

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
~~001a. fax~~	~~Phone No. (Partial) (1 page)~~	~~06/21/1994~~	~~P6/b(6)~~
~~001b. fax~~	~~Phone No. (Partial) (1 page)~~	~~06/21/1994~~	~~P6/b(6)~~
002. talking points	Meeting with CEOs on Affirmative Action (1 page)	7/17/1995	P5 127
003. memo	Richard Shiffrin to Andrew Fois, re: HR 1833 Partial Birth Abortions (4 pages)	7/14/1995	P5 128
004. memo	Bill Andresen to George Stephanopoulos, re: DLC Affirmative Action paper (1 page)	8/1/1995	P5 129

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5682

FOLDER TITLE:

Affirmative Action [2]

2008-0308-F
wr446

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

July 17, 1995

**TALKING POINTS FOR OPENING
MEETING WITH CEO'S ON AFFIRMATIVE ACTION**

From time to time, I have met with CEO's from around the country to discuss a number of challenges facing the nation today. The very first CEO meeting held here in the Spring of 1993 dealt with the economy and the economic plan before the Congress. We have continued that effort for the past 2 and 1/2 years and I have found these meetings to be helpful on giving me advice and input.

As Alexis may have discussed with many of you, today I would like to talk about affirmative action, and I would like to frame the discussion in four areas:

1. As you know, I am speaking on the 19th to signal that the review process has ended and to lay out some key principles. Discuss speech background and focus of review: employment, education and contracting.

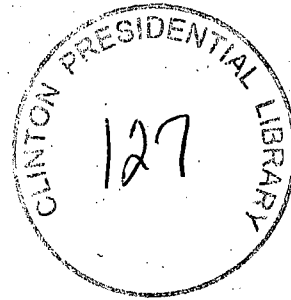
Based on your own experiences, what have been the best practices that have worked for you? What are the key points that you think I should emphasize in my speech?

2. How do you reconcile the perceived and apparent tension between the benefits of a diverse workforce and the need for a leaner, more efficient workforce? (Downsizing.)

3. Affirmative action is in large part the manifestation of anxieties as a result of the stagnation of wages in the workforce. What are some of your thoughts/recommendations of how to begin to discuss this issue and to address the realities?

GEORGE - What the hell does this mean? Shouldn't this be changed?

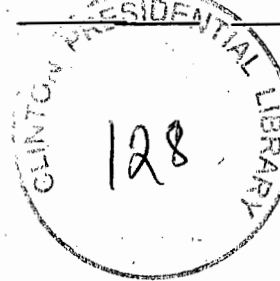
T. Brown



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VP

Memorandum

DRAFT

WJC LIBRARY PHOTOCOPY

Subject

H.R. 1833, Banning "Partial-Birth" Abortions

Date

July 14, 1995

To

Andrew Foia
Assistant Attorney General
OLA

From

Richard Shiffrin
Deputy Assistant
Attorney General
OLC

You have asked for our views on H.R. 1833, a bill to ban so-called "partial-birth" abortions.¹ The bill criminalizes all performance of the procedure in question, now used in some second- and third-trimester abortions, but provides an affirmative defense when the procedure is necessary to save the life of the woman. We believe that the bill is constitutionally flawed.

First, as applied to women seeking pre-viability abortions, the bill is unconstitutional if it imposes an "undue burden" on the ability to obtain an abortion. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2819-21 (1992). Put slightly differently, the government may not place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id. at 2820. We are concerned that the bill's prohibition on a safe and effective abortion procedure will operate as an "undue burden" with respect to a significant number of women, especially when access to alternative procedures is limited. See Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 77 (1976) (invalidating state ban on particular abortion procedure in part because of "severe limitations on the availability" of alternative techniques in state).

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an undue
burden to
end it?

Second, the bill's failure to make an exception for preservation of the health of the woman renders it inconsistent with constitutional standards. Even in the post-viability period, when the government's interest in regulating abortion is at its weightiest, that interest must yield both to preservation of a woman's life and to preservation of a woman's health. Casey, 112 S. Ct. at 2804, 2821 (restriction or prohibition of abortion in post-viability period must except cases in which abortion is necessary to preserve life or health of woman). This means, first

¹ The procedure described in the bill appears to be a form of "dilation and extraction" abortion, sometimes abbreviated as "D&X." See Diane M. Gianelli, Shock-Tactic Ads Target Late-Term Abortion Procedure, American Medical News, July 5, 1993, at 3.

of all, that the government may not deny access to abortion to a woman whose life or health is threatened by pregnancy. Id. It also means that the government may not regulate access to abortion in a manner that effectively "require[s] the mother to bear an increased medical risk" in order to serve a state interest. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986) (invalidating requirement that doctor use abortion procedure most protective of fetal life "unless [that procedure] would present a significantly greater medical risk to the life or health of the pregnant woman" because would require some degree of "trade-off" between woman's health and fetal survival). That is, where the government may not prohibit abortion outright, it also may not enforce regulations that make the procedure more dangerous to the woman's health. Id.; see also Danforth, 428 U.S. at 79 (invalidating ban on abortion procedure after first trimester in part because would force "a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed").

Again, we are concerned that "in a large fraction of the cases" in which the bar in question would be relevant at all, see Casey, 112 S. Ct. at 2830 (discussing method of constitutional analysis of abortion restriction), its operation would be inconsistent with this standard. Our understanding is that the procedure at issue was developed specifically as a safer alternative to other methods of late-term abortion,² and that in fact it often poses fewer medical risks for women in the late stages of pregnancy.³ It is likely, therefore, that in a high percentage of the very few cases in which the procedure actually is used, it is the technique most protective of the woman's health. Accordingly, a prohibition on the method, in the absence of an adequate exception, would require women to "bear an increased medical risk" in order to obtain an abortion. As to women to whom the government may not deny access to abortion altogether -- that is, all women seeking pre-viability abortions and women seeking post-viability abortions in order to preserve their health or lives -- this outcome is constitutionally impermissible.

We have one final concern that would implicate the bill's constitutionality as applied in all cases, even as to women seeking post-viability abortions for reasons other than preservation of life or health. The Supreme Court has recognized that the

² See Shock-Tactic Ads, supra.

³ Id.; see also Karen Hosler, Rare Abortion Method Is New Weapon in Debate, Baltimore Sun, June 17, 1995, at 2A (alternative procedures may pose dangers for women); National Abortion Rights Action League, Third-Trimester Abortion: The Myth of Abortion on Demand, Issue Paper, June 14, 1995 (submitted in connection with House Hearings).



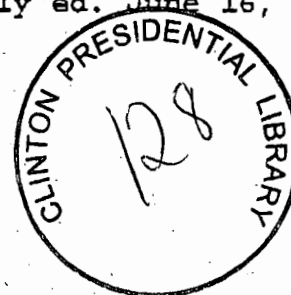
government has legitimate interests from the outset of a pregnancy both in protecting the health of the woman and in protecting "the life of the fetus that may become a child," or "potential life," and that the interest in fetal life becomes even greater in the post-viability period. Casey, 112 S. Ct. at 2804, 2821. It is not clear to us, however, that the bill represents a permissible means of advancing either of these interests.

For the reasons discussed above, the bill obviously cannot be characterized as a health measure. Nor is there a self-evident relationship to the protection of potential life: the procedure barred is no less protective of fetal life than other abortion methods, and the bill does not create a "structural mechanism" designed to persuade women to choose childbirth over abortion. Cf. Casey, 112 S. Ct. at 2821, 2818.

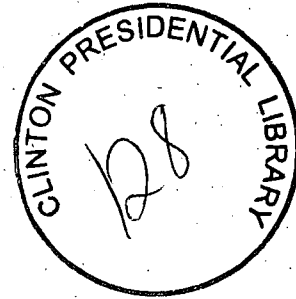
It is possible, we suppose, that the bill might be viewed as effectively encouraging childbirth by making abortion, at least in some cases, more dangerous and hence less attractive as an alternative. But if protecting fetal life by encouraging childbirth were invoked as the interest behind the bill, we think a serious question would be presented as to whether the means chosen are permissible. We are aware of no cases, in the abortion context or any other, in which the Court has approved the imposition of unnecessary health risks on patients as a permissible means of advancing any state end. Indeed, the cases discussed above, holding that a woman's interest in preserving her health takes precedence over the government's interest in protecting fetal life, suggest strongly that the means available to the government in pursuing its interests do not under any circumstances include requiring people to incur gratuitous medical risks or dangers.

In fact, our understanding is that the bill's supporters have not suggested that the measure is intended to protect fetal life by making abortion a more dangerous alternative for women. Rather, the bill is said to advance a governmental interest in "public morality" by banning a procedure that generates "a sense of particular moral outrage."⁴ This is not, however, an interest that the Court has recognized as of sufficient magnitude to override a woman's right to obtain an abortion. Indeed, we are aware of no case in which the Court has recognized any independent governmental interest in regulating or proscribing recognized medical procedures

⁴ See Testimony of David M. Smolin, Professor of Law, Cumberland Law School, Samford University, before House Judiciary Committee, Subcommittee on the Constitution, June 15, 1995, at 4. This testimony is consistent with the statements made by sponsors of the bill (and its Senate counterpart), emphasizing the "sickening" or "disgusting" nature of the procedure. See, e.g., Statement of Senator Smith, Cong. Rec. S8541 (daily ed. June 16, 1995).



because they are deemed offensive or immoral. Accordingly, it is not clear to us that the bill permissibly advances any governmental interest. If this is the case, of course, then the bill cannot be applied constitutionally under any circumstances, even in the post-viability period as to women whose life or health are not threatened by pregnancy.



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**f a c s i m i l e**
T R A N S M I T T A L

to: George Stephanopoulos
fax #: 456-7105
re: DLC Affirmative Action paper
date: August 1, 1995
pages: 1, including cover sheet.

George--I just wanted to let you know that the Senator and the DLC will be holding a press breakfast Thursday morning to unveil the DLC's contribution to the affirmative action debate. Our hope is that this will be portrayed as our contribution to the President's "mend it" challenge, but it will also obviously lead to the "end it" part also.

Although I have every expectation that the press there will probe for differences between the Senator's position and the President's position we plan on being positive and focusing on the need to develop new policies in this area.

If you have any questions about this let me know. Also, if you are interested in seeing a copy of the paper let me know and I'll get you one as soon as I can.

From the desk of...

Bill Andresen
Administrative Assistant
Senator Joseph Lieberman
Room 318 Hart Senate Office Building
Washington, D.C.

202-224-4041
Fax: 202-224-9750

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Michael Waldman to G. Stephanopoulos, re: Draft of AA Paper (4 pages)	5/15/1995	P5	130
~~002. letter~~	~~Paul King to President Clinton [partial] (1 page)~~	~~06/02/1995~~	~~P6/b(6)~~	
~~003. letter~~	~~David Wilhelm to Bruce Lindsey (1 page)~~	~~05/19/1993~~	~~P6/b(6)~~	
004. memo	C. Edley to Margie Sullivan, re: Appropriation Amendments on Affirmative Action (1 page)	6/2/1995	P5	131
~~005. letter~~	~~George Munoz to Suzanna Valdez (1 page)~~	~~02/28/1995~~	~~P6/b(6)~~	
~~006. resume~~	~~Alex Rodriguez [partial] (1 page)~~	~~03/01/1995~~	~~P6/b(6)~~	
007. fax	DNC to G. Stephanopoulos, re AA Misinterpretation (2 pages)	6/15/1995	P5	132

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5761

FOLDER TITLE:

Affirmative Action [3]

2008-0308-F

wr448

RESTRICTION CODES

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

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

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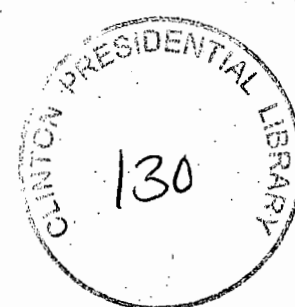
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Tues: 1:00
2:15.

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May 15, 1995

MEMORANDUM FOR GEORGE STEPHANOPOULOS

FROM: MICHAEL WALDMAN MW

SUBJECT: DRAFT OF AFFIRMATIVE ACTION PAPER

Here is my first reaction to the paper, which I tried to read with my jaded/journalist glasses on.

On the plus side, I was impressed by its precision and the intellectual rigor with which it addressed those areas it covered. I learned a lot, and developed a real sense of the degree to which myths govern this issue. The obvious sheer volume of effort that went into it will go a long way toward meeting the goal of "seriousness" -- this wasn't just a procrastination exercise.

On the to-be-improved side, I have a few major concerns:

Carefully
behold!

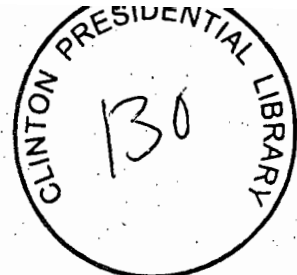
- It lacks context -- i.e., it doesn't provide the reader with a sense of what it would mean for an affirmative action program to "work" (i.e., what are the goals that we want to achieve, what are the side-effects that we don't want). Therefore, it is less helpful than it might otherwise be in helping the reader say, "Aha, that's a good program, that's a program that needs fixing, etc." Ultimately, there should be a set of fixed criteria to apply to these programs, that can be summed up in a conclusory section at the tail end of each of the sections.

- It neither gives a compelling-enough rendition of the arguments for affirmative action, nor the myths/fears/arguments against affirmative action. We cannot rebut the myths unless they are clearly on the table. For such a hot-blooded debate, the tone is curiously bloodless. I recognize that there's a virtue in this, but it risks looking out-of-touch.

I think that the paper would be best restructured in the following way:

Introduction

- * In the introductory section, explain what the criteria are for whether a program "works." Is it necessary to lift up all members of a minority group? What if it helps only those in that group who are educated? etc.



Historical context

- * Then do a history of affirmative action. If we are going to include the Clinton Administration's record, this is the place to do it -- though it is critical to show whether and how we reformed it/differed from the status quo.
- * Then talk about the raging debate, including the charges against it.

Programs, policies & practices

- * Then the taxonomy (ugh!) (I had to look it up), broken out as you have it.
- * It may make sense to reorder the sections, either by the one that affects the most people the first, or by the one we like the first, or whatever

* * *

Here are some section-by-section overall comments (not detailed). After we talk, I will delve into line editing, etc.

1. Introduction/policy to date

My comments are above. I think that we need to say: what does it mean for an affirmative action program to "work"?

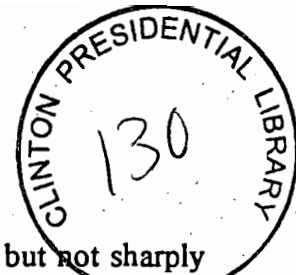
Also, the legalistic stuff (dispassionately indicating what the Supreme Court will and won't allow) is not terribly useful, except as bar exam cramming material. What have we done, what are we for/against?

2. Framework

As I indicated, I think this is too bloodless. The only other thing is that the "taxonomy" doesn't give the reader enough of a sense of how large the overall universe is -- are there hundreds of affirmative action programs, out of which we have chosen a handful of representative ones, or are these the programs that affect 80% of the people affected by affirmative action? A clearer sense of how we chose what we chose to look at would help.

3. Effects

This is good, and rigorous, but absent the context -- what good effects are we particularly looking to find? -- it sort of peters out. We can't discuss the issue of whether or not AA has had positive effects with a few bullet points. I know we don't want to preempt the speech -- but maybe there should be an equally brief, but more declarative section here.



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4. Federal procurement practices

This seems like the deepest swamp here. One point that is made, but not sharply enough, is that we recognized this was broken last year, and have begun fixing it -- before the GOP onslaught.

There isn't enough one way or the other on the sense of pervasive unfairness and corruption that people have about minority set-asides -- the sense of front companies, etc.

5. OFCCP

The rebuttal to criticism relies too heavily on the perspective of the employer or the government official, and not enough on the nonminority employee's perspective. I don't get a real sense of just how messed up this all is, though I have a feeling it's pretty messed up!

Here it seems that the point (on p. 33 esp.) is that -- in the past -- this did lead to quotas, but it was then fixed. This is key and should be part of the history section, at the front.

6. Education

This is a bit of a laundry list that doesn't give a sense of how much \$\$ is involved, or how large a piece of the educational pie we're talking about with all these programs.

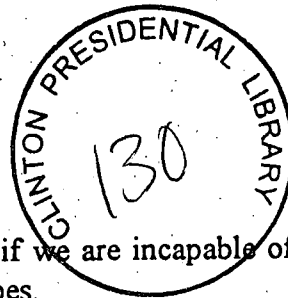
Again, what is the problem that these programs are supposed to address, is there a different set of criteria that one would use on education (the key to opportunity) than for contractors, etc.? Are there particularly bad side effects here -- e.g., are these programs helping create the politically-correct segmentation of students in academia that everyone bemoans?

Also, I don't quite understand where the disabled stuff fits in -- that seems to me to be a big can of worms to open.

7. Civilian employment

This section has a critical element that is central to the affirmative action issue generally -- the impact of downsizing on the attitudes and anxieties of nonprotected, nonminority employees. That needs to be fleshed out a bit, if possible -- otherwise, it's a bit of a laundry list.

Again, it's hard to judge these programs without knowing what our criteria are.



8. Military

A bit gooey -- we have to be careful that it doesn't look as if we are incapable of cross-examining the military folks the way we can HHS types.

9. FCC/RTC

I'm not sure I understand the need for this section, except if the "taxonomy" really deals with all the major AA programs -- since the most important FCC AA provision has been junked, and the RTC's AA provisions have basically never been used.

The FCC program seems to me to have a particularly strong argument -- it's more important to have diversity among broadcasters than among Beltway Bandit consultants -- yet also is more stigmatized as involving sham companies.

* * *

A few other thoughts on optics -- if the goal is to appear very thoughtful, thorough, etc., then the methodology should be worn on the report's sleeve:

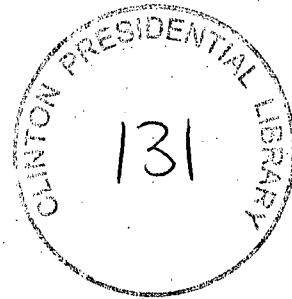
- a huge bibliography/footnote section
- a description of the involvement of the agencies in preparation of the report (rather than just a list of the personnel)?

June 2, 1995

To: Margie Sullivan
Ed Dorn
Department of Defense

From: Christopher Edley, Jr
Special Counsel to the President

Subject: Appropriation Amendments on Affirmative Action

**VIA FAX**

Let me apologize in advance, because I realize you have tragic and pressing things on your plate at the moment.

Our understanding is that the Republicans plan to submit anti-affirmative action amendments to appropriations bills, beginning with the MilCon Subcommittee markup next week. The focus, presumably, will be on contracting set asides.

We need two things rather urgently. Can you help?

1. Any intelligence DOD can gather on precisely what the Republicans have in mind. Is there draft language?
2. Draft background materials and talking points that could be used to explain the workings of and rationale for the current programs. These materials should include some general points about the background conditions of low levels of business ownership among minorities and women. They should also rebut some common myths about the current programs, including: the goals are quotas; unqualified firms get the work; these programs cost the taxpayer tons of money; there is widespread fraud.

The tone of the materials should not be that the programs are perfectly flawless, but they should offer effective and ample ammunition for those attempting to argue that sweeping destruction of the programs is wrong.

Given the timing, we need drafts that George and I can review on Monday. My guess, however, is that most of what we need can be pieced together from material on the shelf.

Would someone give me a call to confirm? Thanks.

cc: George Stephanopoulos
Alexis Herman
Cassandra Pulley

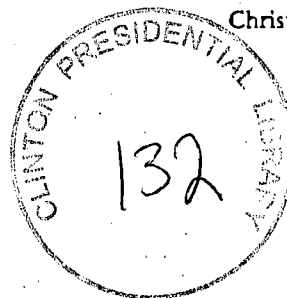
DEMOCRATIC ★ NATIONAL ★ COMMITTEE

Donald L. Fowler
National Chair

Christopher J. Dodd
General Chair

CAMPAIGN DIVISION

PH 202-863-8000
FAX 202-479-5135



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FAX COVER SHEET

DATE: June 15 TIME: _____ -EST

TO: GEORGE STEPHANOPOULOS

FAX: 456 2883 # OF PAGES (incl. cover): 2

FROM: CAREN WILCOX

SUBJECT: AFFIRMATIVE ACTION MISINTERPRETATION

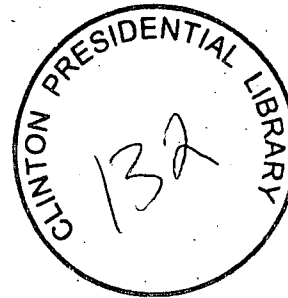
URGENT

IF YOU HAVE TROUBLE WITH THIS TRANSMISSION,

PLEASE CALL _____ AT 202-_____.

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MEMORANDUM FOR MINYON MOORE

FROM CAREN WILCOX

SUBJECT: MISINTERPRETATION OF A TERM IN THE PRESIDENT'S SPEECH

DATE: JUNE 15, 1995

Greg Moore alerted me this afternoon to a terrible misinterpretation of the President's remarks at the White House Conference on Small Business. Apparently it is widely believed on the Hill that he relieved the small business community of liability for discrimination.

We discussed it with the ACLU which had drafted a strong letter to George Stephanopoulos protesting the misunderstood policy. Because of my work at Hershey Foods, I knew this interpretation of the use of the words was incorrect, but could see how it easily could be confused.

The facts are:

The CQ Congressional Monitor in its story regarding the President's speech on Monday, June 12, ran the following paragraph:

Clinton's proposal would exempt companies with 100 or fewer employees from anti-discrimination rules if they guarantee employees a certain contribution to an Individual Retirement Account-based plan.

In the context of pension reform, the term "anti-discrimination" refers to a set of complex formulas intended to prevent different pension plans being offered to employees based on financial status and salary status. These rules **have nothing whatsoever to do with discrimination on the basis of race or gender.** They are complex and require expensive pension consultants causing many small businesses to prefer to offer no pension plans to employees.

Unfortunately, the words were used without clarification in the current political climate concerning affirmative action.

I have called the White House and talked with Dorothy Robine, and left messages for Gene Sperling and Alexis Herman to alert them to the problem. I recommended to Dorothy that a short, clear statement should be sent by an appropriate person to the Black Caucus, as well as the Hispanic Caucus and other appropriate constituencies. She is working on it.

cc: Chairman Fowler, Chairman Dodd, Greg Moore, Andy Hernandez, Maureen Shea

cc: George Stephanopolous, Alexis Herman, Laura Tyson, Gene Sperling, Betsy Myers, Dorothy Robine, Ben Johnson

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Sec. of Education to President Clinton, re: Options for addressing religion/school prayer (6 pages)	5/26/1995	P5 133
002. letter	Amitai Etzioni to George Stephanopoulos, re: Affirmative Action (4 pages)	5/11/1995	P5 134
003. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Speech, Review and Policy Decisions (12 pages)	6/27/1995	P5 135 Dup #3

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5627

FOLDER TITLE:

Affirmative Action - Adarand Constructors Inc vs Pena [1]

2008-0308-F

wr873

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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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)]

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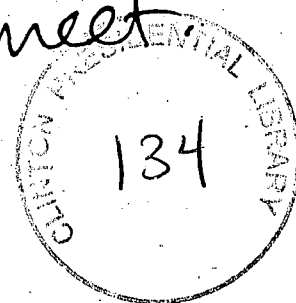
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UNIVERSITY PROFESSOR

June 16th

Still need to
meet

WJC LIBRARY PHOTOCOPY

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:

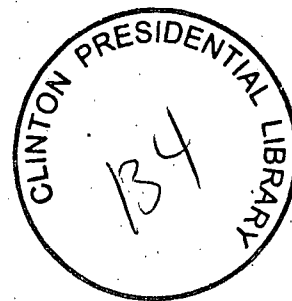
(A) Neither the state of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discrimination against, or granting preferential treatment to any individual or group in the operation of the state's system of public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



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(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.

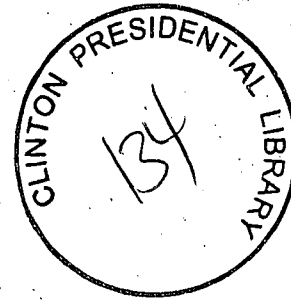
(E) Allowable remedies for violation of this section shall include normal and customary attorney's fees.

(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



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(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.

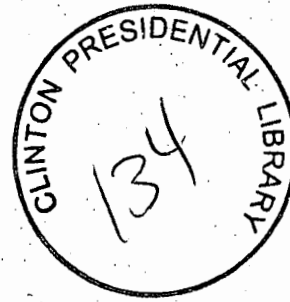
I tested it on several elected officials from California and elsewhere. Before one takes it to focus groups, etc., they need to be exposed to proper discussion as the electorate would. I would like to discuss with you this matter however briefly.

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
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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

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Deval Patrick to John Schmidt, re Adarand and Alternatives to a Commission (1 page)	6/14/1995	P5 136

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5627

FOLDER TITLE:

Affirmative Action - Adarand Constructors Inc vs Pena [2]

2008-0308-F

wr874

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]
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RR. Document will be reviewed upon request.

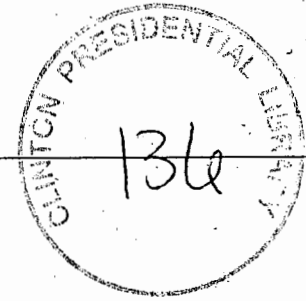
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Office of the Assistant Attorney General

Washington, D.C. 20035



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June 14, 1995

TO: John Schmidt
George Stephanopoulos
Christopher Edley
Alexis Herman

FROM: Deval L. Patrick

SUBJECT: Response to Adarand and Alternatives to a Commission

In thinking a little deeper about the idea of creating a commission to examine federal programs to determine their compliance with Adarand, I have become convinced that a commission has substantial drawbacks:

1. A commission should not determine whether these programs comply with the legal standard laid down by Adarand. The legal determination should be made in the Department of Justice. The Civil Rights Division, as the lawyers charged with defending challenges in court, and the Office of Legal Counsel would seem the appropriate centers for that determination. I am not familiar with any commission that has been charged with deciding legal questions. Moreover, I am concerned that turning legal questions over to a commission sends a message of a lack of confidence in the Department of Justice.

2. There is really no need for a commission to study policy questions. Given Adarand, it seems to me that the only question to be decided is the legal question, since I assume that the Administration would not decide as a matter of policy to jettison a program that was narrowly tailored to accomplish a compelling government interest.

3. Creating a commission to focus exclusively on the Adarand inquiry sends the wrong message about Adarand. It sounds an alarm. I think we should read Adarand as a setback, but not a disaster. The Court (1) made clear that it was not prohibiting all consideration of race, (2) left open the door for courts to give deference to congressional factfinding, and (3) did not foreclose the production of post-enactment evidence to satisfy strict scrutiny. While it is clear that Adarand will increase our litigation burden and that we are likely to suffer some failures, it is by no means clear that we will not be able to defend many programs successfully.

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

Initials: ML Date: 9/9/11

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)	6/27/1995	P5 137
002. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Post-Adarand Steps and Completion of the Review (5 pages)	6/19/1995	P5 138 Dup #4

COLLECTION:

Clinton Presidential Records
Chief of Staff
George Stephanopoulos
OA/Box Number: 5682

FOLDER TITLE:

Affirmative Action: Affirmative Action

2008-0308-F

wr875

RESTRICTION CODES

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

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THE WHITE HOUSE
WASHINGTON

June 27, 1995

MEMORANDUM FOR THE PRESIDENT

From: George Stephanopoulos ³ and Christopher Edley, Jr. ³

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.

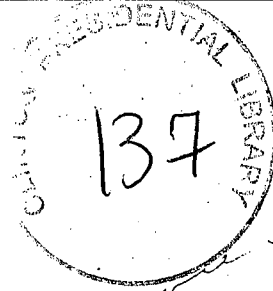
I. The Speech: Content and Venue

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



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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 setasides; and USDA setaside-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*

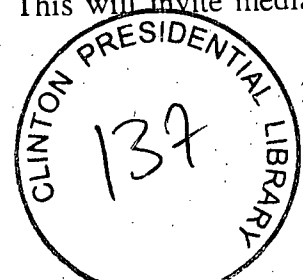
Recommended option. This site would allow your speech and the issues surrounding affirmative action to be framed within the larger context of the civil rights movement and the struggle for equal justice and opportunity. The media would use the school's history when covering the speech. When combined 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.:

_____ Atlanta, (site TBD)

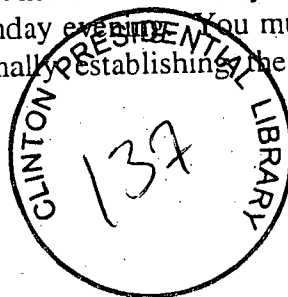
_____ Convention

_____ Audience of church congregations
_____ Other

_____ 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

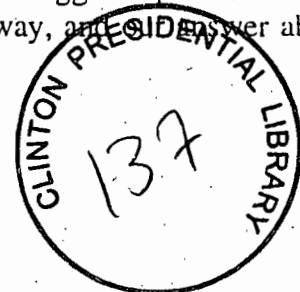
Pro: By not issuing a presidential document we avoid making White House news, and leave this as a DOJ story about legal matters. Although we have a response to a question about the relationship to the Review, that response is best delivered at the time of the speech.

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 the 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:

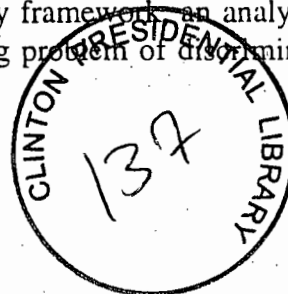
- _____ Option 1: Issue no Directive; rest on informal guidance by the Chief of Staff
- _____ Option 2: Issue the Directive now
- _____ Option 3: Defer decision; perhaps issuing directive at the time of the speech

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

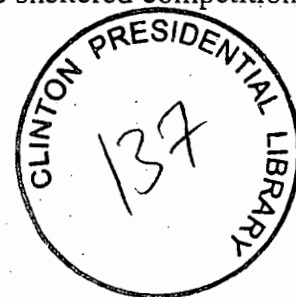
Baseline -- Reform of Abuses: The Review has identified a number of areas of abuse or perceived abuse. As in all the other areas we examined, these abuses are far less common in reality than is generally assumed by critics. Nevertheless, addressing these is necessary as a matter of fairness and political 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.

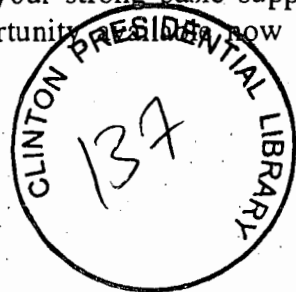
Further Steps -- Options for Broadening Eligibility: In light of your policy tests, and because of the shadow cast by *Adarand*, we offer these additional options to make minority status less of a defining and exclusive condition of eligibility for procurement preferences. The critical choice is whether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

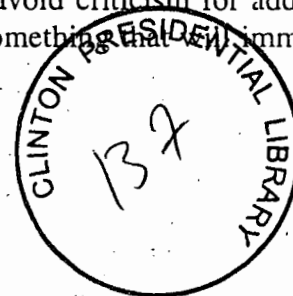
Pro: This incorporates the three key policy priorities you have expressed to us. Specificity of the objectives underscores the commitment to a follow on program, so that your critique of current programs does not signal abandonment of MBEs and WBEs. DOJ believes the resulting program design would be 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 NEC 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.

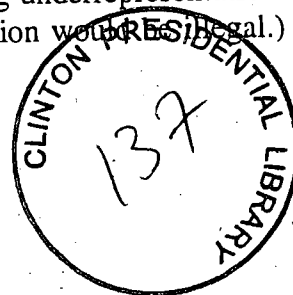
V. Decision on Use of Race or Gender in Layoffs: *Piscataway*

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.)



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.

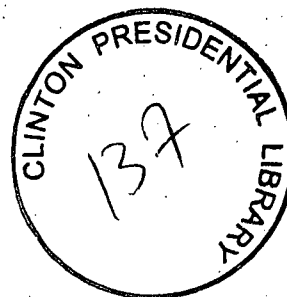
Pro: This option would issue a sharp and clear statement -- layoffs are different -- and would provide some comfort to whites, males, and their dependents, in a time of insecurity. (There would be a corresponding reinforcement of minority and women concerns about their marginality.) In the public employment 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.

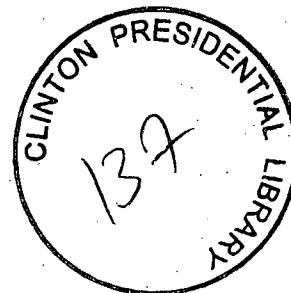
_____ Option 2: As a policy matter, race or gender should *not* be considered in layoff decisions.



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
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001. note	G. Stephanopoulos to C. Edley, re: Affirmative Action (1 page)	n.d.	P5 139
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COLLECTION:

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

FOLDER TITLE:

Affirmative Action Core 6 [1]

2008-0308-F

wr876

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]

10: Chris

Fr: George S.

What is your reaction to principles expressed below. Obviously we have no problem with (1) + (8). ~~(5) + (7)~~ also appears 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.

(65)

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	Joseph Stiglitz to Chis Edleym re: Next steps (3 pages)	3/27/1995	P5 140
002. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Policy Issues (10 pages)	4/17/1995	P5 141

COLLECTION:

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

FOLDER TITLE:

Affirmative Action Core 6 [3]

2008-0308-F

wr877

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]
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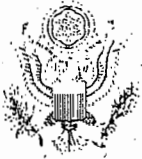
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MEMBER

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON, D.C. 20500



WJC LIBRARY PHOTOCOPY

March 27, 1995

MEMORANDUM FOR CHRIS EDLEY (OMB)
FROM: JOSEPH STIGLITZ
SUBJECT: Next steps on affirmative action

There are several principles that could be useful in guiding reforms to extant affirmative action programs:

1. Affirmative action should focus on expanding opportunities, not on equalizing outcomes.
2. Affirmative action should be broad-based:

We should focus on increasing opportunities for all those for whom opportunities are foreclosed; these include not only women and minorities, but low-income Americans in general. In some areas, equality of opportunity for some groups may already have been achieved, even though those same groups remain disadvantaged in other areas. Thus, at the same time that it is broad-based, affirmative action should be targeted at rectifying specific barriers to equality of opportunity.

Affirmative action should attempt to identify all barriers to equality of opportunity, many of which go well beyond discrimination. These include:

- (a) A lack of access to information;
- (b) A lack of access to the economic resources required to invest in human capital;
- (c) A lack of mentoring and of guidance concerning job promotion (e.g., about career ladders); and
- (d) A lack of perceived incentives: past foreclosure of opportunities in some areas may discourage disadvantaged groups from making the investments necessary for current advancement.

In addressing these barriers, affirmative action should employ the full panoply of available institutions and instruments, but it should explicitly eschew the use of quotas (which, in any case, were never allowed except as part of remedial action associated with discriminatory behavior).

Since so many of the barriers occur outside the workplace, effectively addressing them requires a broader set of initiatives than have traditionally occurred within affirmative action.

3. Affirmative action should be reformed in a manner consistent with the general principles of regulatory reform being formulated within the Reinventing Government Initiative. These include:

(a) An emphasis on performance, with a clear focus on the ultimate objectives of initiatives;

(b) A recognition that most firms are "good actors." They are, and want to be treated, as "good citizens," who believe in American ideals concerning equality of opportunity; and

(c) A recognition that some firms are superlative, and that such exemplary behavior should be publicized.

Such precepts suggest that, for most firms, the annual OFCCP compliance reporting diverts resources that might be more valuably used elsewhere.

Possible reforms

Equality of opportunity is a central tenet of the American value system. Any reforms to affirmative action programs should be consistent with this central principle, as well with the other principles described above. Some ideas for possible reforms include:

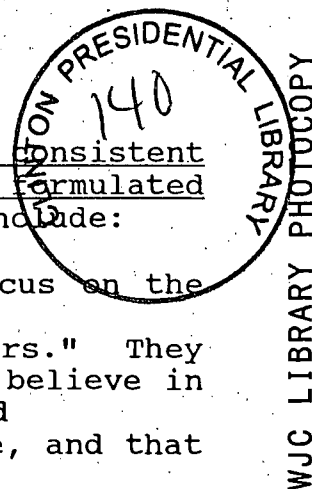
1. The Federal Government could award bonus points in contract bidding (say 5 to 10 percent) to firms with good or exemplary programs expanding equality of opportunity. Points could be awarded for:

- (a) Aggressive programs for outreach in hiring
- (b) Model programs for mentoring employees
- (c) Demonstrated success, through training, guidance, and mentoring, in promotion programs
- (d) Summer intern programs
- (e) High school and after-school programs
- (f) Active participation in the Business/Community Equality of Opportunity Programs

2. We could work with businesses and communities throughout the country to establish Business-Community Equality of Opportunity Programs. These would work to ensure that (at a minimum) every student in the top ten percent of every high school class had the opportunity to go to college. The Councils would strive to ensure guidance for access to publicly available scholarships and loan programs; would guarantee summer jobs; would provide internships, summer and after school jobs.

3. The White House, working with private foundations, could establish a named (Martin Luther King) prize for corporations, business councils, communities, and individuals demonstrating innovativeness and exemplary conduct in expanding equality of opportunity.

4. The White House could establish a summer internship program



for disadvantaged high school and college students. The White House would thus "take the lead" in promoting equality of opportunity by establishing a program similar to the Federal Reserve Board's minority internship program. Given the broad variety of possible tasks within the White House, the program could be targetted at both high school and college students.

5. The Government could encourage more "adoption" programs between universities and high schools in disadvantaged areas. Many corporations have "adopted" high schools--the firms provide computer systems, senior executives give talks, etc. Universities, especially public universities, could be more aggressive in undertaking similar projects. Each university could adopt several high schools, providing mentoring, information, and encouragement to disadvantaged students.

6. Regulatory reforms could ease the burden of affirmative action reporting requirements, especially for firms with good records. For example, annual OFCCP compliance reporting diverts resources that might be more valuably used elsewhere. Firms with good records could be reviewed once every few years, rather than once a year, thereby reducing the administrative burden on both the private sector and the Federal Government.

7. There are several concrete steps we could implement relatively quickly:

- An executive order, banning quotas and reinventing regulations and compliance.
- An executive order, establishing a framework for the creation and encouragement of business-community equality of opportunity programs and a directive for relevant agencies within the Federal Government to take an active role.

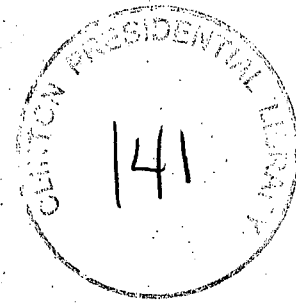
As part of this, a directive could be issued to the National Guard to encourage participation in these activities in appropriate ways (parts of the National Guard have expressed an interest in a variety of such programs.)

- Collaboration with private foundations in establishing a Prize for exemplary behavior.
- Establishment of a White House Disadvantaged Students internship program.
- An executive order reforming the reporting requirements for OFCCP compliance reviews.



DRAFT

April 17, 1995



WJC LIBRARY PHOTOCOPY

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 three areas: education, employment, and procurement. Part II offers two 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 3.5% of all minority students at four-year colleges receive race-specific scholarships. This represents less than 1% of all financial aid administered by these institutions.

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 (\$ ___ million in FY1995) and NIH's Minority Clinical Associate Physician Program designed to increase the number of minority physicians (\$ ___ million in FY1995).

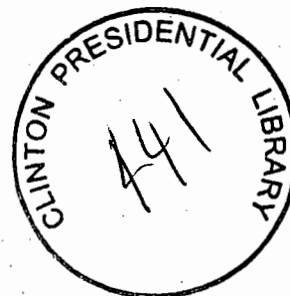
Options. The policy options include:

- 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 are 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 for non-remedial, diversity-related purposes 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.

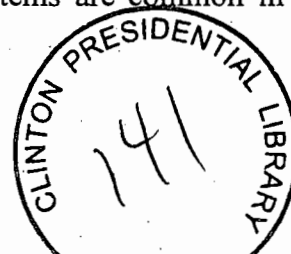
Indeed, current antidiscrimination enforcement guidance from the Department of Education, promulgated during the Reagan Administration pursuant to Title IX, makes the test for gender-specific scholarships whether the financial aid practices of the institution, *taken as a whole*, provide equal opportunity. As a matter of constitutional doctrine, race-based distinctions are subject to stricter scrutiny than sex-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 sex-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 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 consideration of race or sex, while OPM staff counsel believes tie-breakers must be random.

Options. The policy options include:

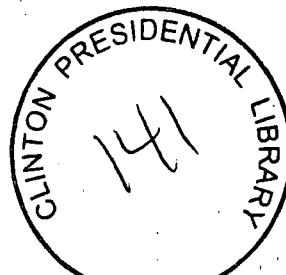
Option 1: As a policy matter, when not inconsistent with a bona fide seniority system, diversity may be considered in layoffs, but only in limited circumstances.

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 sex would be permissible only: when necessary for the institution's operation; when a manifest racial or gender imbalance exists; and when the less race-intrusive considerations are not as 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

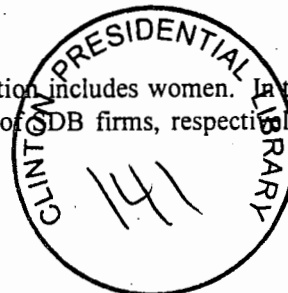
Background. Federal law establishes several goals for the distribution of federal procurement opportunities: 20% for small businesses; 5% for small disadvantaged businesses (SDBs -- virtually all of which are minority-owned¹); and 5% for women-owned businesses. There is a web of programs designed to 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-SDB and male-owned firms. For example, while DOD's contracting with SDB's more than doubled, its contracting with non-SDB firms fell by more than 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 at all. In addition, these programs have had a disparate impact on particular regions and industries -- such as construction and transportation. 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, because the 1978 statute links "social disadvantage" to membership in a group subject to discrimination.

¹ In the Department of Transportation's program *only*, the SDB definition includes women. In the DOD and 8(a) programs, minorities own and control ___ percent and ___ percent of SDB firms, respectively.



Options. The policy options include:

- Option 1: Reform the programs to emphasize transition, 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 over goal for SDB procurement could be increased from 5 to 10%.
- Option 3: Sharply focus on "entryway" to entrepreneurship.** In addition to the reforms in *option 1*, tight limits on the number of contracts an individual SDB or entrepreneur could win through sole-source, set-aside or bid preferences. Strengthen outreach, surety bonding and other pool-building measures.
- Option 4: Phase out these programs.** Under this option, less exclusive and less intrusive assistance to SDBs, such as technical assistance and outreach, would be expanded.

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 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. 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 Support through Federal procurement for opening up entrepreneurship opportunities would be limited to pool-enhancing methods, such as technical assistance, expansion of SBA's surety bond program, and outreach by procurement officers and prime contractors.

Option 3 would retain a small 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 small businesses generally have a rule-of-two set-aside available to them as well, but only if an SDB set-aside is not triggered.)

Option 2 would render these programs less exclusive and recharacterize them as for "disadvantaged" businesses, with race merely one -- but not the only -- way to demonstrate disadvantage. Operationally, this is likely to have only a modest effect on minority contracting. Prior to the codification of the 8(a) program in 1978, SBA employed this approach; at that time, about 4% of all 8(a) firms were white-owned.

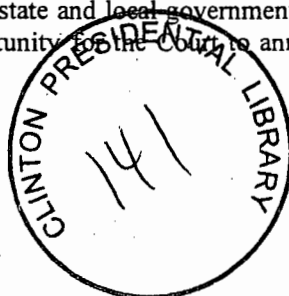
Option 1 would ameliorate some of the most problematic practices in the program. Limiting participation, encouraging graduation, and tightening the asset tests emphasizes that 8(a) is an entryway, not an entitlement. Limiting concentrated use of preferences reduces the unfairness to white bidders in 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.

In addition to these policy options, we have also begun to develop a complementary option: procurement preferences that focus less on minority capitalism and more on job-creation for minorities and other disadvantaged persons. Some of these strategies are place-based and others are employee-based. Preliminary alternatives are outlined in Attachment 4.

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:

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.



- 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, ant 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 procurement preferences and set-asides.

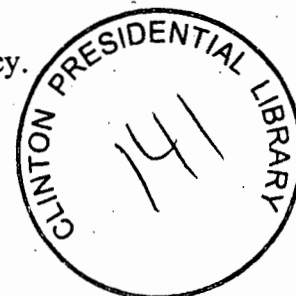
B. The "Least Intrusive Alternative" Approach

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 -- Option 1 or 2.

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 -- Expand eligibility to include nonminority firms.

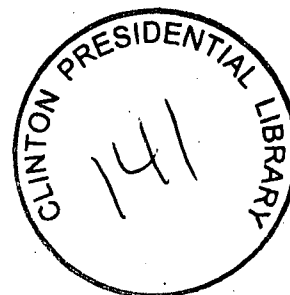


EXHIBIT 1

Provisional Decisions: Check one box (☐) in each column

(#) -- indicates option number in the memo	Education	Employment	Procurement
"Calibrated, Opportunity" Approach	☐ (1) Maintain current policy requiring exhaustion	☐ (1) Permit limited consideration of race/gender in layoffs	☐ (3) Narrow preferences; transitional "entryway"; build pool; <i>or</i> ☐ (4) Phase out preferences; just build the pool
"Least Intrusive Alternative" Approach	☐ (1) Maintain current policy requiring exhaustion; <i>or</i> ☐ (2) "Tweak" current policy, requiring added analysis	☐ (1) Permit limited consideration of race/gender in layoffs; <i>or</i> ☐ (2) Oppose consideration of race/gender in layoffs	☐ (1) Reform to address abuses, limit unfairness; <i>or</i> ☐ (3) Narrow preferences; transitional "entryway"; build pool
"Anti-Exclusion" Approach	☐ (3) Eliminate race/ gender aid by expanding eligibility, softening exclusion	☐ (2) Oppose consideration of race/gender in layoffs	☐ (2) Expand eligibility to include disadvantaged majority firms

A. "Calibrated Opportunity" Approach: Emphasis on creating opportunity, not guaranteeing results. Therefore, opportunity-building contexts (education) and tools (outreach) are strongly favored. Contexts more in the nature of a "reward" (profitable contracts) and tools more in the nature of a guarantee at the expense of others (exclusionary set-asides), are disfavored.

B. "Least Intrusive Alternative" Approach: Emphasis on narrowly tailoring the use of preferences, recognizing that the use of race or sex as a decisionmaking consideration does have some moral cost, and that the interests of bystanders are entitled to some weight in carefully constructing affirmative measures.

C. "Anti-Exclusion" Approach: Emphasis on avoiding bald set-asides that announce: No whites ~~would~~ **LIBRARY PHOTOCOPY**

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. letter	Deval Patrick to George Stephanopoulos, re: Affirmative Action (4 pages)	7/10/1995	P5 142
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COLLECTION:

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

FOLDER TITLE:

Affirmative Action Work Plans - "Speech/Rollout" [1]

2008-0308-F

wr878

RESTRICTION CODES

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

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

- 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]

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

RR. Document will be reviewed upon request.

- b(1) National security classified information [(b)(1) of the FOIA]
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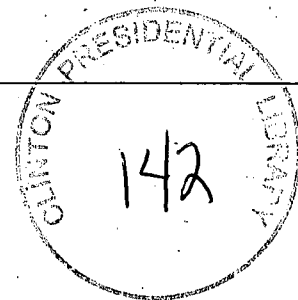


U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035



WJC LIBRARY PHOTOCOPY

July 10, 1995

BY FAX/ORIGINAL BY HAND

George Stephanopoulos
Assistant to the President
The White House
Washington, DC

Dear George:

I think you may not have understood the point I was making at our "roll out" meeting on Friday. Because I feel strongly about it, I want to set it out here.

Favorable commentary by the news media on the President's speech is very important and the staff seem to have anticipated how to help this happen. But we will not win the debate on affirmative action -- or even have a meaningful impact on it -- if we limit our pitch to the media, or if we have one big flourish and no follow up. The case has to be taken to the people, over the heads of the media and the professional politicians.

This is so because, like it or not, this issue has a symbolic significance all out of proportion to its practical impact. Civil rights groups are hardly the only ones who sense this. Many, many Americans -- of all races, incomes and backgrounds, I assure you, people whose lives have never been and may never be touched by affirmative action, people who have opinions on the issue and those who have not yet formed one -- are watching and listening to see whether this Nation really is in full blown retreat from its long struggle to achieve racial, ethnic and gender justice. And they are wondering, like it or not, whether we are going to stand by and let it happen.

I am not exaggerating, I assure you. Affirmative action comes up when I visit everyone from banking groups to housing projects, from college campuses to diplomatic circles and the UN (yes, the United Nations). You overhear conversation about it in grocery stores and restaurants and train stations all over America. Parents talk about it in playgrounds while they watch their kids play. I overheard construction workers talking about

their kids play. I overheard construction workers talking about it during a lunch break when I walked back to DOJ from a meeting with you once recently. There is much less bitterness and rancor in those conversations than you might think. What there is, as I and others have been saying for months now, is high anxiety. They are wondering what kind of society we will be, and whether investing in each others' struggles matters.

The President's speech is important. I know that as well as you do. He has it in him to be brilliant on this. But the rest of us have to pitch in here as well if the Administration is to succeed on this issue. So, to repeat my point of Friday, I believe that what is missing from our planning is the tasking of specific others in the Administration, in Congress and in private life, with the President's blessing and backing, to help take the case the President will make in his speech directly to the campuses, directly to chambers of commerce, directly to the American worker, directly to the international community, directly to Californians, and the Congress and, directly to women and minorities.

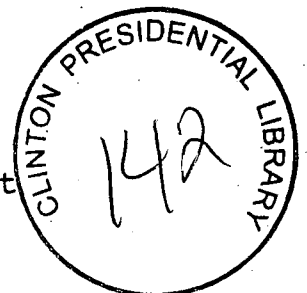
We have lots of talent to draw on. The Vice President has consistently demonstrated his command of the topic and its defense. Key Senators and Members, including moderate Republicans, should be recruited now. Secretaries Riley, Cisneros, Ron Brown and Reich, and the Attorney General, are naturals among the Cabinet. I would have you consider Secretaries Rubin, Christopher and Shalala, too. The subcabinet is also rich in prospects. I am certainly expecting to take a role. A team effort has the added benefit of helping to debunk the view of some that the White House is too nervous to get too close to civil rights issues generally.

That's what I was trying to say. This is no time to finesse; this is a time to be clear and blunt (and maybe even a little bit loud) about our stand.

To that end, I would make two additional suggestions:

(1) Venue - the White House is not the place for this speech, at least inside. For one thing, the East Room is too small. I for one hope this speech is one essentially about American citizenship and patriotism, in which the President feels compelled to speak with passion; frankly, it seems a little unnatural or inappropriate to shout inside the White House.

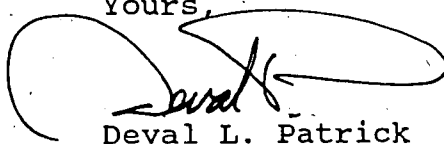
(2) The Policy - before the speech we ought to have ready a short, plain statement of our policy on affirmative action that we can distribute throughout the government and point to publicly. Not knowing specifically what the President decided at Friday



morning's meeting, I am enclosing a rough cut at where I think we are headed. It needs your or Chris's refinement.

Take care.

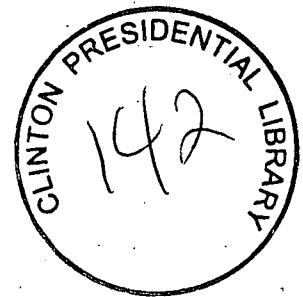
Yours,



Deval L. Patrick
Assistant Attorney General

Enclosure

cc: Abner Mikva
Alexis Herman
Christopher Edley
Maggie Williams



Policy on Affirmative Action

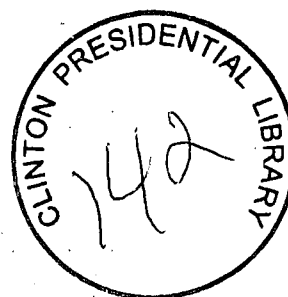
This Administration is committed to expanding the economy, to strengthening programs that support children and families and to vigorous, effective enforcement of laws prohibiting discrimination. These commitments reflect bedrock values upon which American society rests: equality, opportunity and fair play. This country has learned no more important lesson in the second half of this century than that these bedrock principles must extend to all Americans, regardless of race, ethnicity or gender.

While this Nation has made enormous strides toward eliminating inequality and barriers to opportunity based on race, ethnicity and gender, the job is not complete. This Administration, therefore, continues to support affirmative measures that promote opportunities in employment, education and government contracting for Americans historically excluded on the basis of race, ethnicity or gender. These measures incorporate a range of activities, which may include broad recruitment of qualified applicants, targeted outreach for qualified racial and ethnic minorities and women and, in some instances, consideration of race, ethnicity or gender in selecting from among qualified individuals when other factors are comparable.

Quotas are not appropriate affirmative action measures and this Administration will continue to oppose their use. Rigid numerical requirements that disregard merit are inconsistent with equality and opportunity. They will not be tolerated.

In each instance, the affirmative program must be flexible, realistic, subject to review and fair. Such measures must be conceived as part of an overall effort to mold a more harmonious, prosperous and inclusive society in which each individual will have an opportunity to achieve based on merit. The Federal Government will continue to seek reasonable ways to achieve the objectives of inclusiveness and integration without specific reliance on race or ethnicity. Meanwhile, where those objectives cannot be achieved through such means, the Federal Government will continue to support lawful consideration of race and ethnicity.

The Supreme Court has held that a federal or state program that relies explicitly on race or ethnicity in decisionmaking must be narrowly tailored to accomplish a compelling interest. The policy of this Administration is thoroughly consistent with that standard.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Deval Patrick to George Stephanopoulos, re: Affirmative Action (3 pages)	7/10/1995	P5 143 Dup 142
002. letter	Madeleine Kunin to President Clinton, re AA Speech (4 pages)	4/9/1995	P5 144
003. paper	Affirmative Action Rollout strategy (4 pages)	n.d.	P5 145

COLLECTION:

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

FOLDER TITLE:

Affirmative Action Work Plans "Speech/Rollout" [2]

2008-0308-F

wr879

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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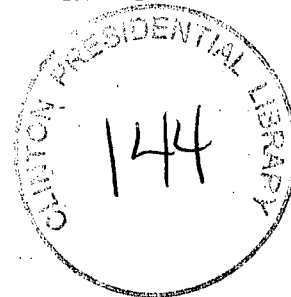
1

THE DEPUTY SECRETARY

WJC LIBRARY PHOTOCOPY

To: President Clinton via Chris Edley
From: Madeleine M. Kunin
Re: Affirmative Action speech

madeleine kunin



April 9, 1995

CONTEXT

I suggest that the affirmative action speech be placed in a larger context--one that will enable the President to inaugurate a new chapter in the movement towards equal economic opportunity and social equality in America.

It is most important to cast the speech not as a retreat from affirmative action, nor an affirmation for the status quo, but rather, a recognition that we live in different times than when affirmative action was launched--in many ways, the status of minorities and women have improved, in other ways, they have not, and in some areas, even regressed. It is important to acknowledge that contradictory conditions can exist simultaneously and that is why, in part, the debate is so heated. Depending on where you look, affirmative action has done its job, or it has failed.

The President can acknowledge that one can find confirmation for opposing conclusions, but as long as inequality of opportunity exists in any form, to any degree in the United States, for any individual or group, the country is not living up to its promise and therefore, the President is unalterably committed to rectifying that inequity with all the tools available to him.

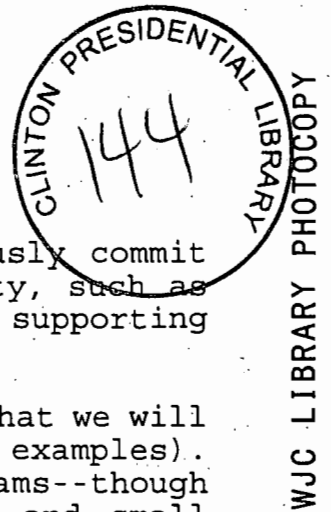
Examples of conflicting results:

-- Schools in the south are more integrated than they were; in the north more segregated, not only by race, but also by poverty and ethnicity. And it is impossible to conclude that the education received by minorities throughout this country, is equal to whites.

-- A strong black middle class has emerged, but at the same time, the poverty rate and incarceration rate of African Americans remains disproportionately high.

-- Women outnumber men in college and in graduate school, but there remains an earnings gap, as well as a gap in women in science and technology, and 95% of the Fortune 1000 top managers continue to be white males.

There should also be an acknowledgement that affirmative action is but one part of a larger dynamic of social and economic



change in this country---and that we must simultaneously commit ourselves to other strategies that increase opportunity, such as expanding access to quality education at all levels and supporting strong families.

However, affirmative action remains a vital tool that we will not discard. It has proven its effectiveness (and use examples). Consider including the largest affirmative action programs--though this may be too controversial--veteran's preference, and small business set asides.

It has also proven to be effective for women and minorities (examples). If Title IX is defined as affirmative action, it's a good example of the dramatic expansion of women's athletics in the last 20 years, while pointing out the continuing disparity.

TONE

It is critical that this speech convey a high moral tone, that it come as close as possible to Lincolnesque, with poetic language and quotations.

The challenge to the President is to elevate the debate above the divisiveness polarizing the country. The President can position himself in contrast to those who thrive on fanning the flames of division.

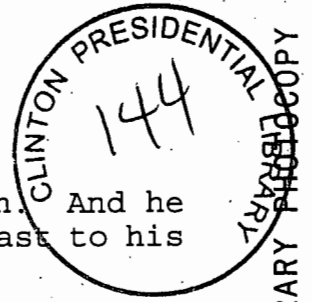
He must be seen as the healer, as the President who appeals to the best and highest motives of human nature, who reminds us of our generosity, our sense of community and tells us that we are personally diminished when any amongst us is deprived.

Finding a way to show his courage in this respect by taking bigotry head on, either through an event or a person, quotation, or even what is considered to be "popular opinion" would be advantageous. Lincoln did face a nation divided --to the death-- although there were no polls to say so.

A combination of careful use of language plus strong inner passion, drawing on his personal experience (as he began to do this weekend) in Arkansas, and what forces and experiences shaped him to become a civil rights minded southern politician.

He can describe what struck him as unfair as a child, and what remains unfair to him today. He can also draw the contrast between what the world was like (for example, the number, if any, of African American politicians he had known about) and what it is like today (the number of African American elected officials).

If comfortable with the idea, he can use his mother's odyssey to describe how hard it was for women to receive an education and



how different it is now and bring in Hillary's generation. And he can boast about the women in the administration, in contrast to his predecessors.

These examples should convey two ideas:

1. the President is a strong supporter of affirmative action in keeping with his life long commitment to civil rights. And he will not retreat, and neither can we as a nation until our work is done (most important not to be viewed as an expedient value modification).

2. That opportunities have changed for minorities and women, much to the better, but far from good enough. So our work must continue, but not precisely in the same way. (Would be interesting to find a parallel situation in history where we have stuck to our principles but changed the means of achieving them.) The fundamental principles upon which any such strategies are based, remain unchanged. It is the means, not the ends, which must be updated.

POLICY THEME

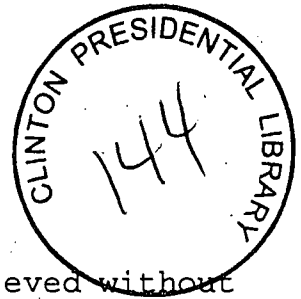
It would be helpful to have an overarching theme which indicates a progression (as the chart shows) from expanding opportunities, increasing the talent pool to enable everyone to compete fairly, to--as a last step-- direct government intervention through set asides, etc. If we do our job right in the first place, by giving all children an equally good and demanding education, we won't need race based scholarships by the time they apply to college.

Example of a theme: Achieve maximum opportunity with minimum government intervention.

Would have to followed by a statement that the President would not hesitate to intervene, when other remedies are ineffective.

The idea of using progressively more stringent means of achieving equity is very attractive, accompanied by the concept of affirmative action as a transition phase. It implies there is an agreed upon goal and end point.

The difficulty is finding consensus on what that end point is in a manner that meets a legal definition and conforms to public perception, which is what the debate is about now.



FAIRNESS

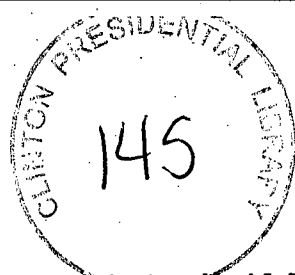
The concept that equal opportunity should be achieved without creating undue burdens on the rest of society should be conveyed without holding up the white male as a new victim. This resonates badly with women and blacks whose experience is all to the contrary and also plays into the idea that the election is the driving force here, and unnecessarily legitimizes the opposition's view.

Keeping that part of the question at a more general level would be better, and turning it upside down, would be even better--i.e., as a society, we are all disadvantaged when we are deprived of the talent and productivity of individuals who are unable to achieve their potential as a result of racial and gender barriers.

PRESIDENT AS TEACHER

The speech is a great opportunity for the President to describe how affirmative action works, what it does and does not do and what it should do.

Also, the President can describe the nature of bias, both conscious and unconscious, that you don't have to be a bigot to continue to hire people who act and look like you do and went to the same schools, but that you do have to be prodded, sometimes, to look beyond your circle, and that too--is affirmative action.



The President's vision

The President's vision of the inclusive America we want to build rests on two principles: equality of opportunity and nondiscrimination. These principles are mutually reinforcing: equality of opportunity offers scope for the fullest possible development of individual talents, while nondiscrimination guarantees the fair treatment of individuals in light of their talents.

Fleshing out the vision: some complications

1. **Equality of opportunity.** All Americans should have, so far as is possible, a full and equal chance to develop their talents and use them for the betterment of themselves, their families, and their society. (I say "so far as possible" because social theorists going all the way back to Plato have recognized that differences among parents can have profound effects on the life-chances of children. I don't think we want to advocate the abolition of the family--as Plato did--in the name of full equality of opportunity.)

Equality of opportunity is traditionally, and correctly, distinguished from equality of result. We have no way of knowing whether equality of opportunity for individuals will produce equality of results for groups. There are too many intervening variables.

2. **Nondiscrimination.** Nondiscrimination exists when two conditions are satisfied. First, the system of rules must be fair. Second, it must be impartially administered--that is, the treatment of individuals must be determined by the fair rules rather than by nongermane factors or the personal whims of authorities within the system.

When the function of the system of rules is to select individuals for social goods such as jobs and educational opportunities, fairness is determined by (a) a rational relationship between these goods and the selection criteria, and (b) reasonable tools for assessing the extent to which individuals satisfy these criteria.

Nondiscrimination can be enforced. Public authorities can assess the fairness of assignment rules and the impartiality of their administration, and they can take corrective action. But arriving at appropriate standards of judgment is not simple.

A nondiscriminatory system applied to individuals can produce a wide range of outcomes for groups, depending on the composition of the pool from which the selection is made. On the one hand, if there are gross disparities in industries such as construction, with a very large and diverse pool of eligible employees, a prima facie case of discrimination can be made out. But problems can arise when a vision of the world drawn from the

construction industry is transferred to very different spheres of activity. Consider the following example offered by Stephen Carter:

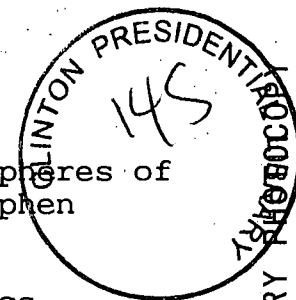
"A good example of the misunderstanding of statistics occurred in 1988, when members of the Michigan legislature argued that they could tell from the numbers that the Detroit Symphony Orchestra was not doing all it could to attract black classical musicians. Only discrimination, it seems, was a possible explanation for the fact that the orchestra employed only one full-time black performer. Never mind that an entirely blind screening process was used to hire musicians; never mind that out of 5,000 orchestra-bound musicians at the nation's top twenty-five conservatories, only 100 were black, of whom a normal distribution would predict that perhaps a fifth--twenty--were good enough to play in a major orchestra. The Detroit Symphony might have been the most racist institution in the world or the most racially benevolent one, but the statistics do not hold the answer."

In practice, the relation between the President's two core principles--equality of opportunity and nondiscrimination--is complex. Equality of opportunity can be, and must be, promoted through social policy--programs directed to infants and children, education and job training, and economic development, among many others. Nondiscrimination can be enforced through a variety of means, including affirmative action. But remedies for discrimination in the assignment of individuals to higher education, jobs, and business opportunities do not for the most part address underlying inequalities of opportunity to develop the skills and talents on the basis of which the assignment occurs. Affirmative action has modestly contributed to the growth of the black middle-class; it has played and will play little if any role in ameliorating the plight of the ghetto poor.

Affirmative action as means

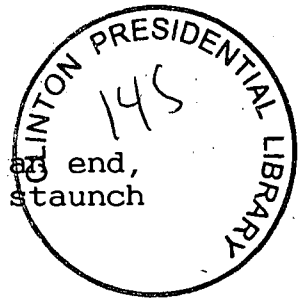
Nondiscrimination is the goal; affirmative action is one means to achieve that goal. Nondiscrimination is a right; affirmative action is a policy in pursuit of that right but is not itself a right. To end a particular program of affirmative action is not necessarily to dismantle a right. Rights are not measured by standards of success or by the sum of costs and benefits; means to rights may be so measured. Conversely, some means that may be effective in the utilitarian sense are nonetheless impermissible because they violate some deep principle. (For example, we might well have more effective law enforcement if we ignored the Fourth Amendment; but we shouldn't.)

So in considering affirmative action as a means, there are two kinds of questions: Does it work? And is it consistent with principles that shouldn't be violated--even in the pursuit of worthy ends? For particular applications of affirmative action, one or both of these questions may be answered in the negative.



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But because affirmative action is a means rather than an end, skepticism about it in these cases is compatible with staunch support for nondiscrimination.



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The way forward: where we agree

I suspect we agree on the following:

1. We cannot allow the choice to be framed as one between the status quo and the abolition of all affirmative action programs. That is a debate we cannot win, and it is a battle that would divide the country. We need a third option.

2. For the federal government: a viable third option will draw the line between the core of justifiable programs and the penumbra of excesses. And it will offer a principled justification for that line.

3. For California: a viable third option must take the form of a ballot proposition that seizes the middle (high) ground. We cannot write that option, but we can and should participate (to the extent that we are allowed) in a process that leads to that result.

4. Absent very unusual remedial circumstances, we are opposed to quotas. We must therefore oppose set-asides that establish rigid numerical tests.

5. We agree that affirmative action entails practical and moral costs--burdens imposed on third parties who have not specifically benefitted in the past from discriminatory practices. Even when affirmative action programs are justified, they must be carefully designed to minimize the burdens on such third parties.

6. As a general proposition, we agree on the importance of the merit principle in the distribution of a range of social goods. Affirmative action is called into question when it appears to violate that principle. Affirmative action programs must, so far as possible, be tailored to bolster the merit principle--for example, by showing that certain criteria do not accurately predict job competence or that advertising strategies do not reach the full pool of potential employees.

7. We can make considerable progress over the next few weeks through internal dialogue and informal outreach. But an issue of this gravity for the country requires a fuller and more public national conversation. We are therefore prepared to recommend a Presidential Commission.

8. Affirmative action is but one element of a broader attack on discrimination. Whatever we decide concerning affirmative action, it is vital to push the broader nondiscrimination agenda forward: Yes, we've made progress, but the problem isn't gone.

9. Suitably tailored affirmative action programs can help promote nondiscrimination, but they do much less the promote equal opportunity--especially for the severely disadvantaged. We should couple our proposed reforms of affirmative action, whatever they turn out to be, with a staunch defense of an aggressive equal opportunity agenda--and, if necessary, with a stinging attack on the hypocrisy of those who attack affirmative action while gutting programs that promote equal opportunity.

Where we may not agree

1. I believe that moral and public case for affirmative action is strongest in the remedial context--specific responses to specific practices of discrimination by specific institutions. I would therefore create a presumption against affirmative action programs that invoke general "curative" justifications loosely linked to "societal discrimination." And similarly for affirmative action programs that invoke as their principal justification the forward-looking criterion of promoting "diversity."

2. From the beginning, affirmative action was understood as transitional--as a temporary means to a desired end. I believe we should be prepared to explicitly endorse that understanding--that is, to spell out the circumstances under which affirmative action programs would be terminated.

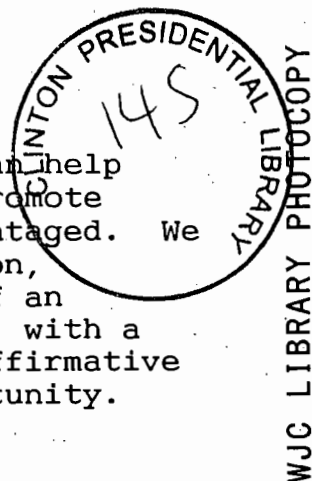
3. Certain costs imposed on third parties should be regarded as unacceptable, even in the pursuit of worthy goals. For example, it is hard to defend race-based firing decisions, and I don't think we should put ourselves in the position of trying to.

Some hard questions

1. When, if ever, can race legitimately be a "plus factor"--along the lines of (e.g.) veterans' preference?

2. On what basis do we justify programs that have the effect of giving middle-class minorities preferences over economically disadvantaged nonminorities?

3. How far are we prepared to take the distinction between public and private action? For example, are we prepared to accept programs voluntarily adopted by businesses that we would not be willing to institute as the policy of the federal government?



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	George Stephanopoulos and Chris Edley to the POTUS, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review (5 pages)	7/19/1995	P5 Dup #4
002. memo	Christopher Edley to George Stephanopoulos and the Core Group, re: Affirmative Action: Themes and Hard Questions (14 pages)	4/6/1995	P5 147
003. memo	James Castello to President Clinton, re: EEOC (2 pages)	5/23/1995	P5 Dup #14
004a. memo	George Stephanopoulos to President Clinton, re: Affirmative Action Follow-Up (4 pages)	8/17/1995	P5 149
004b. memo	Nancy McFadden to George Stephanopoulos, re: Status Report on Post-Speech AA Issues (4 pages)	9/16/1995	P5 150

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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]

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- 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]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

File Affirmative Action

Why does it make sense
to have a 20% goal
for small businesses -
who may or may not be economically
disadvantaged

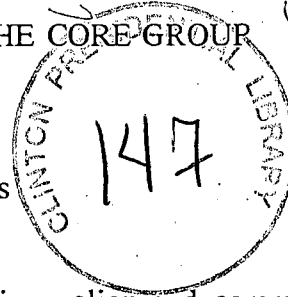
THE WHITE HOUSE
WASHINGTON

April 6, 1995

if it doesn't make sense
Since to be a
small business
& economically disadvantaged

MEMORANDUM FOR GEORGE STEPHANOPOULOS & THE CORE GROUP

From: Christopher Edley, Jr. & Peter Yu
Re: Affirmative Action: Themes and Hard Questions



with a few
black friends
don't

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. Also, a discussion of the "hard cases" in the Attachment may facilitate our deliberations.

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 would seem to entail 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 SDBs demonstrate "economic disadvantage"; this, however, requires a somewhat tortured construction of Dole's statement.)
- 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

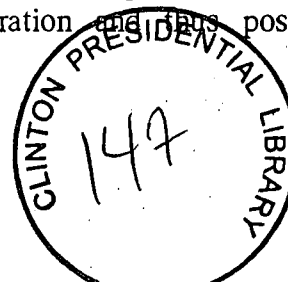
There is an alternative approach to the question of preferences, one more consistent with the President's rejection of the "colorblindness" and "pure remediation" visions and his embrace of a broader justification that includes remediation, opportunity, and inclusion. This approach would emphasize four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

- We oppose quotas and numerical straight jackets (outside of narrow remedial contexts).
- We oppose the use of set-asides in employment and contracting (outside of narrow remedial contexts).
- We oppose giving group-based preferences to unqualified persons in the name of affirmative action.
- We oppose group-based preferences when need-based preferences would be just as effective at creating genuine opportunity.

This Part summarizes this 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 involve 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, when that fact is not a bona fide consideration. A bona fide consideration is a characteristic 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, 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 advantages, but not all advantages are preferences.

B. Central Propositions

- **Proposition 1: Our paramount aspiration is complete equality of opportunity.** We do not seek or guarantee equality of results.

Corollary: We must distinguish among affirmative action in different contexts: education differs from contracting; minority scholarships differ from procurement set-asides.

Corollary: We must distinguish among affirmative action tools: a targeted surety bond program differs from a procurement set-aside; multi-factor admissions differ from quotas.

- **Proposition 2: 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.

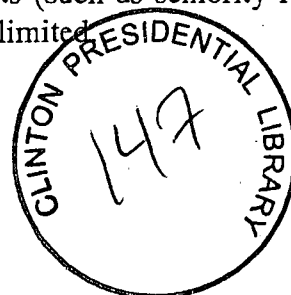
Corollary: Affirmative action should be transitional for individual participants: these programs should be entryways, not entitlements. Each program should have graduation requirements and related supports.

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

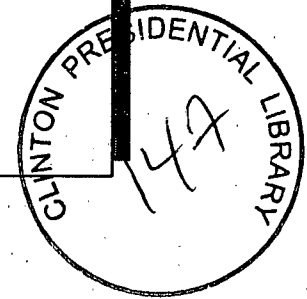
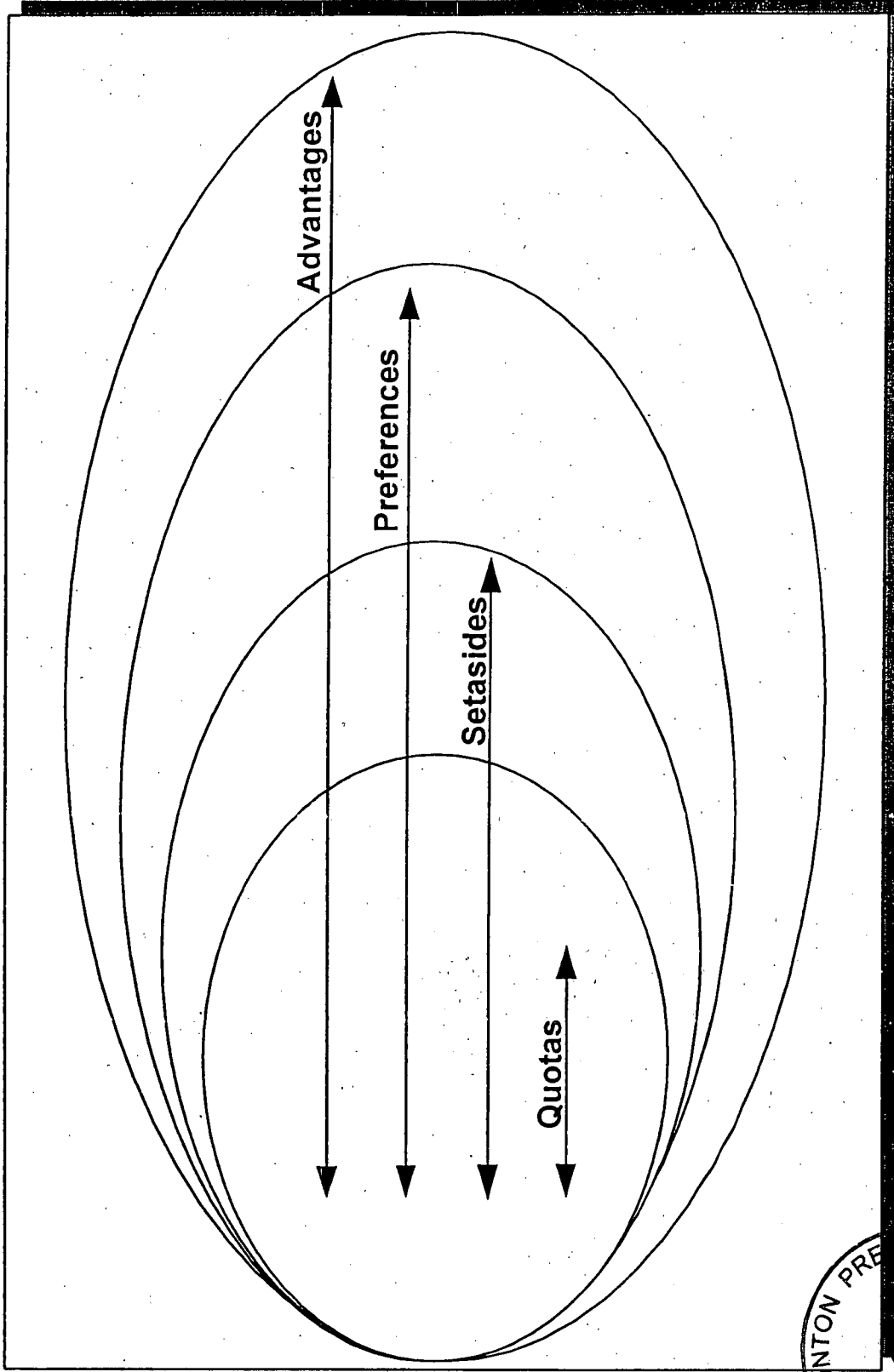
- **Proposition 3: We must recognize--and limit--any harm that these essential programs cause.** We must do the right thing, but in the right way.

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.



total work
in 8(a)
40% paid
after 9 years in prison



C. Policy Implications

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

- **Implication 1: We are opposed to set-asides in employment and government procurement (except in court-ordered remedies).**

Example: We oppose excluding any person from an employment or contracting opportunity on the basis of race, gender, or ethnicity. Thus, we oppose procurement set-asides, including the "rule of two."

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

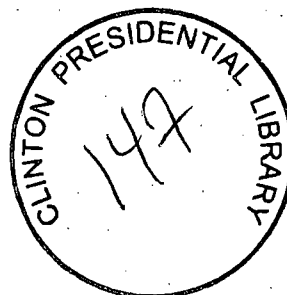
- (1) are never awarded to unqualified persons;
- (2) are transitional—establish objectives and terminate when those objectives are met;
- (3) are flexible—are neither actually or effectively quotas; and
- (4) are narrowly tailored—are the least race-conscious means of maximizing equal opportunity and 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: Because procurement is less directly related to the creation of opportunity, preferences in procurement 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).



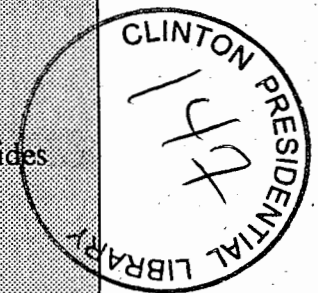
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Selected Affirmative Action Efforts

Opportunity ----- Results

Opportunity ----- Results

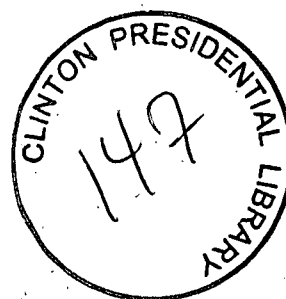
	Opportunity Enhancing Assistance	Advantages & Flexible Preferences	Set-asides	Quotas
Education	Compensatory ed Outreach & recruiting HBCUs	Multifactor admissions policies	Minority-specific scholarships (limited competition among qualified candidates)	Two-track admissions policy
Employment	Outreach & 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	8(a) program Rule of two (limited competition among qualified bidders)	Numeric set-asides



III. Conclusion

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

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



Yu Draft -- 4/6/95

Attachment: Seven Hard Cases**Case 1. Public Employment: Promotions.*****Scenario:***

Chicago's population is diverse: 39% African-American, 38% white, 20% Hispanic. Its police force is less diverse: 66% white, 34% minority (even in the Department's higher ranks). These facts have been the subject and source of litigation and court-ordered remedial hiring and promotion. In addition, the Department has undertaken extensive efforts to redesign its written tests to reduce disparate impact.

Earlier this year, after administering a promotion test, the Department announced 67 promotions from sergeant to lieutenant. Most of the promotions (54) were awarded to those with the highest scores on the promotion exam. Only 3 of these 54 new lieutenants are African-Americans. Probably in response this imbalance, the Department also announced 13 "merit" or performance-based promotions to persons, none of whom scored in the top 67 on the exam. Of the 13, 5 are white, 5 are African-American, and 3 are Hispanic. It is widely assumed that race and ethnicity were considered in the merit promotions. A white sergeant with the 56th-highest score on the exam has sued the Department.

The "Dole" Perspective:

"I'm concerned that the Department has promoted some sergeants simply because they belong to certain racial and ethnic groups. This looks like a quota to me: the 5-5-3 ratio of 'merit' promotions precisely tracks the City's population.

"Clearly, minorities did poorly on the promotion exam. The racial composition of the group receiving 'merit' promotions indicates to me that certain candidates received a preference-- they had lower test score than white candidates but were nonetheless promoted."

The "Alternative" Perspective:

"This is a classic situation in which race is, quite appropriately, a bona fide consideration; the racial composition of a police force can be essential to its effective performance.

"Even if one were to regard this as a preference, it is an appropriate preference. First, there is no indication that the 13 candidates were unqualified; the fact that they had slightly lower scores on a written test is insignificant. Moreover, the fact that five of the merit promotions were awarded to white sergeants indicates that this was a flexible preference and not a quota or set-aside."



Yu Draft -- 4/6/95

Case 2. Public Employment: Layoffs.*Scenario:*

Although Piscataway's Board of Education had never been found to have discriminated on the basis of race or ethnicity, the Board has long maintained an aggressive -- and effective -- affirmative action policy. Piscataway schools have hired the most qualified candidates, but, in cases in which candidates were otherwise comparably qualified, have favorably considered minority status. As a result, by 1985, 9.6% of Piscataway's teachers were minorities, compared to 7.4% of all New Jersey teachers and 12.1% of the statewide labor pool. However, more than 40% of the school district's students were minorities.

In 1989, budget cuts required Piscataway to dismiss one business education teacher at Piscataway High School. The two most junior teachers had been hired on the same day and (it is stipulated) were of equal qualifications. Rather than follow another tie-breaking procedure (such as drawing lots), the Board looked to the racial composition of the business education department and found that one of the most junior teachers (Williams) was the only African-American in the department. Based on this fact, the Board decided to layoff the white teacher (Taxman) and sent her a letter explaining the use of affirmative action as a tie-breaker.

The Third Circuit is currently considering whether Title VII permits the Board to act as it did; the Justice Department has argued that it does. The further issue is whether we would, *as a policy matter*, agree with the Board.

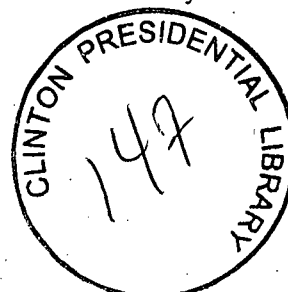
The "Dole" Perspective:

"This is a preference, plain and simple. Except in the remedial context (which this isn't), I don't think race should be a preference in hiring, and, as the Supreme Court has recognized, layoffs are even more problematic: the costs of any affirmative consideration of race or ethnicity in layoffs fall directly and solely on the losing employee."

The "Alternative" Perspective:

"I'm of two minds. On the one hand, race seems to be a legitimate consideration, especially in education, and thus I don't think of the Board as assigning a 'preference.' Race favored Williams in this case, but in another setting, such as in an effort to desegregate a black school in a dual system, Taxman might well have benefitted from the same consideration.

"On the other hand, a tie-breaker that favors one party *feels* like a preference. Group-based preferences can be appropriate in the employment context if they are transitional, flexible, and narrowly tailored. My concern with this case is that it seems to unduly concentrate the burden on Ms. Taxman. It's a very close call."



Yu Draft -- 4/6/95

Case 3. Public Education: Admissions.*Scenario:*

Admission to the University of California at Berkeley is extremely competitive; more than 20,000 students apply for 3,500 spaces. To ensure "diversity of cultural, racial, geographic, and socioeconomic backgrounds," Berkeley uses the following method: about 55 percent of the spaces are assigned strictly on quantitative academic measures (grades and SAT scores); about 5 percent are reserved for "special admissions" (athletes, older students, and the socioeconomically disadvantaged); the remaining 40 percent are admitted based on a number of factors, including race and ethnicity. The results for a recent year:

- entering class: 40% white, 20% Hispanic, 28% Asian, and 11% African-American; compared to
- CA high school graduates: 63% white, 20% Hispanic, 9% Asian, and 8% African-American.

By statute, an applicant must have a "B+" average to apply to the UC-system. Because African-Americans have lower high school grade-point averages, one commentator estimated that an African-American graduate with the requisite average had a 70% chance to get into Berkeley; while a white student with the same average would have less than a 10% chance.

The "Dole" Perspective:

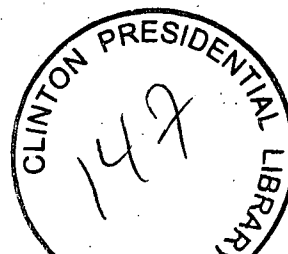
"Berkeley is clearly granting a preference to African-Americans. Competing on the merits of grades and SAT scores, whites would likely capture half or more of the spaces. It's irrelevant that race is 'one of several factors'--it is still *the* decisive factor in many cases.

"Let me also say that this system also disserves African-Americans: in the name of fairness they are placed in schools where competition is fierce and for which many of them -- due to discrimination and other causes -- are ill-equipped. As a result, while 71% of white Berkeley students graduate in five years, only 37% of African-American students do."

The "Alternative" Perspective:

"Race can be a bona fide consideration in admissions. Moreover, this system does not award preferences to unqualified candidates. The admitted African-American students are clearly as qualified (even in numerical terms) as the rejected white students: because the system is so selective, the students of all races meet strict threshold requirements, such as a B+ average.

"Let me also say that any crowding out of white applicants is the result of pure 'merit-based' competition with Asian-American candidates. Critiques emphasize the 11% of spaces awarded to African-Americans and ignore the 28% of spaces awarded to Asian-Americans."



Yu Draft -- 4/6/95

Case 4. Public Education: Remedial Education.*Scenario:*

Twenty years ago, San Bernardino Valley College created two special programs. The Bridge Program is designed to serve African-Americans students who are having academic problems but wish to attend a four-year college. The Puente Program is designed to serve Hispanics facing similar difficulties. Both provide specialized classes and curricula targeted at minority students and offer personal, academic, and career advice. The programs have been successful: 66% of the Puente students go on to attend four-year colleges (compared to 7% of all Hispanic students).

Earlier this year, a 25-year old widowed mother of three was denied access to an English 101 class that was part of the Bridge Program--the only class that fit her schedule. The precise reason for this rejection is disputed: she claims she was not admitted to the class because she was not African-American, the school suggests otherwise.

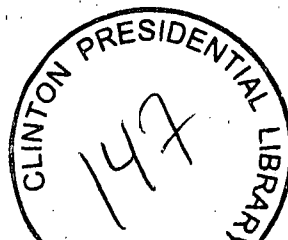
The "Dole" Perspective:

"This is simply a case of 'separate but equal.' Schools are, of course, free to design courses however they wish -- but they cannot exclude a student from a course simply on account of her race. One possible justification for such classes is a desire to build strong ethnic communities -- but must such classes be segregated? African-Americans may have distinct needs, but those could be served through specially trained counselors to provide services outside of the classroom. Moreover, the programs are based on crude stereotypes: why should a privileged African-American be allowed in these classes, but not a disadvantaged white?"

The "Alternative" Perspective:

"I'm opposed to 'set-aside' programs in employment and procurement--I believe that no one should ever be barred from applying for a job or bidding on a contract on the basis of race, gender, or ethnicity. However, education is a different matter.

The Bridge Program is designed to meet the special needs of disadvantaged minority students. The central question is whether there is a less race-conscious manner to achieve the same result. I suspect that the theory of the program is to create a non-intimidating environment by using familiar curricular material and new educational techniques, and by creating an environment in which minorities can view themselves as in the majority. This sort of empowerment may require some selectivity and exclusivity; but I very wary of it. I'd say it was a close call. I'm a little more comfortable with the black-male academies set up in Detroit--there the demonstrated necessity was somewhat greater. By the way, President Bush publicly supported Detroit's effort."



Yu Draft -- 4/6/95

Case 5. Public Education: Scholarships.*Scenario:*

The University of Maryland refused to admit African-American students for most of its existence. In the late 1960s, the federal government found the University in violation of Title VI and directed the school to develop a remedial plan. In 1978, the University established the Banneker Scholarship Program, which offers full scholarships to African-American candidates who meet certain academic qualifications. The Program represents about 1 percent of the University's financial aid budget and provides assistance to about 30 entering students each year.

Podberesky met the academic criteria for the Banneker Scholarships, but is Hispanic and not African-American. He has sued, challenging the legality of the exclusivity of the Banneker program.

The "Dole" Perspective:

"This is a set-aside--and no different from UC-Davis' two-track system that the Supreme Court struck down in Bakke. In today's financial climate, a full scholarship can be the difference between going to college and not going to college. Moreover, if the justification is to remedy past disadvantage, the race requirement of the scholarship is underinclusive: why should the son of a wealthy Jamaican doctor get a scholarship and the needy daughter of a West Virginia coal miner not?"

The "Alternative" Perspective:

"This case illustrates why I'm opposed to set-asides in other sectors, but not in education. After more than a century of exclusion and intimidation, the University of Maryland is finally open to African-Americans. There is no more effective way to do this than to put out a 'welcome' sign--after all, the fathers and mothers of many potential applicants were themselves likely turned away simply on the basis of their race.

"Even outside the remedial context, I believe that set-asides--like fellowships for women in basic research--serve important and legitimate purposes. I'll support them so long as they are flexible and tailored. In that regard, I would note that the Banner program is not a quota. There is no requirement that a fixed number of African-Americans irrespective of qualifications be admitted each year."



Yu Draft -- 4/6/95

Case 6. Government Contracting & Subcontracting: Incentives.***Scenario:***

In response to years of discrimination, the Department of Transportation has established certain goals with regard to minority contracting and subcontracting. To make progress toward those goals, the Department has provided its prime contractors with incentives to use minority subcontractors (typically, these incentives total 1.5-2.0% of the contract price). This incentive is referred to as a "subcontractor compensation clause" (SCC).

In 1989, an agency within DOT awarded a \$1 million prime highway-construction contract to Mountain Gravel (in most cases, DOT awards are administered through state or local entities; this project happened to be on federal land). Adarand bid for a subcontract to construct a guardrail. Although Adarand's bid was the lowest, Mountain Gravel selected a "disadvantaged business entity" (DBE) with a slightly higher bid. Under the SCC, Mountain Gravel qualified for a bonus of approximately \$10,000.

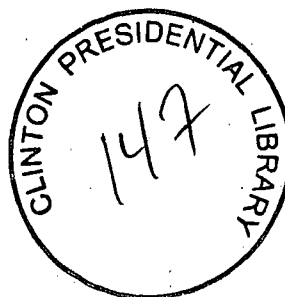
The "Dole" Perspective:

"The SCC is a preference based the race of the owner of the subcontractor. I'm generally opposed to such preferences. Let me just say that race seems truly irrelevant to the business of road-building. If there is discrimination in contracting, it should be prosecuted and eradicated. But contracting takes place in a market in which the bases of competition are clear: quality and price. Why should a minority-owned firm get a special break?"

The "Alternative" Perspective:

"This is not a set-aside: Adarand was free to bid on the contract. It is a preference, and I believe preferences in procurement are appropriate only if they are transitional, flexible, narrowly tailored, and necessary to remedy demonstrated present discrimination or the lingering effects of past discrimination.

"While I believe the SCC is flexible, I would revise these program to be transitional--to make clear when SCCs were no longer needed. I would support these programs if there were a finding of past or lingering discrimination. Upon such a finding, I would support bonuses because they encourage the rethinking of old prejudices and the opening up old-boy networks."



Yu Draft -- 4/6/95

Case 7. Government Contracting: Sheltered Competition.***Scenario:***

As part of a larger effort to reach its Department-wide goal of obtaining 5% of all procurements from small disadvantaged businesses (SDBs), the Department of Defense has promulgated regulations that direct that a "contracting officer shall set aside an acquisition for small disadvantaged businesses when there is a reasonable expectation that --

- (1) offers will be received from at least two responsible [] SDBs...
- (2) award will be made at not more than ten percent above fair market price..."

Each year about \$800 million in procurements (20% of all SDB procurement by DOD) are awarded under this so-called "rule of two."

Such set-asides are viewed by some majority-owned contractors as exclusive, race-based quotas. Moreover, in some regions and industrial sectors, large proportions of the acquisitions are set aside under this rule. For example, during one period, Barksdale AFB set aside all of its construction contracts for SDBs under the rule of two.

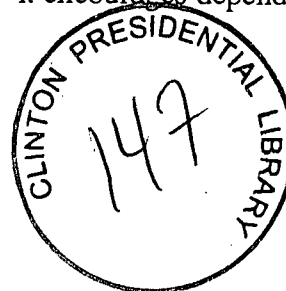
The "Dole" Perspective:

"This is a preference because it limits the competition that minority-owned firms must face. While I would support efforts to reach out to minority contractors, I do not support preferences."

The "Alternative" Perspective:

"While I believe preferences are sometimes appropriate in the contracting arena, set-asides only appropriate in court-ordered remedies. Here's why: a set-aside effectively says: 'No white-owned firms need bid.' That is unnecessary. I support assisting disadvantaged firms through preferences, but I don't believe we should ever bar a firm from bidding on a contract simply because of the race or gender of its owner.

"I have two other concerns about these set-asides. First, they have been implemented in a way that has had a disparate impact on certain industries and regions. That's unfair. Second, the program has no graduation requirement and so is not transitional--it encourages dependency rather than diversification and growth."



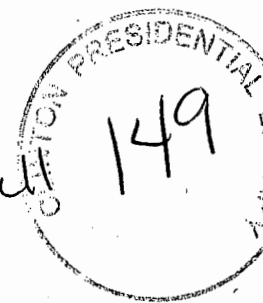
Memorandum for the President

From: George Stephanopoulos

August 17, 1995

Affirmative Action Follow-Up

Eskine
Todd
John Angel



Follow-up to your affirmative action speech falls into three broad baskets, all of which will require significant attention in September:

1.) Political/Legislative -- Alexis is completing the broad mailings of your affirmative action speech, and Administration officials have attended major conventions to outline your position. Both the House and Senate Democrats have prepared amendments to appropriations bills that embody your "mend-it don't end it" approach within the context of Adarand. We fully expect floor votes in September to eliminate set-asides, and these amendments would be used to counter that attack. In addition, hearings on broader affirmative action issues are likely, and we are preparing to testify.

2.) Policy -- The attached memo from the Justice Department outlines the process they have established to ensure compliance with the Adarand decision. We in the White House are deliberately maintaining a modified arms-length relationship from that process to help insulate you from political pressure, but Counsel's office and I are monitoring the process closely.

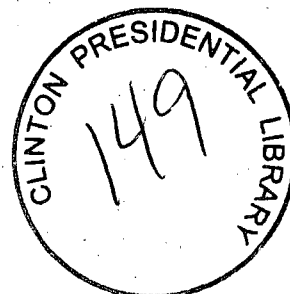
The first big decision we'll face in this process deals with procurement set-asides. The "rule of two" has been challenged in Court, and we believe an alternative will have to be proposed relatively quickly. We believe that the best approach might be to announce a reform package sometime in late-September or early-October that combines eliminating the rule of two with our "anti-fronts, anti-fraud" package and some fleshing out of the empowerment contracting proposal. Such a package will show that we're serious about Adarand and should help give cover to Democrats in the House and Senate as they oppose Republican initiatives to eliminate affirmative action.

3.) California Initiative -- We need to make a decision within 5-8 weeks on whether to propose a counter-initiative to the California Civil Rights Initiative. Many of us in the White House believe that an alternative is essential, but many others - including John Emerson and Bill Carrick -- question whether that's the best course. John convened a meeting today, and we

Affirmative Action Follow-Up
Page Two

all agreed that we need to put a process in place immediately to determine our course of action. John Emerson will prepare a separate memo outlining the steps that need to be taken over the next 6 weeks to reach an intelligent decision. This matter needs attention at the highest levels.

I've also attached a short explanation from the Justice Department on the Hopwood v. Univ. of Texas case. Right now the Justice Department is not involved in the suit, and in my opinion we should continue to stay out of it. It's pretty clear to me that Texas established a flawed program.





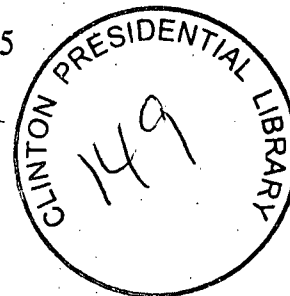
U.S. Department of Justice
Office of the Associate Attorney General

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Deputy Associate Attorney General

Washington, D.C. 20530

August 10, 1995



MEMORANDUM

TO: George Stephanopoulos
Assistant to the President

FROM: Nancy E. McFadden
Principal Deputy Associate Attorney General

SUBJECT: Hopwood v. Texas

NEM

Attached is a brief description of Hopwood v. Texas, the University of Texas Law School affirmative action case.

The case is currently pending before the Fifth Circuit. As is noted, the Administration has played no role in the case nor have we made any public statements.

Please let me know if you need anything else.

Attachment

Hopwood v. Texas

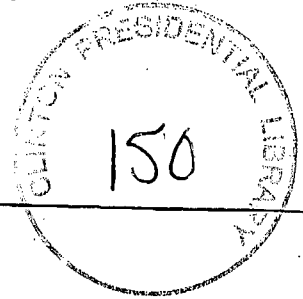
The University of Texas Law School Affirmative Action Case

Hopwood v. Texas is a case currently on appeal in the United States Court of Appeals for the Fifth Circuit. It is a suit in which several white students who had been denied admission to the University of Texas Law School sued to challenge the school's affirmative action plan. The Department of Justice is neither a party nor an amicus in this case; it has played no role, made no statements and submitted no papers.

In Hopwood v. Texas, 861 F. Supp. 551 (W.D. Tex. 1994), the trial court struck down a law school affirmative action admissions program where minority and nonminority applicants were considered by separate committees and under different quantitative admissions standards, i.e., the cutoff for minority applicants' test scores was lower than that of white applicants'. The court found that the program served two compelling state interests: (1) remedying continuing effects at the law school of past discrimination in both the University of Texas and the state educational system as a whole, and (2) obtaining an ethnically diverse student body. The court also found that the program was narrowly tailored in all respects but one, but held that it was unconstitutional because the law school failed to compare applicants on an individual basis as required by Justice Powell's opinion in Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978). The court refused, however, to order prospective injunctive relief, since the law school had subsequently established a new admissions procedure that appeared to eliminate the defects found by the court. The court also found that the white plaintiffs had not established that they would have been admitted in the absence of the program, and thus declined to award compensatory damages or order that they be admitted to the law school.

The plaintiffs have appealed the denial of relief, asserting, in particular, that the district court erred in not issuing an injunction barring the law school from considering race in admissions. The state did not cross-appeal. The plaintiffs' appeal was argued on August 8, 1995 and is currently pending in the appellate court.





Washington, D.C. 20530

August 16, 1995

MEMORANDUM

TO: George Stephanopoulos
Senior Adviser to the President

FROM: Nancy E. McFadden *NEM*
Principal Deputy Associate Attorney General

Susan M. Liss *ml*
Chief of Staff to the Assistant Attorney General

RE: Status Report on Post-Speech Affirmative Action Issues

This memorandum reviews the status of the affirmative action initiatives now underway. It reports on the review of the constitutionality of programs being led by the Department of Justice, summarizes pending litigation challenging federal affirmative action programs, and details the status of reform initiatives. The other pending initiative to arise from the President's review, empowerment contracting, is being handled by the Vice President's staff.

I. STATUS OF THE POST-ADARAND REVIEW

The Department of Justice is supervising the effort to review affirmative action programs to determine whether they comply with Adarand.

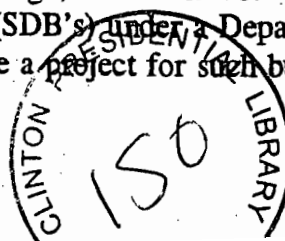
- o **Task Force.** A Task Force chaired by Associate Attorney General John R. Schmidt has been formed at the Justice Department to work with agencies in conducting the post-Adarand review. The Task Force includes representatives from various Department components, including the Civil Rights Division. The efforts of the Task Force are being coordinated closely with those of the Department attorneys handling litigation challenging affirmative action programs.
- o **Meetings with General Counsels.** In mid-July, meetings were held with the General Counsels of approximately 25 key agencies to discuss how best to organize and conduct the review, and to answer any questions regarding the guidance on Adarand issued by the Office of Legal Counsel on June 28, 1995.

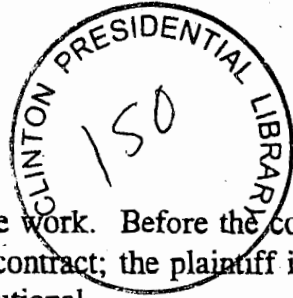
- o **Workplan.** The Task Force has developed an overall workplan and is now actively moving on two fronts: (i) it is collecting factual and statistical information bearing on the extent to which Federal affirmative action programs serve compelling governmental interests; and (ii) it is working with agencies as they review individual programs to determine whether they are narrowly tailored to serve demonstrated government interests. We will continue to work with the agencies to ensure that they will take action with respect to their programs consistent with the President's directive.
- o **The Library.** The Task Force is collecting and indexing broad-scoped materials that bear on the need for a wide range of affirmative action programs -- information that it would be impractical to have each agency develop individually. These materials are being organized in a library and include: (i) key legislative history materials; (ii) disparity studies that have been commissioned by State and local governments to document the need for their affirmative action programs; and (iii) a collection of materials from Government research components and private institutions.
- o **Agency Inventories.** The agencies have each produced a comprehensive inventory of all their affirmative action programs. The inventories have been reviewed and are now being indexed and computerized to allow for the ready identification of programs with similar features. Task Force members have begun to work with key agencies, including the Departments of Defense, Transportation, Education, Energy and Housing and Urban Development, as well as the Small Business Administration and the Environmental Protection Agency. In this phase of the review, Task Force members have been focusing on individual federal procurement programs. By August 25, 1995, when the analysis of the inventories will be completed, workplans will be developed for all other major Federal agencies,
- o **Timetable.** The Task Force is moving as expeditiously as possible. It is reasonable to expect that substantial progress will be made towards completion by October 1, 1995. However, we are not stating publicly any specific completion date.

II. PENDING LITIGATION

The Department is engaged in, or closely examining, eight actions in which federal affirmative action programs are under review after Adarand. In each case, a federal program requires some race-conscious action on the part of a recipient of federal funds, and plaintiffs contend that Adarand establishes that such race-conscious actions violate the Constitution. None of the cases has progressed to the point of a decision determining the constitutionality of a federal program.

1. C.S. McCrossan Construction Company, Inc. v. Sutton (Department of Defense) (McCrossan I), (D.N.M.). The complaint in this action sought to enjoin bidding for construction contracts at the White Sands Missile Range, New Mexico. These contracts were to be bid only to small disadvantaged businesses (SDB's) under a Department of Defense rule which permits the Department to designate a project for such businesses when





there are two such firms in the bidding area capable of doing the work. Before the court took any action, the Army decided not to apply the rule to this contract; the plaintiff is still seeking a declaration that the Army's SDB program is unconstitutional.

2. C.S. McCrossan Construction Co., Inc. v. Carney (Air Force)(McCrossan II), (D.N.M.). This case involves an Air Force runway repair contract at Holloman Air Force Base, New Mexico, limited to small disadvantaged businesses. The Air Force is considering delaying the bid openings or, in order to avoid scrutiny under Adarand, opening the bidding to all businesses.

3. Converse Construction Company, Inc. v. Massachusetts Bay Transportation Authority and Peña (U.S. Department of Transportation), (D. Mass.). Plaintiff has challenged the several state or local projects in Massachusetts, some of which include U.S. Department of Transportation funds that require minority contracting goals.

4. Russian and East European Partnerships (REEP) v. West (Department of Army and the SBA). This case seeks to enjoin the award of a language services contract for a special forces unit at Ft. Carson, Colorado that the Army proposed to procure without competition from a contractor certified by the Small Business Administration as a small disadvantaged business.

5. Morton Manufacturing Co. v. MTA & DOT, (S.D.N.Y.). The complaint in this case challenged a Minority/Disadvantaged Business Enterprise program maintained by New York City. Some of the contracts were funded by the DOT, and included minority contracting provisions. While DOT had been dismissed prior to Adarand, a motion to reinstate DOT as a party was filed after Adarand was issued, and is still pending.

6. Michelle Doe v. National Science Foundation & Texas A&M University (S.D. Texas). This complaint was filed by a 13-year old white girl denied admission to a summer camp run by Texas A&M and funded by the NSF, because the camp was limited to minority students. The NSF funding limitation was designed to implement a statute that directed the NSF to encourage minority students to enter scientific fields. Even before Adarand, NSF agreed to change its policy so that the camps it funds will not be racially exclusive.

7. Safeco Insurance Co. v. Eatherly Construction Co. and White House, Tennessee (M.D. Tenn.). An Environmental Protection Agency procurement regulation sets forth a series of steps that recipients of EPA financial assistance must take to recruit and consider minority, small and women owned businesses for use on EPA funded construction projects. A low bidder who was denied a project for refusing to comply with the regulation claims that Adarand renders the regulation unconstitutional.

8. Adarand Constructors, Inc. v. Peña, (D. Col.) has been returned to the district court for further proceedings regarding the constitutionality of the DOT program.



III. DEVELOPMENT OF REFORMS

The Affirmative Action Review proposed a number of regulatory reforms, particularly with regard to federal procurement reforms, and directed the Administrator of the Small Business Administration, the Deputy Director for Management of OMB, and White House staff to formulate government-wide proposals for change. We understand that this process has recently begun. The reforms to be addressed include:

- o tightening the economic disadvantage test to prevent businesses from hiding assets through a spouse or the value of a personal residence;
- o tightening requirements for graduation from sheltered competition by applying the 8(a) program's graduation requirement to all SDB programs and directing agencies to establish industry-specific graduation criteria;
- o enforcing safeguards against fronts and pass-throughs, including creation of an effective certification process and periodic audits of contractors; and
- o taking steps to reduce regional and industry-sector concentrations;

In addition, it is clear that one further significant regulatory reform will be necessary in the very near future. Spurred by litigation, the Department of Defense is considering whether to adopt an alternative to the so-called Rule of Two, and what that alternative should be. That rule requires that DOD award a contract to a minority firm whenever there are two qualified minority contractors in the bidding area.

All of these reforms should be announced as a package. That announcement should come as early in September as possible, since it is possible that Congress will turn its attention to this area during consideration of appropriations bills and because it is likely that the Rule of Two, at least, will be the subject of fast-moving litigation.

Prior to announcing the reform package, it will of course be necessary to touch base as we have in the past with all interested parties -- Members of Congress, civil rights and women's groups and representatives of the minority business community.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Meeting with Rainbow Coalition (4 pages)	1/9/1995	P5 151
002. memo	Douglas N. Letter to George Stephanopoulos, re: AA Policy (3 pages)	4/13/1995	P5 152
003. memo	Douglas N. Letter to George Stephanopoulos, re: AA Policy (2 pages)	4/13/1995	P5 153
004. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action - Themes and Hard Questions (7 pages)	4/7/1995	P5 154 Dup 43

COLLECTION:

Clinton Presidential Records
Counsel Office

OA/Box Number: 18431

FOLDER TITLE:

Counsel 1995 Affirmative Action I [2]

2008-0308-F

wr881

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]

January 9, 1995



MEMORANDUM

SUBJECT: Brief from meeting of 1/6/95--Nat'l. Rainbow Coalition

Jackson:

- 6 million fewer people voted in '94 than in '90
- "It's not that the Republicans had high water, but that we had low walls"
- Propositions:
 1. Increase the min. wage
 2. Provide Americans a min. package of health care benefits that controls costs
 3. End corp. welfare

Moderator:

- The low turnout (30%) was not a surprise. What was a surprise was that no incumbent Republican lost nationwide
- Was the "Year of the Woman" followed by the "Year of the Angry White Male"? Fact is that white women also voted against the Dem.'s
- 29 Black Republicans ran in '94. This is up from 15 in '90. 2 Black Republicans won in '94 (Congress).
- Dem.'s have lost every important statewide race since '92
- Nov. 8 was also bad for the DLC candidates
- There was a shift in partisan control of state legislatures
- Nov. 8 was the culmination of a 30-year strategy: Convert the solid Dem. South using divisive issues -- race, crime, etc.

Prof. Ron Walters:

- 62% of White males voted Republican
- 55% of White females voted Republican
- The role and condition of the White male: 10 million White males live in poverty, and their situation is tied to Blacks and other minorities in similar circumstances. Republicans try to steer Whites from seeing this and instead work to turn their anger against minorities, immigrants, etc.
- Develop a notion of class; look at how the economic system is developing poverty
- Top 20% is earning almost 99% of the nation's wealth--Read Robert Reich's speech on the middle class yesterday (Jan. 5 at the National Press Club)
- Look at labor force instability--the need for an investment strategy
- Make war on firms that have left our communities. We need to raise the cost of companies not living up to their community-based responsibilities. Responsibility, which up to now has only been directed to the poor, must also be directed to companies

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Prof. Williams:

- What's behind the angry White male? The changes are related to economic and political changes world-wide and a failure of leadership within the United States
- 10% more White males voted than in '90
- 7% more White females voted than in '90
- Results from a Voter Research Survey on the popular vote

'90 52% pro-Dem
 48% pro-Rep

'94 50% pro-Dem
 50% pro-Rep

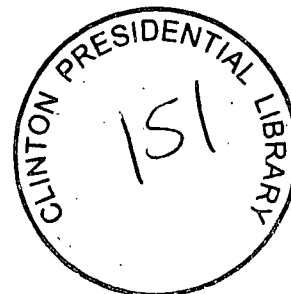
Celinda Lake:

Debates

1. Should we go to base or center?
There is no base left. A lot of our traditional groups (liberals, union) went Rep. or didn't vote
2. Problem was angry White male?
The real problem is a disgusted electorate, cynicism is higher than ever
3. Anger motivated more than any other emotion
4. Voters thought Rep.'s would do better on taxes: As a party we have no economic message or "Kitchen Table" message. Only a third of Americans thought, in '94, that we were in recovery. There was no economic message. Maybe they didn't agree with the Rep. message, but at least they offered one
5. Social issues caused our downfall--False, there were cultural crises that no one was addressing: crime and family values (youthfulness and randomness of violence is the number one concern)

Prof. Lichtman (Historian):

- The Dem. Party let its grass-roots fall into disarray. This is not 1894, but its not 1946 either. The pieces in place for a Truman comeback are not there. In '46, there was still a viable Dem. message. Today there isn't.
- The Dem.'s have not come up with a new routine. Also, in the '40s there was a grass-roots base (unions, etc.) Today it's the Rep.'s that have that strong base (churches, Christian Coalition, Talk Radio, etc.) Third, there's no policies in place for ordinary Americans.
- At every level, the Dem. Party needs to re-organize
- You don't have to go back to the New Deal, but you should be just as creative and ambitious
- This election sounded a thousand alarm clocks for our Party. We should heed its message



Anne Lewis:

- The '94 vote was not so much a vote against a political party as much as against the political establishment in Washington
- People that were "economically squeezed" turned out to vote for change; people even harder squeezed did not because they didn't feel they could make a difference
- This was not necessarily a decisive vote--people yearn to recapture a national sense of community

Mickey Ibarra:

- Expressed disappointment in the Dem. Party.
- Dem. party has lost its message and voice. The NEA will, however, do everything they can to help the Party regain a message and voice
- NEA does believe President Clinton has embraced an education agenda that does make a difference...We cannot turn our backs

Steve Cobble (Political Consultant):

1. Two-party system is breaking down
2. If this is true, then our task is not to rebuild the Dem. Party, but build a new party
3. Freedom is just another word for nothing to lose. Southern Boll-Weevils are gone. Don't take the blame for Establishment Washington. Our agenda was never on the table during the '94 election
4. We need to be just as serious as the Christian Coalition about organization-building
5. Let's not imitate Rep.'s. Dem.'s have not done the right thing since LBJ: since he passed the 1964 Civil Rights Act
6. Recent Poll:

Presidential--

3-man race

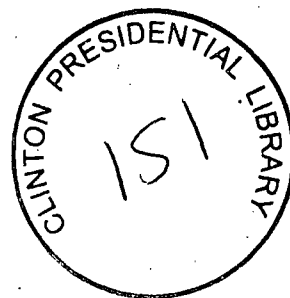
GOP	41%
Dem	37%
Perot	18%

4-man race

GOP	40%
Dem	35%
Perot	14%
Jackson	8%

Congressman Barney Frank:

- Stick with the Dem. Party, they're better than Republicans on every issue you can name
- Blaming, threatening to abandon, etc. is not a good strategy
- We acknowledge that Dem.'s should do more (reduce military budget, etc.)
- But, there is no 'them'. There is no one Dem. Party we can blame. WE are the Party. The Rep.'s understand this relationship between themselves and their Party. We do not. Blaming your friends only gives comfort to your enemies.
- Don't give the DLC the satisfaction of thinking they are the majority of our party. We are



Black Congresswoman from Pennsylvania:

- Dem. Party has been right on all matters that affect ordinary and working Americans
- The press is not owned by the Dem. Party, and thus you sometimes hear only the bad or half the story. It's easy to see why your frustrated with us
- While we may be short in some ways, do not be without hope--We are the Party of the people

Ron Richards (hotel union):

- Has a real problem with the Congresswoman's interpretation: Every time the Party runs into trouble it turns to Bubba

Ms. DeBerry:

- There are too many Dem.'s dressed in rep. clothing
- In '94 many Dem.'s ran from Labor and African-Americans
- We have failed to attract young people to the Dem. Party
- Let us focus less on Newt and more on an agenda: reasons for people to register and vote

Consultant:

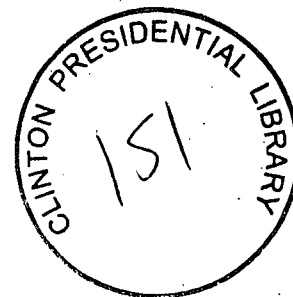
- Turn the focus from race, culture, gender to the common grounds: jobs, health care, etc. re-establish the notion that Dem.'s represent ordinary Americans (NYT article elaborates this)
- In '94 Rep.'s campaigned on "Give us our money back" (from what you promised in '92) Dem.'s campaigned on "We did better than you thought"
- Take a page from Right-Wing book: Build the grass roots
- Generate energy and empowerment at the local level

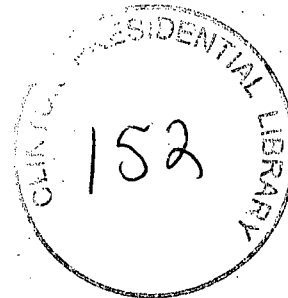
Toney Anaya:

- Agrees with Congressman Frank
- He talked about his disappointments with the party: then refusing his offers to help, etc. But still, he knows the party is not the Washington (DNC) crowd--the Party is millions of ordinary, working Americans
- As a Hispanic, he's concerned about the Party not being serious about reaching out. He challenges us to become more sensitized to the growing Hispanic population

Al Sharpton:

- The Dem. Party tried to make a withdrawal from people (voters) in whom they had made no investment--the account was empty





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EXECUTIVE OFFICE OF THE PRESIDENT

13-Apr-1995 12:04pm

TO: George Stephanopoulos
TO: Christopher F. Edley, Jr
TO: Peter M. Yu
TO: Abner J. Mikva

FROM: Douglas N. Letter
Office of the Counsel

CC: Cheri Sweitzer

SUBJECT: Affirmative Action policy

George, Ab, Chris, and Peter:

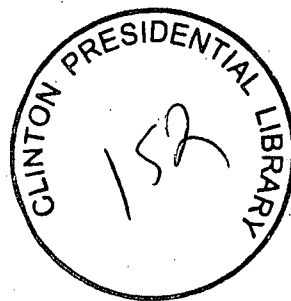
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I want to add another reason to the view expressed primarily by George, Gene Sperling, and Joel Klein about the importance of using rhetoric of inclusions in this debate and not falling into trap of having the President try to measure pain felt by different groups, and thereby judge affirmative action programs on that basis.

I have gathered from the various sessions we have had on this topic that many minorities would identify themselves first or primarily by their minority group status: black, hispanic, etc. (I have no idea if this is true for women too; i.e, would they first identify themselves as women. For many, I suspect not, and assume that they would identify themselves primarily in some other way.) However, I don't think it works to contrast these groups with white males, since I don't believe that many white males identify themselves primarily in that sense. Thus, if the President is comparing interests of minorities, women, and white males, a large segment of his audience will not be attuned to the rhetoric he is using.

I can illustrate with a personal example. I identify myself first as a Jew. This raises a host of ethnic, historical, religious, and other issues. It means that I view myself primarily as part of a very tiny minority group in American society, alien from a large conglomeration of groups -- white, black, and hispanic, men and women -- that are Christian, and therefore very different from me in extremely important ways. Thus, because of this personal self-perception, lumping me in a group with white males in a discussion seems very strange to my ears since I view myself as quite alien from the overwhelming majority of them.

I think that most white males also identify themselves



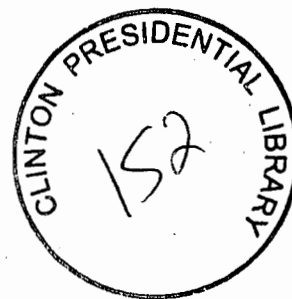
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primarily in other ways than as white males; they likely think of themselves first as Catholic, or Baptist, or gay, or Californian, or Western, or Southern, or New Yorkers, or Irish, or Italian, etc. Rhetoric that compares minorities and women to white males thus seems out of place to them because they do not view themselves as a part of a monolithic group that is opposed to or by minority groups.

Consequently, I think it is essential that the President avoid this type of talk of comparison between groups, and instead use a language of inclusion of all groups in the American dream of equal opportunity. Otherwise, I think he loses the attention and understanding of a large segment of his audience at the outset.

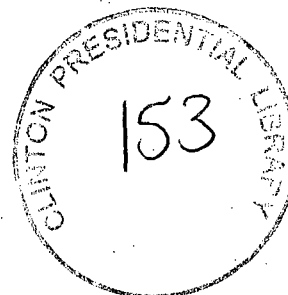
For this reason, I would not recommend that the President speak as Walter Dellinger suggested at the meeting, saying that we need to recognize that there is still significant discrimination in the US. By saying that we need affirmative action because discrimination still exists, the President merely seems to be accusing all white males as a group of continuing to discriminate. We have laws against discrimination and it is conduct that should be punished when encountered. But the President can instead make clear that because of past very serious discrimination there are obvious and important lingering effects that prevent certain groups from getting their fair chance; affirmative action can be legitimately directed at trying to overcome this problem because the practices of the past continue to cause trouble. And the point of affirmative action is not to give groups a leg up in competition with a single group known as white males. Rather, it is to use the identifications that were wrongly used in the past in order to keep certain groups behind now to overcome that problem and its aftereffects.

Anyway, that is my two cents worth.



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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	From Deval Patrick, re: Affirmative Action in the Clinton Administration (3 pages)	2/6/1995	P5 155

COLLECTION:

Clinton Presidential Records
Counsel Office

OA/Box Number: 18431

FOLDER TITLE:

Counsel 1995 Affirmative Action II [1]

2008-0308-F

wr882

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]

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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)]

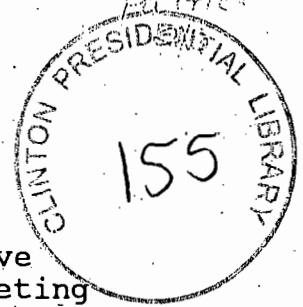
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DRAFT

~~CONFIDENTIAL~~

MEMORANDUM

RE: AFFIRMATIVE ACTION IN THE CLINTON ADMINISTRATION



In light of the increased attention paid to affirmative action in the current political climate, and our recent meeting on the subject, I recommend that the Administration promptly undertake the following initiatives:

1. We should affirm our support for proper, lawful affirmative action. We should define what it is we have been talking about and explain in **non-defensive** terms what our law enforcement program has (and has not) been about. We have consistently acted within Supreme Court limits (see the accompanying paper), which is exactly what the Justice Department is supposed to do.

Apart from the law, we should make the case for affirmative action today. Affirmative action arose in the first place as a device for expanding the middle class to include historically excluded minorities. It was created when we realized that we would not actually change behavior and embrace communities previously left behind wholesale simply by passing strong legislation and bringing individual lawsuits. Although affirmative action has been responsible for the level of racial, ethnic and gender diversity we have in this country, the statistical evidence indicates that inclusion of minorities and women in mainstream American life remains a continuing challenge for this Nation. Affirmative action is one means to address that challenge. As a result, it is widely accepted and even embraced by many American businesses, colleges and universities.

At the same time, we should publicly renounce the abuses of affirmative action. Our collective rejection of "quotas" is a shorthand way of doing this. It seems to me that we should be more explicit. We must reject affirmative action plans in which "race overtakes reason," that is, plans which overlook valid, justifiable qualifications, which are numerical straitjackets, which are limitless in time and unreviewable, which do not take account of a demonstrable available pool of qualified candidates, or which unduly burden the vested interests of the majority. We need to define what we mean and, most importantly, what we **don't** mean. And we need to make the opposition show us that the anecdotes they cite are in fact illustrative. I don't think they can make their case.

2. We should renounce the use of race for political ends.

At a recent briefing on Capitol Hill by the conservative Institute for Justice, Republican strategist William Kristol publicly opined about the ways Republicans could and should use race in the 1996 Presidential campaign. He pointed explicitly to the California ballot initiative and the debate it provokes on affirmative action. We have seen from examples as recent as the

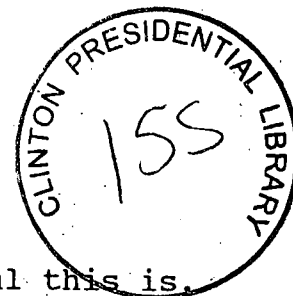
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MARKING Per E.O. 12958 as amended, Sec. 3.3 (c)

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Willie Horton campaign in 1988 how devisive and hurtful this is. We should publicly attack that strategy now, refocussing the debate on the President's oft-repeated assertion that this presidency is committed to bringing communities together across our many differences. The Republicans should not be permitted to use affirmative action in particular or civil rights enforcement in general to divide and belittle the American people. This is a matter of conscience, with deep roots in a stained but important history: We should seize the moral high ground on it.

3. We should explore the possibility of promoting and supporting an alternative to initiatives like the California ballot initiative that may be introduced in Congress. The California "Civil Rights Initiative" addresses affirmative action in the limited sphere of government use. Even this makes exceptions for public safety. Meanwhile, voluntary affirmative action by private businesses and schools is where most of the action is. Thus, the initiative gives expression to the backlash against affirmative action without actually addressing much of substance or reach.

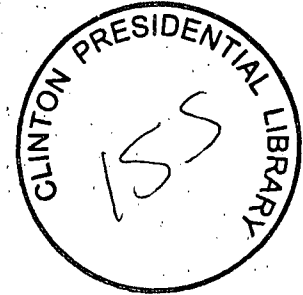
Because I believe the abuses of affirmative action, however isolated, have taken on a life of their own, we should help develop an alternative to wholesale rejection of affirmative action which explicitly rejects the abuses. These abuses occur: (1) where an unqualified person receives a benefit over a qualified one; (2) where numeric goals, if any, are so strict that the plan lacks reasonable flexibility; (3) where the numeric goals bear no relationship to the available pool of qualified candidates; (4) where the plan is of indeterminate length, such that it outlasts the achievement of its original goals; or (5) where majority persons unfairly or unreasonably lose vested rights. We should explore a way to let people vote against the abuses of an otherwise honorable idea without rejecting the idea completely.

4. We should create and support a second "Kerner Commission." If the purpose of affirmative action is to expand the middle class to include historically excluded citizens, we ought to take a serious look at the conditions to which affirmative action is one response. There is no question but that minorities are suffering disproportionately to their population in this country. It may be that the reasons for this current state of affairs have changed; it may be that they have not. It also may be that the explanation for these conditions is different as between African Americans, Hispanic Americans and Asian Americans. The experience of women begs other questions as well. A scholarly, nonpartisan examination of these issues may

help promote a constructive debate about the problem we are trying to address rather than the irresponsible, over-politicized rhetoric with which affirmative action is too often addressed.

Let me know what you think.

Attachment



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Deval Patrick to George Stephanopoulos, re: AA (4 pages)	7/10/1995	P5 157 Dup 142
002. memo	Attorney General to President Clinton, re: Choices Following Adarand (5 pages)	6/23/1995	P5 158
003. letter	Deval Patrick to George Stephanopoulos, re: AA (3 pages)	7/10/1995	P5 159 Dup 142

COLLECTION:

Clinton Presidential Records
Counsel Office

OA/Box Number: 18431

FOLDER TITLE:

Counsel 1995 Affirmative Action II [4]

2008-0308-F

wr884

RESTRICTION CODES

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Office of the Attorney General
Washington, D. C. 20530



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MEMORANDUM FOR THE PRESIDENT

FROM: The Attorney General
DATE: June 23, 1995
SUBJECT: Choices Following Adarand

By imposing a more stringent constitutional test on federal programs that use race or ethnicity as a basis for decisionmaking, the Supreme Court's ruling in Adarand v. Pena raises the need for decisions about how the government will respond. To a large extent, those decisions will be driven by three urgent imperatives: (1) the need to respond to litigation challenging federal programs, including expected fast-moving requests for restraining orders, particularly in the contracting area, (2) the need to advise federal agencies charged with administration of such programs, many of whom award contracts on a regular basis, and (3) the need to respond to anticipated efforts in Congress to amend various appropriations and authorization bills to eliminate or deny funding for affirmative action programs.

The purpose of this memorandum is to set forth options and to clarify the role of the Department of Justice. First, Adarand demands that federal programs be subjected to a fact intensive review to: (a) determine whether they are narrowly tailored to serve a compelling interest and (b) recommend changes where desirable or necessary in order to meet that standard. Two draft presidential directives presenting alternative means of addressing this issue are attached to this memorandum.

In addition, the Department of Justice will be faced with the need to make litigation judgments regarding the defense of specific programs. A central issue will be whether the Department should undertake to defend all programs for which there is a good faith argument after Adarand or whether the Department should exercise some discretion in determining which programs warrant a full defense.

PROCEDURAL OPTIONS

In order to evaluate programs pursuant to Adarand, it will be necessary to undertake an intensive effort to gather and develop facts to determine whether there is compelling need for a program and whether it is narrowly tailored to meet that need.

In addition, judgments will have to be made about possible changes in programs in order to render them more defensible constitutionally. The Department of Justice has neither the staff nor the detailed programmatic knowledge to perform these functions alone.

Procedural Option 1

Direct federal agencies to undertake, subject to the overall direction of the Attorney General, analysis of programs that they administer that use race or ethnicity as a basis for decisionmaking and to identify whether each program, in the judgment of the agencies, (1) appears to satisfy the standard announced in Adarand, (2) falls short of the standard but can be brought into compliance through regulatory changes, or (3) does not appear to satisfy the Court's standard and cannot be made constitutional through regulatory modification.

Under this option, you would direct federal agencies to undertake, subject to the direction of the Attorney General, the analysis required by Adarand. Each agency would be required to provide a report to the Attorney General, including recommendations for any regulatory or legislative changes that would make the programs lawful. The Attorney General would then provide advice to you regarding these programs. Responsibility for judgments about the need to modify or abandon programs will fall largely on the Attorney General or the President. [see Draft A].

Pros

- o Agencies know their own programs well and are in the best position to develop a factual record quickly.
- o Many agencies already have in place administrative factfinding procedures.
- o A number of agencies have already begun this process as part of the review of affirmative action programs.

Cons

- o The findings of agencies may not be viewed as impartial, since agencies can be expected to attempt to preserve their own programs.
- o Some agencies have already demonstrated during the review that they may not be capable of completing this task quickly and thoroughly.



- o Agencies are likely to carry out this process in different and potentially inconsistent manners, which may create litigation difficulties.

Procedural Option 2

Create an independent commission to lead the inquiry into whether programs comply with Adarand.

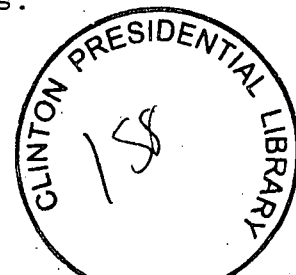
Pursuant to this option, you would appoint a small independent commission of respected Americans to coordinate and, where necessary, conduct the fact-gathering effort. The Commission would have authority to conduct public hearings and draw on the resources of federal agencies in fulfilling its role. The Attorney General would advise the Commission on applicable legal standards and, taking into account such advice, the Commission would make recommendations to you regarding which programs satisfy Adarand, which programs need regulatory modification and which programs cannot be made constitutional through regulatory changes. [see Draft B]

Pros

- o The Commission's independence and stature may give its findings greater credibility.
- o The Commission could centralize and ensure uniformity in the fact gathering process.
- o The Commission might be viewed as sufficiently credible that legislative action would be postponed pending its findings.
- o The Commission would have the capacity to make difficult judgments concerning programs.

Cons

- o The Commission would likely take a minimum of six months to complete its work. Litigation and congressional action might overtake it.
- o There is a risk that the Commission will stray beyond its mandate or make findings with which the Administration disagrees.
- o A Commission finding could conflict with and undermine a litigation position.
- o A Commission might be viewed as inappropriately directing the activities of Executive Branch agencies.



- o Since the Commission would be subject to the disclosure requirements of the Federal Advisory Committee Act, submissions to the Commission from the agencies would generally have to be made available to the public. This might inhibit the candor of the agency evaluations and recommendations and could affect litigation in defense of programs.

LITIGATION OPTIONS

The Department of Justice expects that challenges to programs will be filed quickly and that some will seek emergency relief, including suspension of programs. It is, therefore, necessary to clarify the scope of the response of the Department of Justice to this litigation.

Litigation Option 1

Defend all programs that are determined to be capable of a good faith defense pursuant to Adarand.

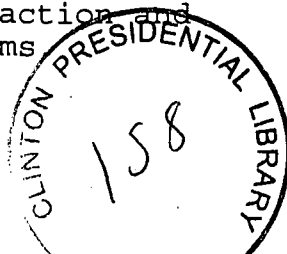
Pursuant to this approach, the possibility of a good faith defense under the Adarand legal standard would become the primary measure of whether a particular affirmative action program would continue. When a program was challenged, the Department of Justice would determine whether the program could, in good faith, be defended under the strict scrutiny standard imposed in Adarand, regardless of the likely outcome of the litigation. There would be an overriding policy determination that any program that could be defended in good faith should be defended.

Pros

- o At least in the short term, this approach gives the broadest possible protection to affirmative action programs. Although there will likely be programs that the Department of Justice will conclude cannot in good faith be defended applying strict scrutiny, this option ensures that as many programs as practicable will be defended in court.
- o This option shifts to courts a part of the ultimate decision regarding the legitimacy of specific programs.

Cons

- o This option forgoes the opportunity initially to move away from existing programs on policy grounds.
- o By defending every arguably defensible program, we will likely lose a number of cases in court, thereby running the risk of establishing bad caselaw on affirmative action and creating additional pressure to dismantle programs.



Litigation Option 2

Exercise selective judgment on the basis of overall objectives regarding which programs should be defended, leaving the weakest programs undefended.

Pursuant to this option, the Department of Justice would exercise its discretion to forego defense of some minimally defensible programs. It would consider the strength of the evidence bearing on the determination whether the program was narrowly tailored to achieve a compelling interest and choose, as a strategic matter, to defend those with the strongest justifications. Conversely, it would decline to defend those programs where the chance of success is relatively low.

Pros

- o This option allows the Department of Justice greater leeway to develop a long-term strategy for building caselaw in support of affirmative action. By presenting our strongest cases to courts, we are more likely to obtain some favorable decisions and lay the basis for future successful legal defenses of affirmative action.

Cons

- o To some extent, this option may be viewed as a departure from usual Department of Justice practice, which is to defend programs that client agencies wish to preserve, so long as there is a good faith legal argument in support of the program.
- o This option will require making difficult judgments up front that some programs should not be defended and should, therefore, be terminated.

Choices:

Procedural Option 1 _____

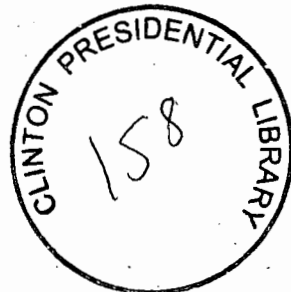
or

Procedural Option 2 _____

Litigation Option 1 _____

or

Litigation Option 2 _____



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Attorney General to President Clinton, re: Choices Following Adarand (5 pages)	6/23/1995	P5 160 Dup 158
002. memo	C. Edley to G. Stephanopoulos, re: The Supreme Court Voting Rights Decision (1 page)	6/29/1995	P5 161
003. memo	Attorney General to President Clinton, re: Choices Following Adarand (5 pages)	6/23/1995	P5 162 Dup 158
004. memo	George Stephanopoulos and Chris Edley to the POTUS, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review - Draft (6 pages)	n.d.	P5 163 Dup 36
005. memo	George Stephanopoulos and Chris Edley to the POTUS, re: Affirmative Action - Decision on Post-Adarand Steps and Completion of the Review (5 pages)	6/19/1995	P5 164 Dup 36
006. memo	Deval Patrick to John Schmidt, re: Response to Adarand and Alternatives to a Commission (2 pages)	6/14/1995	P5 165
007a. memo	George Stephanopoulos and Chris Edley to the POTUS, re: Affirmative Action - The Supreme Court's Adarand Decision (3 pages)	6/12/1995	P5 166
007b. memo	George Stephanopoulos and Chris Edley to the POTUS, re: Affirmative Action - The Supreme Court's Adarand Decision - Draft (1 page)	6/13/1995	P5 167
008. memo	George Stephanopoulos and Chris Edley to the POTUS, re: Affirmative Action - The Supreme Court's Adarand Decision - Draft (3 pages)	6/12/1995	P5 168 Dup 166

COLLECTION:

Clinton Presidential Records
Counsel Office
James Castello
OA/Box Number: 6724

FOLDER TITLE:

Adarand [1]

2008-0308-F

wr886

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]
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file: Adorand



June 29, 1995

WJC LIBRARY PHOTOCOPY

To: George Stephanopoulos
Senior Adviser to the President

From: Christopher Edley, Jr. *CEJ*
Special Counsel to the President

Re: The Supreme Court Voting Rights Decisions

I write before the decisions are announced. I asked the Library to retrieve press conference and speech remarks by President Lyndon Johnson from the spring of 1965, as Roger Wilkins suggested. Generally, however:

- Voting rights has far clearer political and moral resonance than affirmative action. Therefore, there is far less downside to a full-throated defense of the cause.
- Elected and other leaders of the African-American and Latino communities will be *extremely* focused on this decision and its implications, out of self preservation. They will similarly be *very* attentive to the tone, passion and nuances of any White House statement.
- In particular, if minority leaders believe it is a blow to political empowerment, it would be unforgivably unattractive in their eyes for the President to appear significantly less concerned. Our temperature must closely track their temperature, lest they feel abandoned.
- On the other hand, we have an obligation to express an unrelenting determination to carry on -- to get busy with whatever new burdens the Court imposes.
- Although Alexis' "Wednesday Group" (Anne Wexler, Ann Lewis, and Susan Thomases and Al From) cautioned against taking an apocalyptic view and "big" response, the civil rights advocates felt strongly otherwise. Political technicians and political scientists, who appreciate the imponderables and complex tradeoffs in redistricting, will necessarily have a very different take on this than many minority leaders and commentators. The latter will correctly understand this decision as part of a strong and frightening reality of retrenchment by legal, political and social forces. The litmus test for the Administration is whether we communicate that we, too, appreciate that storm clouds are gathering and gains are in serious jeopardy.
- I hope the President's written statement today will be compelling and forceful.

cc: ✓ Abner Mikva, Alexis Herman, James Castello, Deval Patrick



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035



WJC LIBRARY PHOTOCOPY

~~CONFIDENTIAL~~

June 14, 1995

TO: John Schmidt
George Stephanopoulos
Christopher Edley
Alexis Herman

FROM: Deval L. Patrick

SUBJECT: Response to Adarand and Alternatives to a Commission

In thinking a little deeper about the idea of creating a commission to examine federal programs to determine their compliance with Adarand, I have become convinced that a commission has substantial drawbacks:

1. A commission should not determine whether these programs comply with the legal standard laid down by Adarand. The legal determination should be made in the Department of Justice. The Civil Rights Division, as the lawyers charged with defending challenges in court, and the Office of Legal Counsel would seem the appropriate centers for that determination. I am not familiar with any commission that has been charged with deciding legal questions. Moreover, I am concerned that turning legal questions over to a commission sends a message of a lack of confidence in the Department of Justice.

2. There is really no need for a commission to study policy questions. Given Adarand, it seems to me that the only question to be decided is the legal question, since I assume that the Administration would not decide as a matter of policy to jettison a program that was narrowly tailored to accomplish a compelling government interest.

3. Creating a commission to focus exclusively on the Adarand inquiry sends the wrong message about Adarand. It sounds an alarm. I think we should read Adarand as a setback, but not a disaster. The Court (1) made clear that it was not prohibiting all consideration of race, (2) left open the door for courts to give deference to congressional factfinding, and (3) did not foreclose the production of post-enactment evidence to satisfy strict scrutiny. While it is clear that Adarand will increase our litigation burden and that we are likely to suffer some failures, it is by no means clear that we will not be able to defend many programs successfully.

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

Initials: WR Date: 8/25/11

4. As a practical matter, litigation will overtake any other effort. We expect that in short order requests for temporary restraining orders and preliminary injunctions will be filed in court. A commission that will take six months will be virtually irrelevant to the defense of these programs.

5. If we should disagree as a legal matter with the finding of a commission, we would have an obligation to defend the programs and the work of the commission would be used against us.

6. It will be very hard to find 5 members of stature who do not bring with them some baggage on affirmative action. Will we respond to calls for the inclusion of opponents of affirmative action to provide balance? If not, the Commission will lose credibility.

7. People may greet with cynicism a presidential announcement that after reviewing affirmative action programs for 4 or 5 months, he is now going to appoint a commission to review affirmative action programs for another 6 months.

8. To some extent, the President loses control of the issue by launching a commission.

Proposed Plan of Action

I propose the following alternative plan of action:

- o Announce that we continue to support affirmative action programs that meet the Adarand standard and make case-by-case decisions as to the validity of the programs as they are challenged.
- o Create a task force under the direction of the DOJ, with the MBDA responsible for coordinating the factfinding, and issue a presidential directive to agency heads to cooperate with the Department of Justice in defending the programs.
- o (possibly) Have the Attorney General appoint an independent advisory committee to assist in analyzing the factual record developed by the agencies (or perhaps to assist the MBDA in developing that record).



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.

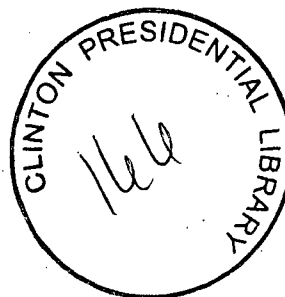
The Key Implications: There is no question but that *Adarand's* move to the *Croson* standard of strict scrutiny tightens prior law. The most important fact is that *Croson* imposed a fact-finding burden on state and local legislatures to establish that there had been prior discrimination of a specific 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:

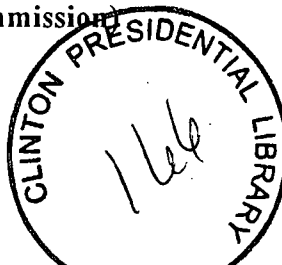
The Review is near completion, etc.;

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:

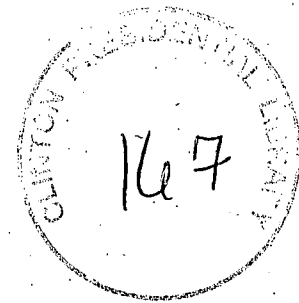
_____ Option 1

_____ Option 2 (Commission)



DRAFT

June 12, 1995



WJC LIBRARY PHOTOCOPY

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	George Stephanopoulos and Chris Edley to the POTUS, re: Affirmative Action - The Supreme Court's Adarand Decision (3 pages)	6/12/1995	P5 169

COLLECTION:

Clinton Presidential Records
Counsel Office
James Castello
OA/Box Number: 6740

FOLDER TITLE:

Adarand [2]

2008-0308-F

wr887

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]
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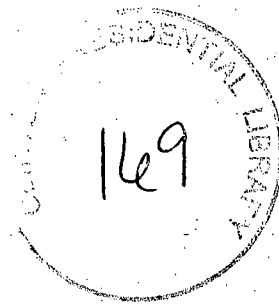
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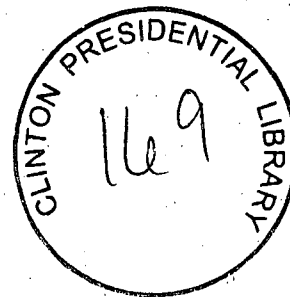
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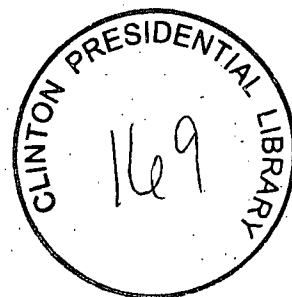


Option 1:

The *Review effectively anticipated this*: State that the Review is near completion; that it already incorporates a policy test that requires careful justification of race- and gender-conscious programs; that we will now work with DOJ to confirm that this policy test satisfies the *legal* test announced in *Adarand*. The preliminary work of the agencies done for the Review suggests that the great bulk of programs meet the test of legality and fairness; that complete confidence that this is so will require ongoing, detailed investigation and fact-finding, even after the Review is submitted to the President.

Option 2:

Same, but with Commission: State that the Review is near completion, etc.; that 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.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	George Stephanopoulos to President Clinton, re: Affirmative Action - Speech, Review and Policy Decisions - Draft 6 (9 pages)	6/27/1995	P5 170
001b. memo	George Stephanopoulos to President Clinton, re: Affirmative Action - Speech, Review and Policy Decisions - Draft 6 (9 pages)	6/27/1995	P5 171 Dup 170

COLLECTION:

Clinton Presidential Records
Counsel Office
James Castello
OA/Box Number: 6724

FOLDER TITLE:

Affirmative Action Vol. 2 [3]

2008-0308-F

wr888

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]
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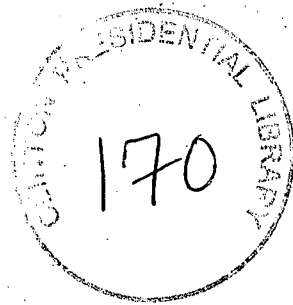
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Draft 6

June 27, 1995



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MEMORANDUM FOR THE PRESIDENT

From: George Stephanopoulos

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

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

- a major speech on July 19th -- we seek your decision on venue;
- release of the Review;
- a Directive to agency heads creating a process, coordinated by the Attorney General to ensure compliance with *Adarand* and with your policy principles; 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

Linked to the Review
take some pressure off the writer
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:

How does this relate to subsequent options?
Will this be done regard of option choice?
The good: Programs you confidently support include: the military; your judicial appointments; your Cabinet appointments; the OFCCP program of affirmative action in employment.

How to avoid litigation implications?
what's the source of our doubt?
The uncertain: Programs you support but for which you want the Attorney General's confirmation of compliance with *Adarand* include: severall 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 setasides: and USDA setaside-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 you deliver it in will provide secondary color based on its historical or symbolic value. In this case specifically, the anticipation and coverage of the speech will be significant, and the location will merely create context and generate helpful side-bar stories.

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

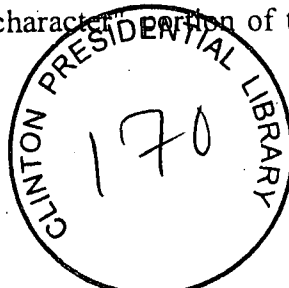
Recommended option. This site would allow your speech and the issues surrounding affirmative action to be framed within the larger context of the civil rights movement and the struggle for equal justice and opportunity. The media would use the school's history when covering the speech. When combined with plus 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.*

Recommended alternative. 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, and 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 modern 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*

The two best possibilities are:

- Presbyterian Church (USA), General Assembly, July 15-22, Cincinnati. Over 3,000 delegates, but the starting date is somewhat late.

Decision

_____ Little Rock Central High School

_____ Constitution Hall, Washington D.C.:

_____ Audience of church congregations

_____ Atlanta, (site TBD)

_____ Other

_____ Convention

_____ of Presbyterians

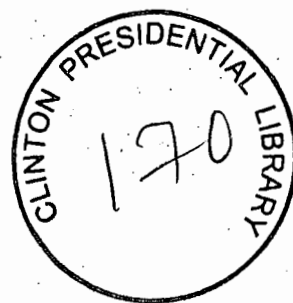
II. *Adarand* Directive to Agency Heads; the Commission

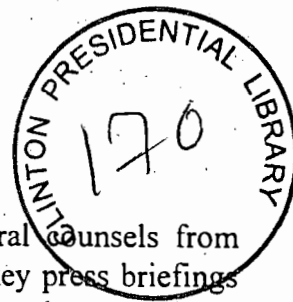
Directive. The detailed empirical analysis and consideration of program revisions now required as a consequence of *Adarand* must be coordinated by the Department of Justice as regards the legal determination of whether a program is constitutionally defensible. But the process must also include some continuing White House participation to superintend interagency policy judgments about reforms that might be desirable to make 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 be led by Judge Mikva and ~~George Stephanopoulos~~. (The directive will not mention the White House role, lest we recreate pressure for White House documents and visible White House decisionmaking.)

This does so with dirce is

will me

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. 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*."





You received on Monday evening the draft legal guidance to agency general counsels from Walter Dellinger, Office of Legal Counsel; it was released today, with low key press briefings at DOJ. We will forward the proposed directive separately, which you may choose to issue immediately or at the time of your 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. 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 legislative action, the Department of Justice and several agency general counsels have raised very serious objections to releasing these factual and policy ^{materials} ~~matters~~ at this time. We are discussing this difficulty, and will have a recommendation for you in the next few days.

Timing of release?

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

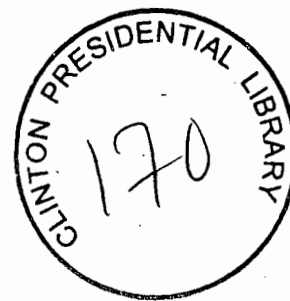
and statutory changes remain to be defined after the general parameters, noted below, are announced. (It would be impossible to develop sound details while maintaining confidentiality.) The five key elements and summary prescriptions are:

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 time of 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 setbacks, 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 purposes of economic development, entrepreneurial opportunity and antidiscrimination; and



(3) elimination of all race/gender preferences, with empowerment contracting only.

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

Does this mean the fine tuning is const. compelled?
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 proposals for changes* 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. The abuses identified are the seeds of much opposition to setasides.

CBC & CW Res. jps agree mgs all below + Deval
Con: The story will be "President Endorses Setasides, Offers Reforms." 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.

AG's

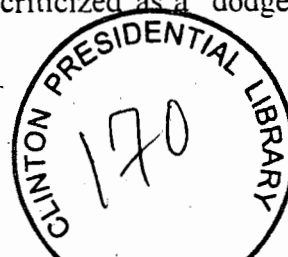
OPTION 2: REJECT CURRENT PREFERENCES; CHARGE AGENCIES TO DEVELOP A NEW PROGRAM WITH BROADER ELIGIBILITY, TARGETING SOCIALLY OR ECONOMICALLY DISADVANTAGED INDIVIDUALS & DISTRESSED AREAS

what do we mean here?
 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. Therefore, current minority-targeted preferences should be eliminated and replaced by a new program designed to open opportunities to entrepreneurship more broadly, consistent with *Adarand*. You would direct the agencies, through the NEC, to develop a proposal addressed not only to remedying discrimination, but also to increasing 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 NEC 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, however you will have signaled a commitment to some Federal-led action on these points*

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

On the record



the asserted need to do careful study will raise questions about what the Review accomplished during its 100 days. By announcing dissatisfaction with the current programs we invite immediate Congressional action to kill them, and greatly complicate the defense of them in court.

option 3: More pointed version of Option 2] How?

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 determined based on performance of the contract by a small business in a distressed zone and/or hiring above a threshold level of employees from a designated area. Aggressive management measures will, we hope, prevent severe erosion of progress we have made in MBE/WBE participation. (All advisers doubt that this is a realistic hope, especially over the longer run.)
But you should note that it is a doubtful proposition.

expd *You talk with Bill Wilson* **Pro:** Eliminates the 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.

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

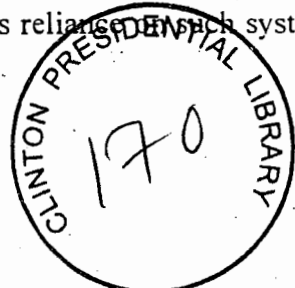
where is option at beginning of memo? ____ Option 2: Out with the old programs; announce policy goals of expanded opportunity and direct officials to formulate a proposal consistent with Adarand.

____ Option 3: 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 thus that white males are 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 in those sectors. (Otherwise, the affirmative action would be illegal.)

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.

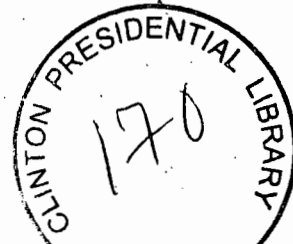
Pro: This option is close to the status quo, but does not lend itself to a simple rule. Instead, this approach would call for the common-sense balancing of the institution's general diversity interest and the burden on identifiable majority employees. Consideration of race or gender would be permissible 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. Consistent with the DOJ position in the *Piscataway* case.

Con: Complex. Does not speak to anxieties of non-beneficiaries.

Add Quote from W, just -- no one person should feel

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. Would be criticized as a flip-flop from the Administration's litigation position in *Piscataway*.

Decision:

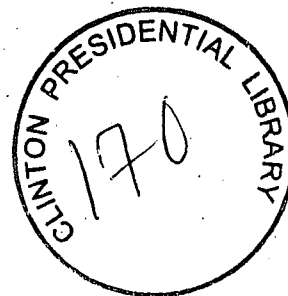
_____ Option 1: As a policy matter, when not inconsistent with a bona fide seniority system, diversity may be considered in layoffs, but only in limited circumstances.

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

VI. 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.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Michael Small to Dellinger et al., re: US vs Board of Education Township of Piscataway (6 pages)	10/25/1994	P5 172

COLLECTION:

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Counsel Office
Chris Cerf
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FOLDER TITLE:

Affirmative Action Cases Overview

2008-0308-F

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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.

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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]
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Memorandum

Dellinger
 Johnsen
 Roseborough
 Shiffrin
 Small
 Murphy
 Files

Reading Files Ret.(Small)AA/Piscat2

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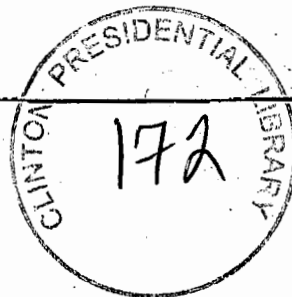


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Subject
 United States v. Board of Educ. Township of
 Piscataway

Date
 October 25, 1994

To
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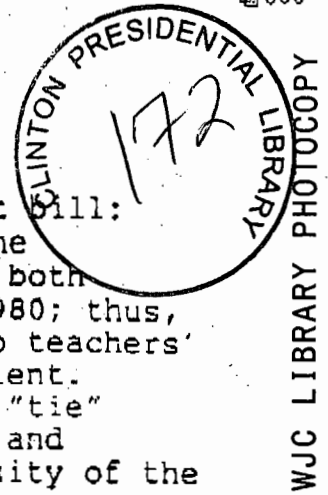
From
 Michael Small MS

The above-referenced case is presently on appeal to the Third Circuit from a district court ruling that the School Board of Piscataway New Jersey violated Title VII of the 1964 Civil Rights Act when, acting pursuant to an affirmative action policy that was intended to promote faculty diversity, it discharged a white teacher in order to retain a black teacher of equal qualifications and seniority. See United States v. Board of Educ. Township of Piscataway, 832 F. Supp. 836 (D.N.J. 1993). This memorandum summarizes views on the case that OLC has conveyed to the Attorney General and other senior Department officials in a series of meetings and conversations. The memorandum also sets forth additional thoughts of my own on the case that have been prompted by a review of an amicus brief that the United States filed in the Third Circuit on September 6. In that brief, the United States, which had brought the case against the School Board in the district court, switched its position and defended the School Board's actions.

I. Background

The affirmative action policy at issue in this case provided that in making teacher employment decisions between persons of equal qualifications, the Piscataway School Superintendent was to recommend to the School Board for favorable treatment the candidate that met the criteria of the affirmative action program -- i.e., minorities and females. The purpose of the policy was to promote the diversity of the faculty in the Township's schools. The policy was not intended to remedy past discrimination against minority teachers or to correct a racial imbalance among teachers in the Township.

In 1989, the Board decided that because of a decline in student enrollment in business courses, it would have to dismiss one teacher from the ten-teacher business department in the Piscataway High School. Under applicable New Jersey regulations that required layoffs to be made in order of reverse seniority, the Board had to dismiss the department's most junior teacher.



There were two teachers in the department who fit that bill: Sharon Taxman, a white teacher, and Debra Williams, the Department's only black teacher. Taxman and Williams both started teaching in the district on the same day in 1980; thus, they had equal seniority rights. In addition, the two teachers' qualifications and performance were considered equivalent. Relying on its affirmative action policy to break the "tie" between the two teachers, the Board discharged Taxman and retained Williams in order to ensure the racial diversity of the faculty in the business department.

In January 1992, the United States, acting through the Civil Rights Division of the Justice Department, brought suit on behalf of Taxman. The United States alleged that the Board's use of its affirmative action policy in deciding that Taxman would be dismissed and Williams retained amounted to racial discrimination against Taxman in violation of Title VII.² The United States made two arguments: (i) workplace diversity, in and of itself, is an impermissible predicate for race-based employment decisions; and (ii) the Board's action unnecessarily trammelled the interests of Taxman because it resulted in her discharge on account of her race. Agreeing with the United States on both points, the district court held in September 1993 that the Board's dismissal of Taxman violated Title VII. In a final judgment entered in February 1994, the court awarded Taxman backpay in the amount of \$123,240.57, plus \$10,000 in damages for emotional pain, suffering, and humiliation.

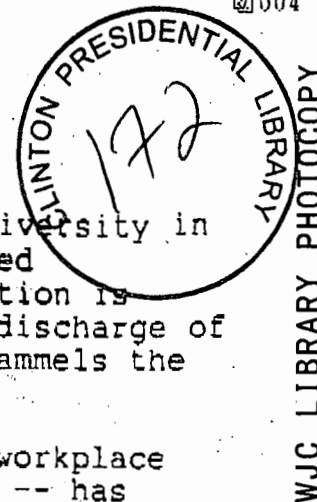
On appeal, the United States reversed its position: it filed an amicus brief that defends the School Board's actions. Taxman, who intervened in the case at the district court, is being represented on appeal by her own counsel.

II. Discussion

There are two steps in evaluating the legality of any race-based affirmative action plan under Title VII. First, the plan must serve a permissible objective. Second, the means to that end must not unduly trammel the interests of those disfavored by the plan. At the "ends" stage of the inquiry, the Piscataway case poses an important and unsettled question in the law of

¹Taxman was unemployed during the 1989-90 academic year. She was rehired at the high school the following year, laid off again the next year, and then rehired one more time. At present, Taxman is still teaching at the high school.

²The United States did not bring a constitutional challenge, even though the Board's affirmative action policy was subject to the constitutional rules governing race-based employment decisions in the public sector.

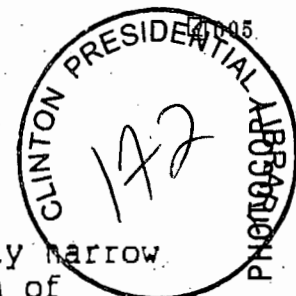


affirmative action: whether the promotion of racial diversity in the workplace is a permissible predicate for race-based employment decisions. At the "means" stage, the question is whether the use of race to determine priority in the discharge of two otherwise equally qualified individuals unduly trammels the interests of the disfavored individual.

The resolution of the first question -- whether workplace diversity is a valid predicate for affirmative action -- has enormous implications for employers in the private and public sector alike. Many corporations and governmental entities (including the federal government) have made workplace diversity a staple of their employment practices, even in the absence of evidence of past racial discrimination or a current racial imbalance in the workforce that would justify race-based affirmative action under the standards of Steelworkers v. Weber, 443 U.S. 193 (1979), and Johnson v. Transportation Agency, 480 U.S. 616 (1987).³ Although Weber and Johnson do not necessarily delineate the parameters of the permissible objectives of affirmative action under Title VII, race-based employment measures that are intended to foster workplace diversity currently are in a legal limbo. The district court decision in the Piscataway case is probably the most definitive judicial treatment of the workplace diversity issue to date.

³There is an ever-growing volume of literature on workplace diversity. A somewhat-dated but still useful discussion of the issue and its legal dimensions is found in Rethinking Weber: The Business Response to Affirmative Action, 102 Harv. L. Rev. 658 (1989) (student note).

⁴Perhaps the closest previous case on point is Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981), which involved a constitutional challenge to a race-based promotion of a black officer in the Richmond, Virginia police department. The court held that it was permissible to consider race in the promotion decision "in order to have both white and black officers in the department's upper ranks." Id. at 931. That holding may be of limited precedential value today, because it was decided fairly early-on in the development of affirmative action jurisprudence. That is even more true of Detroit Police Officers Ass'n v. Young 608 F.2d 671 (6th Cir. 1979), which was decided two years before Talbert v. City of Richmond. The Detroit case involved constitutional and Title VII challenges to race-based employment practices in the city's police department. The Sixth Circuit appeared to give its imprimatur to measures designed to foster workplace diversity, even in the absence of past discrimination by the employer. The court said that "improved law enforcement is a sufficiently important reason in itself for affirmative action." Id. at 696. However, that was only one of the justifications for the police department's practices: the



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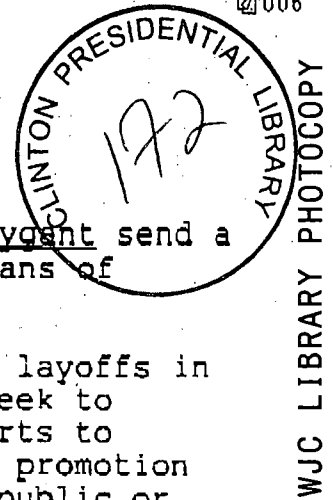
We believe that the district court adopted an overly narrow interpretation of Title VII. In our view, the promotion of workplace diversity should be considered a legitimate predicate for race-based affirmative action under Title VII. While the issue is not free from doubt, the argument in favor of workplace diversity -- at least in the educational setting -- stands a fair chance of prevailing in the Piscataway case at the court of appeals and at the Supreme Court (should the case proceed that far).

We also believe, however, that support for workplace diversity in the Piscataway case should not be coupled with a defense of the discharge of Sharon Taxman as a means of promoting diversity. Several considerations inform our view on that score.

First, while there is no single case exactly on point, the Supreme Court's affirmative action precedents strongly suggest that the Piscataway School Board's race-based dismissal of Sharon Taxman will be held unlawful. The most relevant case is Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), in which the Court, by a 5-4 vote, invalidated a system of race-based layoffs of teachers. The Court was badly fractured in Wygant, and the case produced no majority opinion. Furthermore, the race-based teacher layoffs at issue in Wygant are arguably distinguishable from the layoff of Sharon Taxman. On the other hand, Wygant and

principal justification was to remedy the department's past discrimination. Id. at 686-91.

A more recent decision that the district court in the Piscataway case said is relevant to the workplace diversity issue is Cunico v. Pueblo School District No. 60, 917 F.2d 431 (10th Cir. 1990). That case involved constitutional and Title VII challenges to a race-based dismissal of a white employee that was defended as a means of retaining the only black administrator in the school district. Id. at 437. In ruling against the school district, the Tenth Circuit stated that under Weber and Johnson, the asserted interest in assuring that at least one administrator would be black could be justified only as a "measure to remedy past discrimination" or to correct a statistical imbalance . . . that would give rise to an inference of discrimination." Id. The court held that there was insufficient evidence of past discrimination, as well as insufficient evidence of a statistical imbalance. The school district did not specifically defend its actions on the need to promote diversity. Indeed, it appears that the purpose of the affirmative action plan pursuant to which the school district made its layoff decision was to correct statistical imbalances that the Tenth Circuit said did not exist. See id. at 437 n.3 (plan was designed to "[a]chieve a balance in areas of deficiency of . . . minority employees according to Labor Market Availability") (emphasis added).

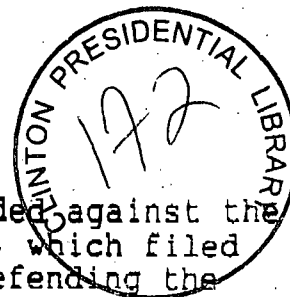


other Supreme Court decisions both before and after Wygant send a clear signal that race-based layoffs are a suspect means of achieving the ends of an affirmative action program.

Second, it is not necessary to defend race-based layoffs in order to defend race-based employment measures that seek to promote workplace diversity. For the most part, efforts to foster workplace diversity are confined to hiring and promotion decisions. We are unaware of any wide-spread use by public or private employers of racial criteria in determining priority in layoffs. Thus, it is unclear to us exactly what stands to be gained in the Piscataway case in terms of equal opportunity for minorities through a defense by the federal government of a race-based layoff. To be sure, race-based layoffs may serve important objectives in some cases. For example, if an employer took affirmative action in hiring in order to remedy blatant discrimination that had led to the total exclusion of minorities from certain job categories, race-based layoffs could be justified as necessary to preserve the gains made by minorities through the employer's race-based hiring initiative.⁵ However, that does not describe the situation in the Piscataway case, as the School Board apparently had an exemplary record of hiring and retaining minority teachers.

Third, coming as it would in a case in which the federal government had previously defended Taxman's interests, a switch of sides to defend her dismissal could spark a backlash that undermines the cause of affirmative action in the court of public opinion. Affirmative action is a profoundly sensitive topic, in large measure because critics tend to brand all race-based action as "quotas." The affirmative action policy at issue in the Piscataway case did not entail the use of quotas: a fixed number of positions were not reserved for blacks, but rather, race was merely one of many factors that the School Board considered in making employment decisions, including the decision to dismiss Sharon Taxman. It cannot be denied, however, that race was the dispositive factor in the dismissal of Taxman. The usual barbs against affirmative action will thus take on greater force, and tend to strike a responsive chord in the nation, precisely because a white person lost her job on account of her race in order to make room for a black person, and the federal government is now lending its support to that result.

⁵As part of remedial decrees in school desegregation cases, lower courts have ordered school districts to give priority to newly-hired black teachers in making faculty layoff decisions. See Race-Based Faculty Hiring and Layoff Remedies in School Desegregation Cases, 104 Harv. L. Rev. 1917 (1991) (student note).



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In light of these considerations, we recommended against the course eventually chosen by the Justice Department, which filed an amicus brief on appeal in the Piscataway case defending the School Board's decision to dismiss Taxman.⁶ Instead, we advocated the filing of an amicus brief in which the United States would take a firm stance in favor of workplace diversity as a permissible predicate for affirmative action, and would criticize the district court for adopting a cramped construction of Title VII and the Johnson and Weber decisions. Under our approach, the United States' brief would not have addressed whether the particular application of the workplace diversity plan in question -- the discharge of the white teacher -- was lawful.

What follows in this memorandum is a more detailed analysis of the issues of workplace diversity and race-based layoffs.

A. Workplace Diversity

1. In Weber and Johnson, the Supreme Court made clear that an employer may adopt race-based employment preferences in order to further the objectives of (i) remedying the employer's past racial discrimination, or (ii) eliminating a manifest racial imbalance in a traditionally segregated job category. In neither Weber nor Johnson did the Court explicitly foreclose the possibility that workplace diversity could be a permissible predicate for affirmative action under Title VII, even in the absence of past discrimination or a manifest racial imbalance.

At issue in Weber was a private sector affirmative action plan -- the result of a collective bargaining agreement between the employer and the union -- that reserved for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craftworkers in the plan was commensurate with the percentage of blacks in the local labor force. The plan was designed to correct the long-standing exclusion of blacks from craft unions. 443 U.S. at 198. The Court took "judicial notice" that numerous lower court decisions had found this exclusion to be discriminatory. Id. at 198 n.1. In a 5-2 decision written by Justice Brennan (two Justices took no part in the consideration or decision of the case), the Court held that Title VII allowed employers to take race-based affirmative action measures to "break down old patterns of racial segregation and hierarchy." Id. at 208. The Court said that it while it was not necessary to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," the

⁶We have not considered any ethical issues that may be raised by the United States' decision to reverse its position on appeal in a case in which it represented the real party in interest in the lower court proceedings.

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003. memo	Jeff Connaughton to Judge Mikva, re: Race-Conscious Remedies (1 page)	12/19/1994	P5

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December 19, 1994

MEMORANDUM TO JUDGE MIKVA

CC: JOEL KLEIN

FROM: JEFF CONNAUGHTON

SUBJECT: Race-Conscious Remedies



It's very difficult to develop general principles applicable to the gamut of race-conscious remedies. This is a very context-specific area of the law with a complex history, including executive orders, federal legislation, federal court orders, the policies of states and local entities, the programs of other public or non-profit entities, and private programs -- in the form of affirmative action in employment, minority set-asides, racial preference in admission and scholarships, and voting rights. Certain of the non-federal programs are mandated by federal law, such as Title VII; certain of the public-entity and private programs are mandated by state law; other public-entity and private programs are voluntary.

When assessing this complex area in an effort to define future Administration policy, these initiatives might be divided into three areas: (1) federal programs subject to executive branch control; (2) federal and non-federal programs mandated by federal statute; and (3) purely non-federal programs (not subject to executive branch influence), but the constitutionality of which the United States has either supported or opposed when challenged in the federal courts. Principles the executive branch should adhere to in this area (in its own programs and policies), might not equate to the principles it should defend in a constitutional forum. In other words, the effort to devine general principles in this area is further complicated by the fact that the President's views of the Constitution may require the United States to defend the constitutionality of race-conscious remedies non-federal entities employ, even though the executive branch itself might not view that particular policy as one it seeks to proliferate.

Given this complexity, any rethinking by the Administration in this area, I believe, can only take place on the margin of its past policies after these policies have been assiduously catalogued and assessed. Accordingly, I recommend that you divide your civil rights working group into thirds: one-third to review federal programs subject to executive-branch control; one-third to review the federal and non-federal programs mandated by federal statute; and one-third to review the United States' history in defending the constitutionality of purely non-federal programs. You might ask each sub-group to provide you with a history of the United States' positions on race-conscious remedies, a summary of current legal and policy issues, and recommendations on future Administration policy.

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