiscent of quota-driven admissions policies (such as the dual-admissions system struck down in *Bakke*). On the other hand, education and training are on the "opportunity" end of the opportunity-to-results spectrum, and the current policy requires that any race- or gender-specific programs be narrowly tailored.

Option 3, which focuses on race-specific scholarships, was proposed by the Bush Administration in 1991. This approach would send a clear message that no applicant should be excluded from a scholarship program on the basis of race or gender. Arguably, this would be a curious rule, as it would leave intact numerous scholarships limited by religion, surname, geography, and other, more arbitrary criteria.

Option 2 would clarify the seriousness of the requirement that an institution wishing to use such scholarships (outside of a remedial context) first analyze race- or gender-neutral approaches and conclude they would not be effective substitutes for more exclusive scholarships. The policy guidance would be amended to require the institution to be prepared, if challenged, to present the evidence and analysis upon which its conclusion was based. (This is the formulation used elsewhere in the guidelines, and by the courts, in explaining that when an institution may invoke its history of discrimination as a remedial justification for race-specific scholarships.) On the one hand, this option amounts to a declaration that race or gender should only be used as a condition of eligibility when truly necessary. On the other hand, its minimal practical effect might not justify the anxiety it would likely generate among minority and women's groups.



COPY

Option 1 would maintain current policy. As noted in our discussions, race- or gender-specific scholarships are small slices of a much larger pie -- much of which is administered on the basis of need. As there are so many different avenues for financial aid, it is possible to argue that race- or gender-specific scholarships do not meaningfully limit the opportunity of any student, or at least no more so than does a scholarship limited to offspring of the Knights of Columbus or the Daughters of the American Revolution.

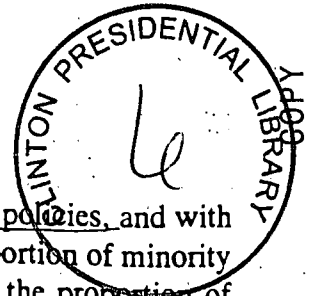
Indeed, current antidiscrimination enforcement guidance from the Department of Education, promulgated during the Reagan Administration pursuant to Title IX, makes the test for gender-specific scholarships whether the financial aid practices of the institution, *taken as a whole*, provide equal opportunity. As a matter of constitutional doctrine, race-based distinctions are subject to stricter scrutiny than gender-based distinctions. But this distinction seems untenable as a general matter of policy or politics. Hence, any toughening of prohibitions on race-based aid should probably be similarly applied to gender-based aid.

Finally, we should note the relationship between these options and the familiar hypothetical: a college admissions or scholarship policy that favors the African-American son of a successful neurosurgeon, but not the son of a steelworker. Some argue that affirmative action should be only for economically disadvantaged minorities, because affluent minorities are evidently not suffering from a lack of opportunity, relative to many less economically advantaged whites. The rebuttal has three central points. First, there should be affirmative efforts to provide opportunity for economically disadvantaged individuals, both white and non-white; such efforts need not come at the expense of affirmative action when it is legitimately directed at minorities on the basis of concerns apart from economic disadvantage. Second, apart from economic disadvantage, but still within the realm of "private fairness," it is often observed that comparatively advantaged minorities nevertheless continue to face social and other obstacles solely because of prejudice and discrimination, and that these disadvantages, while different from badges of poverty, are a fair basis for attention. Third, in the realm of institutional and societal benefit, a college might properly conclude that the institution will benefit from inclusion of the neurosurgeon's son -- even though affluent -- just as they might conclude that the diversity benefit of including a bassoonist is weighty not withstanding the musician's affluence. In America today, it remains likely that the neurosurgeon's experiences, perspective, and aspirations will reflect some aspect of the distinctive reality facing blacks. And the college may choose to value that.

B. Employment: Race or Gender in Layoff Decisions

Background. The central issue in this area concerns race or gender as a consideration in layoffs. Under current law, two propositions are clear. First, layoffs cannot be used as a means to implement an affirmative action policy by "making room" for new, diverse employees. Second, race or gender cannot trump a bona fide seniority system.

The reach of this second principle is limited. While seniority systems are common in the public sector, the decline of unionism has reduced the private sector's reliance on such systems.



✓ Thus, reportedly, many large firms expressly consider diversity in their layoff policies, and with significant results: Illinois Bell cut recently 930 management jobs, but the proportion of minority managers rose from 25 to 27%; Baxter cut 20% of its 2000 employees, but the proportion of minority managers increased from 10 to 12%.

The narrow question of "tie-breakers" is thus most likely to arise in the context of a seniority system where layoff decisions are more structured. In the *Piscataway* case, the Justice Department has argued that Title VII does not prohibit the School Board from using race as a tie-breaking consideration in pursuit of a legitimate interest in diversity. In the context of the federal civil service, the OPM regulations are silent: the Department of Justice (Office of Legal Counsel) believes the statutes and caselaw would, as in *Piscataway*, permit narrowly tailored consideration of race or gender.

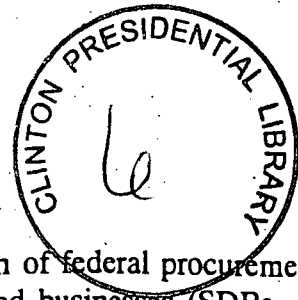
Options. The policy options include:

- Option 1:** As a policy matter, when not inconsistent with a bona fide seniority system, diversity may be considered in layoffs, but only in limited circumstances.
- Option 2:** As a policy matter, race or gender should not be considered in layoff decisions.

Analysis. Concerns about employment are two-fold. In certain sectors, there is a sense that some job opportunities are limited to "diversity candidates" and thus that white males are excluded. Second, there are concerns that in a continuing era of corporate reengineering, women and minorities are, due to affirmative action, at less risk of being laid off. (As you have noted, affirmative action is sometimes used cynically to justify decisions made for other reasons, legitimate and otherwise.)

Option 2 would issue a sharp and clear statement and would provide some comfort to whites, males, and their dependents, in a time of insecurity. (There would be a corresponding reinforcement of minority and women concerns about their marginality.) In the public employment context, this is likely to have little policy impact because of seniority rules, and thus will affect only tie-breaker-type situations. However, this option would send a loud signal to the private sector and could have an effect on private practices.

Option 1 is closer to the status quo, but does not lend itself to a simple rule. Instead, this approach would call for the common-sense balancing of the institution's general diversity interest and the burden on identifiable majority employees. Consideration of race or gender would be permissible only: when necessary for the institution's operation; when a manifest racial or gender imbalance exists; and when less race-intrusive considerations are not effective. If you select this option, announcing a clarification of federal layoff policy could underscore the very high hurdle you would impose, but might also serve to focus resentments around the entire issue. In any case, however, we are likely to face continuing questions regarding the law and policy surrounding the *Piscataway* situation.



C. Procurement: Preferences & Set-asides

Background. Federal law establishes several goals for the distribution of federal procurement opportunities: 20% for small businesses; 5% for small disadvantaged businesses (SDBs -- virtually all of which are minority-owned¹); and 5% for women-owned businesses. There is a web of programs designed to reach these goals; some are government-wide, others are agency-specific. These efforts use several tools:

- **Sole source procurements:** Under SBA's § 8(a) program, small disadvantaged businesses (SDBs) can secure smaller sole-source contracts (usually less than \$3 million).
- **Sheltered competition:** Under DOD's "rule of two," a contract is set aside for SDBs if the officer believes two or more SDBs are likely to make competitive bids on the contract. (If this set-aside is not triggered, there is a similar "rule of two" for all small businesses. Failing this, there is open competition.)
- **Bid preferences:** In open competitions, DOD awards a 10% bid price preference to SDBs; last year's procurement reforms authorized government-wide use of this preference. The RTC program uses a 10% "bonus" preference on contract price and a 15% point bonus on "technical merit," provided the SDB is within the qualified range; the preferences are also provided to joint ventures where the SDB has 40% or more of the transaction.
- **Subcontracting incentives:** DOT provides an incentive payment to prime contractors who (voluntarily) subcontract with SDBs. (The *Adarand* issue.)

These efforts have been successful in expanding procurement opportunities for women- and minority-owned firms. Between 1982 and 1991, while the dollar volume of all contracts increased by 24%, contracts awarded to women-owned firms tripled and contracts awarded to minority-owned firms doubled. Of late, these increases have been accompanied by actual decreases for non-disadvantaged small firms. For example, while DOD's contracting with SDB's more than doubled, its contracting with other small businesses fell by nearly 20%. Notwithstanding these gains, 97 percent of contracting opportunities continue to be awarded to non-SDBs.

Some aspects of these efforts have been problematic. Rates of successful graduation from the 8(a) program remain low and the possibility of abusive practices remains, although recent statutory and administrative efforts promise some improvements. Outside of the limited 8(a) program, however, there are no graduation requirements apart from what happens naturally if a business is no longer "small" or an entrepreneur accumulates substantial wealth. In addition, these programs have in some instances had a disparate impact on particular regions and industries -- such as smaller construction projects and certain transportation sub-industries. Finally, while

¹ In the Department of Transportation's program *only*, the SDB definition includes women.

the 8(a) program permits nonminority firms to participate upon a showing that a firm's owners are "socially and economically disadvantaged," in practice only about 1.6% of all 8(a) firms are white-owned (and those mostly disabled), because the statute links "social disadvantage" to membership in a group subject to discrimination.

Options. The policy options are:

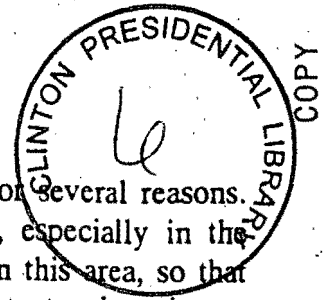
Option 1: Eliminate misuses; expand pre-bid assistance. In particular: establish tighter asset-related eligibility rules to prevent the "disadvantaged millionaire" phenomenon; limit the concentration of set-asides in a single region or industry; and set standards (by business sector and by region) to determine when preferences are no longer necessary. With regard to pre-bid assistance: invest in *new, vigorous* outreach, technical assistance, and surety bonding programs to help level the contracting playing field; continue efforts to "mainstream" minority and women-owned businesses in SBA's programs.

Option 2: Broaden eligibility, but retain race- and gender-based preferences; emphasize the transitional character of program. In addition to the measures in option 1, take the following steps:

- *Social or Economic Disadvantage:* Eliminate the requirement that owners be "socially disadvantaged," thus opening up eligibility to white owners who demonstrate "economic disadvantage." Maintain a less stringent economic disadvantage test for minorities and (*for the first time outside DOT*) for women; this separate standard would preserve some differential benefit for minorities and women, but without excluding disadvantaged whites from the program altogether. To minimize any harm to current participants, increase the goal for total SDB procurement from 5% to 10%.
- *Strict transition requirements:* Require graduation from the program for all SDBs after, say, four years or four contract awards. This limits the moral cost of maintaining preferential treatment for women and minorities.

Option 3: Convert to race-neutral programs. Phase out race- and gender-based eligibility, relying instead on race- and gender-neutral criteria of economic disadvantage only.

Analysis. While procurement policies do not have wide visibility, they are arguably more problematic than either education or employment policies for two reasons. First, the policies rely heavily on racially exclusive set-asides: the practical effect of a set-aside is to take a contract and hang out a shingle saying "whites need not apply." Second, some view procurement set-asides as more problematic than, say, minority-specific scholarships, believing that providing profitable business opportunities seems more directed toward equal results than towards equal opportunity. These observers emphasize that "education is different."



At the same time, preferences may be more necessary in procurement for several reasons. First, anti-discrimination laws are more difficult to enforce in this area, especially in the subcontracting realm. Second, "old-boy" networks are arguably stronger in this area, so that informal exclusionary practices beyond the reach of law enforcement can be potent and persistent. And finally, procurement decisions often turn on a single factor -- price -- and thus the multi-factor mechanisms used in education and employment are less available in this area.

Option 3 would issue a clear statement that federal contracts should not be awarded on the basis of race or gender. Current preference programs would be converted to focus on economic disadvantage (albeit with a tighter asset test than current policy). This option represents a judgment that whatever the group-based discrimination or disadvantages faced by minority or women entrepreneurs, no special policy measures are appropriate beyond "pool-development strategies" such as aggressive outreach and technical assistance.

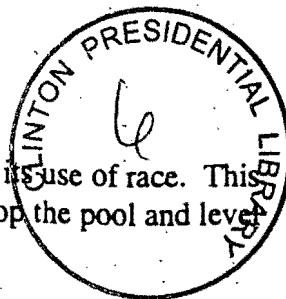
As noted above, one can support race-specific scholarships but reject race-specific contracting set-asides by distinguishing procurement as "more related to results than to opportunity." This approach is far more restrictive than Supreme Court precedents, which permit set-asides based on legislative findings of discrimination or lingering effects.²

Option 2 would retain a minority- and gender-specific preference program, but reform it in three critical respects. *First*, it would ameliorate several of the most problematic aspects of the current programs. Tightening the asset test emphasizes that the goal is to create opportunity, not endow millionaires. Limiting the concentration of preferences reduces the unfairness to white bidders in a particular region or business sector. Capping the number of contracts awarded through sheltered competition ensures that opportunities are spread over more SDBs.

Second, the program would emphasize creating *opportunity* for entrepreneurship, rather than ensuring entrepreneurial success. Thus, in addition to pool-development measures, this approach would require prompt graduation, emphasizing that preferences help "break the ice," but that entrepreneurs should quickly be ready to compete with small businesses generally. Limiting the "bites at the apple" serves to emphasize that the program is an entryway, not an entitlement. It also underscores that benefits from the program should not be unduly concentrated.

Third, the racial exclusivity of current preferences would be reduced by opening eligibility to non-minority firms based on economic disadvantage. Operationally, this is likely to have only a modest effect on minority contracting. Prior to the codification of its minority entrepreneurship focus in 1978, the 8(a) program used this "minority *or* need" approach; at that time, only about 4% of all 8(a) firms were white-owned, compared with 1.6% today. Increasing the SDB goal to 10% should help address concerns about diluting benefits to minority-owned firms.

² The Court has required a somewhat more rigorous demonstration by state and local governments than by the Congress. The *Adarand* ruling, expected before July, presents an opportunity for the Court to announce more restrictive principles.



COPY

Option 1 would maintain the basic structure of the program -- including its use of race. This option would emphasize eliminating misuses and expanding efforts to develop the pool and level the playing field.

Distressed Areas: In addition to these policy options, we have begun to develop a complementary option: procurement preferences that focus less directly on minority capitalism and more on job-creation for disadvantaged persons and distressed communities. Some of these alternatives would be place-based and others employee-based; we are currently examining issues of administrability. Example of such initiatives include:

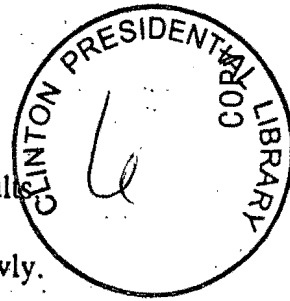
- Provide set-asides or other preferences for firms whose workforce (on the contract) would be drawn more than X% from *chronically distressed* areas, using measures based on Census and BLS data. (There are two especially well-regarded alternative indices of distress in the social science literature.) *Or*
- Provide preferences to firms whose workforce would be drawn more than X% from targeted population groups, such as recent AFDC or food stamp recipients. *Or*
- Provide preferences as above, but based also on the employment of underrepresented groups. *Or*
- Employ any of these approaches, but scale the magnitude or duration of the preference according to the firm's workforce "score."

Bearing in mind that such an initiative speaks to somewhat separable policy and political objectives, you may decide that such an *empowerment contracting* scheme should be a (i) substitute for, (ii) complement to, or (iii) condition of the reformed entrepreneurship preferences.

FCC Auctions: Your decision on procurement set-asides will also govern the Administration's position regarding the FCC's auction of "personal communication systems" (PCS) licenses. Phases of the PCS auction have been stayed pending resolution of a constitutional challenge to bid preferences afforded minority- and women-owned firms by Commission regulations. Because PCS licenses are for cellular and other wireless communication rather than for broadcasting, a programming-diversity rationale will not justify group-based preferences. Instead, the motivation is to create inclusive entrepreneurial opportunity, where there otherwise would be none, in a critical emerging industry. Preferences in the PCS auction should be handled like procurement preferences.

II. PUTTING THE PIECES TOGETHER: BROADER PERSPECTIVES

Your policy choices in this area may be most easily defended if they reflect a coherent theory or approach. This Part outlines three such approaches, and describes the policy choices that seem most easily justified within that approach. (See Exhibit 1.) Each is consistent with some basic inclinations you expressed in our various "vision" discussions, including:



- Emphasize antidiscrimination and *opportunity*, rather than guaranteeing results.
- Stress the *remedial* justification, but also embrace the goal of *inclusion*.
- Respect the interests of *bystanders*, by crafting policies carefully and narrowly.

A. The "Calibrated" Approach

This approach emphasizes the difference between equal opportunity and equal results in two dimensions. In terms of the policy tools one uses, outreach and training are less result-driven and thus less problematic than set-asides or quotas. Similarly, in terms of the context, a specific affirmative action tool is less problematic in education (which expands opportunity) than similar efforts in procurement (which more directly affects the distribution of wealth).

This approach supports a broader range of affirmative action policies in education than in procurement, as illustrated by the diagonal orientation of the "border area" in Attachment 1. Thus, certain kinds of set-asides are acceptable for scholarships, but should be eliminated or sharply focused in procurement. With regard to the policy choices outlined above, this approach would support:

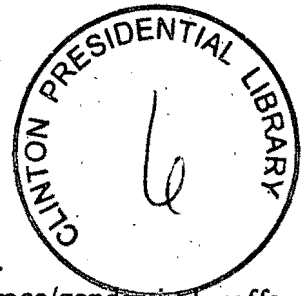
Education:	Option 1 -- Maintain current policy.
Employment:	Option 1 -- Permit race or gender to be considered in layoff decisions.
Procurement:	Option 2 or 3 -- Reform and sharply narrow procurement preferences, or phase them out.

B. The "Least Intrusive Alternative" Approach

A second approach expresses more overt solicitude for bystanders by stressing that affirmative action must be narrowly tailored to minimize exclusivity and the use of race- or gender-based decisionmaking. Thus, result-driven quotas are always inappropriate (except in rare court-ordered remedies), and set-asides may only be used (i) when they are either broadly remedial or (ii) when less intrusive alternatives are not *effective*. In essence, this approach would apply the Title VI scholarship policy to all three sectors.

Of course, "effectiveness" will be a matter of degree, and there is an implied balancing of the benefits of inclusion with the costs of exclusion. Prior discrimination is relevant, as is the opportunity-results distinction. So, one might weigh those costs and benefits somewhat differently in different contexts: it matters if an institution or industry has a history of discrimination, in which case the narrowness need not be too scientific; and it matters if the context is procurement, where the distribution of largesse ought to be narrowly tailored indeed.

This approach leads to support for limited use of race-specific programs. In particular (as



illustrated in Attachment 2):

Education: Option 1 or 2 -- Maintain or tighten current policy.
Employment: Indeterminate -- Either option on consideration of race/gender in layoffs.
Procurement: Option 2 -- Reform and sharply narrow preferences.

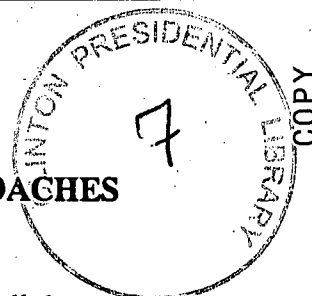
C. The "Anti-Exclusion" Approach

A third approach emphasizes the moral cost of maintaining programs that exclude persons on the basis of race or gender -- even in the name of diversity. This approach entails opposition to the rule-of-two SDB set-aside and to race- or gender-specific scholarships; these are effectively indistinguishable from quotas. Instead, such programs would have to be revamped to rely on multifactor considerations in which race is but one factor, or on race- and gender-neutral approaches.

This approach leads one to support elimination of set-asides in all areas. In particular (as illustrated in Attachment 3):

Education: Option 3 -- Eliminate race- or gender-specific scholarships.
Employment: Option 2 -- Oppose consideration of race or gender in layoff decisions.
Procurement: Option 2 or 3 -- Reform and sharply narrow procurement preferences, or phase them out.

THE MESSAGE WITH THREE DIFFERENT POLICY APPROACHES



GENERIC MESSAGES: Regardless of which of the three approaches we call for, we will want to stress the positive theme of opportunity, anti-discrimination and inclusion while making clear that we are anti-quota (results), against rewarding unqualified people, and against unfair burdens on innocent third parties. Yet, each of the different approaches tilts at a somewhat different angle, with somewhat different strengths and different vulnerabilities. The following seeks to play out those differences.

I. CALIBRATED OPPORTUNITY THEME:

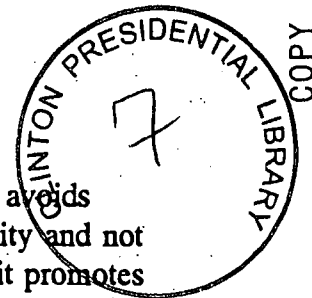
ANALYSIS: The main paradigm that this approach sets up is opportunity versus results. Indeed it sets up a framework where we can have a hard line for opportunity and a hard offensive against results. Because we still allow "minority scholarships" the attacking results may be a better emphasis that attacking set-asides since we will have an easier time defending minority scholarship as pro-opportunity than we will be able to argue that it is not a set-aside. We also could make a decision to go hard on the anti-quota, anti-set-aside argument and simply insist that scholarships must be viewed from a "school-wide" approach and are not set-asides.

[We should recognize that despite the message of opportunity versus results, the message that comes out may be as simple as Clinton came out for affirmative action in education and employment and against it in contracting.]

STRENGTH OF MESSAGE: The strength of this message is four-fold: One, we go hard at a strong American value, opportunity, and use education as our tool -- something most Americans understand and agree with. Two, we are clearly throwing out set-asides, therefore, we have a clear message that we are not just defending the status quo. Three, more minorities are likely to be concerned with education and employment generally than contracting specifically. Four, we can play into the "empowering people to compete" message. We are against set-asides because they determine the result of a competition or limit it, while education and other help in contracting is about giving people the ability to compete, not determining the outcome.

MESSAGE LANGUAGE:

The vision of America is a vision of providing equal opportunity to all Americans so that each Americans has the chance to succeed -- or fail -- but do so on the basis of their ability. Government can play a role in removing barriers that allow opportunity, but we go too far when we seek to guarantee results as opposed to increase opportunity. We want to give every American the tools to compete -- but government should not be determining the outcomes of the marketplace.



These same principles must be applied to affirmative action.

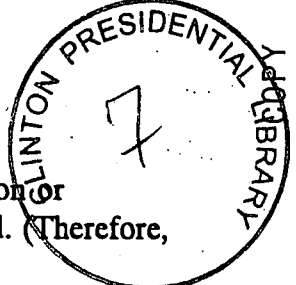
When affirmative action is flexible, when it focuses on merit, when it avoids unfairness to innocent non-minorities, and when it promotes opportunity and not results, we should support it. When affirmative action, is rigid, when it promotes unqualified people, and when it focuses on results as opposed to opportunity, we should be willing to strike it down.

The best way to stress opportunity is to oppose quotas, but promote affirmative steps in education, because education has always been the ultimate means in our society in which we say to people, we will give you the means to compete -- not a guarantee of how you will do. That is why when we can do so fairly, flexibly and without unfairness to innocent parties, we support reasonable consideration of race in education where we can increase the pool of people with the opportunity to compete.

Yet, affirmative action in set-asides has strayed from that principle. Rather than offering firms help in competing -- like we offer young people education to help them compete for jobs -- too many affirmative action program for contracting seek to ensure results through set-asides, or even some contracts where we essentially say, no whites should even apply. We must recognize here that while the intention is right, the means are wrong. We can still help build opportunity without guaranteeing results through efforts to provide minority contractors assistance, technical help, and even one-time advantages to ensure that new contractors have a chance to get on their feet. •

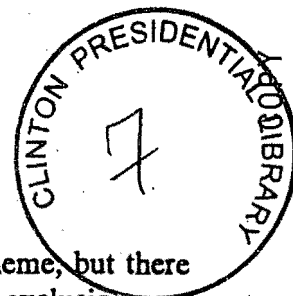
WEAKNESSES AND POTENTIAL POINTS OF ATTACK:

- This is a hypocritical position because if the Administration is really opposed to quotas and exclusion, how to they justify minority scholarships that say that only blacks need apply -- and that even the poorest white, who has overcome the most disadvantages, is told that they can not even compete with the son of a black neurosurgeon, because the scholarship says only blacks need apply.
- Try telling a struggling working family who has been denied the opportunity to compete with a scholarship that the tens of thousands of dollars they were excluded from competing for is not a real result, it is only an opportunity.
- Stressing education in a results vs. opportunity theme does not necessarily provide the best context to defend affirmative action in employment which may be seen as falling more on the "result" side of the equation.
- Minority contractors will suggest that minority capitalism is the best way to give excluded minorities opportunity.

- 
- This will not be perceived as addressing affirmative action in education or employment the two areas where whites are most likely to be concerned. (Therefore, we may wish to consider an employment)

REPLY TO POTENTIAL ATTACK: When we are attacked on scholarship, we should not only stress opportunity, but turn to the notion that we are not hurting innocent non-minorities because privately funded scholarships are about making special efforts to increase the pool of people with opportunity -- not about taking something away from somebody. We have always allowed special scholarships for all sorts of groups -- men only, women only, specific religions -- and it would be absurd to say that we only can't do special scholarships when we are trying to include outcast groups. The key is to ensure that every school offers fair opportunity to all applicants from a school-wide perspective.

POLITICAL: We will have a strong middle ground strategy. We will have strongly defended affirmative action in the areas most important to minority opportunity, yet the throwing out of set-asides will be major, controversial step that will show that the President was truly re-thinking this issue, and even willing to throw out a major affirmative action area that has strong support within the President's base, and even has its origins through Republican Administrations. The downsides risk is that the benefit with the majority of America who has doubts on affirmative action is unclear, yet the fact that this will draw huge criticism from minority supporters is far more certain. It should be noted, however, that the greater the perceived heat taken for throwing out set-asides the greater this plan will be seen as truly a strong middle ground effort.



II. ANTI-EXCLUSION APPROACH:

ANALYSIS: This strategy takes a similar line as the calibrated opportunity theme, but there would be a harder edge on being anti-quota, anti-set aside, with a strong anti-exclusionary message that we should never allow in our society the equivalent of signs to be put up that someone because of their race need not apply. While we would take a strong pro-opportunity, pro-merit and well-qualified affirmative action, this approach would allow us to take a harder anti-quota edge.

STRENGTH OF MESSAGE: Strong opposition to quotas is a strong and fundamental message. Democrats, however, while always saying they are against quotas are probably not taken seriously because they are not seen as ever opposing any specific affirmative action program. This anti-quota, anti-exclusion message however would have real power under this context, because it would be matched with real tangible and controversial stands: throwing out minority-only scholarships (education), set-asides (contracting), and minority only training remedial programs.

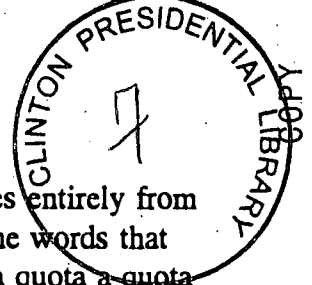
Because this would be extremely controversial with Democratic groups, the President would more likely to be seen as having taken a strong middle ground position, while still allowing most types of affirmative action -- although in a more flexible form. For example, in the calibrated opportunity approach, most affirmative action for contracting would be thrown out, while under the anti-exclusionary approach, affirmative action in contracting would simply have to be more flexible and allow some room for non-minorities. Race could still be considered to support minority scholarships, but would simply have to allow some alteration so that the scholarships were not only for minorities -- even if predominantly so. Thus, the strength of the issue would be that it could give a strong middle ground message while still preserving most affirmative action efforts -- albeit under a more flexible form.

MESSAGE LANGUAGE:

The vision of America is a vision of providing equal opportunity to all Americans so that each Americans has the chance to succeed -- or fail -- but do so on the basis of their ability. Government can play a role in removing barriers that allow opportunity, but we must be vigilant in opposing quotas in all forms -- no matter how well intentioned.

While some oppose all forms of affirmative action and others support nearly any advance in this area, most American do not oppose affirmative action when it is flexible, focuses on merit, avoids unfairness to innocent non-minorities. What Americans have no tolerance for is quotas and exclusionary set-asides, that put a rigid emphasis on numbers ahead of concern with merit and fairness, while also saying to many Americans -- there is no need to apply because of your race.

Both sides of the political debate have failed the American public for too long in this areas. One side, we have politicians who support any affirmative action -- even in



extreme cases where decades of discrimination have excluded minorities entirely from important jobs and positions. On the other side are those who mouth the words that they are opposed to quotas, but are never willing to stand up and call a quota a quota and be willing to throw it out. We need to move beyond these two extremes. My policy protects affirmative action that is flexible and fair, but there are several areas where we are using quotas by sometimes another name, and it is time we ask the people who represent the public to go back to the drawing board and find another way.

That is why we must be willing to look at every area of affirmative action and be protect what is good and weed-out what functions as a quota or a race-only preference. In education, race is supposed to be one -- and only one factor that can be taken into account among reasonably qualified people to promote opportunity and ensure that our schools include all Americans. Yet, when we take some scholarships and put a sign on them that says one-race only, we are using quotas and we must be willing to ask those who have instituted them to go back to the drawing board. When set-asides shelter some contracts and say only minorities can apply, that is wrong and we must send people back to the drawing board to find ways to include all people the ability to compete. And when remedial programs designed to help African Americans become so exclusive that they will not even allow a deserving Hispanic a chance to apply, because there is a sign that says one race only need apply, that is wrong and we should tell that such programs must change.

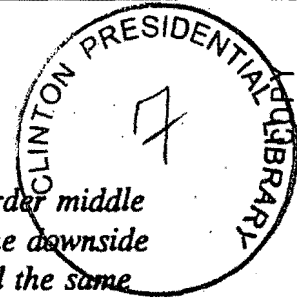
POTENTIAL WEAKNESS:

- Clinton sounds a good game, but he would still allow racial preferences in every walk of life. President Clinton's message is that as long as something is not a technical quota, you can give racial preferences at will.
- Clinton took a major step backwards -- indeed, we would be better off with the end of the Bush Administration when it comes to minority scholarships. These are the most unobjectionable type of affirmative action that hardly hurts anyone. Indeed, now every white ethnic group in the nation can have special scholarships -- except the most persecuted group in our history. What sense does that make.

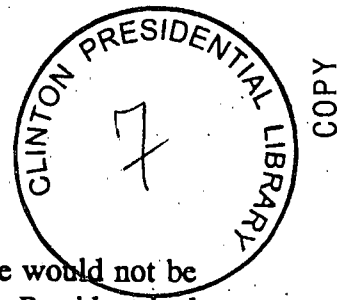
REPLY TO POTENTIAL WEAKNESS:

The President took a principled case for fair and flexible affirmative action and against quotas. He knew this would lead to strong attacks from those who feel strongly on both sides, but he has taken a principled position that appeals to the fairness of the American people.

The President is not taking step backwards, he realizes that if we want to go forward we have to be honest about the strengths and weaknesses of all of the programs.



POLITICAL ANALYSIS: *A key issue is whether the benefits of having a harder middle ground position and somewhat more consistent anti-quota position is worth the downside costs on the other side of throwing out minority scholarships. How much could the same message be made while just distinguishing minority scholarships.*



III. LEAST INTRUSIVE:

ANALYSIS: This proposal would be seen as the most status quo since there would not be any single area of affirmative action that a newspaper headline could say the President had rejected. Thus, it is mostly likely to be the most popular among Democratic base groups and most unlikely to convince most Americans that the Administration had really take a middle ground approach. The key here would be to stress not areas -- like education, employment and contracting -- but show that in all areas he is willing to crack down on affirmative action proposals that offend his notions of fairness and flexibility.

STRENGTH OF MESSAGE: The message would have to allow the President to speak directly to the concerns of innocent bystanders -- concerned non-minorities -- without dropping a bombshell on supportive groups. This approach would assume that the main benefits the President can from opposing the status quo can be achieved with less dramatic policy changes by speaking honestly to the concerns of American non-minorities, **throwing out specific cases** (as opposed to whole areas) and stressing clear principles on limiting the burdens on innocent bystanders. Therefore, this may be the way of getting the most benefits with the least costs.

POTENTIAL WEAKNESSES:

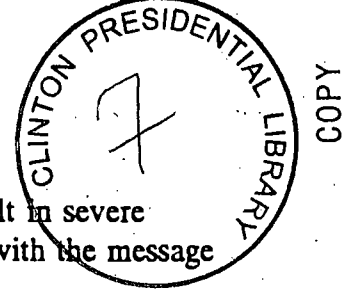
- After the expectations that have been created -- and in the context of the main Republican proposal -- the lack of any major policy alteration and the lack of any perceived outcry from Democratic base groups -- could make the President the defender of the status quo.
- From a policy perspective, without a controversial position in which the President takes on an entire policy area, the Administration may have less credibility and a weaker foundation to defend affirmative action in general.

REPLY TO WEAKNESSES:

- This is the first time a President has spoken honestly to both groups on the sensitive issue, and he laid out standards by which we should all judge these proposals.
- He made clear that he is willing to oppose affirmative action plans that cross one of several lines.

POLITICAL ANALYSIS:

It is possible that there is no middle ground approach that will please those who oppose affirmative action. The first two could end in the worst of all worlds: few points with opponents of affirmative action and real damage in our base.



On the other hand, the expectations are so high, that this could result in severe criticism for ducking a tough issue, and could help fuel opponents with the message that the Administration has no intention of changing the status quo.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action: Policy Issues (10 pages)	4/19/1995	P5	8
~~002. fax~~	~~Phone No. (Partial) (1 page)~~	~~06/21/1994~~	~~P6/b(6)~~	
003. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Speech, Review and Policy Decisions (12 pages)	6/27/1995	P5	9 (Dup) #3
004. notes	Affirmative Action Meeting with CEOs (4 pages)	7/20/1995	P5	10
005. notes	Affirmative Action Meeting (1 page)	7/4/1995	P5	11
006. notes	Affirmative Action Meeting (2 pages)	7/14/1995	P5	12
007. notes	Affirmative Action Meeting (1 page)	7/7/1995	P5	13
008. memo	James Castello to President Clinton, re: EEOC (2 pages)	5/23/1995	P5	14

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9162

FOLDER TITLE:

Affirmative Action - 1995 General [Folder 3] [2]

2008-0308-F

wr450

RESTRICTION CODES

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

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

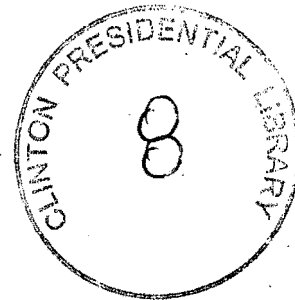
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



April 19, 1995

MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

From: George Stephanopoulos, Christopher Edley, Jr. & Peter Yu

Re: Affirmative Action: Policy Issues

This memorandum presents options regarding federal affirmative action policy. Part I outlines options in four areas: education, employment, procurement, and broadcast licenses. Part II offers three alternative, broader perspectives that may be useful in your deliberations. A subsequent memorandum will discuss the message, communications, and political dimensions of these policy choices.

I. AFFIRMATIVE ACTION IN
EDUCATION, EMPLOYMENT, AND PROCUREMENT

A. Education: Race- or Gender-Specific Scholarships

Background. The central issue in the area of education concerns scholarships for which race or gender is a condition of eligibility. This issue has two dimensions: (i) scholarships administered by universities receiving federal assistance and (ii) federal scholarship programs.

With regard to (i), the current Administration policy for enforcement of Title VI, announced by Secretary Riley in February 1994, permits the use of race as a condition of eligibility for financial aid in order (a) to remedy past discrimination or (b) to promote diversity, provided the measure is narrowly tailored and does not unduly restrict access to financial aid for nonminority students. A measure is "narrowly tailored" if (1) race-neutral means would have been ineffective; (2) a less extensive or intrusive use of race would have been ineffective; (3) the measure is of limited extent and duration, and is applied in a flexible manner; (4) the institution periodically reviews the continuing need for the measure; and (5) the effect on nonbeneficiaries is sufficiently small and diffuse so as not to unduly burden their opportunity to receive financial aid. These restrictions apply to university-administered aid, whether publicly or privately funded. Approximately 3.3% of all undergraduate financial aid, 4.3% of all graduate financial aid, and 12% of all professional-school financial aid is administered through such scholarships.

Current policy with regard to *gender*-specific scholarships provides that institutions may not discriminate on the basis of gender, but may administer privately-funded gender-specific scholarships if the overall effect of such scholarships does not discriminate on the basis of gender. The majority of gender-specific scholarships are limited to men, rather than women.

The federal government also directly administers a number of race- or gender-specific scholarship programs. All of these are designed to increase diversity in professions or specialties in which racial or gender groups have been significantly underrepresented, either because such inclusiveness is deemed critical to the continued strength of that profession, or because inclusion will lead to greater attention for neglected communities and problems. Supporters of these programs emphasize that these scholarships are necessary to attract women and minorities to these areas. Examples include: NSF's Minority Graduate Fellowship Program designed to increase the number of minority scientist and engineers and NIH's Minority Clinical Associate Physician Program designed to increase the number of minority physicians.

Options. The policy options include:

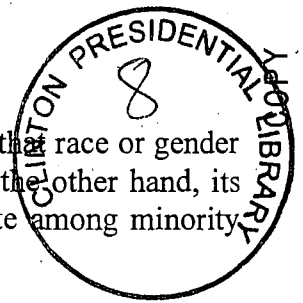
- Option 1:** Maintain current policy, which requires "exhaustion" of alternatives to diversity-based use of race- or gender-specific scholarships.
- Option 2:** "Tweak" current policy to require added analysis of alternatives.
- Option 3:** Bar use of such scholarships except as necessary to remedy past discrimination; otherwise, dilute exclusivity through broader eligibility.

Analysis. Education policies regarding admissions and scholarships are central to public concerns about affirmative action. Some view race- or gender-specific scholarships as a form of "set-aside" and thus reminiscent of quota-driven admissions policies (such as the dual-admissions system struck down in *Bakke*). On the other hand, education and training are on the "opportunity" end of the opportunity-to-results spectrum, and the current policy requires that any race- or gender-specific programs be narrowly tailored.

Option 3, which focuses on race-specific scholarships, was proposed by the Bush Administration in 1991. This approach would send a clear message that no applicant should be excluded from a scholarship program on the basis of race or gender. Arguably, this would be a curious rule, as it would leave intact numerous scholarships limited by religion, surname, geography, and other, more arbitrary criteria.

Option 2 would clarify the seriousness of the requirement that an institution wishing to use such scholarships (outside of a remedial context) first analyze race- or gender-neutral approaches and conclude they would not be effective substitutes for more exclusive scholarships. The policy guidance would be amended to require the institution to be prepared, if challenged, to present the evidence and analysis upon which its conclusion was based. (This is the formulation used elsewhere in the guidelines, and by the courts, in explaining that when an institution may invoke its history of discrimination as a remedial justification for race-

specific scholarships.) On the one hand, this option amounts to a declaration that race or gender should only be used as a condition of eligibility when truly necessary. On the other hand, its minimal practical effect might not justify the anxiety it would likely generate among minority and women's groups.



Option 1 would maintain current policy. As noted in our discussions, race- or gender-specific scholarships are small slices of a much larger pie -- much of which is administered on the basis of need. As there are so many different avenues for financial aid, it is possible to argue that race- or gender-specific scholarships do not meaningfully limit the opportunity of any student, or at least no more so than does a scholarship limited to offspring of the Knights of Columbus or the Daughters of the American Revolution.

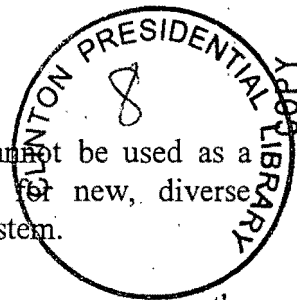
Indeed, current antidiscrimination enforcement guidance from the Department of Education, promulgated during the Reagan Administration pursuant to Title IX, makes the test for gender-specific scholarships whether the financial aid practices of the institution, *taken as a whole*, provide equal opportunity. As a matter of constitutional doctrine, race-based distinctions are subject to stricter scrutiny than gender-based distinctions. But this distinction seems untenable as a general matter of policy or politics. Hence, any toughening of prohibitions on race-based aid should probably be similarly applied to gender-based aid.

Finally, we should note the relationship between these options and the familiar hypothetical: a college admissions or scholarship policy that favors the African American son of a successful neurosurgeon, but not the son of a steelworker. Some argue that affirmative action should be only for economically disadvantaged minorities, because affluent minorities are evidently not suffering from a lack of opportunity, relative to many less economically advantaged whites. The rebuttal has three central points. *First*, there should be affirmative efforts to provide opportunity for economically disadvantaged individuals, both white and non-white; such efforts need not come at the expense of affirmative action when it is legitimately directed at minorities on the basis of concerns apart from economic disadvantage. *Second*, apart from economic disadvantage, but still within the realm of "private fairness," it is often observed that comparatively *advantaged* minorities nevertheless continue to face social and other obstacles solely because of prejudice and discrimination, and that these disadvantages, while different from badges of poverty, are a fair basis for attention. *Third*, in the realm of institutional and societal benefit, a college might properly conclude that the institution will benefit from inclusion of the neurosurgeon's son -- even though affluent -- just as they might conclude that the diversity benefit of including a bassoonist is weighty notwithstanding the musician's affluence. In America today, it remains likely that the neurosurgeon's experiences, perspective, and aspirations will reflect some aspect of the distinctive reality facing blacks. And the college may choose to value that.

B. Employment: Race or Gender in Layoff Decisions

Background. The central issue in this area concerns race or gender as a consideration in

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



The reach of this second principle is limited. While seniority systems are common in the public sector, the decline of unionism has reduced the private sector's reliance on such systems. Thus, reportedly, many large firms expressly consider diversity in their layoff policies, and with significant results: Illinois Bell cut 930 management jobs, but the proportion of minority managers rose from 25 to 27%; Baxter cut 20% of its 2000 employees, but the proportion of minority managers increased from 10 to 12%.

The narrow question of "tie-breakers" is thus most likely to arise in the context of a seniority system where layoff decisions are more structured. In the *Piscataway* case, the Justice Department has argued that Title VII does not prohibit the School Board from using race as a tie-breaking consideration in pursuit of a legitimate interest in diversity. In the context of the federal civil service, the OPM regulations are silent: the Department of Justice (Office of Legal Counsel) believes the statutes and caselaw would, as in *Piscataway*, permit narrowly tailored consideration of race or gender.

Options. The policy options include:

Option 1: As a policy matter, when not inconsistent with a *bona fide* seniority system, diversity may be considered in layoffs, but only in limited circumstances.

Option 2: As a policy matter, race or gender should not be considered in layoff decisions.

Analysis. Concerns about employment are two-fold. In certain sectors, there is a sense that some job opportunities are limited to "diversity candidates" and thus that white males are excluded. Second, there are concerns that in a continuing era of corporate reengineering, women and minorities are, due to affirmative action, at less risk of being laid off. (As you have noted, affirmative action is sometimes used cynically to justify decisions made for other reasons, legitimate and otherwise.)

Option 2 would issue a sharp and clear statement and would provide some comfort to whites, males, and their dependents, in a time of insecurity. (There would be a corresponding reinforcement of minority and women concerns about their marginality.) In the public employment context, this is likely to have little policy impact because of seniority rules, and thus will affect only tie-breaker-type situations. However, this option would send a loud signal to the private sector and could have an effect on private practices.

Option 1 is closer to the status quo, but does not lend itself to a simple rule. Instead, this approach would call for the common-sense balancing of the institution's general diversity interest and the burden on identifiable majority employees. Consideration of race or gender would be permissible only: when necessary for the institution's operation; when a manifest

racial or gender imbalance exists; and when less race-intrusive considerations are not effective. If you select this option, announcing a clarification of federal layoff policy could underscore the very high hurdle you would impose, but might also serve to focus resentments around the entire issue. In any case, however, we are likely to face continuing questions regarding the law and policy surrounding the *Piscataway* situation.

C. Procurement: Preferences & Set-asides

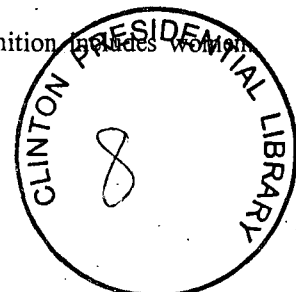
Background. Federal law establishes several goals for the distribution of federal procurement opportunities: 20% for small businesses; 5% for small disadvantaged businesses (SDBs -- virtually all of which are minority-owned¹); and 5% for women-owned businesses. There is a web of programs designed to reach these goals; some are government-wide, other are agency-specific. These efforts use several tools:

- **Sole source procurements:** Under SBA's 8(a) program, small disadvantaged businesses (SDBs) can secure smaller sole-source contracts (usually less than \$3 million).
- **Sheltered competition:** Under DOD's "rule of two," a contract is set aside for SDBs if the officer believes two or more SDBs are likely to make competitive bids on the contract. (If this set-aside is not triggered, there is a similar "rule of two" for all small businesses. Failing this, there is open competition.)
- **Bid preferences:** In open competitions, DOD awards a 10% bid preference to SDBs; last year's procurement reforms authorized government-wide use of this preference.
- **Subcontracting incentives:** DOT provides an incentive payment to prime contractors who (voluntarily) subcontract with SDBs, including women-owned firms. (The *Adarand* issue.)

These efforts have been successful in expanding procurement opportunities for women- and minority-owned firms. Between 1982 and 1991, while the dollar volume of all contracts increased by 24%, contracts awarded to women-owned firms tripled and contracts awarded to minority-owned firms doubled. Of late, these increases have been accompanied by actual decreases for non-disadvantaged small firms. For example, while DOD's contracting with SDB's more than doubled, its contracting with other small businesses fell by nearly 20%.

Several aspects of these efforts have not been successful. Graduation rates from the 8(a) program remain low and the possibility of abusive practices remain, although recent statutory and administrative efforts promise some improvements. Outside of the limited 8(a) program, however, there are no graduation requirements apart from what happens naturally if a business is no longer "small" or an entrepreneur accumulates substantial wealth. In addition, these

¹ In the Department of Transportation's program *only*, the SDB definition includes women.



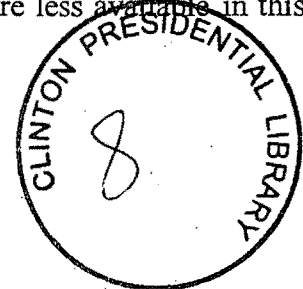
programs have had a disparate impact on particular regions and industries -- such as smaller construction projects and certain transportation sub-industries. Finally, while the 8(a) program permits nonminority firms to participate upon a showing that a firm's owners are "socially and economically disadvantaged," in practice only about 1.6% of all 8(a) firms are white-owned (and those mostly disabled), because the 1978 statute links "social disadvantage" to membership in a group subject to discrimination.

Options. The policy options include:

- Option 1: Reform the programs to emphasize their transitional character; eliminate misuses.** This would involve tighter asset-related eligibility rules, phased graduation for all SDBs, limits on the concentration of set-asides in a single region or industry, and standards to determine when preferences are no longer necessary by business sector and by region.
- Option 2: Expand eligibility to include more nonminority firms.** This would involve revising the current conjunctive statutory criterion ("socially and economically disadvantaged") to a disjunctive ("socially or economically disadvantaged"). In addition, the goal for total SDB procurement could be increased from 5 to 10%.
- Option 3: Sharply focus on "entryway" to entrepreneurship for both minorities and disadvantaged.** In addition to the anti-misuse reforms in *option 1*, and the broader class- or need-based eligibility of *option 2*, impose very tight limits on the number of contracts an individual SDB or entrepreneur could win through sole-source, set-aside or bid preferences.
- Option 4: Convert to race-neutral programs.** Phase out race- and gender-based eligibility, relying instead on race- and gender-neutral criteria of economic disadvantage. Limit race or gender-specific assistance to less exclusive and less intrusive assistance tools -- i.e., technical assistance, surety bonding and outreach.

Analysis. While procurement policies do not have wide visibility, they are arguably more problematic than either education or employment policies. The practical effect of a set-aside such as the rule-of-two is to take a specific contracting opportunity and hang out a shingle saying "whites need not apply." Some view this as more problematic than minority-only scholarships, suggesting an intuition that providing profitable business opportunities seems more directed toward rewards or equal results than towards equal opportunity; education is different. Moreover, some view the procurement set-aside as problematic, even though 97 percent of contracting opportunities continue to go to non-SDBs.

At the same time, preferences may be more necessary in procurement for several reasons. First, anti-discrimination laws are more difficult to enforce in this area, especially in the subcontracting realm. Second, "old-boy" networks are arguably stronger in this area, so that informal exclusionary practices beyond the reach of law enforcement can be potent and persistent. And finally, procurement decisions often turn on a single factor -- price -- and thus the multi-factor mechanisms used in education and employment are less available in this area.



Option 4 would issue a clear statement that federal contracts should not be awarded on the basis of race or gender. Under this view, set-asides are much like quotas. Current preference programs would be converted to focus on economic disadvantage. This option represents a judgment that whatever the group-based discrimination or disadvantages faced by minority entrepreneurs, no special policy measures are appropriate beyond pool-development strategies and race-neutral preferences. If one were to support race-specific scholarships but embrace this option, one could distinguish procurement as "more related to results than to opportunity." This approach is far more restrictive than Supreme Court precedents, which permit set-asides based on legislative findings of discrimination or lingering effects.²

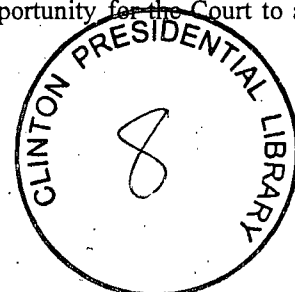
Option 3 would retain a reduced preference program, but focus it sharply on mechanisms more unambiguously related to creating *opportunity* for entrepreneurship, rather than a guarantee of entrepreneurial success. Thus, in addition to technical assistance and other pool-enhancing activities described above, this approach would use preferences and sheltered competition on a limited basis to help "break the ice," but then quickly push entrepreneurs to compete on terms comparable to small businesses generally. (Recall that all small businesses have a rule-of-two set-aside available to them as well, but only if an SDB set-aside is not triggered.) The racial exclusivity of the preferences would be alleviated by opening eligibility to non-minority firms based on economic disadvantage.

Option 2 would similarly render these programs less exclusive and recharacterize them as for "disadvantaged" businesses, with race merely one -- but not the only -- way to demonstrate disadvantage. It would not narrow the overall ambition of the program to the extent of *option 3*. Operationally, this is likely to have only a modest effect on minority contracting. Prior to the codification of its minority entrepreneurship focus in 1978, the 8(a) program used this approach; at that time, about 4% of all 8(a) firms were white-owned. In sum, race becomes irrelevant in *option 4*; in this option its exclusionary effect is diluted.

Option 1 would ameliorate several of the most problematic practices in the program. Limiting participation, encouraging graduation, and tightening the asset tests emphasizes that 8(a) is an entryway, not an entitlement. Limiting concentrated use of preferences reduces the unfairness to white bidders in a particular region or sector. While these changes would be significant, some would view this as "mere tinkering" that does not address the fundamental objection -- namely, the exclusivity of these programs.

Distressed Areas: In addition to these policy options, we have also begun to develop a complementary option: procurement preferences that focus less directly on minority capitalism and more on job-creation for disadvantaged persons and distressed communities. Some of these alternatives would be place-based and others employee-based; we are currently examining issues of administrability. Example of such initiatives include:

² The Court has required a somewhat more rigorous demonstration by state and local governments than by the Congress. The *Adarand* ruling, expected before July, presents an opportunity for the Court to announce more restrictive principles.



- Provide set-asides or other preferences for firms whose workforce (on the contract) would be drawn more than X% from *chronically distressed* areas, using measures based on Census and BLS data. (There are two especially well-regarded alternative indices of distress in the social science literature.) Or
- Provide preferences to firms whose workforce would be drawn more than X% from targeted population groups, such as recent AFDC or food stamp recipients. Or
- Provide preferences as above, but based also on the employment of underrepresented groups. Or
- Employ any of these approaches, but scale the magnitude or duration of the preference according to the firm's workforce "score."

Bearing in mind that such an initiative speaks somewhat separable policy and political objectives, you may decide that such an **empowerment contracting** scheme should be a (i) substitute for, (ii) complement to, or (iii) condition of the reformed entrepreneurship preferences.

FCC Auctions: Your decision on procurement set-asides will also govern the Administration's position regarding the FCC's auction of "personal communication systems" (PCS) licenses. Phases of the PCS auction have been stayed pending resolution of a constitutional challenge to bid preferences afforded minority- and women-owned firms by Commission regulations. Because PCS licenses are for cellular and other wireless communication rather than for broadcasting, a programming-diversity rationale will not justify group-based preferences. Instead, the motivation is to create inclusive entrepreneurial opportunity, where there otherwise would be none, in a critical emerging industry. Preferences in the PCS auction should be handled like procurement preferences.

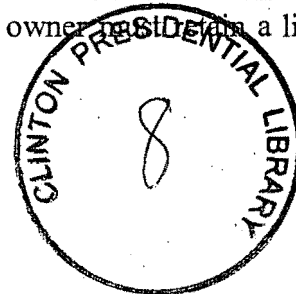
D. FCC Preferences in Broadcast Licenses

Background. Programs administered by the FCC concerning broadcast licenses are *sui generis* because of the linkage between diversity of ownership and diversity of programming. Of the FCC's three "affirmative action" efforts, one is not significant (a preference for minority purchasers in distress sales which is rarely used), a second is not controversial (consideration of race as one of many factors in comparative licensing decisions), and the third -- the "§ 1071" tax certificate at issue in the Viacom transaction -- has just been repealed. The primary issue here is whether we should attempt to revive the tax certificate program in a more limited form.

Options. The policy options include:

Option 1: Maintain the status quo.

Option 2: Establish a limited tax certificate program. Potential misuse of the program would be limited by (i) capping the value of the tax benefit at an amount below \$100 million; (ii) lengthening the period a minority owner resides in a license



from one to several (possibly five) years; and (iii) ensuring that minorities actually control the licensed company.

Analysis. The tax certificate program has been highly successful. In 1978, minorities owned 0.5% of all broadcast licenses; today, 17 years later, that proportion has increased five-fold to 2.9%. FCC officials, including the Chairman, believe that, but for § 1071, most of these transactions would not have occurred. **Option 2** would propose to reinstitute this program, but in a manner that would prevent Viacom-like transactions by capping the amount of the tax benefit in any one transaction, increasing the holding period for the minority purchaser to prevent quick resales, and ensuring that no individual entrepreneur or firm benefitted repeatedly from the preference. (We have not identified a PAYGO offset for this option.) **Option 1** would avoid reopening the battle over these issues.

II. PUTTING THE PIECES TOGETHER: BROADER PERSPECTIVES

Your policy choices in this area may be most easily defended if they reflect a coherent theory or approach. This Part outlines three such approaches, and describes the policy choices that seem most easily justified within that approach. (See Exhibit 1.) Each is consistent with some basic inclinations you expressed in our various "vision" discussions, including:

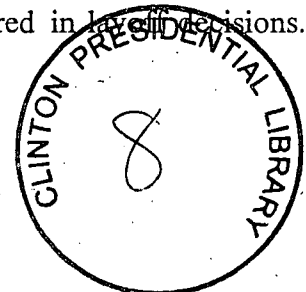
- Emphasize antidiscrimination and *opportunity*, rather than guaranteeing results.
- Stress the *remedial* justification, but also embrace the goal of *inclusion*.
- Respect the interests of *bystanders*, by crafting policies carefully and narrowly.

A. The "Calibrated" Approach

This approach emphasizes the difference between equal opportunity and equal results in two dimensions. In terms of the policy tools one uses, outreach and training are less result-driven and thus less problematic than set-asides or quotas. Similarly, in terms of the context, any specific affirmative action tool is less problematic in education (which expands opportunity) than similar efforts in procurement (which more directly affects the distribution of wealth).

This approach supports a broader range of affirmative action policies in education than in procurement, as illustrated by the diagonal orientation of the "border area" in Attachment 1. Thus, certain kinds of set-asides are acceptable for scholarships, but should be eliminated or sharply focused in procurement. With regard to the policy choices outlined above, this approach would support:

Education: Option 1 -- Maintain current policy.
Employment: Option 1 -- Permit race or gender to be considered in *layoff* decisions.



Procurement: Option 4 or 3 -- Phase out or sharply narrow procurement preferences and set-asides.

B. The "Least Intrusive Alternative" Approach

A second approach expresses more overt solicitude for bystanders by stressing that affirmative action must be narrowly tailored to minimize exclusivity and the use of race- or gender-based decisionmaking. Thus, result-driven quotas are always inappropriate (except in rare court-ordered remedies), and set-asides may only be used (i) when they are either broadly remedial or (ii) when less intrusive alternatives are not *effective*. In essence, this approach would apply the Title VI scholarship policy to all three sectors.

Of course, "effectiveness" will be a matter of degree, and there is an implied balancing of the benefits of inclusion with the costs of exclusion. Prior discrimination is relevant, as is the opportunity-results distinction. So, one might weigh those costs and benefits somewhat differently in different contexts: it matters if an institution or industry has a history of discrimination, in which case the narrowness need not be too scientific; and it matters if the context is procurement, where the distribution of largesse ought to be narrowly tailored indeed.

This approach leads to support for limited use of race-specific programs. In particular (as illustrated in Attachment 2):

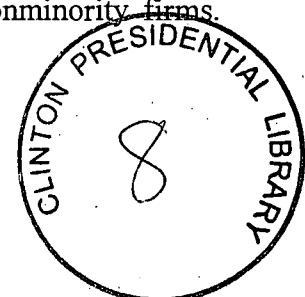
Education: Option 1 or 2 -- Maintain or tighten current policy.
Employment: Indeterminate -- Either option on consideration of race/gender in layoffs.
Procurement: Option 1 or 3 -- Reform or sharply narrow preferences and set-asides.

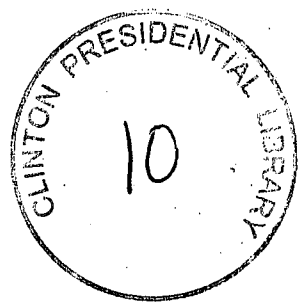
C. The "Anti-Exclusion" Approach

A third approach emphasizes the moral cost of maintaining programs that exclude persons on the basis of race or gender -- even in the name of diversity. This approach entails opposition to the rule-of-two SDB set-aside and to race- or gender-specific scholarships; these are effectively indistinguishable from quotas. Instead, such programs would have to be revamped to rely on multifactor considerations in which race is but one factor, or on race- and gender-neutral approaches.

This approach leads one to support elimination of set-asides in all areas. In particular (as illustrated in Attachment 3):

Education: Option 3 -- Eliminate race- or gender-specific scholarships.
Employment: Option 2 -- Oppose consideration of race or gender in layoff decisions.
Procurement: Option 2 or 3 -- Expand eligibility to include nonminority firms.





RA meeting w/ CEOs - 7/20/95

Moody - Rapson

12 CEOs

- Product
- McLarty
- Werner
- George S
- Paul McIntyre
- Jerry Choate
- August Bush
- Ellen Gordon
- Ray Imani
- John Pepper [Proctor & Gamble]
- Jay Cook
- John Leva
- Joe P
- Don Schlenker
- Donna
- August Bush
- Jerry Choate
- John Leva
- Ellen Gordon

① Proctor - diversity is increasingly important

- new markets

- synergy of ideas

- reach different population groups -

- w/o RA we wouldn't be where we are today much less

where we need to be

- RA won't take us where we need to

go - People must truly believe

that all must succeed - until

this is a conviction, we won't

be as successful as we can be

② Wage Block -

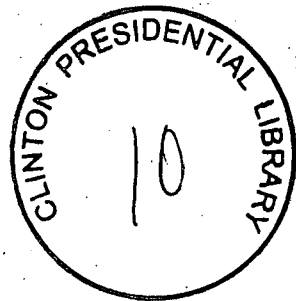
- real difference is in how polarized young people believe

- 75% of CEOs ~~would~~ shared view

that Adams won't change RA

position is esp. those

captives -

Jerry Chavito

- Having a large diversity
- Any large community is a mirror of the nation

XYZ -

① What does NA mean mean -

- outreach } broad curriculum on these
- education }
- problem re perception & perception treatment

letter to curriculum writer

Pgt

- This is where the issue is difficult

- Govt contracts / non govt contracts

Ray I. Hunt -

① likes idea of govt support to poor economic areas

① Need to ensure persons that define equal access & equal opportunities -

① number of NA persons are not be helping

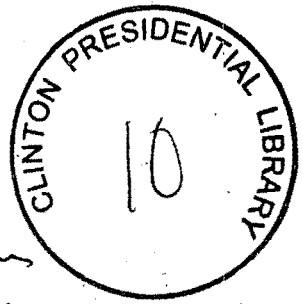
① Too much merit need

Don S. Chavito

- Tell nation about now, now & benefits of NA

NA - > 21% of total population is minority

- many minority dealers - need a lot of training



- mostly supply program
- business strategy to also get more disease
disease went from/dealers etc -

Donna

- Training/educated content
- Appalo 13 - planted bag -

Jerry Cook -

- cost of RA of little consequence
- Need the best people
- more than 1/2 of people coming into the
program are women -
- we need to program out how
to deal w/ the patients
practically -

~~to go~~

- we perform well over the minimum
standards -

Bx - No. of real objectives text to dated me
who is the best was a ~~particular~~
to patients for

XYZ - Need to go to 100% of
best population to get best
people - - not to ~~go~~ just 80%
of population -

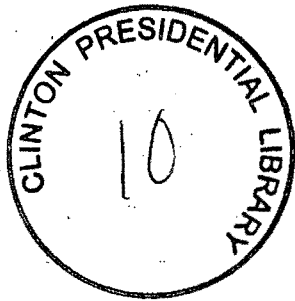
- No problem in hiring a promoter
as long as they are qualified

Ellen

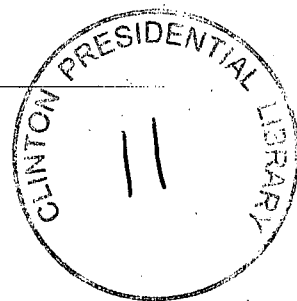
- RA essential to be capitalised in
global market,

Eller _____ (cont'd)

- absolute preference -



9 COPY



Bled census next - 7/11/98

Transit — 32 ABC numbered —

VP

9 W H stuff at hotel
5 ~~P. Stock~~ Blue

- Albus
- NorL
- Carme Pella
- Dewol Patrub
- Eni Ene

~pechinty

- A p p A t t u

157 w. ~~Development~~

- pruned

Berlin

Soches / P. m.

production

redes twenty -

- bullets moved from Sep 4 to state legislators
- need DOJ help

My Act - Refuse

- cancer supported with review of AA
- everyone looks to WH for clarity
- issue of both protection & ~~also~~ evacuation
- can't make RA needs based - ~~can't~~ on it

will be a new poverty program -

- ⑧ - AA should apply to ~~to power~~ poorest & richest - to put them to enter the market place

BC-

- AALin never the unity and
- You will be plenary with what I have to say

* most difficult problem is Caly ballad
initiated

no effort to return 7/14/95

- President
- D. even
- Pareto
- F. class
- Graves
- C. W. Eddy
- General Patton
- Rocky ranges
- E. Lieberman
- D. Frazier
- Ben Johnston

⑤. across black river 2

other civil rights leaders

21 ~~total~~ i/

6-4 blots

- 2 chives

BC- essentially features in AD

- hand drawn.

• I know what I am going to say

* Some will be resigning but not better none

- educated, employed, business continuity

read threat to PA must be carefully handled instructions

- could consume 96 electrons

2nd after return from

- Need to have been to deal w/ lady & speak to them

- I can carry the country with about men

all agree w/ "me or less" of what I

~~not on~~ day on Wed

We have analyzed all the ~~the~~ papers

I will give a rip roaring speed to it

You need to think about the followups -

Elaine Jones - [NAACP LDF] :

- No one wants to give ~~more~~ basis of support to
city institutions -

- blocks + others must ~~not~~ come out in numbers-

Under press press upon inter it as a
~~from~~ a quarter, black ink red.

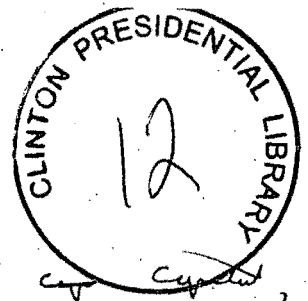
Chore man

~~S. Paul Bremer memo - threat as for not contacts~~

Confidential

- don't want preforming

- went for shoes -



④

over

AK is about access to explicit & explicit, credit, continuity,

⑤

Speaker - AK is about philosophy - -

Real principle ~~prospects~~ ~~prospects~~

prospects for symbols - rather than progress

• What does this country stand for -

Long public (Sunk) -

Obligation of a just society

AK is a process of inclusion & should rest on ability - ~~rest~~

~~Explain~~

AK is an admirable policy

Worse - not just a other issue -

turning the group -

14

Worse

Later
speech

Great issue

Mark Evans -

- ~~DEAL~~ - ~~concern~~ ~~concern~~ about BC's position on AK
- looking for strong statement from AK
- Need to point out how all groups have benefitted from AK -

Now nearly nothing nothing nothing are groups against the other

⑥ Not nearly a black benefit.

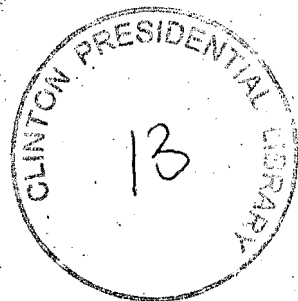
- Need clear, firm, positive leadership -

⑦

Everyone is being helped by AK

Goal of AK is
more issues
not nearly nothing
nothing

defining nothing for
the country



- Affected Act - 7/7/95

- BC : Name
- LP : Chris Edley
- GS
- NE

Henry & Jerry] 2 key issues
not address

- Venue

- meetings

Set aside process -

- A decision would probably have been that out
-
- BC explained he hadn't had time to read the news

- Geography only

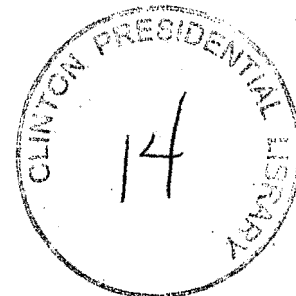
- on Geography + race where there is ~~discrepancy~~
discrepancy

He needs to report the case against AA & describe
what opponents are trying to do

Henry/Jerry

- OK me race re Henry
- Paul just shouldn't do it, re Jerry
- but have it up to individual re employers
- prosecuting - hard, but DC would have
decided against it
- = prevented against against

THE WHITE HOUSE
WASHINGTON



PRIVILEGED AND CONFIDENTIAL

May 23, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES CASTELLO *J.E.C.*
DEPUTY COUNSEL TO THE PRESIDENT

MARVIN KRISLOV *MK*
ASSOCIATE COUNSEL TO THE PRESIDENT

THROUGH: LEON E. PANETTA
CHIEF OF STAFF

RE: Wall Street Journal Article Regarding EEOC

You asked for information regarding the April 27, 1995 article in which James Bovard attacked the EEOC's Chicago district office for suing businesses to impose what he terms "quotas" of minority employees. He bases his analysis on five "pattern and practice" cases, all filed before the start of this Administration. As the published response from Chairman Casellas indicates (see attached), these cases represent a small fraction of the thousands filed by the Chicago office during this period. Moreover, Bovard's comments do not reflect accurately the litigation in question.

1. Role of Statistics. Bovard contends that the EEOC used a statistical model to predict the number of minorities that should have been employed by a company, and then charged discrimination if those "quotas" were not met. This argument is not an accurate statement. The EEOC used statistics as one type of evidence of discrimination, which is consistent with long-standing precedent in the Title VII area.

Statistical disparities have long been considered valid evidence of discrimination in Title VII claims. Statistics generally do not stand alone, and they may be attacked or supported with witness testimony and documentary evidence. In the three cases Bovard cites that were decided on the merits by the appellate court, the EEOC presented anecdotal witnesses as well as statistical evidence. The appellate courts determined that the total evidence was unpersuasive in two cases, and was persuasive in one. In the remaining two cases described in the article, numerous minority witnesses had complained to the EEOC.

2. Statistical Evidence and Burden of Proof. The statistical evidence used in these cases was particularly significant, given the nature of the alleged discrimination. In

DETERMINED TO BE AN ADMINISTRATIVE
MARKING Per E.O. 12958 as amended
Initials: *MK* Date: *9/19/11*
2008-0208-0

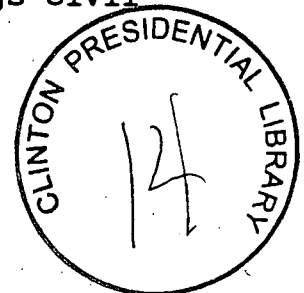
the three cases decided by the appellate courts, the EEOC was contesting the use of word-of-mouth recruiting (or walk-in hiring). The EEOC argued that these policies operated to exclude the non-favored racial group(s). In 1991, the Seventh Circuit determined, in a departure from previous case law, that word-of-mouth recruitment did not constitute an employment practice that would be prohibited under a discriminatory impact theory (although it would violate the law if intent was shown). As allowed by Title VII, the employers could rebut this evidence by showing, for instance, that minority workers were not interested or qualified, or that business necessity justified the challenged hiring practices.

3. Monetary Relief for Applicants. Bovard criticizes efforts to obtain monetary relief for those who were rejected for employment with the businesses. Title VII recognizes that applicants and would-be applicants should be made whole if they have suffered discrimination. Thus, advertising to find victims often is part of the remedy in class action lawsuits (e.g., the airlines lawsuit) and may represent the only practical way to identify victims of discrimination and to deter wrongdoing. However, Bovard is simply wrong when he implies that the EEOC typically grants all such claims for relief that are elicited by advertisements. For example, contrary to Bovard's claim, the EEOC actually rejected two thirds of the claims it received in the O & G Spring Wire case.

Moreover, the litigating stance of the EEOC regarding settlement demands has softened recently. Under Clarence Thomas' leadership, the agency instituted a "full relief" policy, demanding that all victims be made whole. The EEOC informs us that this prior policy even applied to early settlement discussions, thus discouraging employers from compromise. Last month, as part of a reform package initiated by Chairman Casellas, the EEOC adopted a policy wherein the Commission may accept "substantial" relief after a finding of probable cause, or "appropriate" relief at an earlier stage in the investigation. In addition, the EEOC has changed its policy to identify priority matters (instead of relying on the date a claim was filed to determine its priorities). The EEOC hopes that these policies will encourage early settlement and allow it to concentrate its resources productively.

4. EEOC Enforcement Policies. Bovard finally claims that a "mere shortage of properly pigmented job applicants is enough to turn a business into a criminal enterprise." This statement is inaccurate. As discussed, the necessary evidence requires more than a statistical showing, which may be rebutted by contrary evidence. Additionally, the EEOC only brings civil lawsuits and cannot file criminal charges.

Attachment



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Weldon Latham to Harold Ickes, re: Presidential Solution to Republican Attacks on Minority and Female Business Set-Aside Programs (5 pages)	6/7/1995	P5	15
002. fax	Weldon Latham to Harold Ickes, re: Proposed Participants in Meetings with President Clinton (4 pages)	5/12/1995	P5	16
~~003. letter~~	~~Phone No. (Partial) (1 page)~~	~~05/11/1995~~	~~P6/b(6)~~	
004. note	President Clinton's notes on WSJ Article from - 4/19/1995, "The Democrats' Quota System" (1 page)	4/20/1995	P5	17
005. notes	Affirmative Action Meeting Notes (2 pages)	4/10/1995	P5	18
006. notes	Affirmative Action Meeting Notes (4 pages)	3/20/1995	P5	19
~~007. memo~~	~~Joan Logue-Kinder to Harold Ickes, re: Affirmative Action (1 page)~~	~~3/2/1995~~	~~P5, b(6)~~	~~20~~

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9162

FOLDER TITLE:

Affirmative Action - 1995 General [Folder 3] [3]

2008-0308-F

wr451

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

SHAW, PITTMAN, POTTS & TROWBRIDGE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N STREET, N.W.
WASHINGTON, D.C. 20037-1128
(202) 663-8000
FACSIMILE
(202) 663-8007

900 THIRD AVENUE
NEW YORK, NEW YORK 10022-4728

1501 FARM CREDIT DRIVE
MCLEAN, VIRGINIA 22102-5000

115 SOUTH UNION STREET
ALEXANDRIA, VIRGINIA 22314-3361

201 LIBERTY STREET, S.W.
LEESBURG, VIRGINIA 22075-2721

WELDON H. LATHAM
(202) 663-9228

June 7, 1995

VIA HAND DELIVERY

Honorable Harold Ickes
Deputy Chief of Staff for Politics
and
Honorable Erskine Bowles
Deputy Chief of Staff for Operations
The White House, West Wing
Washington, D.C. 20500

~~CONFIDENTIAL~~

**Re: Presidential Solution to Republican Attacks on Minority
and Female Business Set-Aside Programs**

Dear Harold and Erskine:

As a follow-up to both the May 23rd meeting with President Clinton and the June 2nd meeting with Alexis Herman, Chris Edley, George Stephanopoulos and others on the White House staff, it is becoming clear that the President needs *both* a long-term and short-term strategy on affirmative action generally, and on minority and female business programs, in particular.

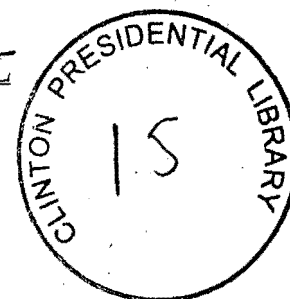
Enclosed is the Meeting Agenda we prepared for the June 2nd meeting as well as a copy of the *MBE* magazine *Special Report* entitled "Voices of Reason -- The Case for Affirmative Action", which were provided to each of the meeting participants. The Special Report includes support for affirmative action and minority and female procurement programs voiced by some 53 prominent members of the business and government communities, including just to name a few, the CEOs of NationsBank, J.C. Penny's, Pacific Gas and Electric, Marriott International, Ameritech, AT&T, Texaco, Washington Gas, Eastman Kodak, Hewlett Packard, Coors Brewing Company, Chevron, Time Warner and Lockheed Martin, not to mention members of Congress, and members of professional and minority trade associations.

DETERMINED TO BE AN ADMINISTRATIVE
MARKING Per E.O. 12958 as amended, Sec. 3.3 (c)

Initials: WL Date: 7/19/95
FOIA 2008-0365-F

Honorable Harold Ickes
Honorable Erskine Bowles
June 7, 1995
Page 2

~~CONFIDENTIAL~~



I propose for your consideration the following recommendation: there is probably a political need to have the President appoint a Commission, composed of white male CEOs of the Nation's largest companies, a few key Republican [e.g., Senator William S. Cohen (R-Maine)] and Democratic members of Congress, as well as members of the minority business community to "further study the minority business programs," particularly given the apparent divergent views and recommendations on the White House staff.

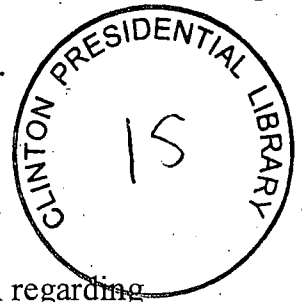
As you well know, there continue to be daily rumors that "the President" has decided to support continued affirmative action programs for employment and education, but dismantling of Federal minority business procurement programs. While the President, both of you, and other key staffers have assured us this is not the case, both our discussions with members of the White House staff and the persistent rumors make clear that there is a group within the White House that appears to support this approach. While politically this would be a disaster for the President, by gravely undermining his support from two of his core constituencies (*i.e.*, minorities and women), perhaps the safest political action for the President, after he presents his strongest unequivocal support for affirmative action generally, is to buttress that unequivocal support with the appointment of a Blue Ribbon Business Commission to study the viability of continuing or modifying minority and female business programs within the Federal Government. The Voices of Reason Special Report provides an excellent list of possible appointees to such a Commission.

Our ad hoc group has begun working with the White House to support the short-term efforts to overcome any House Republican back door attacks on these programs via the appropriations process, and we would be pleased to continue assisting in this effort in any reasonable manner.

What is clear, however, is that the longer the President waits to declare support for these programs, the weaker he is viewed by both his friends and enemies, alike, and for those of us who strenuously support him, the more difficult it is to secure support in his behalf from both the minority and female communities.

Honorable Harold Ickes
Honorable Erskine Bowles
June 7, 1995
Page 3

~~CONFIDENTIAL~~



I hope the President will give serious consideration to my suggestion regarding a "Blue Ribbon" Commission and I am certain that the other members of our ad hoc group have other equally constructive ideas on how to assist the President in "selling" a program that supports affirmative action and minority and female set-aside because *they* represent an expansion of opportunity and are good for America.

I trust that this recommendation will be helpful and that you will continue to call on our assistance.

Best regards,

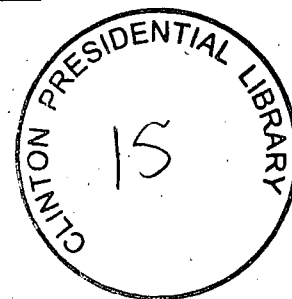
Weldon H. Latham

WHL:jl
Enclosures

cc: Honorable Donald E. Fowler
Honorable Alexis Herman
Honorable George R. Stephanopoulos
Mr. Melvin E. Clark
A. J. Cooper, Esq.
Mr. Ernest G. Green
Mr. Robert E. Johnson
Ms. Marianne Spraggins

Honorable Harold Ickes
Honorable Erskine Bowles
June 7, 1995
Page 4

~~CONFIDENTIAL~~

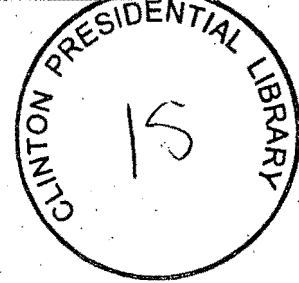


bcc: Honorable Robert Nash

MEETING WITH WHITE HOUSE STAFF

June 2, 1995

3:00 p.m.



COPY

SUBJECT: Expanding Opportunities for *All* Americans/Affirmative Action/Minority and Women Owned "Fair Access" Issues.

I. Background: As a follow-up to the May 23rd meeting with President Clinton regarding the above-captioned subject and in order for us to provide President Clinton with useful policy and political input, it is crucial that we receive an accurate report on the status and copies of documents on which Messrs. Edley and Stephanoulous are relying for their preliminary opinions on these subjects. Our reliance to date on rumors and unsubstantiated media accounts is counterproductive to making this a useful process.

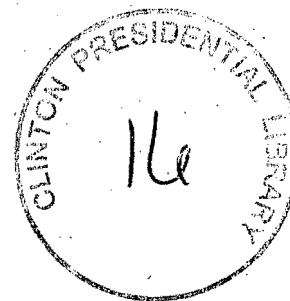
II. Issues for Preliminary Consideration:

- Copies of Department and Agency analyses regarding SBA Section 8(a), DoD/SDB, and Government-wide specific statutory SDB and Federal Acquisition Streamlining Act mandated SDB programs -- status of recommendations.
- White House Strategy while Presidential Decisions are pending: Avoidance of *New York Times* Article "Trial Balloons"

III. Next Steps:

- Process for Our Useful Input
- Consideration of Creation of Presidential Commission (*see Voice of Reason*)

SHAW, PITTMAN, POTTS & TROWBRIDGE



MEMORANDUM

VIA FACSIMILE

To: Honorable Harold Ickes
Assistant to the President and Deputy Chief of Staff
The White House

From: Weldon H. Latham

Date: May 12, 1995

Re: Proposed Participants in Meetings with President Clinton

Thank you for your telephone call of yesterday and the follow-up call from John Sutton of your staff responding to my letter of May 5th, 1995 to Democratic National Committee (DNC) Chairman Don Fowler, requesting a meeting for a representative group of African American supporters of the President and the DNC.

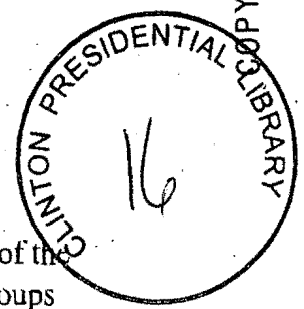
Given the obvious constraints on the President's time and the desire to have the most meaningful interchange, I conferred with DNC Trustees Mel Clark and Ernie Green and developed the following list of six proposed invitees:

Mr. Melvin E. Clark	President, Metroplex Corporation
A. J. Cooper, Esq.	Partner, Ginsburg, Feldman & Bress
Mr. Ernest G. Green	Managing Director, Lehman Brothers
Mr. Robert E. Johnson	President/CEO, BET Holdings, Inc.
Weldon H. Latham, Esq.	Senior Partner, Shaw, Pittman, Potts & Trowbridge
Mary Ann Spraggins, Esq.	Phoenix, Arizona

In addition to these individuals' demonstrated support of the DNC and the President, and beyond the businesses in which they hold significant positions -- each

update

Honorable Harold Ickes
Memorandum
Page 2



proposed invitee represents a broad sphere of influence in various diverse sectors of the minority community -- across the country as well as represent various business groups and interests, with ties to the religious community, government contractors, financial community, high technology companies, automobile dealers, and various minority, female and other elected officials nationwide, not to mention their "mainstream" relationships.

We look forward to a constructive meeting and appreciate your assistance in this matter of concern to our nation.

cc: Honorable Donald L. Fowler

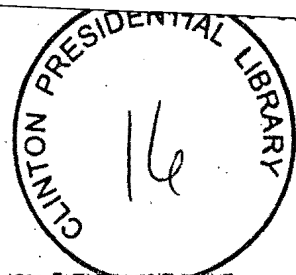
169651-01 / DOCSDC1

SHAW, PITTMAN, POTTS & TROWBRIDGE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2500 N STREET, N.W.
WASHINGTON, D.C. 20037-1120
(202) 883-8000

FACSIMILE
(202) 883-8007



1501 FARM CREEK DRIVE
ALEXANDRIA, VIRGINIA 22102-5000

800 THIRD AVENUE
NEW YORK, NEW YORK 10022-4720

115 SOUTH UNION STREET
ALEXANDRIA, VIRGINIA 22314-3301

501 LIBERTY STREET, S.W.
LEESBURG, VIRGINIA 22075-2781

WELDON H. LATHAM
(202) 883-0000

May 5, 1995

VIA FACSIMILE

Honorable Donald L. Fowler
Chairman
Democratic National Committee
430 South Capitol Street, SE
Washington, D.C. 20003

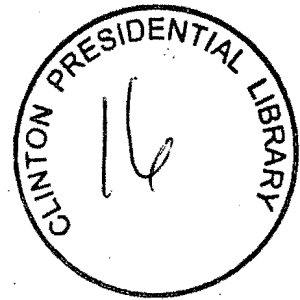
Re: Presidential Meeting with African American Democratic National
Committee (DNC) Trustees and BLF Members

Dear Mr. Chairman:

First, it was a pleasure to spend time with you in Pittsburgh on Monday at Bishop Clark's 35th Anniversary celebration. On the return flight to Washington, I spent time with Congressman Mfume. He and I continue to share the concern that President Clinton must turn his ultimate position on Affirmative Action policies into an election year positive! Additionally, based on discussions with numerous other national African American political leaders, from California Speaker Willic Brown to Senator Carol Mosley Braun *et al.*, this view is broadly shared in the minority and White Female communities. It is crucially important to the President's re-election that he very soon adopt a forceful consistent position in favor of "Pro-Opportunity" for African Americans, other minorities and Females, which will energize and reinvigorate these potential voters.

This letter is to formalize a recommendation I made to you, Erksine Bowles and Harold Ickes some months ago (prior to President Clinton announcing the Internal Review of Affirmative Action policies), that *the President* meet with a small group of loyal African American supporters [e.g., drawn from African American DNC Trustees and DNC Business Leadership Forum (BLF) members] who are knowledgeable about Federal affirmative action and minority business programs. The meeting, to be valuable to the President and the DNC, must occur before a final decision on affirmative action issues is made and the group must be small enough to permit real dialogue with the President and his key aides. I understand that Trustee Melvin Clark

5/10
HAROLD - do you want this submitted?
Letter from Weldon Latham re mtg with POTUS
& small group of African American supporters
RE FILE



COPY

Honorable Donald L. Fowler
May 5, 1995
Page 2

made similar recommendations to the President, at a recent Trustee meeting at the White House.

While rumors in Washington are the rule, you should be aware that rumors abound that the President "has decided" to "gut" the Section 8(a) Program. Elimination or significant weakening of this minority business development program, which has clearly been the basis for creating and strengthening a sound minority business infrastructure in this Nation (see attached *Washington Business Journal* Commentary), would clearly undermine minority support for *this* President. It is, therefore, imperative that those of us who are dedicated to President Clinton's re-election, have an opportunity to voice our considered recommendations directly to him.

As a former Carter appointee, I personally, recall similar circumstances in which President Carter moved away from his base of support, and we all know the result. Three obvious people to assist in selecting the participants in such a meeting are Ernie Green, Mel Clark and me.

I look forward to hearing from you concerning the proposed meeting.

Best regards,

Weldon H. Latham

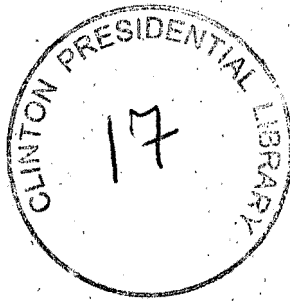
WHL:jl

cc: Hon. Harold Ickes, Deputy Chief of Staff
Hon. Erksine Bowles, Deputy Chief of Staff
Hon. Robert Nash, Assistant to the President
Hon. Alexis M. Herman, Assistant to the President
Hon. Terry McAuliffe, National Finance Chairman
Hon. Minyon Moore, DNC Political Director
Mr. Ernest Green, DNC Trustee
Mr. Melvin E. Clark, DNC Trustee

Copy whom?

Harold
George
Bruce

original
to me



THE PRESIDENT HAS SEEN

4/20

COPY

The Democrats' Quota System

By PHILIP S. FRIEDMAN

In dealing with affirmative action, President Clinton has apparently seized on the slogan "reflect, don't retreat" while he awaits the findings of a bipartisan commission. But before he embarks on yet another timid assertion of presidential leadership, President Clinton would be wise to reflect on the presidential nominating rules of his own party. There, the full extent of the Democratic Party's institutional commitment to race and gender preferences underscores the likely failure of any affirmative action commission that the president might appoint.

Delegate selection rules for the 1996 Democratic National Convention provide that the national and state Democratic parties must "adopt and implement affirmative action programs with specific goals and timetables" for five minority groups: African-Americans, Hispanics, Native Americans, Asian/Pacific Americans and women. While the rules profess to prohibit quotas, each state delegation, and the convention as a whole, must be divided equally between male and female participants. Moreover, at-large seats are "reserved" for members of the above named minority groups to meet the representation "goals" typically established by a demographic study of the Democratic electorate in each state.

While these rules started as a commendable effort to ensure minority participation, in practice they are enforced with the rigidity of quotas. Indeed, during the 1992 Clinton campaign, I found myself in the uncomfortable position of assisting Mr. Clinton's delegate selection team, like

all of its Democratic counterparts, in counting the number of women, African-Americans, Asians, Hispanics and other party-sanctioned minority groups.

Consider a typical example: A state is allotted 100 convention delegates. Seventy-five of these delegates must be elected at the district or caucus level. The remaining 25 "at-large" delegates are held in reserve pending a final examination of the gender, ethnic and racial characteristics of the 75 delegates elected at the district level. Although any Democrat is eligible to run for these delegate positions, the rules mandate that the district delegates be evenly divided between men and women. Consequently, in a district with 10 delegates, if the voters elect eight male and two female delegates, the party rules dictate that three male delegates be replaced with three female delegates.

The state party must then tally the ethnic, gender and racial characteristics of all the district delegates. If the tally shows that the makeup does not match the state's representation "goals," then the state's "at-large" delegates are "cherry-picked" from among those individuals possessing the group attributes necessary to bring the entire delegation into compliance with affirmative action criteria.

Ostensibly, the purpose of these rules is to encourage those groups who have historically been underrepresented in the party. But rather than provide for equal opportunities, the Democratic Party's rules—as my own experience revealed—dictate equal outcomes based on race and sex. In short, convention delegates are increasingly selected on the basis of their

status as members of defined groups, rather than as individuals with unique ideological principles, commitments and beliefs.

And there is no limit to those who qualify for "minority" status. The New York Democratic Party's 1992 affirmative action plan, for example, guaranteed niches for, among others, African-Americans, Latinos, Asian/Pacific Americans, Native Americans, women, people under 30, people over 65, people of low and moderate income, workers, people with a high school education or less, the physically handicapped, and lesbians and gays.

These quotas can't simply be dismissed as the work of a voluntary organization. The Democratic Party, like the Republican, receives millions of dollars in taxpayer funds. Were there any delegates with the courage—and standing—to challenge the system, the federal courts might well find the Democratic Party's use of federal dollars to promote racial and gender set-asides to be in violation of both Title VI and Title VII of the civil rights laws.

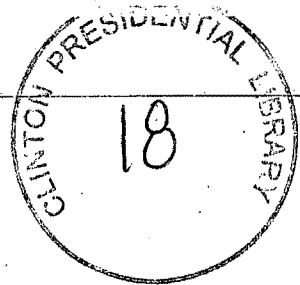
Even more important, however, the Democratic Party's nominating rules embody the ideological commitment of the party and presumably its leader, Bill Clinton, to race and gender set-asides. Until President Clinton revamps these rules, not much credence can be given to his promise for an honest review of this country's affirmative action policies.

Mr. Friedman was the deputy general counsel to the 1992 Clinton campaign. He is an attorney in Washington.

THE WALL STREET JOURNAL WEDNESDAY, APRIL 19, 1995

Isn't this the guy Ron Brown
didn't like? Did he get saved by
for a minority? Didn't we go to
his parents' home for a Democratic
fundraiser? —

BB

Affiliated actors

4/12/98

- | | | |
|-----------------------|--------------|------------------------|
| • Brendt | • VP | • Spaulding |
| • AS | • H. Myers | • Dunn |
| • L.P. | • Spaulding | ~~W. H. H. H.~~ |
| • HI | • Galt | • Griffin |
| • FO | • H. H. H. | • McCann |
| • Yew | • Chas Edley | • + W. H. H. |
| • ~~H. H. H.~~ | • J. H. H. | (21) |
| • Boer | | |

only 17

Contract ret. and

- ret. and
- best reference

has has 1

or full bulls

- helps develop many contacts

- 90% of many contacts are grant contacts
- Experiment and

Lay-off:Prescutaneous care:

BC - Layoff should be subject to
higher standard than a layoff
standard.

Can rose be taken into account

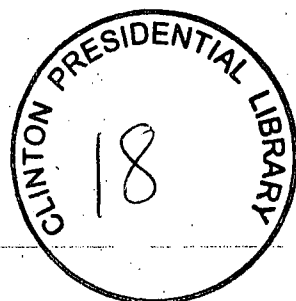
Promotion:

- Take rose into account for any
public policy

Scholarship:

BC OK on rose or a poster

Disputed until 4/10/98
 • Panto
 • GS
 • C Edly



(1) past documents -

(2) long-term effect of documents
 analyzing many effects of ~~dis~~ documents

(3) Inclusion

→ inclusion as revelation

- no quotas
- no one who is inherently qualified
 rather than unqualified
- stress needs based

* [exception for minority set aside for
scholarships]

[Eliminate the set aside
but keep the 10% ~~reference~~ but reference]

Steps:

- if an unusable or an economic tool

W

3/20/95

BC meeting w selected members of cabinet
Cabinet room -

- BC
- R. Brown
- Lee Brown
- Denise Brown
- Reich
- US Reps
- Pally
- C. Edley
- Skelton
- Higgins
- S. Allen
- G-S
- Paelto
- WI
- Brown

One appointed
action

NOTE! Panel 1

Lee Brown didn't
have name
names

RNB - against the review

- must be for equal opportunity
- appointed action is major tool
- can't be forever
- but still room + discussion
- concerned about the business aspect -
- finally we are getting support
from minority business community &
if we abandon ~~that~~ AA
we will lose our support
- Govt contracting during + minority
set aside have helped to develop
minority business -
- Even ~~Union~~ Union is OK
- minority owned status apply
to minority es -
- also ~~promote~~ promote

- needs to save ourselves from disaster

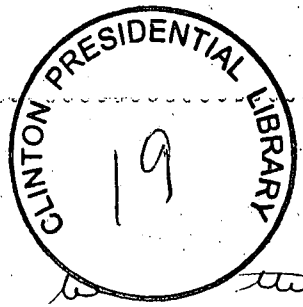
- focus on what we're important

- there is a new horizon

H. Carver

- can't get program until legislative powers
have been made -

The text should be the numbers



2 COPY

Thurman -

- Q What should be the best ranch

- Harker out "fast" sheet
- Perhaps a "blue ribbon" commission that would judge the money

Shalala -

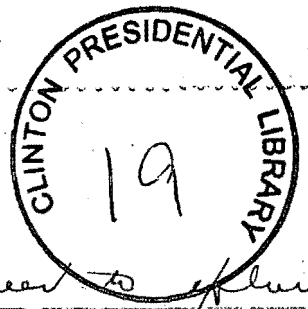
- Pataps need different tools but still need race & gender as factors
- Economic factors won't suffice
- When interviewed for two security jobs DS was asked
 - could she raise & become she was a woman
 - could she talk to the post office work -
- May need stronger tools to achieve goals but they must be explainable
- Need to achieve a critical mass of women/blacks etc to change attitudes -
- Don't think discrimination has gone away ~~as~~

Clinton = bewildered about the routes all the buses

- ① - must also include "masters" see some thoughts prior of court orders
- ② - Corporate downsizing has hurt
- ③ - anti appointed actors people have have the advantage a language & framing the issue -

Rally - Urban re opportunity -

(*) - { biggest problem Bc has is lack of deurbaness



Reilly (cont'd)

- AA has number & we need to explain it

- can't depart from concept of AA -- but need to get something off dead center

- use AA where there is discomfort

- use AA where can't achieve

identity w/o it

* → - BC can't be perceived as backing off commitment to appointing ~~from~~ ^{fairness to} blacks etc

Reich -

retainers - 2 ~~kind~~ kinds -

① discrediting w/ poor outcomes - where the agency wants to expand identity

② Non discrediting

- language is critical

Need to stress show business & identity that casting a wider net for future benefits legit business & the country -

J. Brown

① White females have benefited most from AA

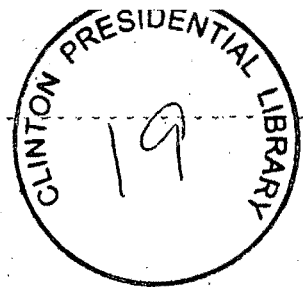
Need to make this the public cause

• Veterans not threatened by this debate

Browner

- Focus on the goal ^{of equality} rather than discuss the process

- When know that they are where they are primarily because of AA



Lee Brown

- Not enough to get no minority in an organization -- must also get them moving ~~up~~ up the ladder

RNBrown

- Need to have diversity if our business is going to be able to compete in global, diversified economy -

fourth A.D. in terms of opportunity

① attract new people

② 95% of what we do is to put qualified people

③ Set agendas - need to look at

④ Talk about the advantages of a diverse society

Admission to school

living

promoted

supply

relationships

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Bob Mullholland to George Stephanopoulos (3 pages)	04/04/1995	P5, P6/b(6) 21

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9162

FOLDER TITLE:

Affirmative Action - 1995 General [Folder 3] [4]

2008-0308-F

wr452

RESTRICTION CODES

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

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

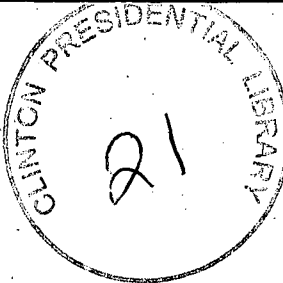
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



To: Doug Sashik
Harold Ickes
Don Fowler
Fr: George S.

COPY

MEMORANDUM

FYI

[oo]

TO: George Stepanopoulos
FROM: Bob Mulholland, Campaign Advisor
California Democratic Party
DATE: April 4, 1995
RE: Affirmative Action

Work 916.442.5707
FAX 916.442.5715
Home
Mobile

PS(b)(6)

In case you were looking for some more input on the issue of Affirmative Action (A.A.), here's mine -different from many other Democrats.

I usually tend to be with the voters on issues. President Clinton should have positions on his issues in 1996, and avoid taking positions on the Republican issues. Affirmative Action effects very few voters. Using the recent LA Times poll (3/30/95) and our projections of the 11/5/96 California voters you see this:

1. About 442,580 minorities believe that they have benefitted from Affirmative Action.
2. White men who believe they have been victims of reverse discrimination = 1,219,680.
3. Three times as many white men believe Affirmative Action has hurt them as the number of minorities who believe A.A. has helped them.

The same poll states that only 5% of women say it has helped them.

The Los Angeles Times poll also shows:
" Civil Rights Initiative"

	Yes	No
Whites (non Latino)	71%	21%
Latinos	52%	
Asian-American	54%	
African-American	45%	48%

Yes, the poll shows people support Affirmative Action without quotas but no electoral campaign will ever win the debate that quotas are not or won't be used.

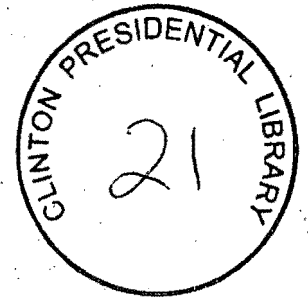
On Proposition 187, I advocated in early 1994 that we should not try to defeat it and just let a Reagan Federal Judge throw it out after it passed, but some in the Democratic Coalition (outside of the Party) thought it could be defeated with a \$3 million budget (maybe) and they hired the Woodward McDowell firm (specializes in initiatives, especially defeating them).

Of course the big money never materialized and when Prop 187 appeared (falsely) not to be doing as well, the Wilson campaign spent over \$1 million in TV advertisements using it as a wedge against Kathleen Brown.

The Brown campaign, that couldn't figure out how to run a campaign, then in the last few weeks became the No on Prop 187 campaign, so "at least the voters would know that Kathleen Brown stood for something" (yes it was that sad). Prop 187 passed statewide 58.9%. Even though 47% of the African-Americans voted for Prop 187, they still voted 77% for Kathleen Brown. They didn't hold it against her for opposing Prop 187.

Summary of Prop 187 vote (LA Times exit poll)

	yes	No
(81%) White	63%	37%
(5%) African-American	47%	53%
(8%) Latino	23%	77%
(4%) Asian-American	47%	53%
Statewide	58.9%	41.1%



Some Democrats were happy that we stood our ground, just like they were still happy after McGovern lost.

Don't expect a Legislative solution. Legislative bodies are rarely capable of a solution to a major problem. They were designed by the Founding Fathers to move no faster than a snail.

The California Legislature couldn't solve the property tax problem in 1978. Proposition 13 passed with 64.8% of the vote (06/78).

In 1990 Pete Wilson looked at Dianne Feinstein in their debate and said he supported Prop 140 (term limits for state elected officials).

Feinstein knew her legislative supporters were against it, and she was against it. Wilson won the election (49.3% to 45.8%) and Prop 140 won with 52.2% (despite millions of dollars spent against it)

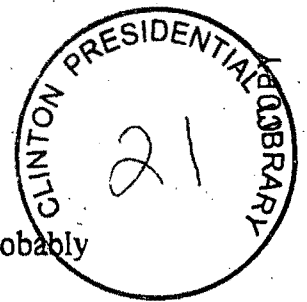
On the issue of Civil Rights and Affirmative Action, for those of us over 40 we can remember in the 60's seeing on our TV & newspaper images of the following:

1. White Democratic Governors blocking schoolhouse doors.
2. Firehoses and clubs being used on African-Americans.
3. German Shepherds foaming at the mouth.
4. National Guards being called in.
5. KKK in their white sheets.
6. Homes and churches being burned to the ground.
7. People being murdered.
8. "Whites only" signs in store and restaurant windows.

America was shocked, embarrassed, and feeling guilty.

That's not the case today and that's why Republicans can call for the end of Affirmative Action without fear. Afterall, it was Democrats who controlled the south and who were the advocates of segregation.

Activists miss the point when they scream about the glass ceiling - where 95% of the top



jobs in America are occupied by white males.

Probably 95% of the white males in America aren't in those top jobs either and probably 95% of the voters will never be in them - there are too few jobs at the top.

There are more white male voters in California making less than \$50,000 than all the minorities combined.

In fact on Nov 5, 1996 there will be 4.356 million white males voting and only 2.783 million minorities (males & females) voting. Of course, we will not win a majority of the white male voters.

In 1996 Democrats should focus on our issues (economic and possibly abortion) - ones that the Republicans can't support.

Of our base voters, the largest group is white Democratic women.

Of our swing voters, the largest group is white Democratic women.

I bet these women have spent more time thinking of what Marcia Clark said in February about her child care problems than Affirmative Action.

These women want:

- security in the home
- security in the streets
- security in the schools
- security in the job

Some people want us to drop everything and fight the Republicans and their "Civil Rights Initiative". If we do, 1996 in California for Democrats will be like the last scene in Thelma and Louise.

Whatever happened to raising the minimum wage, giving tax credits for families with children in college, etc.?

Hopefully we'll decide soon what if any initiatives we want on our Nov, 96 ballot.

P.S. Some Latino community leaders have been on TV saying Affirmative Action to Latinos means African-Americans.

Last year the former State Republican Chair (a Cuban-American) charged that Hispanics were being neglected in Affirmative Action especially in the U.S. postal system..

So the Los Angeles Times did a big story, breaking down Los Angeles county showing about 60% of the mail carriers in the Los Angeles city area were African-Americans.

In Vietnam, Affirmative Action goals were met. About 13% of the 58,000+ Americans killed in Vietnam were African-Americans. At the time, the U.S. population was about 11% African-Americans.

* * *

AM/AFFACTME

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
~~001. list~~	~~Invitees for Monday Dinner with POTUS [partial] (2 pages)~~	~~03/09/1995~~	~~P6/b(6)~~
002. notes	BC - Affirmative Action Meeting (3 pages)	3/10/1995	P5 22
003. notes	Affirmative Action Meeting (3 pages)	2/24/1995	P5 23
004. notes	Affirmative Action Meeting (1 page)	2/23/1995	P5 24
005. notes	Affirmative Action Meeting (2 pages)	2/15/1995	P5 25
006. notes	Affirmative Action Meeting (1 page)	2/12/1995	P5 26

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9162

FOLDER TITLE:

Affirmative Action - 1995 General [Folder 3] [5]

2008-0308-F

wr453

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

BC - a printed out ~~ready~~ ready ready 3/10/95

- | | |
|-------------|---------------|
| • BL | • D. Baer |
| • UP | • Galton |
| • Len | • David Patel |
| • Douglas W | • Tom Allen |
| • Quinn | • Hanson |
| • Edley | • Higgins |
| • GS | • Spelling |
| • H # | • Gaffer |

race, gender,

- disabled -
- retards -

- A neckle info
- Develop speed
- develop a 'reborn' package"

3 q tu:

- ① color blind
- 1 penetration where disrupted is stem
- 2 penetration + action

need to articulate started of quality -
Bos should count #2

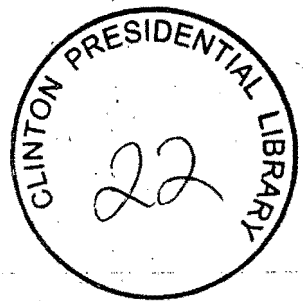
integrity has done good job because they
don't sacrifice stability

Things to abolish
Things to rectify
Things to increase

eg - fewer blacks getting
into white colleges
now

every one can have opportunity to realize ^{potential} ~~potential~~

- equality of gratitudes
- efforts to develop capacities of people
- so that can see series the amount



- Part
- merit
- inequality unrelated to ability

- compensatory programs - eg. head start etc. college loans, EITC; expansion zones
- people who are victims of past decisions, present decisions or inequality of ability

Need:

1. adequate need based programs
2. programs to develop pool of people to get equality of opportunities
- eg. schools
business

3. expansion of actual decisions

last

4. If ~~need~~ appointed action to develop the qualified pool is not enough; is there a need to have programs that is rare, quite basic

① Now the reason - what do you want
dream to look like

② programs made over past 30 years

③ How

What is ~~over~~ appointed action 2nd
goal - benefit for whole
country



(3)

UP -

- ① Need to be fair to victims of domestic
part, present & future
included primary
- ② Public good of harmony, diversity &
national character

- Stress what is going on in the world
today - a barrier
"Tutor / Hints conflict"

PC - Need in order to talk to other side.

1. Task is understandable laws -
from general to specific

2. we know how they feel

3. on some cases there has been
some sacrifice



2/24/95

• Denis H.

• George S.

• Chris Edly

• HS

+ others

u / about rocks / TV pictures

- Seelye Smith - not used
- Lewis - cannot
- Jay Cooper - cannot
- Herb Wilkes
- Bob Schmitt - BET -

- Bob Schmitt -

• Tay on ~~the~~ - 1778

• black occurs to remove pie -

- historically blacks have been denied equal

Bob Schmitt: occurs

→ No room to be in political process with those who don't represent our ~~values~~ interests -

- BC should say he will veto reauthorization of 1071

- shouldn't even say we need to remove AA

- economic health of blacks is receding

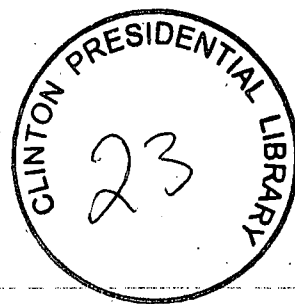
• have ~~an~~ anxiety

- assault on AA is assault on ability of blacks to ~~opt~~ participate in the ~~economic~~ economy -

→ - AA vehicle to economic well being -

Jay Cooper:

- worked ^{on} ~~ag~~ ^{hours} & four minutes ~~who~~
who waited ~~to~~ big deals (new son
night of day) cut to help white
men -



Tag Coqa: /



- 1) Be confident in request
- 2) Under attack
- 3) Wanna

we need to show how whites & benefited from credit subsidies

- There is a lot of states for blacks & whites must return BC to WH
- Watch for P. Sutter / B. Kennedy

Ed Lewis -

every equal capital always a public

- tag certificates
- AD is only about opening the door -
- white house are lowest benefiting

GS - • Committed to equal opportunity

• discrimination must be removed

• BC must walk away from the project

• top of iceberg - of republican assault

• we must be smart

• we need to look at this program like any other program

• Need to know what works or what doesn't work -

BC needs to send ~~some~~ request that he will veto 1071

BC needs to give a proper speech on

Tag certificates

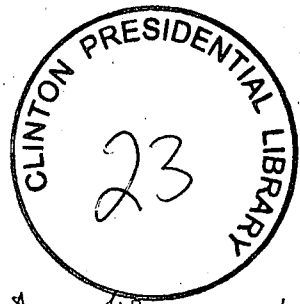
= permits

Any possible compromise on 1071?

eg - a cap?

• Cap on tag size of tag benefited

• Structured the benefit differently eg -



Bob Johnston

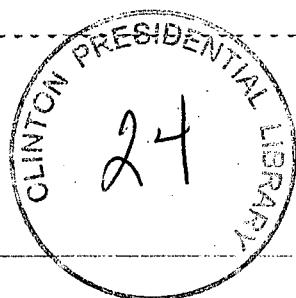
some of the dedicated need be put into
developing minority enterprises
- Tay anticipates is a lube to which
to draw w/ blacks -
must convince white America that they
will be better off w/ black access
to wealth - money - etc

Chris E - all v. rational strategies is a loser -

Bob
Johnston

Can't separate west from water
1071 is based on race - can't separate it
from race

Issue - can we ~~become~~ ~~become~~ get access -



2/23/94 - Affiliated with

• Robert K. Bentley

• Fred

→ left very hard to know in the sense
will do it BE the last time ~~protesters~~
protesters

Franco - wants to have a complete construction
dialogue -

Coated

• NAACP

• started by

DELU

Narrative
public

new
advertisements

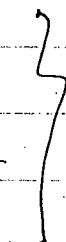
Longer units

People might not know

• PG+E

• Bar of Power

• Walk Fairs



these guys will try
to get these guys to
come out against it

Pamela pants //

→ Not enough to ensure federal courts
denies -

→ Validity as process - eg Walk Fairs
- does advertising to promote a
change with force -

Could get away w/o set rules -

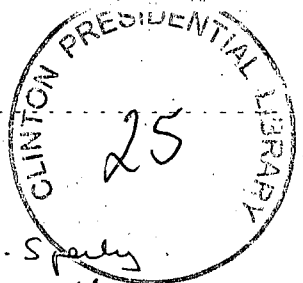
→ Pamela to defeat the only institution

will be

any teacher in school

quarantine AIDS people

} all were defeated in
only -



Appointed Act 2/15/82

• Gary S

• S. Gentry

• David Patrick

• J. Quinn

• Al. Tucker

• Bill Galster

• Joel Kuhn

• Susan ~~Long~~ Liff

• McFarlane

• R. Hennen

• K. Haggins

• G. Sperry

• C. Edley

• P. Giffin

• Lorne Miller

19 Total

- ① What has BC said in past in issue of race
- ② How to decide the money
- ③ Time taken
- ④ BC needs to make a long statement where he has been on this issue & where he is going

County meeting

- Race will be used to divide county

- ~~the~~ ~~meeting~~ to

- republicans are my backbone // we want to move forward

- ⑤ Edley to drop ~~the~~ ~~points~~ ~~how~~ to ~~count~~ ~~on~~ ~~meeting~~ -

- Harbort contest

- legal contest

- political projects - say how to deal w/ civil liberties

- ① Republicans want to use race to divide the county

Dem - committed to integrated society

- now & future moves for this

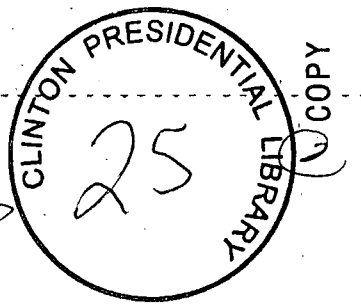
- what it better people that ~~real~~ people use race to divide the county

Kind of appointed actor we have suggested

- race a factor when value broken is not placed on other

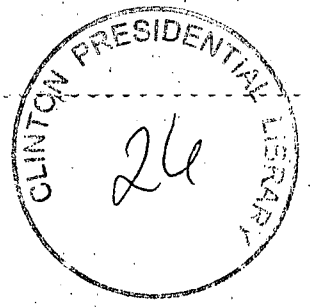
RP different from universal entitlements

what your preferences for to implement



minutes are qualified no minutes

② Cady - need to put resolution in the Cady
ballot to vote for



Proposed Act - Gen P 2/12/95

- Bc to stand by the people's ideology and rights - i
- can look at areas of enforcement & improvement but Bc want

Bc want back as away from power
such as in civil rights & to opportunity -
- oppose efforts to turn the clock back
on civil rights

⑥ Where there is discussion, must have
a remedy which ~~is~~ includes appropriate
action

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
--------------------------	---------------	------	-------------

001. memo From Mark Mellman, re: Affirmative Action (2 pages)

3/16/1995

P5

27

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9163

FOLDER TITLE:

Affirmative Action - White House

2008-0308-F

wr867

RESTRICTION CODES

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

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

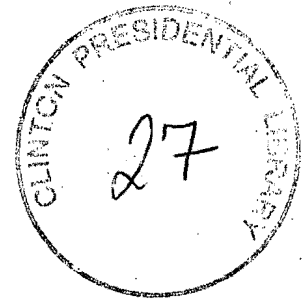
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



THE MELLMAN GROUP

RESEARCH, STRATEGY & POLICY

~~CONFIDENTIAL~~
NOT FOR DISTRIBUTION

MEMORANDUM

TO:

FROM: Mark Mellman

RE: Affirmative Action

DATE: March 16, 1995

The affirmative action issue threatens to do greater long term damage to our party, both internally and externally, than any other issue in recent memory. It is a classic wedge issue that splits our base voters from our swing voters. It also splits our activist core from the majority of our rank and file voters.

The issue is highly emotional and likely to become much higher profile. Note the cover headline in U.S. News and World Report a couple of weeks ago: "White Males Need Not Apply." Polling data from California indicates that two-thirds (66%) of voters support the anti-affirmative action initiative that stimulated the national debate. (The initiative will likely be on the ballot in 1996). Nearly three-quarters of whites (71%) support this anti-affirmative action initiative. Yet, our historic commitments, together with our base constituency and activist core, do not allow us to just give up.

In the end, of course, this is a fundamental policy decision. However, below I have outlined some political/communication strategies that could be employed in dealing with affirmative action. This memo is not meant to be exhaustive. Rather it is designed to stimulate further thought. Very little research has been done on this delicate issue, so I cannot say with any real confidence how well any of these strategies might work.

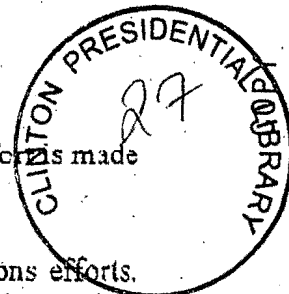
Defend -- To have any hope of defending affirmative action, I believe one must start by stating unequivocal opposition to quotas and reverse discrimination of any kind. Only then is

DETERMINED TO BE AN ADMINISTRATIVE
MARKING Per E.O. 12958 as amended, Sec. 3.3 (c)

Initials: WM Date: 4/16/95

FOIA 2008-0308-F

it even potentially possible to talk about the continuing need to make certain every effort is made to insure that opportunity is open to all.



Change the Terms of Debate -- This can be done in law or in communications efforts. Changing the criterion for affirmative action from race and gender to economic disadvantage is the most commonly discussed change in law that might alter the terms of the debate. There are three potential problems with this. First (as with most of these points), we have no research to indicate that this kind of affirmative action is any more acceptable than current law. Second, the activists adamantly oppose such a change because they say it will not do enough to help minorities. Numerically, they say, there are a lot more poor whites than poor blacks. Finally it is not clear what it would mean to give preferences to businesses owned by poor people or provide a tax deduction to people who sell radio stations to the poor.

From a message/communications point of view, the clearest way to change the terms of debate is to talk about affirmative action in gender rather than race terms. Preliminary data suggests that voters are 10-15 points more supportive of affirmative action when women, as opposed to racial minorities, get the extra help.

Trade -- One may be able to trade the elimination of some programs for the preservation of others. For example one might be able to develop a compelling message around ending minority set asides (or other programs that smack of quotas), while preserving programs that "require efforts to expend the availability of opportunity." Again the activists will find this problematic, but they may find part of a loaf is better than none.

Substitute -- It may be possible to develop a message around eliminating affirmative action, but instead significantly increasing the penalties for discrimination, along with an increase in enforcement. Perhaps, even turn discrimination into a felony. The same caveat and rejoinder applies to the activists as above.

Again, we do not have clear evidence that any of these strategies are sufficient or even workable. We also do not know from a political view, which would be best. We do have enough evidence to know that some coherent strategy is necessary.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Speech, Review and Policy Decisions - Draft (6 pages)	6/23/1995	P5 31
002. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review (5 pages)	6/19/1995	P5 32 Dup #4
003a. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review (5 pages)	6/19/1995	P5 33 Dup #4
003b. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review (5 pages)	6/19/1995	P5 34 Dup #4
003c. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review (5 pages)	6/19/1995	P5 35 Dup #4
004a. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review - Draft (6 pages)	6/16/1995	P5 36
004b. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review - Draft (6 pages)	6/16/1995	P5 37 Dup 36
005a. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - The Supreme Court's Adarand Decision - Draft (3 pages)	6/12/1995	P5 38
005b. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - The Supreme Court's Adarand Decision - Draft (3 pages)	6/12/1995	P5 39

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5930

FOLDER TITLE:

AA [Affirmative Action] POUTS Memos (Chron) [Chronological] [2]

2008-0308-F
wr870

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. note	G. Stephanopoulos to C. Edley, re: Affirmative Action (1 page)	n.d.	P5 40
007. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Policy Issues (10 pages)	4/20/1995	P5 41 Dup #6

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5930

FOLDER TITLE:

AA [Affirmative Action] POUTS Memos (Chron) [Chronological] [2]

2008-0308-F

wr870

RESTRICTION CODES

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

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

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

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

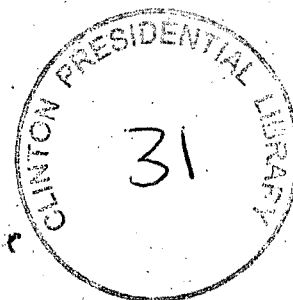
RR. Document will be reviewed upon request.

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

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

Draft 1

June 23, 1995



WJC LIBRARY PHOTOCOPY

MEMORANDUM FOR THE PRESIDENT

From: George Stephanopoulos and Christopher Edley, Jr.

Re: Affirmative Action -- Speech, Review and Policy Decisions

This memorandum reviews the four pieces to the Affirmative Action rollout:

- A major speech
- Release of the Review
- The Directive the Attorney General creating an interagency process to ensure compliance with *Adarand* and with your policy principles
- Key policy choices -- the "triage" you requested -- only one element of which (setasides) we present for immediate decision and for announcement with the speech

You will receive a draft of the Review next Wednesday, June 28; and a draft of the speech on Friday, June 30. Staff are considering dates for the speech beginning July 10.

II. The Speech

As we discussed, the speech will be a broadly thematic discussion of discrimination, exclusion, equal opportunity, and healing. It will include a strong defense of affirmative action when done the *right* way, and offer defining policy principles which will be made concrete with a few pointed programmatic examples of the good, the uncertain and the problematic. Among possible speech venues we are reviewing are: Little Rock Central High ; Atlanta; a company with an outstanding EEO performance; and a combined congregation of black and white mega-churches.

Don Baer and Carolyn Curiel, with assistance from others, are conducting the broad outreach you requested.

III. The Directive to the Attorney General and Agency Heads

The detailed empirical analysis and consideration of program revisions that is now required as a consequence of *Adarand* must be coordinated by the Department of Justice as regards the *legal* determination of whether a program is constitutionally defensible. But the process must also include some continuing White House participation to ensure that *defensible* programs

meet your *policy* test, or are reformed. The legal and policy choices are all but impossible to disentangle, and will in any case be attributed to the White House. Our recommendation is that the formal White House participation in the interagency effort be lead by Judge Mikva. George Stephanopoulos will participate as needed. A draft of the Directive to the Attorney General is in Attachment B.

What is the relationship of the Review to the Directive? "The Review provided the President with basic factual information concerning various Federal programs and the background conditions of discrimination and exclusion, and provided an preliminary application of his policy principles to various programs. In light of *Adarand*, however, these policy judgments are now subject to strict scrutiny by the courts, and must be reconsidered by the Justice Department to ensure compliance with *Adarand*."

IV. The Review

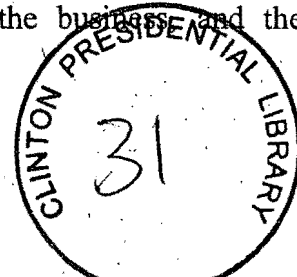
At a minimum, the Review will include a description of you policy framework, an analysis of the *Adarand* case, a review of evidence documenting the continuing problem of discrimination and exclusion, and a description of the range of Federal programs and how they operate. The *draft* of the Review prepared prior to *Adarand* also included a balanced presentation of good and bad information collected on program performance, our "findings of fact" based on that information, and some policy conclusions and recommendations. In light of *Adarand*, however, and the certainty of both litigation and legislative action, however, the Department of Justice has raised serious concerns about whether these factual and policy matters should be released at this time. We are discussing this difficulty, and will have a recommendation for you when you receive the draft Review next Wednesday, June 28.

Meanwhile, Attachment A has the table of contents and the opening "policy framework" section of the draft Review.

V. Decision on Procurement Setasides

Baseline -- Reform of Abuses: The Review has identified a number of areas of abuse or perceived abuse. As in all the other areas we examined, these abuses are far less common in reality than is commonly assumed by critics. Nevertheless, addressing these is necessary as a matter of fairness and political circumstances; the reforms will also have a marginal helpful impact on the constitutional analysis. The details of needed regulatory and statutory changes remain to be defined after these general parameters are announced. (It would be impossible to develop sound details while maintaining confidentiality.) The five key elements and summary prescriptions are:

1. **Tighten the Economic Disadvantage Test.** Reform the asset test to count the value of personal residence, spouse's investment income from the business, and the value of



"passive" investment in the small disadvantaged business (SDB).

2. Tighten Requirements for Graduation. Apply 8(a)'s 9 year graduation limit to all SDB programs, but then direct the NEC and SBA to establish objective industry-specific criteria for determining when any individual firm "develops" beyond need for sheltered competition. Direct the NEC and SBA to establish caps on the dollar value of contracts, plus a cap on total dollars a single firm can win through sheltered competition.

3. Stringent Safeguards Against Fronts and Pass-Throughs. Create a uniform, privatized certification process for all SDBs. Require that certification audits at first contract and periodically thereafter to verify continuing eligibility and to monitor for "fronts" and "pass-through" companies. Increase civil and criminal penalties.

4. Sunsets and Caps to Reduce Regional/Industry Concentrations. Direct the NEC to formulate industry and regional caps/controls to prevent significant adverse burden on non-SDBs. Direct the NEC to determine industries/areas where sheltered competition programs may be phased out based upon successful inclusion.

5. Reduce the Concentration of 8(a) Contract Dollars Among a Few Firms. Cap contract value and lifetime value of contracts to a firm.

Key agency officials agree that we must announce this package, making clear that the details will require careful consultation. The package would be described not only in terms of combatting abuses, but also ensuring conformity with your policy test of fairness.

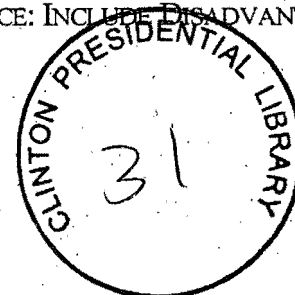
Further Steps -- Options for Broadening Eligibility: In light of your policy tests, and because of the shadow cast by *Adarand*, we offer these additional options to make minority status less of a defining and exclusive condition of eligibility for procurement preferences.

OPTION 1: ANNOUNCE ONLY THE "BASELINE" SET OF ANTI-ABUSE MEASURES DESCRIBED ABOVE.

Pro: It would be prudent to complete the detailed empirical and program assessments required by the Supreme Court before rushing to judgment. If we rush, Congress will feel emboldened to rush. No policy choices at this stage could accurately be described as *constitutionally* compelled; they would be naked policy judgments. Defer specific policy judgments of this radical sort until after the Attorney General's process.

Con: Especially after so long a Review, the public expects at least some policy judgment from the President -- in both the affirmative and negative -- as a measure of leadership as well as commitment to the fairness principles. Completely collapsing the policy judgment into the constitutional analysis amounts to ceding policy authority to Justice O'Connor.

OPTION 2: BROADEN PREFERENCE ELIGIBILITY TO DE-EMPHASIZE RACE: INCLUDE DISADVANTAGED INDIVIDUALS & DISTRESSED AREAS



The current minority-targeted preferences would be replaced by a single program for disadvantaged entrepreneurs and firms, with three eligibility gateways for participation in sheltered competition:

■ *Gateway 1: Socially and Economically Disadvantaged Entrepreneurs --*

- The current programs, whose purpose is remedying discrimination and its effects, with women added.
- Eligibility based on membership in a group that has been subject to discrimination. Genuinely rebuttable presumption for minorities **and women**. More realistic opening for white groups to demonstrate victimization.

■ *Gateway 2: Emerging Enterprises*

- Race-neutral eligibility for very small firms with little or no government experience, and an economically disadvantaged owner.

■ *Gateway 3: Empowerment Contracting: Distressed Area Employers*

- Preferences to stimulate jobs and development in designated severely distressed areas, designated by the Department of Labor.
- Eligibility based on performance of the contract in a distressed zone **and/or** hiring above a threshold level of employees from a designated area.

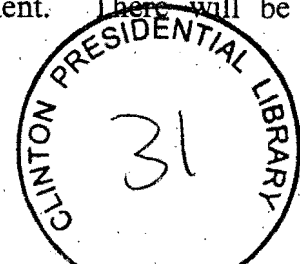
Pro: Preserves a gateway for victims of discrimination, while opening opportunity to deserving white males through Gateway 2. Gateway 3 adds explicit attention to economic development goals. The new eligibility for women is a major step. MBE and WBE goals of 5 percent could each be retained, within an overall goal of 15 percent.

Con: Program is a bit complicated to describe. The 15 percent aggregate goal is enormous, and will erode contracting under the "ordinary" small business contracting initiative.

OPTION 3: GEOGRAPHICAL TARGETING ONLY -- ELIMINATE RACIAL AND GENDER PREFERENCES

This option would eliminate the current programs and create sheltered competition program with eligibility determined as in *Gateway 3* above, i.e. based on performance of the contract in a distressed zone and/or hiring above a threshold level of employees from a designated area

Pro: Eliminates the controversial and constitutionally touchy racial targeting, while elevating and focusing on the message of jobs and economic development. There will be some



disproportionate benefit to minority entrepreneurs, though far less effective than currently.

Con: Will be viewed as abandonment and denial of the commitment to address directly the problem of discrimination-based denial of entrepreneurial opportunity

Decision:

_____ Option 1: Anti-abuse reforms only; defer major program changes

_____ Option 2: Broaden eligibility to "three gateway" model

_____ Option 3: Eliminate race- and gender-based preferences; geography only

VI. Sorting Programs into Three Categories

Finally, you said you wanted to sort the programs:

Group A: Programs You Can Support: Attorney General and Agencies instructed to confirm that these comply with *Adarand*.

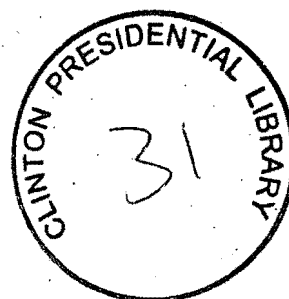
-
-
-

Group B: Programs whose goals you support, but for which you need additional detailed information from the agencies and Justice Department in order to make a final conclusion.

-
-
-

Group C: Programs you believe require modification in order to comply with your policies, including consistency with *Adarand*.

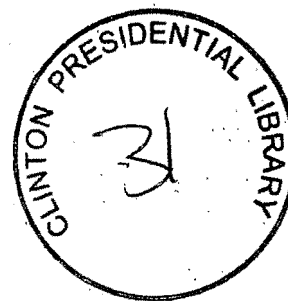
-
-
-



VII. Rollout Scenario More Generally

A coordinated communications and outreach effort is currently in development. The finalization of the policy options, speech thematic, and date will help with this process. The goal of this effort will be to effectively manage expectations and shape the characterization of the speech before it is given, as well as to amplify it to the greatest extent possible afterwards.

The effort will involve members of the Cabinet and sub-Cabinet, and the Legislative Affairs, Public Liaison, Communications and Press offices. In addition to the Administration efforts, outside/independent opinion leaders from the civil rights community, academia/education, women's community, economic/corporate and religious worlds will be integrated into the validation efforts.

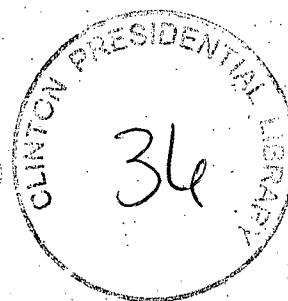


DRAFT 1

MEMORANDUM TO THE PRESIDENT

From: George Stephanopoulos and Christopher Edley, Jr.

Re: Affirmative Action: Decision on Post-*Adarand* Steps and Completion of the Review



WJC LIBRARY PHOTOCOPY

BACKGROUND: THE COURT, THE REVIEW AND THE HILL

The Supreme Court's 5-4 *Adarand* decision applies strict scrutiny to Federal race-conscious programs. The Court's 1989 *Croson* decision, on Richmond's setaside program, established the same heightened standard for state and local measures. All government race-conscious government programs must be *narrowly tailored* to serve a *compelling interest*.

Adarand's constitutional test is essentially identical to questions we have posed as a matter of policy to the agencies. But the Court raised the hurdle in two key respects.

- **Justification:** First, the Court now requires a *compelling interest*, while we previously assumed that you (and the Congress) have broader policy flexibility to judge whether each program's purposes justify race- and gender-conscious decisionmaking. We must now take greater care demonstrating the justification for setasides, targeted graduate fellowships, etc. (Caselaw is uncertain about whether and when nonremedial purposes, such as diversity, can meet the compelling interest test.)
- **Factual Predicate:** Second, in making *policy* judgments, you and the Congress were relatively free to accept whatever quantity of evidence and tightness of logic seemed, on balance, reasonably convincing. But now, courts applying strict scrutiny will insist on an unknown but surely much more substantial factual showing. They will probe for the factual predicate establishing prior discrimination (or other compelling interest), and for the facts establishing narrow tailoring.

In sum, while the Review has asked many of the same questions, *Adarand* requires far more rigor. In this light, can we state policy conclusions at this time? Your policy judgment *must* conform with the constitutional requirements; but that in turn means that most of your policy judgments on these programs must be preliminary or provisional, pending the detailed empirical work that is necessary to state and defend a conclusion about constitutionality.

Meanwhile, however, we expect some GOP members of Congress to move legislatively as early as this week, but no later than early July. On the appropriations front, Rep. Istook, Rep. Franks and Sen. Gramm are reportedly prepared to offer "anti-preference" amendments, perhaps in the innocuous-sounding language of the proposed California ballot proposition, or perhaps striking

funds for specific setaside or other programs. On the authorization side, Rep. Canady will soon introduce broad anti-preference language, and there is a chance that the Senate may face an anti-setaside or anti-preference amendment to the National Highway System bill now on the floor.

House Democrats are divided on how best to counter a GOP anti-preference measure. Most tactical discussions focus on a commission of some kind to conduct a fact-based review of whether current programs satisfy *Adarand*. Under this theory, moderate members would be able to vote to table or otherwise suspend a GOP move pending the commission's report. While the Black Caucus is generally opposed to a commission, the Democratic leadership and its task force strongly favor some form of commission, believing that members need a device such as this to provide political justification for voting against an *Adarand*-inspired preemptive attack on virtually all programs. In the Senate, Democratic leaders are also very interested in a commission, but may accept an Administration-led process with a date-certain for reporting.

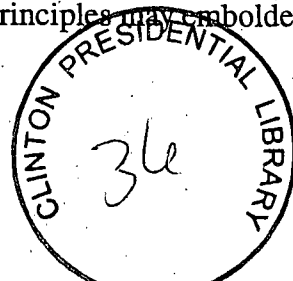
FIRST ISSUE: THEMATIC SPEECH ON EQUAL OPPORTUNITY

Your advisers all recommend a broad, thematic speech, as soon as practicable, on equal opportunity, tolerance and community/economic strength. The speech goals are:

- Go beyond remonstrance of those who practice wedge politics by demonstrating how to conduct a national conversation on the issues of discrimination, inclusion and opportunity;
- Reestablish your commitment to lead and shape that conversation by communicating your values and vision;
- Provide a third way for moderate Democrats and Republicans who want neither the status quo nor a blunderbuss, reckless response to *Adarand*;
- Lay down your own policy marker as guidance to the subsequent processes on the Hill, in the agencies, in litigation and in any Commission. With this done, details and day-to-day management of the issue can shift out of the White House, putting an end to months of "waiting for Clinton" commentary.

The speech would be above the plane of program details, but would offer a few specific examples in order to communicate effectively your central policies and values. The details would be left for other Administration officials to discuss, and for the Review document.

There are two main arguments against an early speech. First, the danger of a thematic speech is that the more unifying the framework of values, the more risk that some pundits will criticize you for attempting to speak to all sides of the issue. We discount this risk both because there are far more observers who recognize the need for healing, and because selected examples plus the Review document will contain enough that is disputable to prove that you are offering principles, not nostrums. Second, declaring ourselves on policy principles may embolden Senator



Gramm and others to press harsh anti-affirmative action legislation. They will declare that your "sympathy" for affirmative action makes it pointless to wait for the Administration's detailed analysis of *Adarand*'s implications. We acknowledge this risk, but consider that GOP amendments are likely whether you speak or not; Congressional Democrats and civil rights leaders agree that your speech will improve the chances of forestalling reckless legislation.

SECOND ISSUE: THE REVIEW AND A DIRECTIVE TO THE ATTORNEY GENERAL

Assuming you give a framework-setting speech, the two remaining questions concern release of the Review, and a directive establishing a follow-on process to assure compliance with your policies and with *Adarand*.

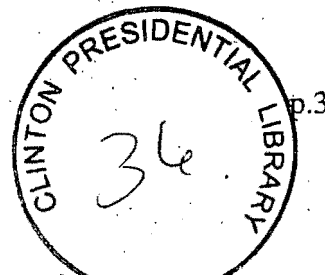
To satisfy strict scrutiny after the 1989 Richmond setaside case, over 80 state and local jurisdictions have conducted contracting "disparity studies" to establish the factual predicate and to analyze alternative program designs. In virtually all cases, officials used consultants and commissions to gather and analyze data, and each telephone-book-like report took months to complete. While much of the methodology is settled, the work takes time. Comparable Federal studies will be needed for litigation, and not only for procurement setasides. Such studies will likely be demanded by Congress as well, *and indeed they will be necessary before the Attorney General can confidently advise you concerning the constitutionality of a specific program.*

Your advisers agree that, with the speech, you should issue a Directive instructing the Attorney General to conduct an expanded and more detailed study, as required now by *Adarand*, to address the issues raised preliminarily by the White House Review. Working with the relevant agencies, and with consultants as needed, the Justice Department would coordinate preparation of the kind of empirical work likely to be required by federal courts and by the Congress.

There are three options for linking the speech and Directive with the White House Review:

Option 1: Finish the Review Now, With Policy Principles and Preliminary Conclusions.
The Review could be released containing:

- a detailed policy framework, as sketched in your framework speech;
- descriptions of key programs, providing helpful explanatory material;
- for a few programs -- where substantial evidence is already available -- preliminary conclusions about whether they satisfy your policy test (which includes conformity with *Adarand*); and
- for most programs -- those in which the evidence is too meager to make a confident *constitutional* estimate -- reserve judgment pending further analysis in light of *Adarand*.



The materials and preliminary conclusions from the Review would be turned over to the Attorney General's process for further work.

Option 2: Issue Abridged Review, Reserving Judgments on Facts and Policies. Alternatively, the Review document would be substantially shortened to:

- Eliminate the recitations of positive and negative facts concerning specific programs, and factual conclusions based on those facts.
- Eliminate preliminary policy conclusions about fairness or the need for program reforms, on the theory that such judgments should not be offered in a preliminary way, but in light of *Adarand* should await the results of the Attorney General's work.

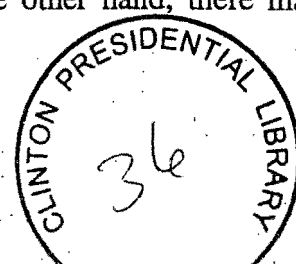
In essence, the Review document would be an elaboration of the speech's framework, background material on discrimination, plus a description of the nuts and bolts of several programs.

Option 3: Issue no Review; Rely on Directive to the Attorney General. Finally, we could announce that in light of the more stringent standard of evidence and documentation now constitutionally required by *Adarand*, the work of the Review has been suspended and turned over to the Attorney General to continue in a manner consistent with what will be required in litigation. The Presidential Directive to the Attorney General would include any needed elaboration of the policy framework. In conjunction with the speech, and as a service to Members of the Congress and journalists, we would repackage sections from the draft Review into a short document summarizing the key programs, the evidence on continuing discrimination, and the law of affirmative action.

Analysis:

Favoring Option 1: Complete the Review. We promised that the review would answer the tough questions you asked, and some observers will equate reserving judgment with "punt." Even if the constitutional test now makes definitive answers impossible, critics will say that surely *something* can be said by now. Our discussions with the Justice Department indicate, however, no existing programs can be flatly ruled out as constitutionally flawed under any conceivable set of additional facts. In particular, disparity studies may establish a strong factual predicate of prior discrimination in contracting, sufficient to justify the current, modest, racially-targeted goals and sheltered competition. Recall that the Justice Department argued forcefully to the Supreme Court that setaside in *Adarand* would in fact survive strict scrutiny; that argument will be joined on remand. Still, this option allows full opportunity to demonstrate leadership.

Favoring Option 2: Abridged Review, Reserving Judgments: Stripping out the facts and conclusions bearing on "what works and what doesn't" avoids a formal document containing statements that might create awkwardness in later litigation. More detailed study is now constitutionally required: reserving policy judgments avoids controversial pronouncements that may, in the end, not be constitutionally compelled. (On the other hand, there may be some



policy changes you would embrace regardless of any "disparity study," and whether or not constitutionally compelled.)

Favoring Option 3: Defer Decisions: Preliminary or tentative decisions about particular programs, without the kind of careful empirical scrutiny required under the new constitutional standard, will only confuse the debate and invite second-guessing by members of congress eager to score political points by rushing to action. Moreover, a policy choice to abandon or reform programs without being able to indicate whether such changes are constitutionally required will draw substantial fire. If you speak before the new homework assignment is complete, all you can do is either surmise that programs are acceptable (when the full facts may eventually show otherwise) or volunteer that you want to reform them even though a full development of the facts might ultimately show that such changes are not constitutionally compelled.

THIRD ISSUE: CHARTER OF THE COMMISSION

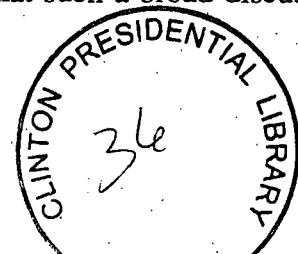
Finally, we must respond to the growing Congressional interest in a bipartisan commission. Your advisers are agreed that if there is to be a commission its membership should not require Senate confirmation; its fact-finding would supplement rather than supplant the work to be done within the Administration under the overall leadership of the Attorney General; the Commission's charter would in no way compromise the authority of the President and the Attorney General to set policy for the executive branch and define the position of the United States in litigation. We are also agreed that, given the views of Democratic leaders in Congress, a commission of some sort is the best option for holding marginal Democrats off of a GOP amendment. Even still, a tabling strategy is unlikely to succeed in the House.

Accepting that a commission seems necessary, the question is how broad to make its mandate:

Option 1: Narrow mandate -- review and supplement agency fact-finding. This approach poses the least risk to Presidential and agency prerogatives. Agencies, led by Justice, will do most of the work. The Commission would comment on methodology, act generally as interlocutor, review agency findings, and conduct hearings to supplement the "record." Although a commission with the inevitable independence will stray into policy territory, starting with a narrow mandate will help. Moreover, it is the fact-finding role that is of most practical value in completing the empirical work required after *Adarand*.

Option 2: Broader mandate to develop evidence and findings independently. Those skeptical about agency objectivity may argue that the commission needs a full capability to use consultants and other methods to develop evidence on its own.

Option 3: Broadest mandate -- facts and general policy debate. This approach, analogous to the consensus-building model you employed as Governor to tackle education reform, would create the greatest threat to traditional Executive prerogatives, but would also create a vehicle to sustain a national conversation. Civil rights activists now believe that such a broad discussion



will be perceived as a poor and unpredictable substitute for Presidential leadership on the issue. Moreover, protracted policy debate by a commission would interfere with effective and timely completion of the factual inquiry needed to defend programs in litigation or on the Hill.

DECISIONS

Speech: _____ Schedule speech as soon as practicable

_____ Defer speech until later in the summer

Review: _____ Finish now, offering policy views; issue directive for DOJ-led process

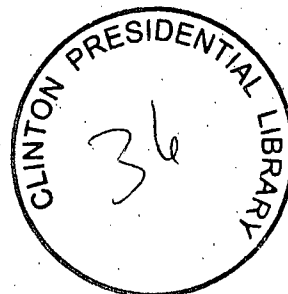
_____ Issue abridged review, reserve judgment; issue directive

_____ No review; issue directive

Commission: _____ Narrow fact-supplementing mandate

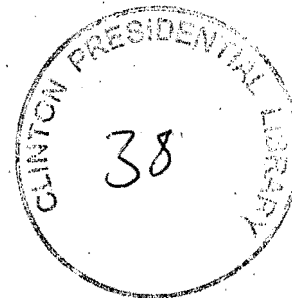
_____ Broader fact-finding mandate

_____ Broadest facts-and-policy mandate



DRAFT

June 12, 1995



WJC LIBRARY PHOTOCOPY

MEMORANDUM FOR THE PRESIDENT

From: George Stephanopoulos and Christopher Edley, Jr.

Re: Affirmative Action: The Supreme Court's *Adarand* Decision

This memorandum presents a very brief summary of the Supreme Court's decision this morning, and presents options for our immediate response. Thus far, we have indicated to the media that (i) the decision is by no means a death knell for affirmative action, and (ii) we do not have to go back to the drawing board with our affirmative action review because your instructions to us asked many of the same questions the Court has focused on in *Adarand*.

After the Supreme Court struck down Richmond's set aside program in the 1989 *Croson* decision, state and local governments used commissions and consultants to create the factual record needed to justify their programs under the tougher standard that *Adarand* now applies to federal action. The question is whether to indicate that we will now use some analogous form of fact-finding commission at the federal level -- with details to be defined after consultations. Your basic policy views would still be announced with release of the Report, in the not too distant future.

I. The Court's Action

The Opinion: In a 5-4 decision, Justice O'Connor's opinion held that any government action which treats individuals unequally on the basis of race is subject to strict scrutiny. The Court relies on the Richmond set aside case, *Croson*, which applied strict scrutiny to state and local contracting programs, but reverses a subsequent holding (*Metro Broadcasting*, involving broadcast licensing) which suggested that *federal* statutes with *benign* purposes could be sustained under a less rigorous, "intermediate" scrutiny standard.

- "Strict scrutiny" means that (a) the government's must have a "compelling interest," and (b) the program must be "narrowly tailored."
- The *Adarand* decision leaves open what will constitute a "compelling interest," but there is a suggestion that it need not be limited to purely remedial measures addressing proven instances or patterns of discrimination. It is unclear, for example, whether general concerns about diversity in the education setting would meet the test (probably) or whether a pattern of massive underrepresentation in certain professions would meet the

test (tougher, but unknown). The earlier standard for Congressional measures had been "substantially related to achieving an important interest."

- The decision has rhetoric about the tightness with which the program must be "tailored," but these implications are also unclear. There is probably no change to current strict scrutiny law, which requires, *inter alia*, consideration of race-neutral alternatives, and sunseting of the measure once its legitimate goals are met.
- Although *Adarand* concerns a contracting program, the language is quite clear and sweeping. The same constitutional standard will be applicable to racially targeted programs in Education, HHS, and throughout the federal, state and local government.

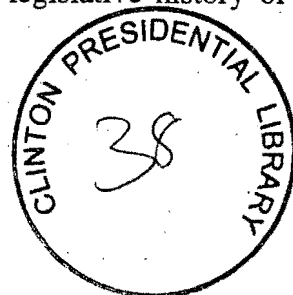
The Key Implications: There is no question but that *Adarand's* move to the *Croson* standard of strict scrutiny tightens prior law. The most important fact is that *Croson* imposed a fact-finding burden on state and local legislatures to establish that there had been prior discrimination of a specific sort, not just broad societal discrimination or underrepresentation among local government contractors. State and local governments responded to *Croson* by hiring consultants and appointing commissions to lay the factual predicate, and then *reenacting* their set aside programs, often with more flexibility and broader eligibility than before. Courts have generally sustained the revised programs.

Two critical and open questions left by the *Adarand* opinion, therefore, are:

1. Must there be a specific factual demonstration of racial discrimination (or present effects clearly traceable to past discrimination), and if so, what kind of evidence is needed to make the case?
2. Must that factual case, and the other elements of strict scrutiny, be in the *contemporaneous* legislative history? That is, must Congress have made specific legislative findings of discrimination, and with respect to race-neutral alternatives? Or will it suffice to supply that analysis and justification now, after the fact?

This last point is critical. There is good reason to fear that if this new standard of evidence is applied to the contemporaneous legislative history, many programs may fall because no one at the time these programs were enacted would have anticipated such a standard of judicial scrutiny. Quite obviously, reenactment of many of these programs, even with revisions, would be a daunting task.

Your advisers agree that we must assume for present purposes the more favorable answers to the two questions above: that affirmative action remains permissible in contexts broader than pure remediation, if done very carefully; that any deficiencies in the legislative history of current programs can be repaired by evidence developed now.



Options:

We believe it is important to communicate as early as possible a general reaction to the *Adarand* case that will provide a measure of reassurance to those who will fear that the opinion sounds the death knell of affirmative action, while reemphasizing your continuing commitment to affirmative action "done the right way." At the same time, we want to begin the process of moving the day-to-day focus on affirmative action away from the White House, recognizing that your general policy guidance should suffice as agencies and courts work through the implications of *Adarand*.

We see two principal options. The critical question is whether to say now that we believe some form of commission is a desirable response to the Court's decision

Option 1: Just complete the Review:

The President has always believed that affirmative action is valuable and justified when it is done the right way. The Court's opinion in *Adarand* is consistent with that view.

Using policy guidance from the President, the Review already asks many of the same questions the Court has focused on in *Adarand* -- ensuring that race- and gender-conscious programs are carefully justified and fair. We will now work with the Justice Department to confirm that this policy test satisfies the *legal* test announced in *Adarand*.

The preliminary work done by the agencies for the Review has been encouraging as regards their fairness and their legality, even under the new standard. But the review is not complete.

Even when the Review is submitted to the President, there will be a need for ongoing, detailed factual investigation to ensure that each of the many programs does meet the Supreme Court's legal standard.

Option 2: Same as above, but with follow-on fact-finding Commission:

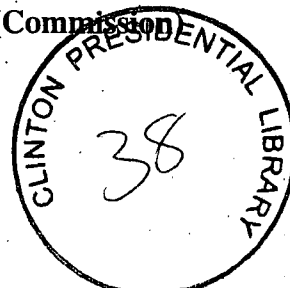
The Review is near completion, etc.;

Because the detailed factual inquiry required by *Adarand* is beyond the scope of the Review, you have instructed your staff to consult with Congress and the Cabinet on how best to structure a blue ribbon fact-finding commission to examine the facts, in cooperation with the relevant agencies and with the Department of Justice.

DECISION:

_____ Option 1

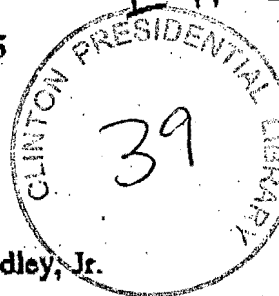
_____ Option 2 (Commission)



DRAFT

To: Chris Edley
From: JOHN SCHMIDT

June 12, 1995

There are some things
I'll call you. (MS)REVIEW their
programs,
propose changes
as needed
and, where
appropriate,

WJCLIBRARY PHOTO COPY

MEMORANDUM FOR THE PRESIDENT

From: George Stephanopoulos and Christopher Edley, Jr.

Re: Affirmative Action: The Supreme Court's *Adarand* Decision

This memorandum presents a very brief summary of the Supreme Court's decision this morning, and presents options for our immediate response. Thus far, we have indicated to the media that (i) the decision is by no means a death knell for affirmative action, and (ii) we do not have to go back to the drawing board with our affirmative action review because your instructions to us asked many of the same questions the Court has focused on in *Adarand*.

After the Supreme Court struck down Richmond's set aside program in the 1989 *Croson* decision, state and local governments used commissions and consultants to create the factual record needed to justify their programs under the tougher standard that *Adarand* now applies to federal action. The question is whether to indicate that we will now use some analogous form of [fact-finding] commission at the federal level -- with details to be defined after consultations. [Your basic policy views would still be announced with release of the Report, in the not too distant future.]

I. The Court's Action

The Opinion: In a 5-4 decision, Justice O'Connor's opinion held that any government action which treats individuals unequally on the basis of race is subject to strict scrutiny. The Court relies on the Richmond set aside case, *Croson*, which applied strict scrutiny to state and local contracting programs, but reverses a subsequent holding (*Metro Broadcasting*, involving broadcast licensing) which suggested that federal statutes with *benign* purposes could be sustained under a less rigorous, "intermediate" scrutiny standard.

- "Strict scrutiny" means that (a) the government's must have a "compelling interest," and (b) the program must be "narrowly tailored."
- The *Adarand* decision leaves open what will constitute a "compelling interest," but there is a suggestion that it need not be limited to purely remedial measures addressing proven instances or patterns of discrimination. It is unclear, for example, whether general concerns about diversity in the education setting would meet the test (probably) or whether a pattern of massive underrepresentation in certain professions would meet the

test (tougher, but unknown). The earlier standard for Congressional measures had been "substantially related to achieving an important interest."

- The decision has rhetoric about the tightness with which the program must be "tailored," but these implications are also unclear. There is probably no change to current strict scrutiny law, which requires, *inter alia*, consideration of race-neutral alternatives, and sunseting of the measure once its legitimate goals are met.
- Although *Adarand* concerns a contracting program, the language is quite clear and sweeping. The same constitutional standard will be applicable to racially targeted programs in Education, HHS, and throughout the federal, state and local government.

The Key Implications: There is no question but that *Adarand*'s move to the *Croson* standard of strict scrutiny tightens prior law. The most important fact is that *Croson* imposed a fact-finding burden on state and local legislatures to establish that there had been prior discrimination of a specific sort, not just broad societal discrimination or underrepresentation among local government contractors. State and local governments responded to *Croson* by hiring consultants and appointing commissions to lay the factual predicate, and then reenacting their [set aside] programs, often with more flexibility and broader eligibility than before. Courts have generally sustained the revised programs.

Although there has not been a large volume of litigation

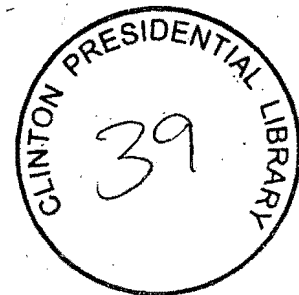
Two critical and open questions left by the *Adarand* opinion, therefore, are:

1. Must there be a specific factual demonstration of racial discrimination (or present effects clearly traceable to past discrimination), and if so, what kind of evidence is needed to make the case?
2. Must that factual case, and the other elements of strict scrutiny, be in the contemporaneous legislative history? That is, must Congress have made specific legislative findings of discrimination, and with respect to race-neutral alternatives? Or will it suffice to supply that analysis and justification now, after the fact?

This last point is critical. There is good reason to fear that if this new standard of evidence is applied to the contemporaneous legislative history, many programs may fall because no one at the time these programs were enacted would have anticipated such a standard of judicial scrutiny. Quite obviously, reenactment of many of these programs, even with revisions, would be a daunting task.

Your advisers agree that we must assume for present purposes the more favorable answers to the two questions above: that affirmative action remains permissible in contexts broader than pure remediation, if done very carefully; that any deficiencies in the legislative history of current programs can be repaired by evidence developed now.

and a burden to demonstrate that the specific program is "narrowly tailored" to correct that discrimination



Unless you take some initiative, moreover, Congress and other voices will fill the void with calls for other Options: at various kinds.

We believe it is important to communicate as early as possible a general reaction to the *Adarand* case that will provide a measure of reassurance to those who will fear that the opinion sounds the death knell of affirmative action, while reemphasizing your continuing commitment to affirmative action "done the right way." At the same time, ~~we want to begin the process of~~ moving the day-to-day focus on affirmative action away from the White House, recognizing that your general policy guidance should suffice as agencies and courts work through the implications of *Adarand*.

We see two principal options. The critical question is whether to say now that we believe some form of commission is a desirable response to the Court's decision

Option 1: Just complete the Review:

The President has always believed that affirmative action is valuable and justified when it is done the right way. The Court's opinion in *Adarand* is consistent with that view.

Using policy guidance from the President, the Review already asks many of the same questions the Court has focused on in *Adarand* -- ensuring that race- and gender-conscious programs are carefully justified and fair. We will now work with the Justice Department to confirm that this policy test satisfies the legal test announced in *Adarand*.

The preliminary work done by the agencies for the Review has been encouraging as regards their fairness and their legality, even under the new standard. But the review is not complete.

Even when the Review is submitted to the President, there will be a need for ongoing, detailed factual investigation to ensure that each of the many programs does meet the Supreme Court's legal standard.

[with or without submission of Review]

Option 2: Same as above, but with follow-on fact-finding Commission:

The Review is near completion, etc.:

Because the detailed factual inquiry required by *Adarand* is beyond the scope of the Review, you have instructed your staff to consult with Congress and the Cabinet on how best to structure a blue ribbon fact-finding commission to examine the facts in cooperation with the relevant agencies and with the Department of Justice.

DECISION:

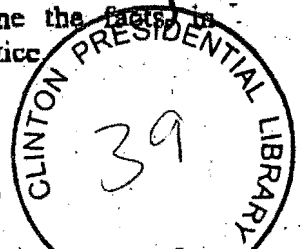
_____ Option 1

_____ Option 2 (Commission)

and because the Court has now mandated a specific consideration of race-neutral alternatives to any program and has laid down other specific legal requirements,

and the Supreme Court has now mandated even greater scrutiny with respect to both justification and the availability of race-neutral alternatives

and make recommendations



WJC LIBRARY

Fr: George S.



What is your reaction to principles expressed below. Obviously we have no problem with ① + ⑧.

~~②~~ + ⑦ also appear fine. ②, we know the arguments pro + con. ⑥ we like as a supplement, not a replacement, for other efforts.

③ + ④ are problematic unless the definitions in ⑧ are expanded to clearly include education, I think.

⑤ is interesting. Read one way it simply restates the Bakke standard, I think.

But a different reading could make it completely unacceptable.

Please get back to me a confidential memo with your reaction.

(GS)

1. No unqualified person hired
2. no layoffs based on race or gender
3. affirmative action where discrimination (statistical evidence only OK)
4. color and gender blind after discrimination remedied, but affirmative action continues for poor regardless of race or gender
5. Immediate inclusion of poor white men in all affirmative action programs. However, such inclusion in cases where racial discrimination exists must be so limited as to permit progress in abating the racial discrimination. (i.e. second preference for poor whites men)
6. set asides based only on residence, ownership, employees in community
7. no disproportionate marginal ratios of contract awards under set asides. (i.e. if goal is 20% and current level is 5%. You can't require that more than 50% (?) of the contracts go to set asides even though that means it will take a few years longer to meet overall goal.)
8. areas where permanent racial and gender based affirmative action is necessary: police, teachers, army, policy makers, etc.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Policy Issues (10 pages)	4/20/1995	P5 42 Dup#6
002. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Themes and Hard Questions (7 pages)	4/7/1995	P5 43
003. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Themes and Hard Questions (7 pages)	4/7/1995	P5 44 Dup#43

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5930

FOLDER TITLE:

AA [Affirmative Action] POUTS Memos (Chron) [Chronological] [3]

2008-0308-F

wr871

RESTRICTION CODES

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

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

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

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

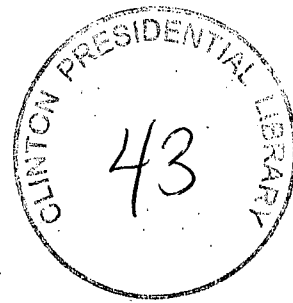
RR. Document will be reviewed upon request.

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

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

THE WHITE HOUSE
WASHINGTON

April 7, 1995



WJC LIBRARY PHOTOCOPY

MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

From: George Stephanopoulos, Christopher Edley, Jr. & Peter Yu

Re: Affirmative Action: Themes and Hard Questions

This memorandum summarizes our evolving thoughts regarding policy and communication choices arising out of the Review. Part I outlines the central issue and Senator Dole's response; Part II offers an alternative response, building on our earlier conversations and on the Review. Attachment A presents seven "hard cases" that may facilitate your deliberations. We plan to discuss this memorandum and the cases with you on Monday. On Tuesday, we will discuss the more specific policy options, some of which are presented in rough draft in Attachment B.

I. The Central Issue: Questions about "Preferences"

The central and most difficult questions—substantively and politically—concern group-based preferences: what are those preferences and when are they appropriate?

In public statements, Senator Dole has expressed support for affirmative action as a remedy for "proven past discrimination against individuals" and for expanded outreach and recruitment of "qualified minorities and women to give them an opportunity to compete without guaranteeing the results of the competition." However, he has expressed his opposition to "*quotas, set-asides, and other preferences that favor individuals simply because they happen to belong to certain groups.*"

The most likely construction of Dole's opposition to preferences implies opposition to several existing policies identified in the Review, for example:

- Contracting programs, including: the 8(a) program; sheltered competition among small disadvantaged businesses (SDBs); and the 10-percent bid preference for SDBs. (Some of these could be saved, perhaps, if Dole's phrase "simply because" is satisfied by the current requirement that SDB's demonstrate "economic disadvantage"; this, however, requires a somewhat tortured construction.)
- Race-specific and gender-specific scholarships and fellowships motivated by inclusion rather than remediation. Examples include an academic scholarship program for minorities that Secretary Shalala established at the University of Wisconsin and an NSF program designed to support women in basic research.

- Clinton-style judicial and Cabinet appointments, assuming consideration of race, gender, or ethnicity amounts to a "preference."

II. An Alternative Approach

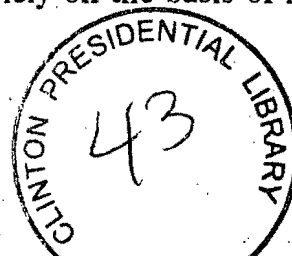
There is an alternative approach to the question of preferences, one more consistent with the President's rejection of the "colorblindness" and "pure remediation" visions and his embrace of a broader justification which includes remediation, opportunity, and inclusion. This approach would emphasize five points.

- 1■ We oppose quotas and numerical straitjackets (outside of narrow remedial contexts).
- 2■ We oppose the use of set-asides in employment and contracting (outside of narrow remedial contexts).
- 3■ We oppose giving group-based preferences to unqualified persons in the name of affirmative action.
- 4■ We oppose group-based preferences when need-based preferences would be just as effective at creating genuine opportunity.
- 5■ We oppose group-based preferences when the benefits or burdens of those preferences are unduly concentrated.

This Part summarizes the approach, proposing definitions and central propositions, and then discussing the most significant implications of such a position.

A. Definitions

- A quota is a rigid numeric or proportional measure that must be attained or that cannot be exceeded, without regard to the number of potential applicants who meet necessary qualifications. *Example:* Before the *Bakke* decision, the UC-Davis Medical School maintained a two-track admissions policy reserving a minimum of 16 of 100 spaces for minority students.
- A set-aside is a reservation of a set of opportunities or benefits for a particular group of potential candidates that effectively excludes members of other groups. *Example:* Under the "rule of two," procurement contracts meeting certain requirements may be reserved for small disadvantaged businesses (SDBs). This set-aside is not a quota because it does not involve "a numeric or proportional measure that must be attained or cannot be exceeded"; in other words, set-asides respect minimum qualifications, but quotas need not.
- A preference is an advantage assigned to a candidate solely on the basis of his/her



gender, race, or ethnicity. A preference does not include consideration of such characteristics, when consideration is essential to the effective operation of the institution or enterprise. *Example:* DOD provides a 10% bid preference to SDBs in certain situations. Because status as an SDB is not "essential to the effective operation" of DOD contracting, this advantage is a preference. In the case of the police force of a racially-diverse city, race may be a bona fide consideration and thus positive consideration of race would not constitute a preference. Similarly, race, gender, or ethnicity may be a bona fide consideration in university admissions if diversity is essential to the effective functioning of the institution.

In sum, the concepts as illustrated in **Exhibit 1:**

All quotas are set-asides, but not all set-asides are quotas.

All set-asides are preferences, but not all preferences are set-asides.

All preferences are considerations, but not all considerations are preferences.

B. Central Propositions

- **Proposition 1: Discrimination in every sector of our society and economy must be eliminated root and branch.**

Corollary: Affirmative action practices may be more aggressive and, if necessary, intrusive in settings in which there is a demonstration of present discrimination or the lingering effects of past discrimination.

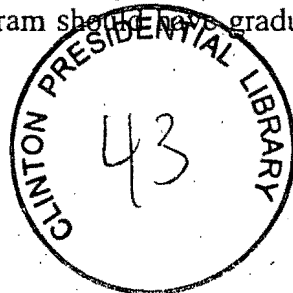
- **Proposition 2: Our paramount aspiration is complete equality of opportunity. We do not guarantee equality of results.**

Corollary: We must distinguish among affirmative action in different contexts. Education is more closely related to opportunity-creation than is federal contracting; thus, minority scholarships differ from procurement set-asides.

Corollary: We must distinguish among affirmative action tools. Some tools enhance opportunity and level the playing field, others come closer to ensuring certain results; thus, a targeted surety bond program differs from a procurement set-aside, and multi-factor admissions differ from admissions quotas.

- **Proposition 3: Affirmative action remains necessary, but must be transitional. Inequality of opportunity persists, as illustrated by the persistence of both discrimination and severe social and economic inequalities.**

Corollary: Affirmative action should be transitional for individual participants: these programs should be entryways, not entitlements. Each program should have graduation requirements and related supports.



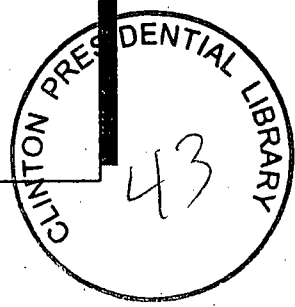
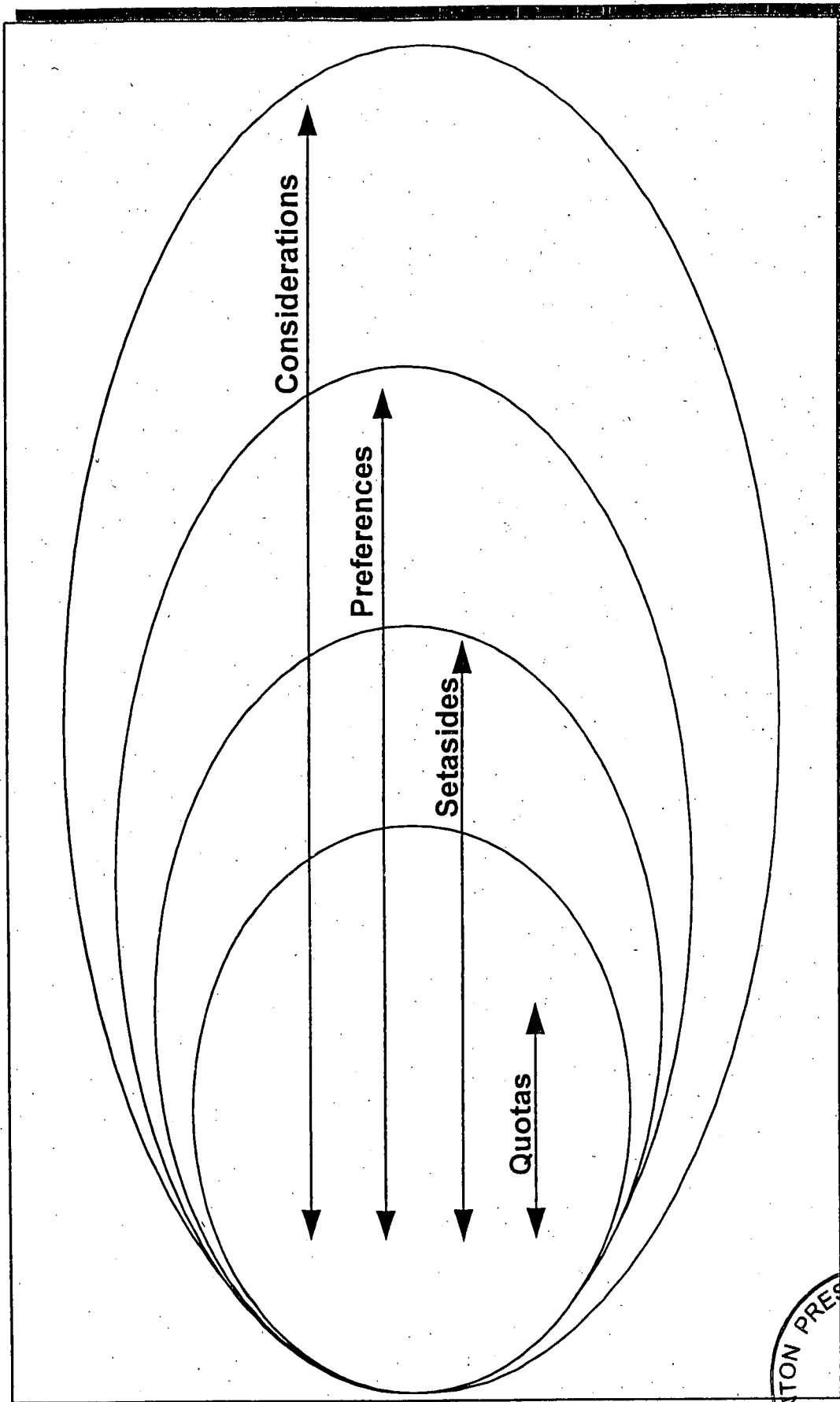


Exhibit 1

Corollary: Affirmative action should be transitional for society: when each program accomplishes its objectives, it should end.

- **Proposition 4: We must recognize--and limit--any harm that these essential programs cause. We must do the right thing, but in the right way.**

Corollary: Affirmative action programs must respect individual merit. Quotas--in virtually all contexts--are unacceptable because they subordinate individual merit to rigid numerical objectives.

Corollary: Affirmative action programs must not unduly concentrate burdens. The burdens that affirmative action imposes on vested interests (such as seniority rights) or on particular regions or sectors of the economy must be limited.

C. Policy Implications

Fully developed, these propositions have significant policy implications, particular as concerns set-asides and preferences.

- **Implication 1: In general, we are opposed to set-asides in employment¹ and government procurement because they are exclusionary; alternative tools should be used. We oppose excluding any person from an employment or contracting opportunity on the basis of race, gender, or ethnicity. There are two options for when this general rule should not obtain:**

Alternative 1(a): Oppose set-asides except in court-ordered or -supervised remedies. Under this alternative, we would oppose the "rule of two" procurement set-aside and the 8(a) program as currently constituted.

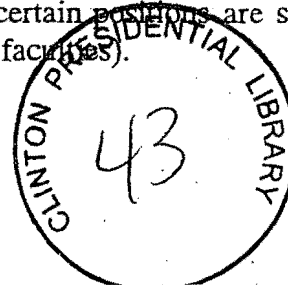
Alternative 1(b): Oppose set-asides except as a remedy for specific findings of discrimination (by court, Congress, or agency). Under this alternative, we would examine procurement practices to determine whether set-asides are necessary.

- **Implication 2: Preferences and set-asides in education and preferences in employment are appropriate to maximize equal opportunity and inclusiveness but only if they**

(a) are never awarded to unqualified persons;

(b) are transitional--establish objectives and terminate when those objectives are met;

¹We know of no formal "set-asides" in the employment context, but there is some anecdotal evidence that majority candidates sometimes feel that certain positions are set-aside by "bean counters" for minority candidates only (e.g., university faculties).



(c) *are flexible*--are neither actually or effectively quotas; and
 (d) *are narrowly tailored*--are the least race-conscious means of maximizing equal opportunity and inclusiveness.

Example: Race, gender, and ethnicity are often bona fide considerations in education and employment. For example, scholarships set aside for women, if appropriately designed, are justified by the values of inclusion and equal opportunity.

- **Implication 3: Contracting is on the "results" end of the continuum because receipt of a contract seems in significant measure a commercial success rather than a mere entrepreneurial opportunity. Preferences in procurement, therefore, may be appropriate only if the above conditions are met and only when necessary to remedy demonstrated present discrimination or the lingering effects of demonstrated past discrimination.**

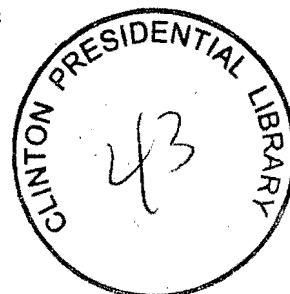
Example: Procurement preferences, such as the §1207 bid preference, must be appropriately designed and justified by the demonstration of past discrimination or lingering effects. Race- and gender-neutral advantages--such as competitive advantages based on "opportunity creation" as measured by employment and entrepreneurship for disadvantaged groups--need not be justified in this way.

In sum, as illustrated in **Exhibit 2**, we are opposed to certain practices (the shaded area). In addition, we believe other practices must be both tailored and justified by past discrimination or lingering effects (the cross-hatched area).

III. Conclusion

The Attachment presents seven "hard cases" and outlines both a "Dole" perspective and an "alternative" perspective on each case. The cases are:

- 1■ SDB set-asides: the "rule-of-two" for reserving contracts exclusively for SDB bidders
- 2■ The *Adarand* case: bonus payments for subcontracting with SDBs
- 3■ The *Piscataway* case: race as a consideration in layoffs
- 4■ Chicago Police Department promotions (Rep. Lipinski's example)
- 5■ Banneker Scholarships: black-only merit scholarships at the University of Maryland
- 6■ Admissions to the University of California at Berkeley
- 7■ Remedial education: a black-only community college course

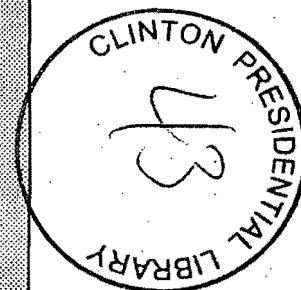


Selected Affirmative Action Efforts

Opportunity ----- Results

Opportunity ----- Results

	Opportunity Enhancing Assistance	Advantages & Flexible Preferences	Set-asides	Quotas
Education	Compensatory ed Outreach & recruiting HBCUs	Multifactor admissions policies	Minority-specific scholarships (limited competition among qualified candidates)	Two-track admissions policy
Employment	Outreach & recruiting Apprenticeships Training Second look programs	Multifactor hiring (e.g., judicial selection)	Exclusive job listings	Race-norming
Contracting & Procurement	Technical assistance Mentoring Bonding assistance	10% bid preference SCC program (the Adarand case)	8(a) program Rule of two (limited competition among qualified bidders)	Numeric set-asides



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. letter	Amitai Etzioni to George Stephanopoulos, re: Affirmative Action (4 pages)	5/11/1995	P5	45
002. memo	William Julius Wilson, re: Affirmative Action Challenge (8 pages)	3/20/1995	P5	46
003. memo	Stephen Carter to President Clinton, re: Affirmative Action (5 pages)	3/13/1995	P5	47

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5930

FOLDER TITLE:

AA [Affirmative Action] Work Plan Speech

2008-0308-F

wr872

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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



UNIVERSITY PROFESSOR

Speech material

WJC LIBRARY PHOTOCOPY

(L) Please send copy to Cher Colly. Copy to A/ Action file. (C)

The George Washington University Center for
Communitarian Policy Studies

May 11, 1995

Mr. George Stephanopoulos
Executive Assistant to the Chief of Staff
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Stephanopoulos:

This is to follow our brief exchange at the dinner with the President on May 2. I suggest that the following does provide an ethically sound and community-building way to respond the anti-affirmative action California Civil Rights Initiative. It is not more complicated than the other initiative; in effect it closely mimics its text.

The current initiative reads:

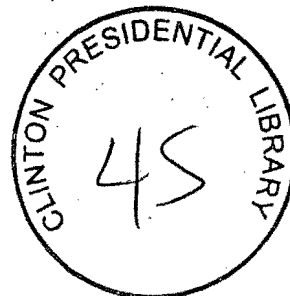
(A) Neither the state of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discrimination against, or granting preferential treatment to any individual or group in the operation of the state's system of public contracting.

(B) This section shall apply only to state action taken after the effective date of this section.

(C) Allowable remedies for violation of this section shall include normal and customary attorney's fees.

(D) Nothing in this section shall be interpreted as prohibiting classifications based on sex which are reasonably necessary to the normal operation of the State's system on public employment or public education.

May 11, 1995
Letter to Mr. George Stephanopoulos
Page 2



WJC LIBRARY PHOTOCOPY

(E) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(F) Nothing in this section shall be interpreted as ~~prohibiting state action~~ which is necessary to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(G) If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

The suggested alternative is as follows:

(A) Neither the state of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as the SOLE criterion for either discrimination against, or granting preferential treatment to any individual or group in the operation of the state's system of public contracting.

(B) Where there is specific documentation of discrimination against anyone (including discrimination in reverse) remedies will be instituted and penalties exacted.

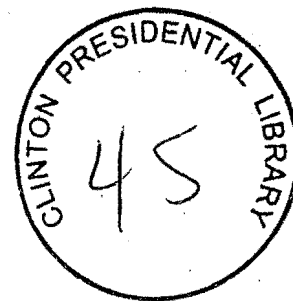
(C) Nothing in this initiative should be interpreted as detrimental to equality of opportunity programs such as training and educational programs based on the need to be able to compete on equal footing. (This addition may not be needed.)

(D) This section shall apply only to state action taken after the effective date of this section.

(E) Allowable remedies for violation of this section shall include normal and customary attorney's fees.

(F) Nothing in this section shall be interpreted as prohibiting classifications based on sex which are reasonably necessary to the normal operation of the State's system on public employment or public education.

May 11, 1995
Letter to Mr. George Stephanopoulos
Page 3



WJC LIBRARY PHOTOCOPY

(G) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(H) Nothing in this section shall be interpreted as prohibiting state action which is necessary to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(I) If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

An argument could be made that the text should be further differentiated, to protect it from the charge that it is a gimmick.

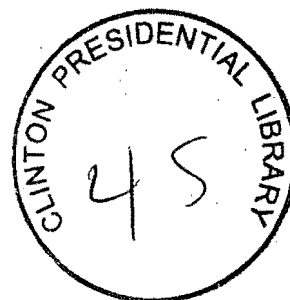
I tested it on several elected officials from California and elsewhere. Before one takes it to focus groups, etc., they need to be exposed to proper discussion as the electorate would. I would like to discuss with you this matter however briefly.

I truly believe this text could make a difference in terms of defending what should be defended, but not more, in this area. Naturally, I do not go into all the other related issues here: the history of affirmative action, what various studies have shown, etc.

Ethical Rationale:

If race and gender are used as THE exclusive, sole criteria, then one must accept signs that say, even when there is no proven wrong-doing, "Latinos, Asians, and whites need not apply here," as was the case with the University of Maryland's black-only fellowship. It also follows that a male African-American billionaire (as in the Viacom case) will be entitled to a benefit that a poor, white Appalachian woman with cancer may not. This allows reverse discrimination which undermines the very drive against discrimination by legitimating it. (One exception is a situation of the kind that took place in San Francisco's fire department, but this is covered by "where there is specific evidence. . . .")

May 11, 1995
Letter to Mr. George Stephanopoulos
Page 4



WJC LIBRARY PHOTOCOPY

On the other hand, if we use race and gender as A criteria, this can be justified readily on the grounds that we use many other so-called un-meritorious criteria, from the state you are from to veterans status to alumni parents. How can we exclude gender and race?

Rejection slips in this situation would come not because you are white or male but because your total index (taking into account all your scores) was lower than someone else's, and a white male from Appalachia may go ahead of a black millionaire in the queue, etc., etc.

Public Support Considerations:

Pollsters often do not take into account that many people have complex feelings, which we do not see when they are asked if they are for or against an initiative and are not given a new third alternative. While there may be as many as the estimated third of Californians who may vote for the prohibition without any consideration of social history, I estimate that a third or more of those who would vote for it would be relieved to have a middle, fair alternative.

It also will allow elected officials a different position than having to be either for against the current initiative.

If any of this requires documentation I would be happy to provide it.

Sincerely,

Amitai Etzioni

1

UNIVERSITY OF CHICAGO
CENTER FOR THE STUDY OF URBAN INEQUALITY
1313 EAST 60TH STREET
CHICAGO, ILLINOIS 60637

WILLIAM JULIUS WILSON
Director and Lucy Flower University Professor
of Sociology and Public Policy

IRVING B. HARRIS GRADUATE SCHOOL
OF PUBLIC POLICY STUDIES
TEL: (312) 702-0894
FAX: (312) 702-8822



WJC LIBRARY PHOTOCOPY

MEMORANDUM

Sent to: ~~Patricia~~
Patricia
Klein
Spearing
Galston
Curriel

TO: George Stephanopolous (The White House)
FROM: William Julius Wilson
SUBJECT: In response to your request for a memorandum on how President Clinton should respond to the Affirmative Action challenge.
DATE: March 20, 1995

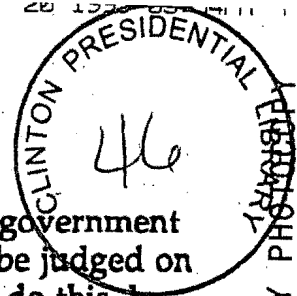
I am sorry that I was unable to fax you this memorandum over the weekend. I arrived in New Mexico (my second home) on Sunday, and I forgot to bring my fax machine with me from Chicago. So I had to wait until today to fax this to you.

How should the President respond to the current attacks on affirmative action?

The core dilemma is this: if the President is to defend policies to lift the burdens of segregation and discrimination that limit the life chances of black Americans, he risks further alienating the very white voters he needs to win in 1996. But if he offers a response that signals a weakening of resolve to support civil rights policies, he risks alienating constituencies he cannot afford to lose in 1996: party activists, women and minority voters.

The only way out of this dilemma is to confront, head on, two distinct but politically intertwined issues:

1) the President should address the economic insecurities of working class Americans by making the case that his policies to create jobs and raise incomes are the only real solutions to their problems being offered. Republican policies to cut welfare, cut support for education, deny social benefits to immigrants and end affirmative action will do nothing to alleviate the economic squeeze faced by so many in the working class. They are victims of global economic change, not affirmative action.



2) the President should rededicate the moral force of the federal government to fundamental principles of equality of opportunity in life, the right to be judged on the basis of merit and the right to be free from racial discrimination. To do this, he should present to the public the concept of *affirmative opportunity*.

These two issues are tightly intertwined because political support for affirmative action among whites is related to their sense of prosperity. Let me elaborate on each of these points.

Addressing the Economic Insecurities of Working-Class Americans

When affirmative action and compensatory remedies for the social and psychic damage inflicted by segregation were first discussed in the 1960's, the economy was expanding and incomes were rising. It was a time of hope, a time of optimism, a time when most Americans believed their children would have better lives than they had. During such times a generosity of spirit permits consideration of sharing an expanding pie.

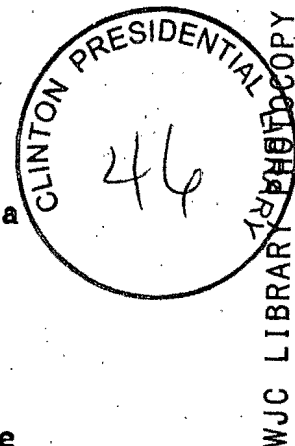
But since the late 1970's, real wages have fallen. Wage disparities between those with college degrees and those without have widened considerably. Working class Americans today feel economically pinched, barely able to maintain current standards of living even on two incomes. Many are insecure about keeping their jobs and fear they will never be able to afford to send their kids to college. Many believe that for all their hard work, their children's lives will be worse than theirs.

This is not a receptive climate for a national seminar on the moral underpinnings of affirmative action. The President will first have to persuade working class white Americans that he knows what is pressing in on them. He needs to convince them that he is working hard to relieve the pressure and to build a better future for their children. He needs to acknowledge the legitimacy of their fears, but to challenge forcefully Republican claims that their economic insecurity is the result of blacks, women and immigrants taking away their jobs. He needs to expose the falseness of arguments that white working class Americans' lives will be improved by eliminating school lunches, reducing educational opportunities, cutting off welfare benefits to teenage mothers, and cutting taxes for the affluent.

The President should reassert his support of policies to expand educational opportunities, to expand job training programs to raise skills and thereby raise incomes. He should point out that his economic and trade policies have created an unprecedented numbers of jobs and brought unemployment to its lowest levels in years, both while keeping inflation down. In short, he should make the case that *his* policies, not the Contract with America, promise to restore confidence in the present and hope for the future for American workers. There is an opportunity for the President to begin to change the debate over affirmative action with a forceful populist rebuttal to Republican policies that reward the wealthy and punish the

parents and children of working class Americans.

Reassuring the white working class about their economic futures is a prerequisite for making the case for *affirmative opportunity*.



The Case for Affirmative Opportunity

By contrasting "opportunity" with "action", the concept "affirmative opportunity" distinguishes this approach from a guarantee of equality of results, which is how "affirmative action" has come to be understood. It echoes the phrase "equal opportunity," which connotes a principle most Americans still support, and it avoids the connotations of quotas, standard-lowering and reverse discrimination, which most Americans now detest (regardless of whether they fairly characterize affirmative action).

However, by retaining the term "affirmative," the concept retains the connotation that something more than offering formal, legal equality is required to overcome the legacy of slavery and Jim Crow discrimination. We also have the continuing moral obligation of society to compensate for the enduring burdens -- the social and psychological damage -- of segregation, discrimination and bigotry. "Affirmative opportunity" means to renew the nation's commitment to enable all Americans, regardless of income, race, or other attribute, to achieve to the highest level their abilities will permit. In this sense, the phrase echoes President Johnson's 1965 Howard University speech.

What, precisely, does affirmative opportunity mean? How would such a policy be put into practice?

- 1) Affirmative opportunity represents a movement from an affirmative action based on solely on race to one based on the principle of equality of life chances. The major distinguishing factor of affirmative opportunity is the recognition that the problems of disadvantaged individuals--class background, low income, a broken home, inadequate housing, poor education, or cultural and linguistic differences--may not be clearly related to the issue of previous discrimination. Nevertheless, children who grow up in homes plagued by these disadvantages are more likely to be denied an equal chance in life because the development of their aspirations and talents is effectively hindered by their environments. Minorities would benefit disproportionately from this position because so many of them suffer from these handicaps, but the problems of disadvantaged whites would be addressed as well.

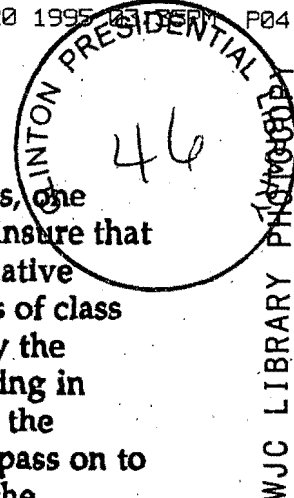
However, affirmative opportunity extends the principle of equality of life chances to include race--so that in addition to class background, low income,

a broken home, poor education, or cultural and linguistic differences, one would also add racial background. The reason for adding race is to insure that individual minorities do not "slip through the cracks." The cumulative effects of race are not captured when one uses the standard measures of class background such as parental occupation, education, and income. By the cumulative experiences of race, I include the long-term effects of living in certain neighborhoods, the cultural milieu, the quality of schooling, the nurturing of parents, the resources that parents are able to spend or pass on to their children and so on. For example, if we were to rely solely on the standard measures for college admission--such as SAT scores--even many children from black middle income families would be denied admission in favor of more privileged whites who are not weighed down by this accumulation of disadvantages and who tend to score higher on these standard measures as a result. Moreover, blacks and many other minorities continue to experience racial discrimination. Explicitly including race under the principle of equality of life chances would continue to help offset or minimize these practices.

The principle of equality of life chances is a promise that all Americans will compete on an even playing field on the basis of merit. It represents simple fairness. It would be hard for Republicans to challenge this proposition. Polling data suggest that Americans support the idea of affirmative programs to enable people to overcome disadvantages that are not of their own making. The aim of affirmative opportunity is to expand the pool of disadvantaged Americans of all racial backgrounds who are qualified or have the potential to qualify for positions in education and the labor market. Since race is one of the components of "disadvantaged" affirmative opportunity ensures that race does not exclude qualified minorities. *This would be done, however, through the use of flexible criteria of evaluation, not through numerical guidelines or quotas.* The obvious rejoinder is that "use of flexible criteria" is another way of saying that you want to lower standards. On the contrary, the use of flexible criteria of evaluation is to make sure that you are measuring merit or potential to succeed rather than privilege. In other words we want to use criteria that would not exclude people who have as much potential to succeed as those admitted from more privileged backgrounds. This brings me to programmatic strategies for each of the components of affirmative opportunity.

To implement the principle of affirmative opportunity, we must recognize that most promising strategy for increasing competitiveness for scarce places in higher education and the labor market is investment in human capital -- developing the capacities of the economically and culturally disadvantaged by encouraging their acquisition of skills. Five basic strategies are recommended, the first four of which are not necessarily tied to racial criteria:

(A) Redouble the nation's commitment to nurturing the minds of the very young. We should commit ourselves to stimulating children early, before despair



and hopelessness rob them of their futures. There is a growing consensus in the social and behavioral science community that the key to stimulating a desire for lifelong learning is to motivate the very young to learn. Lack of sufficient stimulation early on defeats interest in learning. Returns to dollars spent on Headstart-type programs, enriched day care and kindergartens, parenting training, health care, nutritional support and other interventions designed for the very young will be much higher than returns to dollars spent on job training for teens and young adults.

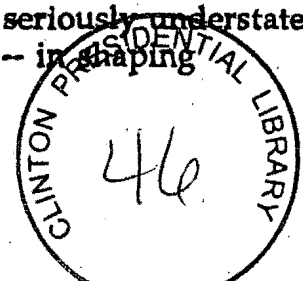
(B) Press for public school reforms. Gains made by early childhood interventions are all too often undermined by poor schooling later on. Public schools must not only prepare graduates for the world of work, community and citizenship, they must also nourish children's appetites for learning. The federal government should be monitoring and funding local school reform innovations, funding valid assessments, and encouraging the replication of successful models.

(C) Expand financial opportunities for the economically disadvantaged to go to college. Labor market returns to higher education continue to rise faster than returns to high school degrees, but the rapid rise of college costs will squeeze more working and middle class Americans out of higher education.

(D) Expand access to job training. There are two important points to make about job training. First, the administration should stimulate the provision of training by the private sector, perhaps through tax incentives. There is evidence that the returns to private sector training are higher than returns to government training programs. Second, special attention should be paid to dislocated workers. They are most likely to benefit from retraining and doing so according to non-racial criteria would address directly a major source of the economic insecurity driving white male opposition to affirmative action.

(E) Encourage the use of flexible criteria for evaluating merit. This should replace a reliance on racial quotas while preserving a mechanism for providing entry to qualified minorities and women. Psychometric test scores should not be relied upon as the sole, or dominant, determinant of entry to higher education or employment. While some test scores may correlate well with performance, they often fail to measure important attributes that also determine ability to perform, such as motivation, leadership skills, interpersonal ability, perseverance and reliability.

Recent claims that on average blacks are less intelligent than whites and that compensatory social programs cannot work have gained currency among those attacking affirmative action. These claims do not withstand scientific scrutiny. Rigorous analysis by a growing number of social scientists finds that such arguments, premised on racial disparities in average test scores, seriously understate the role of environment -- families, schools and neighborhoods -- in shaping outcomes in life.



The difference in average test scores touted by some opponents of compensatory social programs and affirmative action are largely measures of differences in opportunities between the advantaged and the disadvantaged -- especially factors early in life like access to high quality child care and good schooling. The concept of flexible criteria is to design metrics of ability that predict success that are not captured by such tests.

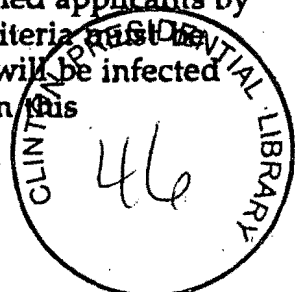
Indications of these attributes may be obtained from letters of recommendation, past performance or other measures. Mayor Daley's recent use of "merit promotions" in the Chicago police Department, based on such factors as job performance and leadership ability, is an example of how such criteria can be used.

Some Final Remarks about Race

Let me end this memorandum with a few reflections on the sensitive issue of race. Affirmative opportunity offers a principled basis for preferential treatment on the basis of race in certain contexts. This principle can be justified in several ways. One justification is simply that discrimination continues to exclude blacks from positions for which they are qualified and that special efforts are still required to overcome it. That is powerfully illustrated by the release this week of the so-called Glass Ceiling Commission report, which demonstrates that white men constitute 95% of top management but only 43% of the workforce. Newspaper accounts of the report describe various ways the social structure of corporate management works to perpetuate the effects of past forms of legal discrimination. Senator Dole advocated creation of this commission in the 1980's and the Clinton Administration should aggressively expose his hypocrisy in now attacking the very remedies that would be required to eliminate the lingering effects of previous forms of discrimination.

Another justification for preferential treatment in this form is that ethnic diversity is socially valuable. In the cases of policing, fire fighting and teaching, racial diversity contributes to stable community relations. A third justification is that access to such professions and other municipal and government occupations has been a major vehicle for upward social mobility for black Americans. A fourth justification is the "role model" argument: strong representation by minorities in the professions helps to motivate younger people to pursue high aspirations for themselves, by demonstrating that race is not a barrier to entry. The use of flexible criteria may be a way to replace the goals and timetables currently used by government agencies and contractors.

Having said that, it will be extremely important to calibrate the use of flexible criteria in practice. They must not be perceived as a ruse for lowering standards for blacks. They must be presented as a way to expand the pool of qualified applicants by making attributes other than raw test scores count more. Flexible criteria must be applied in predictable, non-subjective ways. Otherwise, the practice will be infected with arbitrariness, which will quickly undermine public support. In this



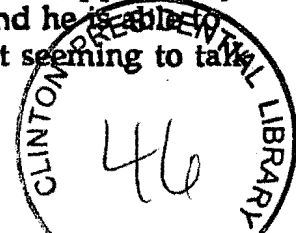
connection, the President should also be forthright about the fact that clumsy applications of the principle of affirmative action have, in the past, led to abuses. Admitting, hiring or promoting unqualified blacks over qualified whites is wrong and should not be permitted. The President's commitment to enforce laws against race discrimination should include a pledge to prosecute clear cases of discrimination against whites. He should pledge to fight against the lowering of admission standards and qualifications.

I want to mention a final justification for the administration to make a serious commitment to affirmative opportunity, backed up by real programs and real dollars. That is the need to restore hope to the most disadvantaged among us, particularly low-income young blacks. Growing numbers of young people are deeply alienated from mainstream society. For them the hopes of the civil rights era were never to be fulfilled; the promises always to be broken.

Since the days when Dr. King offered black Americans his dream of a society in which merit, not skin color, would determine how far one could go in life, a new generation has grown up tasting the bitter truth that the privileges of American life are still reserved for whites. Job opportunities have vanished for millions of blacks living in our cities. Street violence and crack have ravaged once thriving, if poor, black neighborhoods. Housing segregation still prevents most black Americans from choosing where to live. The deterioration of the public schools, except in affluent, mostly white, suburban communities, abandons black children to illiteracy and innumeracy, unable to get or to keep jobs that require basic skills. More black males between the ages of 18 and 24 are in jail than college. Homicide is the leading cause of death in this age group.

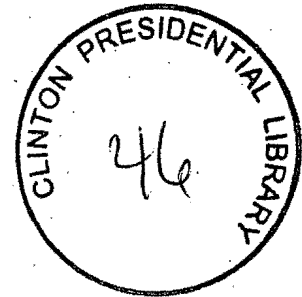
The rhetoric from our political leaders today demonizes black Americans as "welfare dependent," immoral, and now, unintelligent. These are the verbal equivalents of the police dogs in Birmingham and firehoses at the Edmund Pettus bridge. But the hopelessness and alienation of today is far more dangerous than the frustration and moral outrage of the civil rights era because a generation of black Americans has grown up with no stake in their futures. They have nothing to lose by acting on their rage. Failure to respond vigorously to this assault on the principles of fairness and equality for all Americans regardless of race will only confirm what many black Americans have come to believe -- that America has no stake in them. The result could be a firestorm of civil strife compared to which the 1992 rebellion in Los Angeles was merely a brush fire.

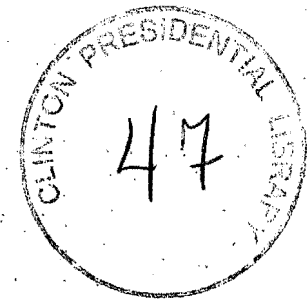
I won't presume to suggest a political strategy to educate the public on these matters. However, it seems to me that the President should enlist highly respected white male leaders in this effort. To the extent this message can be communicated by white leaders of corporations and unions it will receive a better hearing. Also, the President is at his best in town meeting settings in which he has an opportunity to respond spontaneously to questions. He projects empathy well and he is able to communicate subtle and complicated ideas in these settings without seeming to talk



down to the public. It might be that a major national address to set forth the major themes of affirmative opportunity, followed quickly by a series of televised town meetings, would be effective. This would enable the President to communicate these points in a forum in which the message would directly reach the public and would not be filtered through the media

I hope you find this helpful.



C. CAROLYN
CURIEL

WJC LIBRARY PHOTOCOPY

MEMORANDUM

To: The President
From: Stephen L. Carter
Date: March 13, 1995
Re: Affirmative Action

COPY
from ORM

Dear Mr. President:

I am flattered once more that you have asked my advice, this time on the subject of affirmative action, and I very much regret that family responsibilities will make it impossible for me to attend the working dinner this evening. As I promised Skila Harris, I am putting some thoughts on paper, in the hope that they will be of some use.

This brief memorandum is of necessity but a sketch of a larger argument, and I would be happy to discuss it with you or members of your staff should it seem appropriate. I have divided what I have to say into three sections. Section A sets forth the theoretical justifications for affirmative action and argues that they have not changed. Section B unpacks the principal arguments against the programs and suggests that they are, with one exception, specious. Section C discusses the political implications of all of this.

I should add that my defense of affirmative action is principally in the area of race, where both the need and the justification are most compelling. It has no direct application to programs that are aimed at assisting women. I also express no opinion here on the frequent proposals to "broaden" affirmative action programs by taking wider account of socio-economic disadvantage. In general, I think that a very good idea, as long as it is not done in a way that ends up reducing the gains that people of color continue to make under affirmative action.

A. The Theoretical Justifications for Affirmative Action

The original theoretical underpinnings for affirmative action programs have never been refuted, although some of the more recent

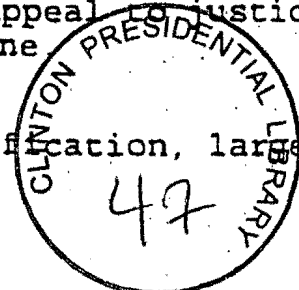
justifications are less convincing. And whatever one may think of the theories, there is a simple fact that must not be overlooked: affirmative action programs work. They have generated more black doctors and firefighters and lawyers and schoolteachers than we would otherwise have had. Thus, the argument that we should have less affirmative action is also, albeit indirectly, an argument that we have too many black people succeeding.

1. Role Modeling -- After all these years, what is still the most powerful argument for affirmative action programs is probably that they provide opportunities for people who would not otherwise have a shot to show what they can do, thus shattering stereotypes that hold others back. This justification works most cleanly for admission to graduate or professional school or at the entry level in employment. But it also has obvious application when one is making appointments to public office -- not selecting people who cannot do the job, but considering race or gender in the mix of factors. That is how one constructs a cabinet -- or a staff -- or a federal bench -- that helps to change the way that others think about women or people of color. You have tried to do exactly this in your Administration and should not apologize for it.

2. Compensation -- The original conception of affirmative action is that it compensates its beneficiaries for the nation's legacy of racial discrimination. The moral imperative for that compensation remains compelling. The nation so far has not been willing to do the hard work -- including spending the hard money -- that would be needed to compensate in other ways. For example, the nation could decide to spare no expense in bringing predominantly black schools up to the first rank, in repairing the social infrastructure of the inner cities, and so on -- but programs of this kind, for all of their value, are politically unpopular. Consequently, affirmative action programs, for all of their flaws, provide the nation with the opportunity to repay a tiny piece of what it owes those it has harmed.

3. Remediation -- Most affirmative action programs (some would say all of them) exist as remedies for past or present discrimination. Sometimes they are judicially imposed; sometimes they are proposed by government agencies; but most of the programs that exist have been adopted voluntarily. The idea behind the remedial aspect of the programs is to place groups in roughly the position they would have been in in the absence of discrimination. To fine-tune such an approach is of course not possible, for groups are amorphous and complex. This approach, moreover, is the one that raises political hackles with its notion of group equality. The appeal to justice, however, remains strong: something has to be done.

4. Representation/Different Voices -- This justification, largely



the product of the last decade, holds that it is vital to have women and people of color in the corridors of power because of the differing and special points of view that they are able to bring. There is a surface appeal to this argument, but also a considerable risk, for it is this approach that leads to the depressing debates over whether one view or another is the "correct" opinion for a woman or a black American to have. This justification is quite a bit weaker than the first three.

B. The Anti-Affirmative-Action Arguments

1. The "Fairness" Argument -- The principal political argument against affirmative action is that the programs are unfair, mainly to white males. This argument has gained tremendous currency and seems to be sweeping the talk shows, the press, and the halls of the Congress. But the argument is either misleading or actually false.

Let me offer a single example. When I read applications for admission to Yale, I certainly do take race into account in the sense that I read the folders of people of color with greater care, looking for reasons to admit them instead of doing what it is easier to do when 4500 students apply for 175 places -- looking for reasons to say no. (I should mention that I also read with particular care the folders of applicants who are from less known colleges, who have had interesting career experiences, and so forth.) Because I read the folders of people of color that way, one might argue that white applicants are disadvantaged, and I suppose that they are, very slightly. But this slight statistical disadvantage is not different than the similar disadvantages suffered at Yale by applicants who happen not to be the children of alumni. (In fact it is less.) And it is not different than the disadvantages suffered in many areas of life by those who do not happen to be veterans.

Indeed, the example of veterans is particularly to the point. The reason for the veterans' preference (which I fully support) is that the veterans have given something special to their country, which the country is struggling, in a small way, to give back. Black Americans have historically had something special taken away by their country, and through affirmative action, the country struggles, in a small way, to give it back.

Some critics argue that the difference is that the sins for which affirmative action compensates were done long ago by somebody else. But even if that is true, it misses the point. The legacy of racial oppression is our national legacy, and doing something about it is our national obligation. Indeed, it should be viewed as an obligation of American citizenship -- the reason, as Charles Black once pointed out, that even recent immigrants share the duty.

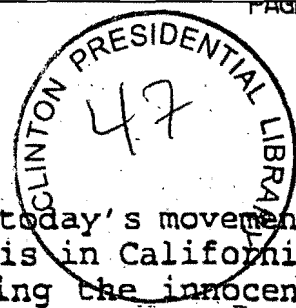
Moreover, there is ungentle irony in the fact that today's movement to halt affirmative action seems to have its genesis in California -- irony because if fairness consists of not making the innocent pay for the sins of others, then California is a principal offender. This is a state, after all, where people knowingly build their houses where there are risks of earthquakes, mudslides, and brushfires, and then, when the entirely predictable harm occurs, they turn to the state and federal governments to spend tax dollars, paid by other (innocent) citizens to save them from the foreseeable costs of their own folly.

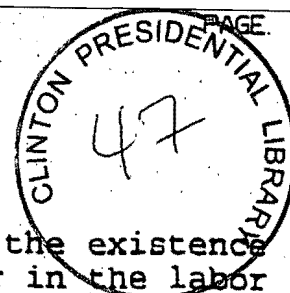
I do not say that it is wrong for the government to grant special preferences to veterans or to give aid to those who have suffered from great disasters; on the contrary, those are very good ideas with very solid support. But they are no less "unfair" than affirmative action is said to be.

2. The "Qualification" Argument -- The second, and related, common argument against affirmative action is that the programs result in the hiring or promotion of less qualified women or people of color who displace better qualified white males. The argument is so commonly made that it has become widely accepted. But when one looks at the facts, the arguments are thin.

Only a few careful studies have been performed in this area, but the verdict seems to be unanimous: there simply is no evidence of any consistent favoring of less qualified women or people of color over better qualified white males.¹ Of course there are anecdotes, and some of them are true, but the existence of a handful of truthful anecdotes can hardly be considered a serious argument against affirmative action when the existence of a handful of executions of the innocent is considered an insufficient argument against the death penalty.

¹ The use of differential hiring standards is well documented (although still relatively rare) in some cases involving public employees who are hired in part according to scores on standardized tests. The debate over the alleged bias in the tests is an old but continuing one. Many studies, including a comprehensive review by the National Academy of Sciences, dispute the notion that the tests are biased in the way that many critics charge. The NAS review, in turn, has been subjected to sharp criticism. Even if there is bias in the tests, it is not clear that the construction of two hiring tiers is the way to solve it. Surely it is more sensible to develop better tests, or to invest in improving the skills of the groups against whom the bias is said to exist. But this problem of two-tiered hiring, for all the publicity that it receives, is in fact quite rare, and when it does exist, it is often a remedy for proven discrimination, in which case even Republican Justice Departments have found the practice justified.





WJC LIBRARY PHOTOCOPY

At the same time, one study after another documents the existence of continuing discrimination against people of color in the labor markets. (The evidence on women is evidently more equivocal.) If one wants to scrap affirmative action in employment, therefore, one must recognize that a remedy for an existing and pervasive problem is being sacrificed in the name of solving another problem that barely exists at all, except in a handful of Republican campaign commercials.

3. The "Stigma" Argument -- The third, and in some ways the weakest, anti-affirmative action argument is that the programs create a stigma in their beneficiaries, by leading others to doubt that those of us who have obtained professional success in part through affirmative action have made it on our own -- an argument, I am sorry to say, that is quite often credited to me, presumably by people who have not in fact read my book on the subject. For the sake of precision, then, let me clarify my views.

First, doubt about the validity of the achievements of people of color in general -- and black people in particular -- is as old as America. Affirmative action programs did not create the doubt, and people who believe otherwise are putting their heads in the sand.

Second, the bright promise of affirmative action programs was that they would erase the long-lived stereotypes that create the doubt, and although that promise has never been fulfilled, attitudes have obviously changed. Here the laboratory evidence is interesting: white Americans tend more and more to accept that black Americans have earned the "status indicators" that might show up on their resumes, but, in the absence of any indicators, white Americans often return to the same old stereotypes. In other words, what the programs have done is to erase some of the doubts about some of the achievements of some black people, while doing little to alter white attitudes about black people generally. (See, for example, the 1990 NORC survey data.) But at least this is some progress.

Third, is it certainly true that affirmative action provides some ammunition for those who want to argue that black Americans do not deserve the progress that we have, with such difficulty, made. If a way to make the same progress without providing this ammunition is available, I think we should flock to it. So far, none has been suggested. Compared to doing nothing at all, then, affirmative action looks very good.

4. The "Color-Blindness" Argument -- The most principled of the arguments against affirmative action is that we as a society should take no account of color. I certainly agree that there is great risk in supposing that we can be so delicately color-conscious -- thinking about people's color when it is to their benefit, not thinking about it when it isn't. But, race should never have

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Charles Moskos to George Stephanopoulos (2 pages)	3/20/1995	P5, P6/b(6) 48

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5186

FOLDER TITLE:

Affirmative Action [1]

2008-0308-F

wr444

RESTRICTION CODES

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

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

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

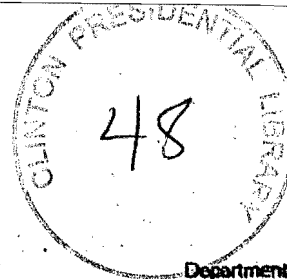
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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

NORTHWESTERN UNIVERSITY



Department of Sociology
Evanston, Illinois 60208-1330
Telephone (708) 491-5415
Fax (708) 491-9907

WJC LIBRARY PHOTOCOPY

March 20, 1995

To: Mr. George Stephanopoulos

From: Charles Moskos, (tel) P6(b)(6)

Subject: Affirmative Action

The discussion on affirmative action this past Monday was very productive. That the President devoted such a lengthy time to his guests speaks to an extraordinary commitment to guide America on this most vexing issue. We must keep in mind, of course, that affirmative action is much less popular among the general electorate than it was in the Green Room that evening.

The Military Example. The example of the armed forces highlights how affirmative action changed the stumbling organization of the 1970s into the premier and effective organization it is today. As outlined in previous memos, the Army success story is based on no tolerance of racial discrimination, a policy of goals not quotas, no timetables, promotion goals based on qualified pools, and agencies to upgrade personnel to meet rigid standards. Nowhere else has black achievement been so impressive.

These conditions cannot always be replicated in civilian life, but they serve as models for good affirmative action. Such positive references to the military example will also enhance the President's standing within the armed forces.

The military example also has another spin-off. Like the military, AmeriCorps can also upgrade otherwise disadvantaged youth. The military/AmeriCorps examples counter two of the objections, noted by the President, raised against affirmative action: the anti-government mood in the country and the popular support of individual over group rights. Through service to the country -- traditionally in the military, but now also through AmeriCorps -- individuals from deprived groups can earn post-service benefits. The GI Bill precedent, moreover, invokes one of the most successful government programs ever.

How to Refocus Affirmative Action. In what would admittedly be a daring move, I would drop affirmative action for all but Afro-Americans. This, again, essentially follows the military model. Blacks have a sense of identity and grievance with America that is unique and far exceeds that of any other ethnic group. That immigrants who voluntarily come to this country are recipients of affirmative action boggles the mind.



Diversity for its own sake, much less enhancing multiculturalism, is not argument for affirmative action. Remember that these buzz words have a negative ring in middle America. We are a nation with a common shared culture and reject the notion that America is but a collection of different cultures.

Surely, narrowing affirmative action to Afro-Americans will upset the affirmative action establishment. But survey data are quite clear that affirmative action is not popular among most Asian Americans, women, and even Hispanics. The core constituency for affirmative action has been and will remain Afro-Americans. Increasingly, blacks see affirmative action as exclusive as much as inclusive because of emphasis shifting to other groups.

The Chimera of Affirmative Action Based on Class. Income affirmative action has a sort of intuitive appeal, but does not hold up under scrutiny. For starters, it is much more difficult to operationalize than either race/ethnicity or gender. Even more to the point, the non-black poor would soon displace blacks in affirmative action procedures. Affirmative action based on class or income, ironically enough, would work against black Americans, the very group that is most justified in affirmative action.

General Principles and "The Speech." The speech should include some examples of outlandish consequences of affirmative action and how new policies will prevent these from happening. Stress how absolute proportionality is neither possible nor desirable. Then go on to look at success stories. Here the military example should be prominent.

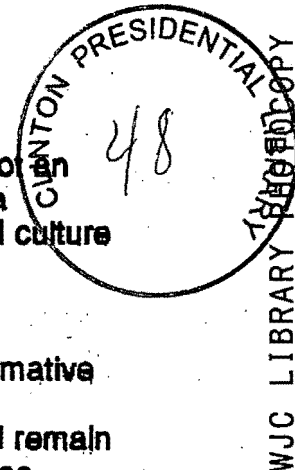
Ultimately, affirmative action must meet a single test: Does it, in the long run, improve the performance of the particular organization in which it is implemented? This is why the military model is so impressive.

The choice before us is stark. To drop affirmative action entirely would be a tremendous step away from racial equality. To obtain racial equality without affirmative action, we would have to criminalize racial discrimination. Certainly, affirmative action is the best of the options.

The Politics of Affirmative Action. A focus on Afro-Americans will increase the President's base where it matters -- a large black vote turnout -- without materially affecting his strength in other present recipients of affirmative action.

The major political reality is that white America is hostile to affirmative action. Here the President could consider how to frame affirmative action as a non-permanent policy. Specifying a precise end date for affirmative action is not feasible, but setting up a Commission to look at the problem from a long-term viewpoint might be.

Finally, let us be thankful that the President is uniquely suited to lead the way on affirmative action. He is absolutely true to his self on a genuine commitment to racial comity and equal opportunity. Only a President Clinton can reframe affirmative action in a manner that is both good politics and good for the country.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
~~001. fax~~	~~Phone No. (Partial) (1 page)~~	~~05/24/95~~	~~P6/b(6)~~
002. memo	To Chris Edley, re: Affirmative Action Memo Outline (3 pages)	n.d.	P5 49

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5186

FOLDER TITLE:

Affirmative Action [3]

2008-0308-F

wr445

RESTRICTION CODES

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

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

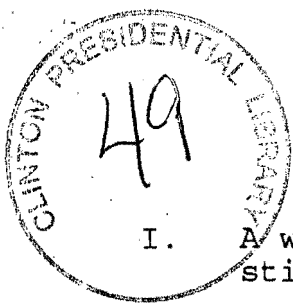
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



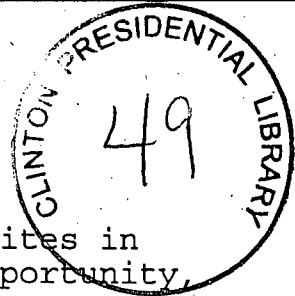
To: Chris Edley
From: Harvey Casimiro

Affirmative Action memo outline

- I. A wide chasm which can be measured by objective evidence still exists between blacks and whites in America.
- II. Affirmative action should not end until this chasm is closed; we would be reneging on our most deeply held principles if we ended this effort now.
- III. Nevertheless, ~~a review~~ ^{change in} of current affirmative action programs is warranted. Not every current program contributes to closing the gap between blacks and whites; some programs are not well run, some are off the mark and some are clearly wrong-headed.
- IV. We must convince the public that the goal of affirmative action -- closing the gap between blacks and whites -- is justified. As part of this effort, the public must understand:
 - A. Affirmative action will not continue forever, but it will continue until the gap is closed.
 - B. We must all work together to hasten the day when affirmative action is no longer needed.
- V. A national commission can be created to:
 - A. Determine areas of our national life where measurable progress must be made.
 - B. Monitor progress toward closure of gaps in these areas between blacks and whites over the long run.
 - C. Recommend specific affirmative action programs for phase out as gaps are closed.

WJC LIBRARY PHOTOCOPY

Affirmative Action memo



WJC LIBRARY PHOTOCOPY

A wide chasm still exists between blacks and whites in America. It is a chasm of physical separation and opportunity, which can be demonstrated by objective evidence:

- Our metropolitan areas remain highly segregated. On average, 65 percent of the African American residents in our cities would have to move to achieve residential integration.
- Access to decent, affordable housing and homeownership is sharply disparate between races: 71.5 percent of low-income blacks have worst case housing needs, compared to 65.5 percent of whites; blacks are treated less favorably than whites by real estate agents and landlords 46 percent of the time; mortgage-loan denial rates are 18.2 percent for high-income blacks, compared to 7.9 percent for high-income whites; the homeownership rate for all blacks is 42.5 percent, compared to 67.8 percent for all whites.
- Black children are much more likely to begin life in poverty than white children. The poverty rate is 45.9 percent, compared to 17 percent for white children.
- Blacks are much more likely to face unemployment than whites. Unemployment for black men is 14.5 percent, compared to 6.7 percent for white men; and 14 percent for black women, compared to 5 percent for white women.
- Blacks earn less than whites. The average weekly wages of black women are 70 percent of the average weekly wages of white women with comparable experience.

These and other quantifiable measures clearly show that American society remains sharply, racially divided along fault lines coinciding with our citizens' most fundamental needs, including housing, job opportunity and income.

This coincidence of race and disparity of opportunity threatens to tear us apart as a nation, and affirmative action efforts must continue until these fundamental gaps between blacks and whites are closed. We would be reneging on one of our most deeply held principles -- equal opportunity -- if we ended affirmative action now.

However, reaffirming our commitment to affirmative action does not mean across-the-board endorsement of all existing affirmative action programs. Not every program contributes to closing the gap between blacks and whites; not every program is well run. Some are entirely off the mark and wrong-headed.

A review of affirmative action programs is warranted to determine whether they are in fact accomplishing their purpose. Such a review should result in termination of programs which are

not narrowing the chasm between blacks and whites and in the continuation of programs which are.

We must convince the public that closing this divide is a goal worth pursuing. It should be made clear that affirmative action will not continue indefinitely, but that it will continue until the nation makes objectively measurable progress. The best way to end the need for affirmative action is to work together to close the gap between blacks and whites.

To promote public understanding and unity of purpose, a national commission should be created to:

- Determine areas of our national life where measurable progress must be made to eliminate the future need for affirmative action;
- Monitor progress toward closing gaps between blacks and whites in these areas over the long run; and
- Recommend when specific affirmative action programs can be phased out.

