

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. memo	Joel to Jeff, re: Race-Conscious Remedies (2 pages)
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1/9/1995

P5

174

COLLECTION:

Clinton Presidential Records
Counsel Office
Jeff Connaughton
OA/Box Number: 7442

FOLDER TITLE:

Affirmative Action [2]

2008-0308-F

wr890

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]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

To: Joel
From: Jeff
Date: January 9, 1995
Re: Race-Conscious Remedies



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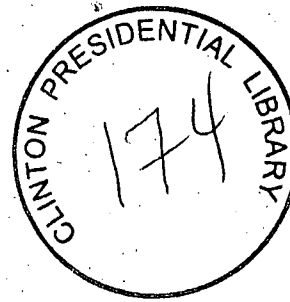
I have been attempting to summarize the Justice Department's positions in the race-conscious policy cases (unfortunately, I'm not finished). Though they involve various context-specific issues, some of the common themes that emerge from these cases involve the following questions:

- * Does the Constitution limit the use of race-conscious remedies to contexts with a proven remedial purpose?
- * Or does the goal of promoting racial diversity, even in a nonremedial context, represent a sufficiently compelling governmental justification that satisfies constitutional scrutiny?
- * If Congress has authorized a race-conscious program in a nonremedial context, does Congress's status as a co-equal branch of government warrant a court upholding its constitutionality under *Fullilove-Metro Broadcasting* intermediate level scrutiny?
- * Or should *Croson*-style strict scrutiny apply to federal as well as state race-based programs, thus effectively limiting even congressionally authorized programs to proven remedial contexts?
- * Relatedly, do federal agencies face constitutional limitations when employing race-conscious policies mandated by Congress?
- * What evidence of the vestiges of racial discrimination justify the continued use of remedial programs?
- * Do the evidentiary standards supported by the Justice Department amount virtually to the imposition of racial quotas?

Arguably, while the rest of the country has debated the merits of affirmative action, the Justice Department has taken positions in these cases which not only favor the use of race-conscious remedies, but would expand the circumstances in which their use is constitutionally required (or, for voluntary programs, would expand the circumstances in which their use is constitutionally defensible).

Therefore, some additional questions include the following:

- * Where do DOJ positions arguably go beyond even a strong commitment to affirmative action?



- Taxman
- Aderand
- Jenkins
- Podberesky
- disparate impact
- voting rights cases

- evidence of vestiges of racial discrimination
 - in instances of remedial purpose
 - where there is congressional/agency authority in absence of remedial purpose

- * Were the Administration to change its commitment to affirmative action, where does wiggle room exist (e.g., executive agency policies versus federal statutory mandates)? Where does it not exist (other than in DOJ positions before Court) (e.g., a President cannot alter the federal government's commitment to school desegregation, for example, because that issue is constitutionally driven by the federal courts).
- * What are the competing political visions/theories of democracy in this area?
- * What are the questions whose answers lead to an overriding principle in this area?
- * Any breakout thinking possible?
 - (1) school desegregation;
 - (2) minority set-asides;
 - (3) voting rights;
 - (4) employment policies;
 - (5) scholarship preferences;
 - (6) disparate impact theories.



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 175 Dup 158
002a. memo	Chris Edley to John Schmidt, re: Adarand Implications for Setaside Sunsets (1 page)	7/6/1995	P5 176
002b. letter	Christopher Edley to Deval Patrick, re: Miscellany (2 pages)	7/5/1995	P5 177

COLLECTION:

Clinton Presidential Records
Counsel Office
Christopher Edley
OA/Box Number: 5747

FOLDER TITLE:

Affirmative Action - Adarand/Post-Adarand Implications [1]

2008-0308-F
wr891

RESTRICTION CODES

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

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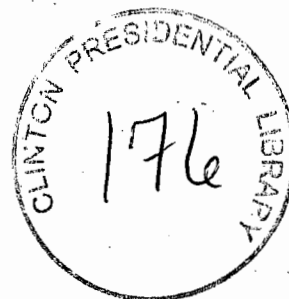
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July 6, 1995

To: John Schmidt

From: Chris Edley *CE*Re: *Adarand* Implications for Setaside Sunsets

Thanks for your note.

1. I certainly agree with your correction *re*: prime contractors. Yes, if the program purpose includes (as it does) remedying discrimination by primes, the relevant pool could be constructed with reference to existing firms.

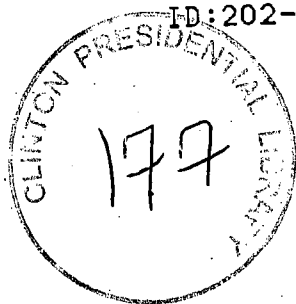
2. But I still think my underlying point is sound. Mike Small (OLC) called to chat about my note, and reminded me that in *Croson* itself the court recognized that if the pool of existing firms is artificially depressed because *identifiable* discrimination has limited entry and success, then the relevant comparison should be "grossed up" to some larger number. (There has to be some analysis to justify the larger number, of course. And all this becomes murky, uncharted waters.)

There would certainly still need to be attention to identifying the cause of the low pool numbers so as to make it more than general societal discrimination. I gather from Mike Small that this analysis is doable -- that it is part of what some disparity studies attempted.

3. But put aside the strict scrutiny issue for a moment. *If* we have a serious public policy goal of expanding entrepreneurship with a range of programs from outreach to setasides, then you may want to use racially targeted efforts as far as is constitutionally permissible, and then use race-neutral measures to get you the rest of the way to victory.

Even in that construct, however, it makes sense to figure out what we mean by "victory." So we need a test for sunsets, which may or may not turn out to be identical to the constitutional boundary for racial targeting.

4. In any case, I'm leaving the White House payroll tomorrow and starting the intermittent relationship with you folks. So, starting next week, I will agree with you far more often, and with far fewer qualifications!



July 5, 1995

To: ~~Deval Patrick, Walter Dellinger~~
 cc: ~~Nancy McFadden, John Schmidt~~

From: Christopher Edley, Jr.

Re: ~~Miscellaneous~~

FROM: JOHN SCHMIDT

1. **Deval & Co.:** George notes quite correctly that the current draft of the Report has a section on the history of affirmative action that is framed almost entirely in terms of the African-Americans. Can your team draft a short subsection on affirmative action as regards other minorities? The point is to say something about the history of discrimination and exclusion, the origin of judicial and public policy attention to the problem, and the origin of affirmative measures. Doesn't have to be a ton of stuff; just two pages that would provide some balance. In particular: Hispanics, Asian Pacific Islanders. Maybe even a paragraph on Aleuts (I'm not kidding: including them in the original Richmond ordinance was stupid, but I assume there is a story to be told about hardships they have faced in Alaska.) Our sense is that some concrete examples/anecdotes or something would be helpful. As you know, the President's view is that while the history of slavery and Jim Crow presents the most compelling justification for taking remedial steps, blacks have not been alone in facing virulent discrimination and race-based denial of opportunity. So we need to fill that out.

2. **Walter & Co.:** On the setaside issue, I need to clarify the discussion I have in the current draft about sunsets. Here's the problem. I recommend an NEC-led effort to think about appropriate measures to determine when to declare victory in the fight to create equal entrepreneurial opportunity -- I point out that the proper ratios to use are not self-evident. (Minority vendors as proportion of all vendors? Share of minority contracts in comparison with share of minorities in the adult population; or minorities in the college-educated population?) George notes, however, that the Court in *Adarand* and *Croson* seems pretty clear about the need to focus on the pool of qualified minority firms.

But this definition of the pool makes sense as the test only if the compelling interest (and hence the purpose of the program) is to remedy discrimination by the contracting agency, and if our immediate object is merely to ensure that agencies do business with minorities in amounts fairly representative of minority firms' presence in that market.

Of course our real purpose is broader. The problem is far less a matter of the Federal

Chris - I don't think this is so - Discrimination by prime contractors against subcontractors may be equally important, but it still leads you to the pool of qualified minority vendors as the relevant focus - The same would be true if the problem is lack of financing needed for federal contracting purposes - You can go beyond the existing pool of vendors only if you talk about creating new firms & the obbretu. If our identific some speci access banner may be you could some with. But gets ven close of the of ducan the Co specif. recent

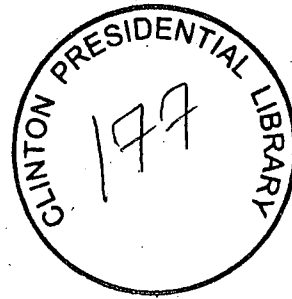
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government's discrimination, than the broader remedial objective of curing the problems in the internal workings of these particular industries, the patterns of subcontracting, the issues of financing, and so forth. I have assumed, without arguing the point, that there is room to argue that section 5 of the 14th Amendment would give Congress (and perhaps us?) some authority to solve problems of discrimination (not mere diversity concerns) beyond any specific discrimination by the Federal government.

Am I correct in this? Note that I'm not changing the requirement of a factual predicate of discrimination. The issue is *whose* discrimination. I want to argue that under section 5 of the 14th Amendment it need not be *our own* discrimination. Please let me know what you think.

3. Walter & Co.: Where are you on the issue of gender-based preference programs? We have a general sense that there needs to be some careful homework done in anticipation of litigation and, perhaps, legislative battles. But there is obviously no need for *Adarand*-style guidance. You should try to crystalize your thoughts about how agencies can be encouraged to do that homework assignment, without miscommunicating any intention to raise the hurdle higher than the Supreme Court has.

cc: George Stephanopoulos
Michael Waldman
James Castello
Bill Yeomans
Dawn Johnson
Mike Small



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 178 Dup 158
002. memo	To President Clinton, re: Policy and Strategic Choices Following Adarand - Draft (5 pages)	6/21/1995	P5 179
003. fax	DOJ to Chris Edley, re: Affirmative Action (4 pages)	6/12/1995	P5 180

COLLECTION:

Clinton Presidential Records
Counsel Office
Christopher Edley
OA/Box Number: 5747

FOLDER TITLE:

Affirmative Action - Adarand/Post-Adarand Implications [2]

2008-0308-F
wr892

RESTRICTION CODES

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Draft



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TO: The President

FROM:

SUBJECT: Policy and Strategic Choices Following Adarand

By imposing a more stringent constitutional test on federal programs that consider race, the Supreme Court's decision in Adarand v. Peña raises the need for fundamental policy and strategic 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.

POLICY OPTIONS

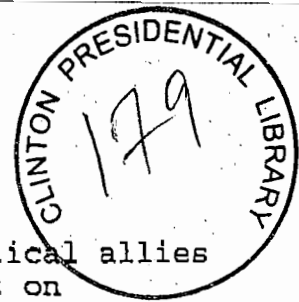
Policy Option 1

Defend programs that are determined to be defensible pursuant to Adarand.

Pursuant to this approach, 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. There would be an overriding policy determination that any program that could reasonably be defended should be defended. Beyond that determination, policy would yield to legal judgment, except insofar as policy mixes with law in determining whether an interest is compelling or a program's structure is narrowly tailored. Where the Attorney General determines that a challenged program is not defensible in the absence of specific reforms, the Department will not defend the program but will suggest specific reforms for the agency's consideration.

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 be defended applying strict scrutiny, this option ensures that as many programs as practicable will be defended in court.



- o Spirited defense of programs will reassure political allies and "the base" who are concerned about a retreat on affirmative action.
- o Reliance on the adversary system to surface suspect programs will tee up the issues in a focused manner. The Attorney General can then contribute ideas for adjusting programs as warranted.
- 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 in an effort to occupy the middle in this debate.
- o By defending every 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. This concern would be ameliorated by exercise of the Department of Justice's discretion to decline to defend some minimally defensible programs in order to ensure that the litigated challenges were focused on the strongest programs.

Policy Option 2

Combine the Adarand legal determination with a policy judgment regarding ways to improve existing programs.

Following on the review of affirmative action programs, Adarand may provide added opportunity to consider policy changes that reform existing programs. You would direct the agencies to develop new measures to guard against abuses, such as sham fronts and pass-throughs, and to tighten and enforce graduation and asset requirements. The Department of Justice would defend those programs that are reasonably defensible under Adarand, as stated in policy option 1.

Pros

- o This position demonstrates the Administration's view of these programs as providing a short-term "leg up" for those persons the programs are intended to benefit.
- o Following Adarand, there is more incentive, as a legal matter, to restructure programs.
- o Moving in this direction would show that the Administration is serious about ensuring against abuses, while continuing to support affirmative action.

- o There is broad agreement, even among strong proponents of affirmative action, that abuses should be addressed.
- o This option is consistent with litigation in support of existing programs.

Cons

- o This level of reform may be viewed as too little and too late by opponents of affirmative action.
- o Supporters of affirmative action may view this option as a retreat.

Policy Option 3

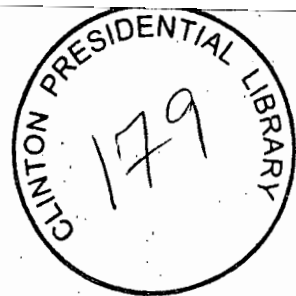
Go beyond Adarand to restructure programs more dramatically, including jettisoning some programs and moving away from reliance on race in others.

Pros

- o Moving in this direction may take the edge off of political attacks by opponents of affirmative action.
- o This option could make the Administration appear flexible and willing to compromise.

Cons

- o This option represents a reversal of current policy, risking another charge of "waffling."
- o It is premature to conclude as a matter of law that any program is invalid pursuant to Adarand. Even Adarand itself did not invalidate the program at issue, but simply remanded the case for application of strict scrutiny.
- o Any cutback on affirmative action that is not required by Adarand will be viewed as retreat by proponents of affirmative action.
- o Cutbacks at this point may make it appear that the Administration is unwilling to stand firm in support of principles.
- o Because Adarand has been decided, the Administration may not receive credit for leadership for proposing changes in affirmative action now.
- o Changes now could affect our ability to defend programs in court.



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STRATEGIC OPTIONS

In addition to this basic policy decision, one strategic decision needs to be made. In order to evaluate programs pursuant to Adarand, it will be necessary to undertake an intensive effort to gather and develop facts show whether there is compelling need for a program and it is narrowly tailored. The resources of the Department of Justice alone are inadequate to perform this function.

Strategic Option 1

Direct federal agencies to undertake factual development regarding the programs they administer.

Under this option, you would direct federal agencies to develop the necessary facts upon which to base a determination whether a program complied with the new standard imposed by Adarand. This factual base could be relied upon by the agency itself in determining the lawfulness of a program and by the Attorney General in litigating any challenge to a program. [see Draft A].

Pros

- o Agencies know their own programs well and are in the best position to develop a factual record quickly.
- o Agency fact gathering is the usual manner in which this task would be done.
- o Agencies already have in place administrative factfinding procedures.

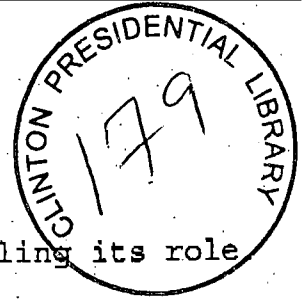
Cons

- 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.

Strategic Option 2

Create an independent commission to lead the factual inquiry.

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
[see Draft B]

Pros

- o The commission's independence 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.

Cons

- o The commission would likely take a minimum of six months to complete its work. Meanwhile, events, driven by litigation and congressional action, might overtake it.
- o If the commission is truly independent, there is a risk that it will stray beyond its mandate or make findings with which the Administration disagrees or which put the Administration in a difficult political position.
- o There is the potential that a commission finding could conflict with and undermine a litigation position.
- o There is little support among Democratic Members of Congress for a commission.

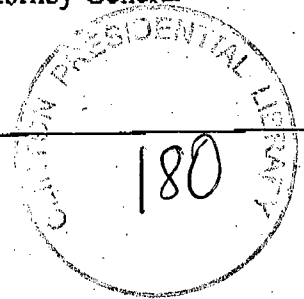


U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530



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FACSIMILE TRANSMITTAL COVER SHEET

DATE:

6/12/95

TO:

Chris Edley

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395-7294

TELEPHONE NO.

395-7468

FROM:

John R. Schmidt

FACSIMILE NO.

202/514-0238

TELEPHONE NO.

202/514-9500

NUMBER OF PAGES INCLUDING COVER SHEET:

4

COMMENTS:

Some Thoughts



OPTIONS FOR AFFIRMATIVE ACTION
REVIEW IN WAKE OF ADARAND

1. Indicate that the review will go forward as planned, downplaying any impact of the Supreme Court decision.

This approach would emphasize that the current review is a policy-based analysis, not dictated by legal concerns. Moreover, the Court in Adarand did not actually invalidate any programs but merely subjected race-based programs to "strict scrutiny" as to whether they are "narrowly tailored" to serve a "compelling interest." This approach would imply (or state outright) a view that most current federal programs can survive such strict scrutiny.

The negative to this approach are that it ignores the likelihood that many current programs may not be able to survive the new rigorous scrutiny. This is particularly true in the absence of a congressionally-supported process -- which is unlikely -- to make the necessary factual inquiries, consider non-race-based alternatives and reenact programs as appropriate. Moreover, this approach would appear to be trying to minimize or disregard what will unquestionably be viewed generally as a major Supreme Court decision requiring greater scrutiny of race-based federal programs.

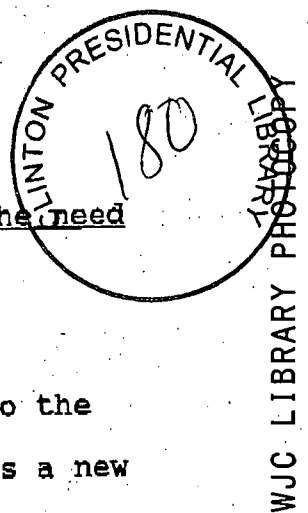
2. Instruct that the review should take into account the need for all race-based programs to meet the new strict scrutiny test.

This approach would acknowledge that, in addition to the analysis already underway, the Supreme Court now requires a new level of legal scrutiny for all race-based federal programs. The President could specifically ask the Justice Department to analyze all federal race-based programs for compliance under the new standard, or the responsibility for the analysis could be placed in the current review. This analysis would also identify any further steps (such as congressional hearings or findings) that are needed to sustain programs that are determined to be desirable.

This approach gives recognition to the legal impact of the Supreme Court opinion. It also may lay the groundwork for the recognition of legal considerations as a reason why some programs have to be modified. However, it may be taken by some affirmative action advocates as implying a less aggressive defense of all current programs in light of the Adarand decision.

3. Appoint a bi-partisan commission to review all current race-based federal programs in light of the new legal standard.

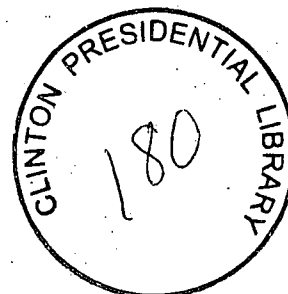
This would follow the approach adopted by many localities when the Supreme Court applied "strict scrutiny" to their race-based programs in the Crosson decision -- appointing commissions (often consisting of people such as former judges) to review



programs, determine facts as necessary, and recommend reenactment or changes.

Such an approach can be argued to be useful in order to defend various programs under the new standard -- which is why most localities adopted this approach after Crosson. However, the ability of such a commission to work effectively to defend, current programs may depend heavily on the ultimate willingness of Congress to reenact them, which is what typically happened at the local level. It is not certain under current law whether Congressional judgment at the time of enactment -- as passed to retroactive or after-the-fact rationalization -- is necessary to meet the strict scrutiny test. Obviously the composition of such a commission is a key to its political impact and ultimate effect. The appointment of such a commission would presumably moot the current affirmative action review.

One disadvantage of this approach is that it will look like an effort to cop-out from the affirmative action review. However, the Adarand decision might provide the substantive and political cover for doing that if it is desired.



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Raymond Kogut to Christopher Edley, re: AA Help (2 pages)	5/1/1995	P5 181
002. memo	Christopher Edley to Susan Carr et al., re: EEOC (partial) (3 pages)	4/28/1995	P5, b(6) 182

COLLECTION:

Clinton Presidential Records
Counsel Office
Christopher Edley
OA/Box Number: 5749

FOLDER TITLE:

Affirmative Action - EEOC [1]

2008-0308-F

wr893

RESTRICTION CODES

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EXECUTIVE OFFICE OF THE PRESIDENT

01-May-1995 12:34pm

TO: Christopher F. Edley, Jr
FROM: Raymond P. Kogut *PK*
Office of Mgmt and Budget, VAPD
CC: Franklin S. Reeder
SUBJECT: RE: AA Help -- Response from Frank Reeder & Ray Ko

Chris:

Thanks for inviting us to comment on the draft piece on Federal civilian employment affirmative action. Our initial reactions follow:

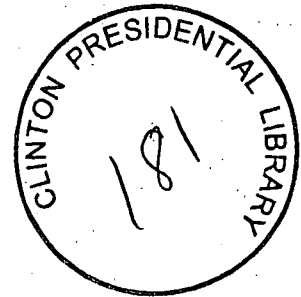
The OFCCP piece is better focused than the one on Federal employment. It's interesting that so much space was given to the already dismissed perception that quotas and reverse discrimination are major concerns by including the examples from the only 2% of respondents who specifically raised the issue(s). Such isolated comments don't deserve that much emphasis.

With regard to the Federal employment piece, it has its highs and lows. Data use is good, but not the whole story. For example, OPM just released a contract study showing that minorities are disciplined 2+ times more often than others. Further, the NPR- and NPC-identified problems with current dispute resolution systems (MSPB/Negotiated Grievances/FLRA processes for mixed cases and the EEOC complaint process) is not raised, nor is the timeliness of those processes. The whole piece seems EEOC directed, but would be better oriented toward the Federal civilian workforce situation. It's not forward looking. FTEs and reductions are issues to be confronted, but only anecdotally acknowledged. Doesn't suggest any reforms.

As to the rewrite of MD-715, our only involvement with this has been on the procedural end. Late in the Bush Administration, an earlier draft was floated by the President's Council on Management Improvement, which had some serious concerns about the process. Early drafts called for fully centralizing the complaint investigation process in EEOC, with agency reimbursement. EEOC was to have its FTEs and spending increased, but with no offsets from the agencies. The OMB expert on the substance of those deliberations is Joe Wire in Ken Apfel's area. He was the EEOC examiner at the time.

Since you asked, here are my personal opinion on goals and timetables for agencies and critical job elements for relevant Federal managers. (Is that in contrast to irrelevant Federal managers?) On both I vote a strong yes with one proviso. As a general rule, that which is not measured does not get done. Asking agencies to set their own goals and timetables seems a reasonable step. As to setting up a CJE for individual managers, my only reservation is that measurement be over a long enough period of time to be meaningful. Depending on turnover, it may take a while for the manager of a small unit to change its demographics. Nevertheless, making equal employment opportunity a critical job element for relevant Federal managers is both symbolically and substantively important.

Ray Kogut contributed to the above. He's sending it all to you since Frank Reeder is off to Camden Yards for season opener.





WJC LIBRARY PHOTOCOPY

EXECUTIVE OFFICE OF THE PRESIDENT

28-Apr-1995 04:04pm

TO: (See Below)

FROM: Christopher F. Edley, Jr
Office of Mgmt and Budget, EG

SUBJECT: EEOC

Just had a 30 minute chat with Gil Casellas. We agreed that:

(b)(6)

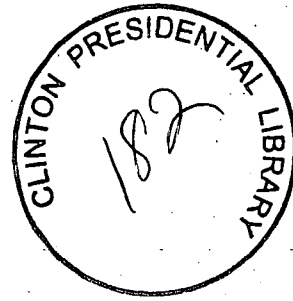
(2) EEOC staff will work with Susan/OMB to develop a bold option for POTUS. That option will challenge Dole, Gramm and Gingrich (who claim to be against preferences but in favor of vigorous enforcement) to invest in the EEOC the resources necessary over a period of years to "eliminate" the backlog.

(3) On the ADR stuff -- sounds like the proposal the Commission just adopted was carefully negotiated out, and relies on voluntary mediation, rather than arbitration. You should obviously take a look at it, but I would be surprised if there is enormous policy gain to be had by pressing for something different. The real issue is:

(4) Gil will think about how much of the multi-faceted reinvention effort in which they have been engaged for the past four months can and should be rolled out as part of the President's Affirmative Action rollout. His instinct is to package all of it, but he will think about it. So, as Bob Litan suggested yesterday, what we might end up with for EEOC is (a) trumpeting what we have already been up to, and (b) perhaps a bold option to get rid of the backlog.

(5) A final issue, (c) is what to do with Management Directive 715 [MD-715], which was drafted under Bush but never finalized. The questions are (i) whether we should reverse the Reagan Administration's elimination of diversity goals for Federal agency employment (the Bush draft obviously did not), and (ii) whether we should have a government-wide requirement that EO issues be included in the critical job elements used in performance appraisals for federal managers.

I think the policy answer to both questions should be "yes,



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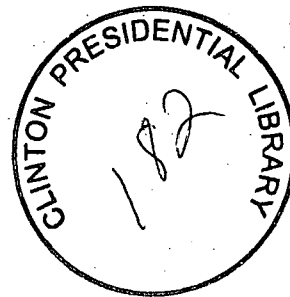
carefully." (How can we defend keeping goals & timetables for private employers under E.O. 11246, but not have goals and timetables for federal agencies who have job categories with manifest imbalances?) But we need to get to closure on these next week. Peter, I think that means generating those 1-page option pro-con sheets for each of these two issues. You might try to talk Susan into handling it for you. Good luck.

Finally, Gil is eager to come over and brief Litan on all of their activities. I explained that, while that's a terrific idea, Bob is in Oklahoma City mode. So timing is not ideal. Background: Gill and EEOC are feeling underappreciated and unloved by the West Wing. That problem is at Leon's doorstep, but we have to cope with the emotional fallout.

Distribution:

TO: Susan M. Carr
TO: Peter M. Yu

CC: Robert E. Litan
CC: Sharon K. Thomas
CC: Alan B. Rhinesmith
CC: Douglas N. Letter



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
~~001a. resume~~	~~Paul M. Igasaki [partial] (1 page)~~	~~10/12/1994~~	~~P6/b(6)~~
~~001b. resume~~	~~Paul Steven Miller [partial] (1 page)~~	~~10/12/1994~~	~~P6/b(6)~~
002. memo	Susan Carr to OMB Director, re: Administration's position on HR 344 (3 pages)	1/25/1995	P5 184

COLLECTION:

Clinton Presidential Records
Counsel's Office
Christopher Edley
OA/Box Number: 5749

FOLDER TITLE:

Affirmative Action - EEOC [3]

2008-0308-F
wr454

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).

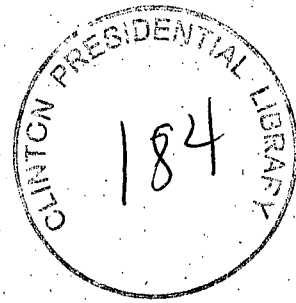
RR. Document will be reviewed upon request.

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

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



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Carr
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January 25, 1995

MEMORANDUM FOR THE DIRECTOR

THROUGH: Christopher Edley, Jr. *CEJ*
FROM: Susan Carr/Anna Briatico
SUBJECT: Amendment to the Age Discrimination in Employment
Act (ADEA) of 1967 for State and Local Firefighters
and Law Enforcement Officers

Issue

What should be the Administration's position on HR 344, a bill to exempt State and local firefighters and law enforcement officers from the ADEA?

Background

The Amendments of 1986 to the ADEA established an exemption for the hiring and retirement of State and local law enforcement officers and firefighters. This exemption expired on December 31, 1993.

Yesterday, the House Employer-Employee Relations subcommittee (Harris Fawell, Chairman) held a hearing on HR 344 (Pickett (D) VA) to reinstate the exemption of State and local firefighters and law enforcement officials from the hiring and retirement provisions of the ADEA.

Witnesses at the hearing represented the AFL-CIO, AARP, the City of Alexandria, Virginia, and law enforcement and firefighters organizations. There were no Administration witnesses.

The AARP has contacted EEOC, strongly opposing the bill. EEOC also strongly opposes this bill and would like to send a letter to Congress expressing its views.

Related Efforts to Pass Similar Legislation During the Last Congress

This bill is very similar to HR 2722, which passed the House during the last Congress. EEOC sent an OMB-cleared letter to the Hill opposing the bill in September 1993. The White House later withdrew support for the letter.

A lot of the debate over HR 2722 occurred in the context of the Crime Bill. At that time, the Administration was prepared to support a temporary, three-year extension of the exemption, thereby allowing further study of age restriction policies for public safety workers. Although HR 2722 was included in the House-passed version of the Crime Bill, it was excluded from the version that became law, largely because of Senator Metzenbaum's strong opposition.

Timing of Congressional Action this Year

During yesterday's hearing, Chairperson Fawell indicated that he plans to move on this issue quickly and may be introducing his own bill shortly.

Domestic Policy Council's Position

The DPC staff (Jose Cerda) supports a three-year extension of the exemption. According to Cerda, this expression of limited preference would support the coalition of police, firefighters, mayors and Federal law enforcement officials who are strong proponents of the exemption, while minimally upsetting the AARP and Civil Rights Community.

Options

1. Advise EEOC that the Administration will not be taking a position on HR 344 at this time.

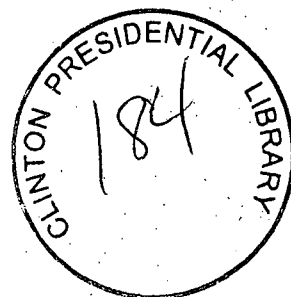
Pros - Buys the Administration some time on a largely "no-win" political issue. The Administration conceivably could wait to express its views until legislation is scheduled for markup or House floor consideration.

Cons - Potentially limits the Administration's ability to influence the outcome of this legislation. It's unlikely that the issue will become less difficult later in the legislative process.

2. Advise EEOC to prepare a letter to the House Economic and Educational Committee opposing HR 344.

Pro - Supports EEOC efforts to end age-based discrimination.

Cons - Makes Administration look indecisive -- i.e., we were willing to accept a three-year exemption last year. Also makes Administration vulnerable to criticism of double standards. The Federal Government is exempted from the ADEA and maintains mandatory age restrictions for its law enforcement (and certain other) personnel.



3. Advise EEOC to prepare a letter to the House Economic and Educational Committee stating the Administration prefers no exemption, but could accept a three-year extension of the exemption.

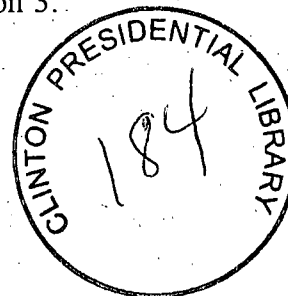
Pro - Is consistent with the Administration's position on the issue during last year's Crime Bill debate.

Con - Will not fully satisfy the opponents or proponents of HR 344.

Recommendation

Because of the tie with the Crime Bill, we recommend that you discuss which option the Administration should pursue with the Chief of Staff, who was heavily involved in the discussions over the last year. Jack Lew and Chris Edley favor Option 3.

cc: Jack Lew
Jose Cerda



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Lisa Jacobs to Peter Yu, re: NSF's Urban Systemic Initiatives Program (1 page)	5/7/1995	P5 185

COLLECTION:

Clinton Presidential Records
Counsel Office
Christopher Edley
OA/Box Number: 5749

FOLDER TITLE:

Affirmative Action EEOC Research Resource Documents [1]

2008-0308-F
wr895

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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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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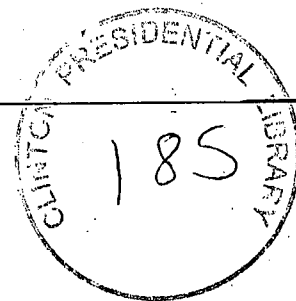


U.S. Department of Justice

Office of Policy Development

Washington, D.C. 20530

May 7, 1995



WJC LIBRARY PHOTOCOPY

MEMORANDUM

TO: Peter Yu

FROM: Lisa Jacobs

SUBJECT: Additional Info. on the NSF's Urban Systemic Initiatives Program (USI)

Attached is an additional background piece on the USI Program. It's not particularly useful in terms of program results. I'm planning to check to see if the initial grants have made any discernible results yet.

Admittedly, from a "let's depoliticize the issue" viewpoint, race-neutral programs like this are attractive, but I don't see them as ever having the potential to replace programs which are race or gender specific. There are any number of issues which are peculiar to race or gender (e.g. blacks have disproportionately high drop out rates in junior high and high school; girls, for a variety of reasons, become less interested in the sciences (typically during junior high school) and begin moving in different career directions) that can only be addressed by programs which focus on the specific group which manifests the "problem." Thus, we'll be on stronger footing to the extent that we can justify the need for the programs that currently exist rather than trying to make them more palatable by "neutralizing" them.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action Policy Issues (14 pages)	4/20/1995	P5 186
002. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action Policy Issues (14 pages)	4/20/1995	P5 187
003. memo	To President Clinton and Vice President Gore, re: Affirmative Action Memo Excerpts (3 pages)	4/20/1995	P5 188
004. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action Policy Issues (11 pages)	4/19/1995	P5 189
005. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action Policy Issues (11 pages)	4/19/1995	P5 190
006. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action Themes and Hard Questions (16 pages)	4/7/1995	P5 191
007. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action Themes and Hard Questions (16 pages)	4/7/1995	P5 192 Dup 191
008. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action Themes and Hard Questions (16 pages)	4/7/1995	P5 193

COLLECTION:

Clinton Presidential Records
Counsel Office
Christopher Edley
OA/Box Number: 5759

FOLDER TITLE:

Affirmative Action POTUS Memo(s) - Final [1]

2008-0308-F

wr896

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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THE WHITE HOUSE
WASHINGTON



April 20, 1995

MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

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

Re: Affirmative Action: Policy Issues

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

I. AFFIRMATIVE ACTION IN
EDUCATION, EMPLOYMENT, AND PROCUREMENT

A. Education: Race- or Gender-Specific Scholarships

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

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

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

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

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

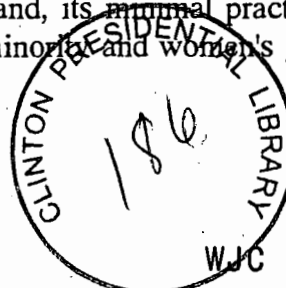
Options. The policy options include:

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

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

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

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



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

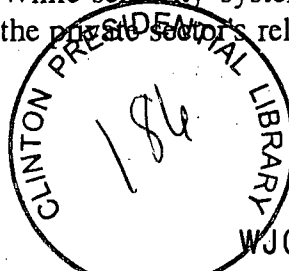
Indeed, current antidiscrimination enforcement guidance from the Department of Education, promulgated during the Reagan Administration pursuant to Title IX, makes the test for gender-specific scholarships whether the financial aid practices of the institution, *taken as a whole*, provide equal opportunity.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

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

B. Employment: Race or Gender in Layoff Decisions

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

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



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

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

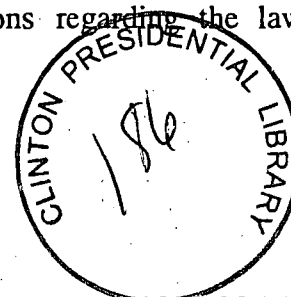
Options. The policy options include:

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

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

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

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



C. Procurement: Preferences & Set-asides

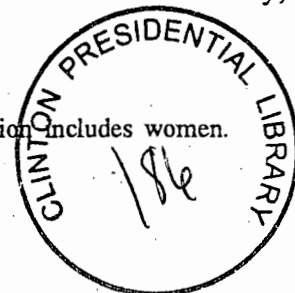
Background. Federal law establishes several goals for the distribution of federal procurement opportunities: 20% for small businesses; 5% for small disadvantaged businesses (SDBs -- virtually all of which are minority-owned¹); and 5% for women-owned businesses. There is a web of programs designed to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

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

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

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

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



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

Options. The policy options are:

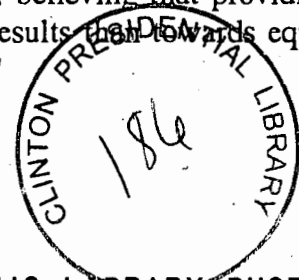
Option 1: Eliminate misuses; expand pre-bid assistance. In particular: establish tighter asset-related eligibility rules to prevent the "disadvantaged millionaire" phenomenon; limit the concentration of set-asides in a single region or industry; and set standards (by business sector and by region) to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

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

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

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

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



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

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

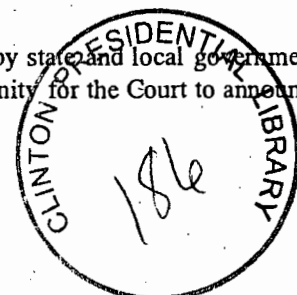
As noted above, one can support race-specific scholarships but reject race-specific contracting set-asides by distinguishing procurement as "more related to results than to opportunity." This approach is far more restrictive than Supreme Court precedents, which permit set-asides based on legislative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

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

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

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

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



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

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

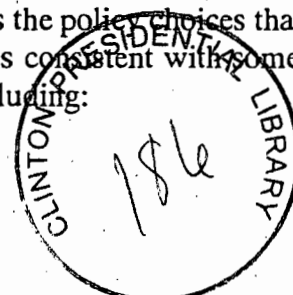
- Provide set-asides or other preferences for firms whose workforce (on the contract) would be drawn more than X% from *chronically distressed* areas, using measures based on Census and BLS data. (There are two especially well-regarded alternative indices of distress in the social science literature.)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

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

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

II. PUTTING THE PIECES TOGETHER: BROADER PERSPECTIVES

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



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

A. The "Calibrated" Approach

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

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

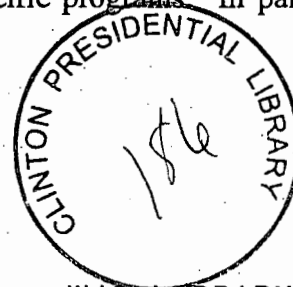
Education:	Option 1 -- Maintain current policy.
Employment:	Option 1 -- Permit race or gender to be considered in layoff decisions.
Procurement:	Option 2 or 3 -- Reform and sharply narrow procurement preferences, or phase them out.

B. The "Least Intrusive Alternative" Approach

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

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

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



illustrated in Attachment 2):

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

C. The "Anti-Exclusion" Approach

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

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

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

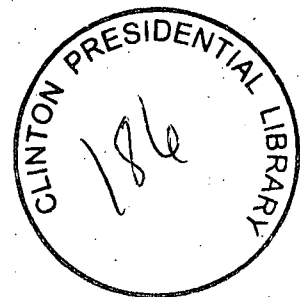


EXHIBIT 1

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

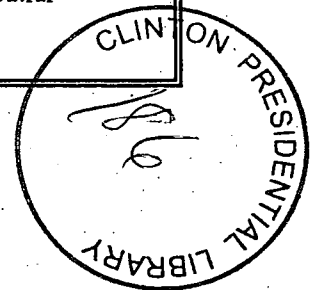
(#) -- indicates option number in the memorandum	Education	Employment	Procurement
"Calibrated, Opportunity" Approach	☐ (1) Maintain current policy requiring exhaustion.	☐ (1) Permit limited consideration of race/gender in layoffs.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility; <i>or</i> ☐ (3) Convert to race-neutral programs.
"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.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility.
"Anti-Exclusion" Approach	☐ (3) Eliminate race- and gender-based aid by expanding eligibility, softening exclusion.	☐ (2) Oppose consideration of race/gender in layoffs.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility; <i>or</i> ☐ (3) Convert to race-neutral programs.

A. *"Calibrated Opportunity" Approach:* Emphasize creating opportunity, not guaranteeing results.

B. *"Least Intrusive Alternative" Approach:* Emphasize narrow tailoring, and concern for bystanders.

C. *"Anti-Exclusion" Approach:* Emphasis on avoiding bald set-asides that announce: "No whites need apply."

Additional Decision: FCC Broadcast Licenses: ☐ (1) Maintain status quo, *or* ☐ (2) Establish a limited tax-certificate program.

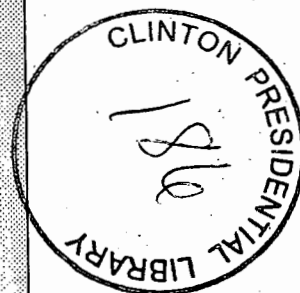


Attachment 1: A Calibrated Approach

Opportunity ----- Results

	Opportunity Enhancing Assistance	Advantages & Flexible Preferences	Set-asides	Quotas
Education	Compensatory ed; Outreach & recruiting; HBCUs	Multifactor admissions policies: e.g., UC-Berkeley	Group-based programs: e.g., Banneker; NIH Minority Fellowship; San Bernardino's Bridge Program	Two-track (i.e., pre-Bakke) admissions
Employment	Outreach & recruiting; Apprenticeships; Second look programs: e.g., the military	Multifactor hiring: e.g., judicial selection; the Chicago police dept.	Exclusive job listings: e.g., Ill. State Univ.; anecdotes from academe	Race-normed tests to ensure proportional representation
Contracting & Procurement	Technical assistance; Mentoring; Bonding assistance	10% bid preference, "Subcontractor Compensation program": e.g., the Adarand case	8(a) program; Rule of two	Numeric set-asides

under this approach, shaded policies would be appropriate only as remedies for lingering or ongoing discrimination



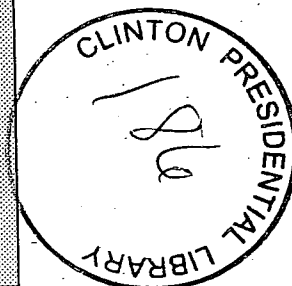
Attachment 2: A Least Intrusive Alternative Approach

Opportunity ----- Results

	Opportunity Enhancing Assistance	Advantages & Flexible Preferences	Set-asides	Quotas
Education	Compensatory ed; Outreach & recruiting; HBCUs	Multifactor admissions policies: e.g., UC-Berkeley	Group-based programs: e.g., Banneker ; NIH Minority Fellowship ; San Bernardino's Bridge Program	Two-track (i.e., pre-Bakke) admissions
Employment	Outreach & recruiting; Apprenticeships; Second look programs: e.g., the military	Multifactor hiring: e.g., judicial selection ; the Chicago police dept.	Exclusive job listings: e.g., Ill.State Univ. ; anecdotes from academe	Race-normed tests to ensure proportional representation
Contracting & Procurement	Technical assistance; Mentoring; Bonding assistance	10% bid preference; "Subcontractor Compensation program": e.g., the Adarand case	8(a) program; Rule of two	Numeric set-asides

under this approach, shaded policies would be appropriate only in court-ordered remedies

lined programs would be available either to remedy lingering or ongoing discrimination or to increase diversity, but only if less intrusive policies are not effective



Attachment 3: An Anti-Exclusion Approach

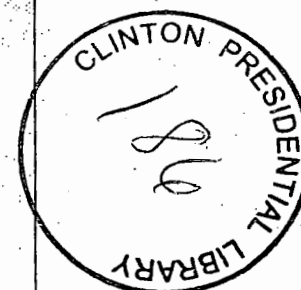
Opportunity ----- Results

Opportunity

Results

	Opportunity Enhancing Assistance	Advantages & Flexible Preferences	Set-asides	Quotas
Education	Compensatory ed; Outreach & recruiting; HBCUs	Multifactor admissions policies; e.g., UC-Berkeley	Group-based programs; e.g., Banneker; NIH Minority Fellowship; San Bernardino's Bridge Program	Two-track (i.e., pre-Bakke) admissions
Employment	Outreach & recruiting; Apprenticeships; Second look programs; e.g., the military	Multifactor hiring; e.g., judicial selection; the Chicago police dept.	Exclusive job listings; e.g., Ill.State Univ.; anecdotes from academe	Race-normed tests to ensure proportional representation
Contracting & Procurement	Technical assistance; Mentoring; Bonding assistance	10% bid preference; "Subcontractor Compensation program" e.g., the Adarand case	8(a) program; Rule of two	Numeric set-asides

under this approach, shaded policies would be appropriate only as court-ordered remedies for lingering or ongoing discrimination



THE WHITE HOUSE
WASHINGTON



April 20, 1995

MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

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

Re: Affirmative Action: Policy Issues

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

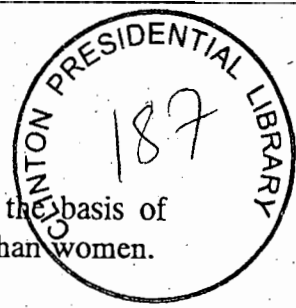
I. AFFIRMATIVE ACTION IN
EDUCATION, EMPLOYMENT, AND PROCUREMENT

A. Education: Race- or Gender-Specific Scholarships

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

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

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



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

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

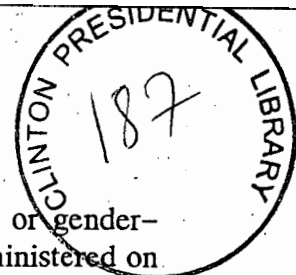
Options. The policy options include:

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

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

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

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



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

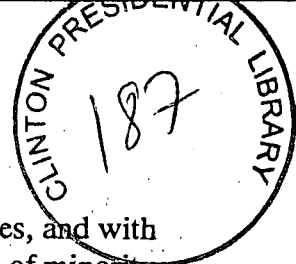
Indeed, current antidiscrimination enforcement guidance from the Department of Education, promulgated during the Reagan Administration pursuant to Title IX, makes the test for gender-specific scholarships whether the financial aid practices of the institution, *taken as a whole*, provide equal opportunity.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

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

B. Employment: Race or Gender in Layoff Decisions

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

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



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

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

Options. The policy options include:

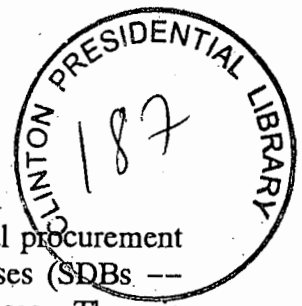
Option 1: As a policy matter, when not inconsistent with a bona fide seniority system, diversity may be considered in layoffs, but only in limited circumstances.

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

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

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

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



C. Procurement: Preferences & Set-asides

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

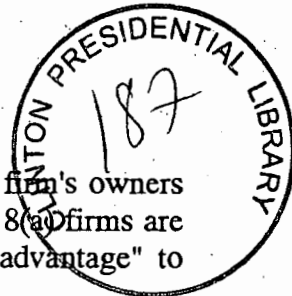
- **Sole source procurements:** Under SBA's § 8(a) program, small disadvantaged businesses (SDBs) can secure smaller sole-source contracts (usually less than \$3 million).
- **Sheltered competition:** Under DOD's "rule of two," a contract is set aside for SDBs if the officer believes two or more SDBs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

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

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

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

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



Options. The policy options are:

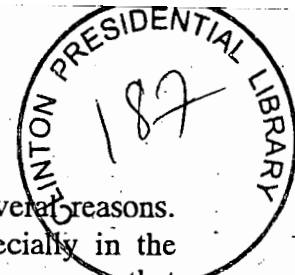
Option 1: Eliminate misuses; expand pre-bid assistance. In particular: establish tighter asset-related eligibility rules to prevent the "disadvantaged millionaire" phenomenon; limit the concentration of set-asides in a single region or industry; and set standards (by business sector and by region) to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

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

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

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

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



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

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

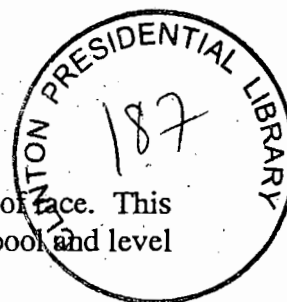
As noted above, one can support race-specific scholarships but reject race-specific contracting set-asides by distinguishing procurement as "more related to results than to opportunity." This approach is far more restrictive than Supreme Court precedents, which permit set-asides based on legislative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

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

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

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

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



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

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

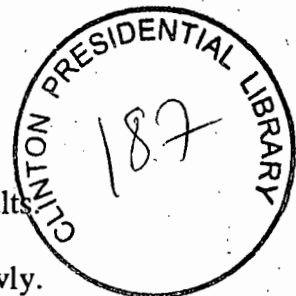
- Provide set-asides or other preferences for firms whose workforce (on the contract) would be drawn more than X% from *chronically distressed* areas, using measures based on Census and BLS data. (There are two especially well-regarded alternative indices of distress in the social science literature.)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

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

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

II. PUTTING THE PIECES TOGETHER: BROADER PERSPECTIVES

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



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

A. The "Calibrated" Approach

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

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

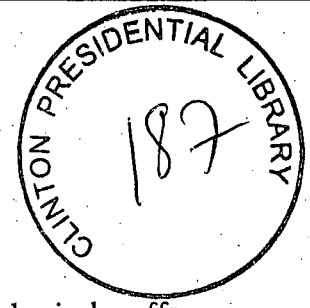
- Education:** Option 1 -- Maintain current policy.
Employment: Option 1 -- Permit race or gender to be considered in layoff decisions.
Procurement: Option 2 or 3 -- Reform and sharply narrow procurement preferences, or phase them out.

B. The "Least Intrusive Alternative" Approach

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

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

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



illustrated in Attachment 2):

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

C. The "Anti-Exclusion" Approach

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

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

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

EXHIBIT 1

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

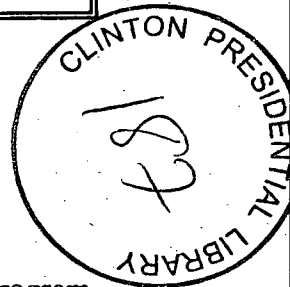
#) -- indicates option number in the memorandum	Education	Employment	Procurement
"Calibrated, Opportunity" Approach	☐ (1) Maintain current policy requiring exhaustion.	☐ (1) Permit limited consideration of race/gender in layoffs.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility; <i>or</i> ☐ (3) Convert to race-neutral programs.
"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.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility.
"Anti-Exclusion" Approach	☐ (3) Eliminate race- and gender-based aid by expanding eligibility, softening exclusion.	☐ (2) Oppose consideration of race/gender in layoffs.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility; <i>or</i> ☐ (3) Convert to race-neutral programs.

A. *"Calibrated Opportunity" Approach:* Emphasize creating opportunity, not guaranteeing results.

B. *"Least Intrusive Alternative" Approach:* Emphasize narrow tailoring, and concern for bystanders.

C. *"Anti-Exclusion" Approach:* Emphasis on avoiding bald set-asides that announce: "No whites need apply."

Additional Decision: FCC Broadcast Licenses: ☐ (1) Maintain status quo, *or* ☐ (2) Establish a limited tax-certificate program.

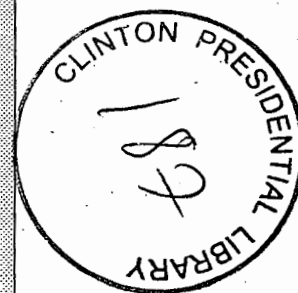


Attachment 1: A Calibrated Approach

Opportunity ----- Results

	Opportunity Enhancing Assistance	Advantages & Flexible Preferences	Set-asides	Quotas
Education	Compensatory ed; Outreach & recruiting; HBCUs	Multifactor admissions policies: e.g., UC-Berkeley	Group-based programs: e.g., Banneker; NIH Minority Fellowship; San Bernardino's Bridge Program	Two-track (i.e., pre-Bakke) admissions
Employment	Outreach & recruiting; Apprenticeships; Second look programs: e.g., the military	Multifactor hiring: e.g., judicial selection; the Chicago police dept.	Exclusive job listings: e.g., Ill.State Univ.; anecdotes from academe	Race-normed tests to ensure proportional representation
Contracting & Procurement	Technical assistance; Mentoring; Bonding assistance	10% bid preference, "Subcontractor Compensation program": e.g., the Adarand case	8(a) program, Rule of two	Numeric set-asides

under this approach, shaded policies would be appropriate only as remedies for lingering or ongoing discrimination



Opportunity

Results

Attachment 2: A Least Intrusive Alternative Approach

Opportunity ----- Results

	Opportunity Enhancing Assistance	Advantages & Flexible Preferences	Set-asides	Quotas
Education	Compensatory ed; Outreach & recruiting; HBCUs	Multifactor admissions policies: e.g., UC-Berkeley	Group-based programs: e.g., Banneker ; NHI Minority Fellowship ; San Bernardino's Bridge Program	Two-track (i.e., pre-Bakke) admissions
Employment	Outreach & recruiting; Apprenticeships; Second look programs: e.g., the military	Multifactor hiring: e.g., judicial selection ; the Chicago police dept.	Exclusive job listings: e.g., Ill. State Univ. ; anecdotes from academe	Race-normed tests to ensure proportional representation
Contracting & Procurement	Technical assistance; Mentoring; Bonding assistance	10% bid preference; "Subcontractor Compensation program": e.g., the Adarand case	8(a) program; Rule of two	Numeric set-asides

under this approach, shaded policies would be appropriate only in court-ordered remedies

lined programs would be available either to remedy lingering or ongoing discrimination or to increase diversity, but only if less intrusive policies are not effective



Opportunity

Results

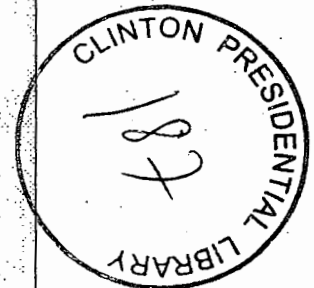
Attachment 3: An Anti-Exclusion Approach

Opportunity ----- Results

Opportunity ----- Results

	Opportunity Enhancing Assistance	Advantages & Flexible Preferences	Set-asides	Quotas
Education	Compensatory ed; Outreach & recruiting; HBCUs	Multifactor admissions policies: e.g., UC-Berkeley	Group-based programs: e.g., Banneker; NIH Minority Fellowship; San Bernardino's Bridge Program	Two-track (i.e., pre-Bakke) admissions
Employment	Outreach & recruiting; Apprenticeships; Second look programs: e.g., the military	Multifactor hiring: e.g., judicial selection; the Chicago police dept.	Exclusive job listings: e.g., Ill.State Univ.; anecdotes from academe	Race-normed tests to ensure proportional representation
Contracting & Procurement	Technical assistance; Mentoring; Bonding assistance	10% bid preference; "Subcontractor Compensation program" e.g., the Adarand case	8(a) program; Rule of two	Numeric set-asides

under this approach, shaded policies would be appropriate only as court-ordered remedies for lingering or ongoing discrimination



(May 3, 1995)



April 20, 1995

MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT (EXCERPTS)

A. Education: Race- or Gender-Specific Scholarships

- 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.

B. Employment: Race or Gender in Layoff Decisions

- 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.

C. Procurement: Preferences & Set-asides

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

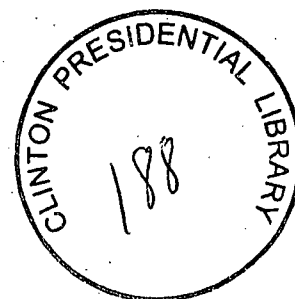
- Option 2: Broaden eligibility, but retain race- and gender-based preferences; emphasize the transitional character of program. In addition to the measures in option 1, take the following steps:

- *Social or Economic Disadvantage*: Eliminate the requirement that owners be

"socially disadvantaged," thus opening up eligibility to white owners who demonstrate "economic disadvantage." Maintain a less stringent economic disadvantage test for minorities and *(for the first time outside DOT)* for women; this separate standard would preserve some differential benefit for minorities and women, but without excluding disadvantaged whites from the program altogether. To minimize any harm to current participants, increase the goal for total SDB procurement from 5% to 10%.

- *Strict transition requirements:* Require graduation from the program for all SDBs after, say, four years or four contract awards. This limits the moral cost of maintaining preferential treatment for women and minorities.

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



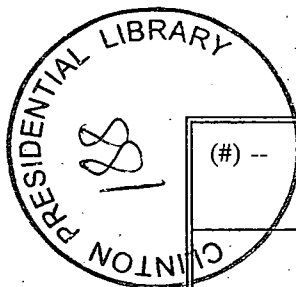


EXHIBIT 1

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

(#) -- indicates option number in the memorandum	Education	Employment	Procurement
"Calibrated, Opportunity" Approach	☐ (1) Maintain current policy requiring exhaustion.	☐ (1) Permit limited consideration of race/gender in layoffs.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility; <i>or</i> ☐ (3) Convert to race-neutral programs.
"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.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility.
"Anti-Exclusion" Approach	☐ (3) Eliminate race- and gender-based aid by expanding eligibility, softening exclusion.	☐ (2) Oppose consideration of race/gender in layoffs.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility; <i>or</i> ☐ (3) Convert to race-neutral programs.

A. *"Calibrated Opportunity" Approach:* Emphasize creating opportunity, not guaranteeing results.

B. *"Least Intrusive Alternative" Approach:* Emphasize narrow tailoring, and concern for bystanders.

C. *"Anti-Exclusion" Approach:* Emphasis on avoiding bald set-asides that announce: "No whites need apply."

Additional Decision: FCC Broadcast Licenses: ☐ (1) Maintain status quo, *or* ☐ (2) Establish a limited tax-certificate program.



April 19, 1995

MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

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

Re: Affirmative Action: Policy Issues

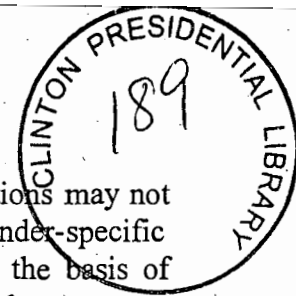
This memorandum presents options regarding federal affirmative action policy. Part I outlines options in four areas: education, employment, procurement, and broadcast licenses. Part II offers three alternative, broader perspectives that may be useful in your deliberations. A subsequent memorandum will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

I. AFFIRMATIVE ACTION IN
EDUCATION, EMPLOYMENT, AND PROCUREMENT

A. Education: Race- or Gender-Specific Scholarships

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

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



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

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

Options. The policy options include:

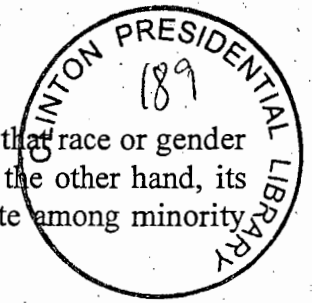
- Option 1: Maintain current policy, which requires "exhaustion" of alternatives to diversity-based use of race- or gender-specific scholarships.**
- Option 2: "Tweak" current policy to require added analysis of alternatives.**
- Option 3: Bar use of such scholarships except as necessary to remedy past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

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

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

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

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



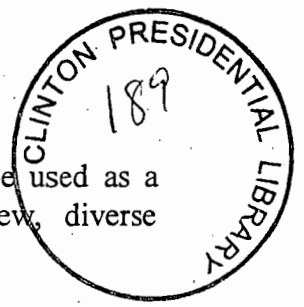
Option 1 would maintain current policy. As noted in our discussions, race- or gender-specific scholarships are small slices of a much larger pie -- much of which is administered on the basis of need. As there are so many different avenues for financial aid, it is possible to argue that race- or gender-specific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

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

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

B. Employment: Race or Gender in Layoff Decisions

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



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

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

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

Options. The policy options include:

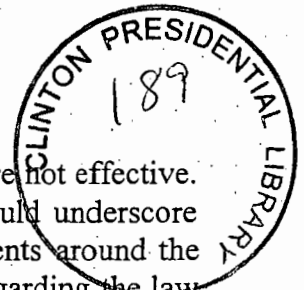
Option 1: As a policy matter, when not inconsistent with a *bona fide* seniority system, diversity may be considered in layoffs, but only in limited circumstances.

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

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

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

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



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

C. Procurement: Preferences & Set-asides

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

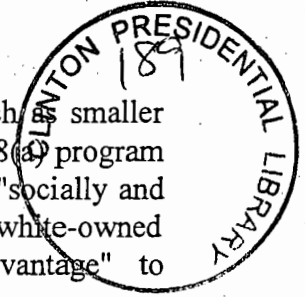
- **Sole source procurements:** Under SBA's 8(a) program, small disadvantaged businesses (SDBs) can secure smaller sole-source contracts (usually less than \$3 million).
- **Sheltered competition:** Under DOD's "rule of two," a contract is set aside for SDBs if the officer believes two or more SDBs are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

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

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

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

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

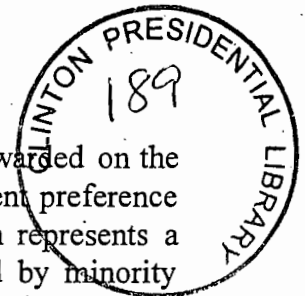


Options. The policy options include:

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

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

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



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

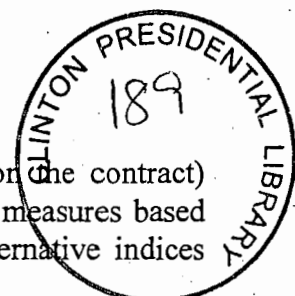
Option 3 would retain a reduced preference program, but focus it sharply on mechanisms more unambiguously related to creating *opportunity* for entrepreneurship, rather than a guarantee of entrepreneurial success. Thus, in addition to technical assistance and other pool-enhancing activities described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

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

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

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

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



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

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

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

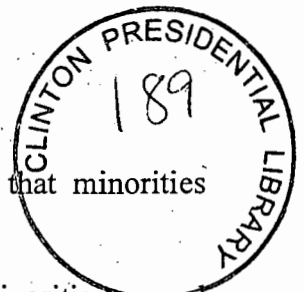
D. FCC Preferences in Broadcast Licenses

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

Options. The policy options include:

Option 1: Maintain the status quo.

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



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

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

II. PUTTING THE PIECES TOGETHER: BROADER PERSPECTIVES

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

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

A. The "Calibrated" Approach

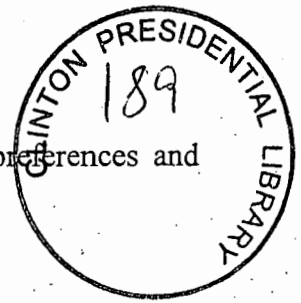
This approach emphasizes the difference between equal opportunity and equal results in two dimensions. In terms of the policy tools one uses, outreach and training are less result-driven and thus less problematic than set-asides or quotas. Similarly, in terms of the context, ant specific affirmative 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 or sharply narrow procurement preferences and set-asides.



B. The "Least Intrusive Alternative" Approach

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

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

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

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

C. The "Anti-Exclusion" Approach

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

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

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

EXHIBIT 1

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

(#) -- indicates option number in the memorandum	Education	Employment	Procurement
"Calibrated, Opportunity" Approach	☐ (1) Maintain current policy requiring exhaustion.	☐ (1) Permit limited consideration of race/gender in layoffs.	☐ (3) Narrow preferences; emphasize "entryway"; add disadvantage as a basis of eligibility; <i>or</i> ☐ (4) Convert to race-neutral programs; 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; emphasize "entryway"; add disadvantage as a basis of eligibility.
"Anti-Exclusion" Approach	☐ (3) Eliminate race- and gender-based aid by expanding eligibility, softening exclusion.	☐ (2) Oppose consideration of race/gender in layoffs.	☐ (2) Expand eligibility to include disadvantaged majority firms; <i>or</i> ☐ (3) Narrow preferences; emphasize "entryway"; add disadvantage as a basis of eligibility.

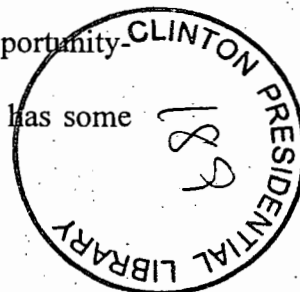
A. "Calibrated Opportunity" Approach: Emphasize creating opportunity, not guaranteeing results. Therefore, opportunity-building contexts (education) and tools (outreach) are strongly favored.

B. "Least Intrusive Alternative" Approach: Emphasize narrow tailoring, that use of race/gender in decisionmaking has some moral cost, and that the interests of bystanders are entitled to some weight in constructing affirmative measures.

C. "Anti-Exclusion" Approach: Emphasis on avoiding bald set-asides that announce: No whites need apply."

Additional Decision Point: FCC Broadcast Licenses

- ☐ (1) Maintain the status quo. ☐ (2) Establish a limited tax-certificate program.





April 15, 1995

MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

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

Re: Affirmative Action: Policy Issues

This memorandum presents options regarding federal affirmative action policy. Part I outlines options in 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.

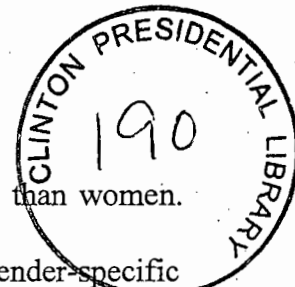
**I. AFFIRMATIVE ACTION IN
EDUCATION, EMPLOYMENT, AND PROCUREMENT**

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.

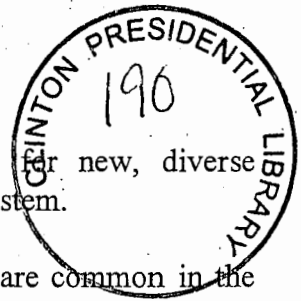
Indeed, current antidiscrimination enforcement guidance from the Department of Education, promulgated during the Reagan Administration pursuant to Title IX, makes the test for gender-specific scholarships whether the financial aid practices of the institution, *taken as a whole*, provide equal opportunity. 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 notwithstanding the musician's affluence. In America today, it remains likely that the neurosurgeon's experiences, perspective, and aspirations will reflect some aspect of the distinctive reality facing blacks. And the college may choose to value that.

B. Employment: Race or Gender in Layoff Decisions

Background. The central issue in this area concerns race or gender as a consideration in layoffs. Under current law, two propositions are clear. First, layoffs cannot be used as a

means to implement an affirmative action policy by "making room" for new, diverse employees. Second, race or gender cannot trump a *bona fide* seniority system.



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

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

Options. The policy options include:

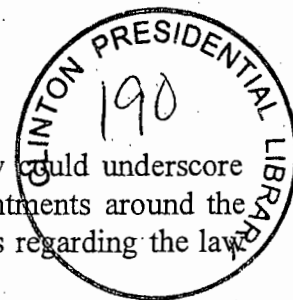
Option 1: As a policy matter, when not inconsistent with a *bona fide* seniority system, diversity may be considered in layoffs, but only in limited circumstances.

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:

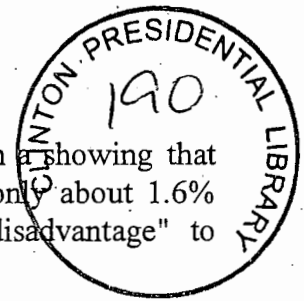
- **Sole source procurements:** Under SBA's 8(a) program, small disadvantaged businesses (SDBs) can secure smaller sole-source contracts (usually less than \$3 million).
- **Sheltered competition:** Under DOD's "rule of two," a contract is set aside for SDBs if the officer believes two or more SDBs are 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.

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.

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.



Options. The policy options include:

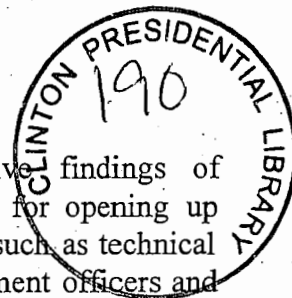
- Option 1: Reform the programs to emphasize transition, eliminate misuses.** This would involve tighter asset-related eligibility rules, phased graduation for all SDBs, limits on the concentration of set-asides in a single region or industry, and standards to determine when preferences are no longer 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.

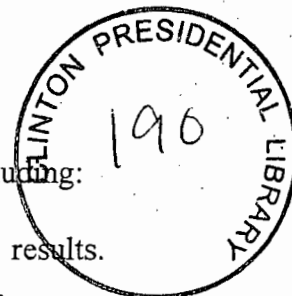
Option 1 would ameliorate some of the most problematic practices in the program. Limiting participation, encouraging graduation, and tightening the asset tests emphasizes that 8(a) is an entryway, not an entitlement. Limiting concentrated use of preferences reduces the unfairness to white bidders in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

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.



some basic inclinations you expressed in our various "vision" discussions, including:

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

A. The "Calibrated" Approach

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

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

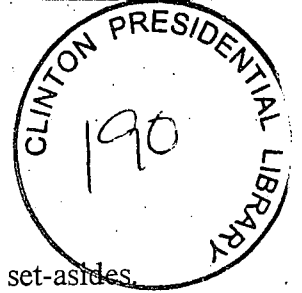
Education: Option 1 -- Maintain current policy.
Employment: Option 1 -- Permit race or gender to be considered in layoff decisions.
Procurement: Option 4 or 3 -- Phase out procurement preferences and set-asides.

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):



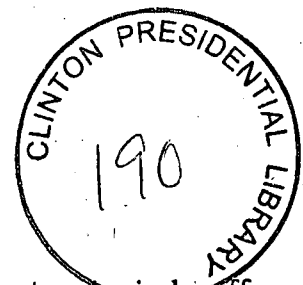
Education: Option 1 or 2 -- Maintain or tighten current policy.
Employment: Indeterminate -- Option 1 or 2.
Procurement: Option 1 or 3 -- Reform or sharply narrow preferences and set-asides.

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.



illustrated in Attachment 2):

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

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

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

EXHIBIT 1

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

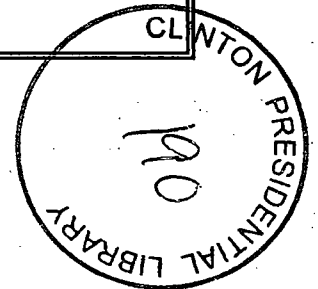
(#) -- indicates option number in the memorandum	Education	Employment	Procurement
"Calibrated, Opportunity" Approach	☐ (1) Maintain current policy requiring exhaustion.	☐ (1) Permit limited consideration of race/gender in layoffs.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility; <i>or</i> ☐ (3) Convert to race-neutral programs.
"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.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility.
"Anti-Exclusion" Approach	☐ (3) Eliminate race- and gender-based aid by expanding eligibility, softening exclusion.	☐ (2) Oppose consideration of race/gender in layoffs.	☐ (2) Reform & sharply narrow preferences; emphasize transition; add disadvantage eligibility; <i>or</i> ☐ (3) Convert to race-neutral programs.

A. *"Calibrated Opportunity" Approach:* Emphasize creating opportunity, not guaranteeing results.

B. *"Least Intrusive Alternative" Approach:* Emphasize narrow tailoring, and concern for bystanders.

C. *"Anti-Exclusion" Approach:* Emphasis on avoiding bald set-asides that announce: "No whites need apply."

Additional Decision: FCC Broadcast Licenses: ☐ (1) Maintain status quo, *or* ☐ (2) Establish a limited tax-certificate program.



THE WHITE HOUSE
WASHINGTON

April 7, 1995



MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

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

Re: Affirmative Action: Themes and Hard Questions

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

I. The Central Issue: Questions about "Preferences"

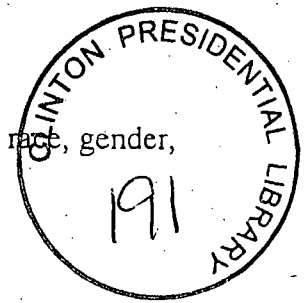
The central and most difficult questions--substantively and politically--concern group-based preferences: what are those preferences and when are they appropriate?

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

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

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

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



II. An Alternative Approach

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

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

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

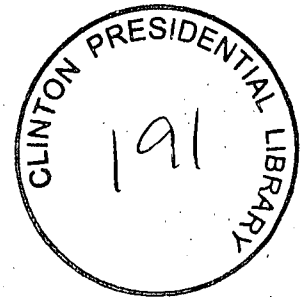
A. Definitions

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

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

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

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



B. Central Propositions

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

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

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

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

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

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

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

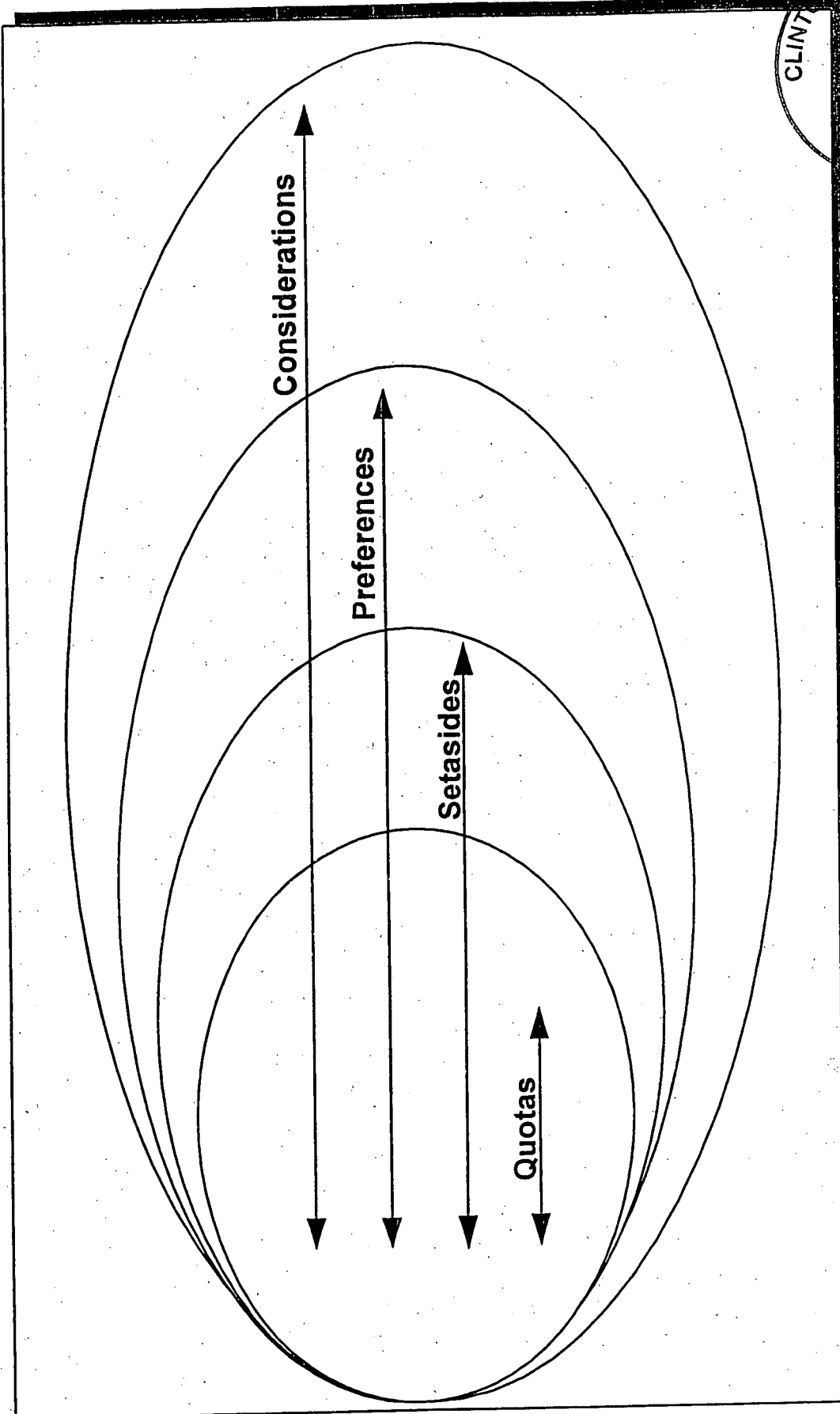
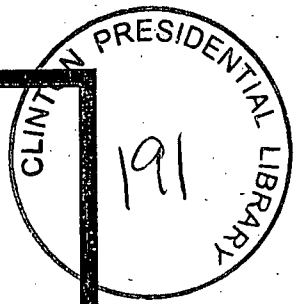
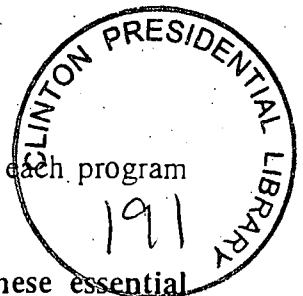


Exhibit 1

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



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

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

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

C. Policy Implications

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

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

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

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

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

(a) are never awarded to unqualified persons;

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

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

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

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

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

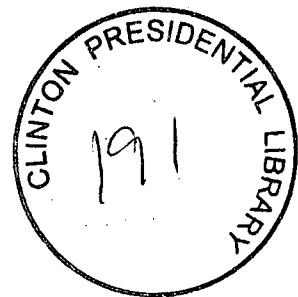
Example: Procurement preferences, such as the §1207 bid preference, must be appropriately designed and justified by the demonstration of past discrimination or lingering effects. Race- and gender-neutral advantages--such as competitive advantages based on "opportunity creation" as measured by employment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

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

III. Conclusion

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

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



Selected Affirmative Action Efforts

Opportunity ----- Results

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

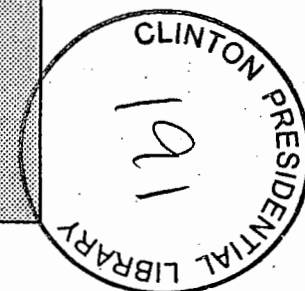
Opportunity

Results

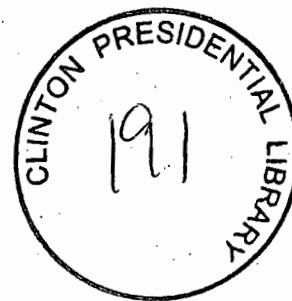
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Exhibit 2



Attachment A: Seven Hard Cases



Case 1. 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) the 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:

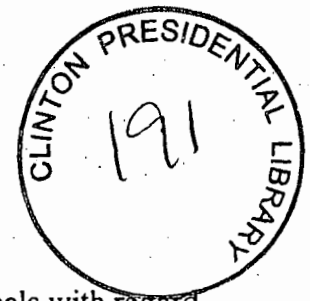
"This is a preference because it limits the competition that minority-owned firms must face. While I support efforts to reach out to minority contractors, I do not support preferences."

The "Alternative" Perspective:

"While I believe preferences are sometimes appropriate in the contracting arena, set-asides are only appropriate in [narrow] remedial contexts. 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.

"There's a better way that includes: (1) outreach and technical assistance to SDBs to enhance opportunity; (2) narrowly tailored preferences to SDBs to redress discrimination; and (3) a broader race-neutral program focusing on the creation of opportunity through race-neutral preferences for companies that create opportunities for disadvantaged workers and communities."



Case 2. Government Contracting & Subcontracting: Incentives.

Scenario:

Based on its finding of discrimination, Congress has established certain goals with regard to minority contracting and subcontracting. To make progress toward those goals, the Department of Transportation 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.¹ These efforts 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 it to ensure it was transitional—to make clear that the program ends when SCCs are no longer needed. I support these programs as an effort to remedy past or lingering discrimination, to level the playing field. These bonuses encourage the rethinking of old prejudices and the opening up old-boy networks."

¹Analytically, this program is a preference but not a set-aside.



Case 3. 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. 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."

Two "Alternative" Perspectives:

A: "Race seems to be a legitimate consideration, particularly in light of the demographics. 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."

B: "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. That's why *layoffs* are different from hiring decisions."



Case 4. 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 to 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:

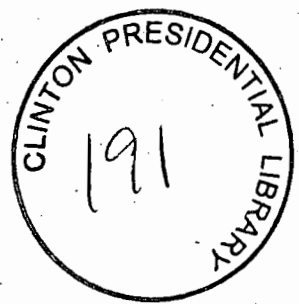
"The Department ignored qualifications in the name of race. The Department promoted some sergeants simply because they belong to certain racial and ethnic groups. This looks like a quota to me: the 5-5-3 ratio of 'merit' promotions precisely tracks the City's population.

"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 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 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.

"The Department's real error was in ever assuming that a written test could somehow capture the full richness of what it means to be a good police officer. The initial list should have been based on the test scores and other relevant considerations."



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 how procurement set-asides differ from targeted scholarships. After more than a century of exclusion and intimidation, the University of Maryland is finally open to African-Americans. The University must put out an effective '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 targeted scholarships--like fellowships for women in basic research--serve important and legitimate purposes. I support them so long as they are flexible, tailored, and there is no comparably effective and group-neutral alternative. In that regard, I would note that the Banneker program is not a quota. There is no requirement that a fixed number of African-Americans irrespective of qualifications be admitted each year."



Case 6. 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:

	% white	% Hispanic	% Asian	% black
Entering class	40	20	28	11
Cal. H.S. grads	63	20	9	8

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:

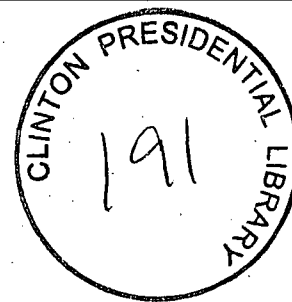
"Berkeley is clearly granting a preference to African-Americans. Competing on the merits of grades and SAT scores, whites would likely capture half or more of the spaces. It's irrelevant that race is 'one of several factors' -- it is still *the* decisive factor in many cases.

"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:

"Creating opportunity and ensuring diversity are appropriate goals--if not obligations--of our universities. Accordingly, race can be a bona fide consideration in admissions. 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 must meet strict threshold requirements, such as a B+ average."

Case 7. 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.

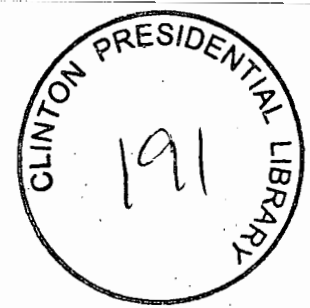
The "Dole" Perspective:

"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 oppose this program as an unnecessary race-based set-aside.

"I'm generally 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. In education, these sorts of set-asides are a little different, but still must be narrowly tailored. The Bridge and Puente programs are designed to meet the special needs of disadvantaged minority students by using familiar curricular material and new educational techniques. I support that objective entirely. It is not, however, necessary to exclude non-minority students in order to achieve these important objectives."



Attachment B

DRAFT PROCUREMENT OPTIONS

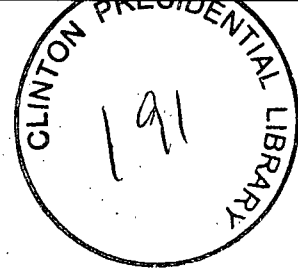
OPTION (A) -- Remedial Preferences and Empowerment Set-Asides

- **Eliminate race/sex-based quotas and set-asides, including "rule-of-two" set-aside**
- **Remedial Preferences:** Use § 1207-style bid price preferences only in modified *Croson* situations only, i.e., where there is a legislatively or administratively determined factual predicate of discrimination or lingering effects of past discrimination, and race- and sex-neutral means will be inadequate.
- **Empowerment Contracting:** Set-asides for "Most Favored Businesses" who are periodically recertified based on objective performance in a combination of (i) hiring targeted disadvantaged workers and (ii) activity in distressed communities.¹ Reform 8(a) to be focus sheltered competition and sole-source contracting for Most Favored Businesses. (Transition for current 8(a) firms.)

OPTION (B) -- Reform Current Programs to Address Perceived Unfairness and Abuses

- **Transitional:**
 - **Graduation:** Graduation requirements for all contracting programs. Link graduation to size, experience. Link "graduation" issue to the individuals, as well as to the firm; avoid churning in corporate form.
 - **Sunsets and Rheostats:** With introduction of electronic commerce, growth of the surety program, and sophistication of the technical assistance, create "rheostats" to moderate the terms of procurement preferences as conditions change. For example, electronic commerce may justify converting the preferences for small SDB contracts into technical assistance and a very short duration in sheltered competition.
- **Curb abuses:**
 - **Anti-Fraud:** Increased enforcement resources against shams and fronts; increased penalties.
 - **Need:** Economic disadvantage: tighten the test to exclude millionaires.
- **Deconcentrate Burdens and Benefits:**
 - **Disaggregate Goals:** Refine goals to incorporate concern for sectoral and regional integration - opening up opportunities outside of the customary fields, and outside of the customary regions.
 - **No Concentrated Burdens:** Limit regional set-aside "crowding," as at Barksdale AFB. No contracting entity may apply preferences to more than a set percent of contracts.
- **Enhancing the effort:**
 - **Pool Outreach/Technical Assistance:** Better linkage of technical assistance efforts with procurement opportunities. Better technical assistance for prime contractors looking for subcontractors (in part to avoid pressure to rely on fronts and shams); expand the OFCCP/GSA pilot program.
 - **Reorganization:** SBA's 8(a) program and Commerce's MBDA program at Commerce.
 - **Subcontracting Plans:** Strengthen requirements/incentives for large primes to develop plans for outreach to SDB subcontractors.

¹ This recasts the Labor Surplus Area program to make it far more effective and aggressive, focused on structural distress rather than countercyclical assistance.



DRAFT EMPLOYMENT OPTIONS

■ ***Strengthen Enforcement:***

- More enforcement resources for OFCCP -- both for compliance and for reverse discrimination.
- More enforcement resources, and added dispute resolution flexibility, for the EEOC to eliminate its backlog over three years.
- Update the statistical labor market data base used by OFCCP to determine the reasonableness of employment goals.

■ ***Reduce burdens:***

- Raise the OFCCP threshold to \$100,000 as part of paperwork reduction and procurement reform. [DOL strongly opposes.]
- Eliminate "flowdown" of OFCCP requirements to subcontractors on commercial procurements. [DOL strongly opposes.]
- Eliminate the 30-day delay for pre-contracting surveys (since adverse survey result does not, by court order, result in delay or modification of the procurement action anyway).
- Scale the reporting and audit "burden" to the size of the enterprise or the magnitude of the contract, or both. [DOL questions.]
- Relaxed paperwork and audit burden for good performers. Reduce paperwork burden otherwise -- form simplification, etc.

■ ***Clarify rights and responsibilities:***

- Revise E.O. 11246 or the regulations to require that plans expressly prohibit hiring unqualified individuals in order to achieve a plan's goals.
- Revise regulations so that, for the largest employers, plans should provide for EO training of personnel officers to prevent abuses of reverse discrimination and numerical straight jackets.
- Balanced notice. Ensure that employees receive notice about the legal limitations on affirmative action plans, and of their right to redress for discrimination *and* reverse discrimination.

■ ***Research on Diversity and Merit Selection:***

- Interagency development of alternative job-related selection devices as alternatives to, or in addition to, paper-and-pencil tests. The goal would be to develop a variety of mechanisms that would provide broader criterion on which to base merit selection, without disparate impact.

THE WHITE HOUSE
WASHINGTON

April 7, 1995



MEMORANDUM FOR THE PRESIDENT & THE VICE PRESIDENT

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

Re: Affirmative Action: Themes and Hard Questions

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

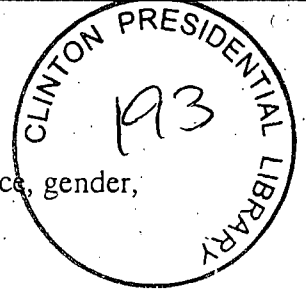
I. The Central Issue: Questions about "Preferences"

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

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

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

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



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

II. An Alternative Approach

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

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

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

A. Definitions

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

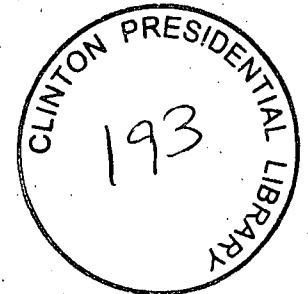
gender, race, or ethnicity. A preference does not include consideration of such characteristics, when consideration is essential to the effective operation of the institution or enterprise. *Example:* DOD provides a 10% bid preference to SDBs in certain situations. Because status as an SDB is not "essential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

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

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

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

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



B. Central Propositions

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

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

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

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

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

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

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

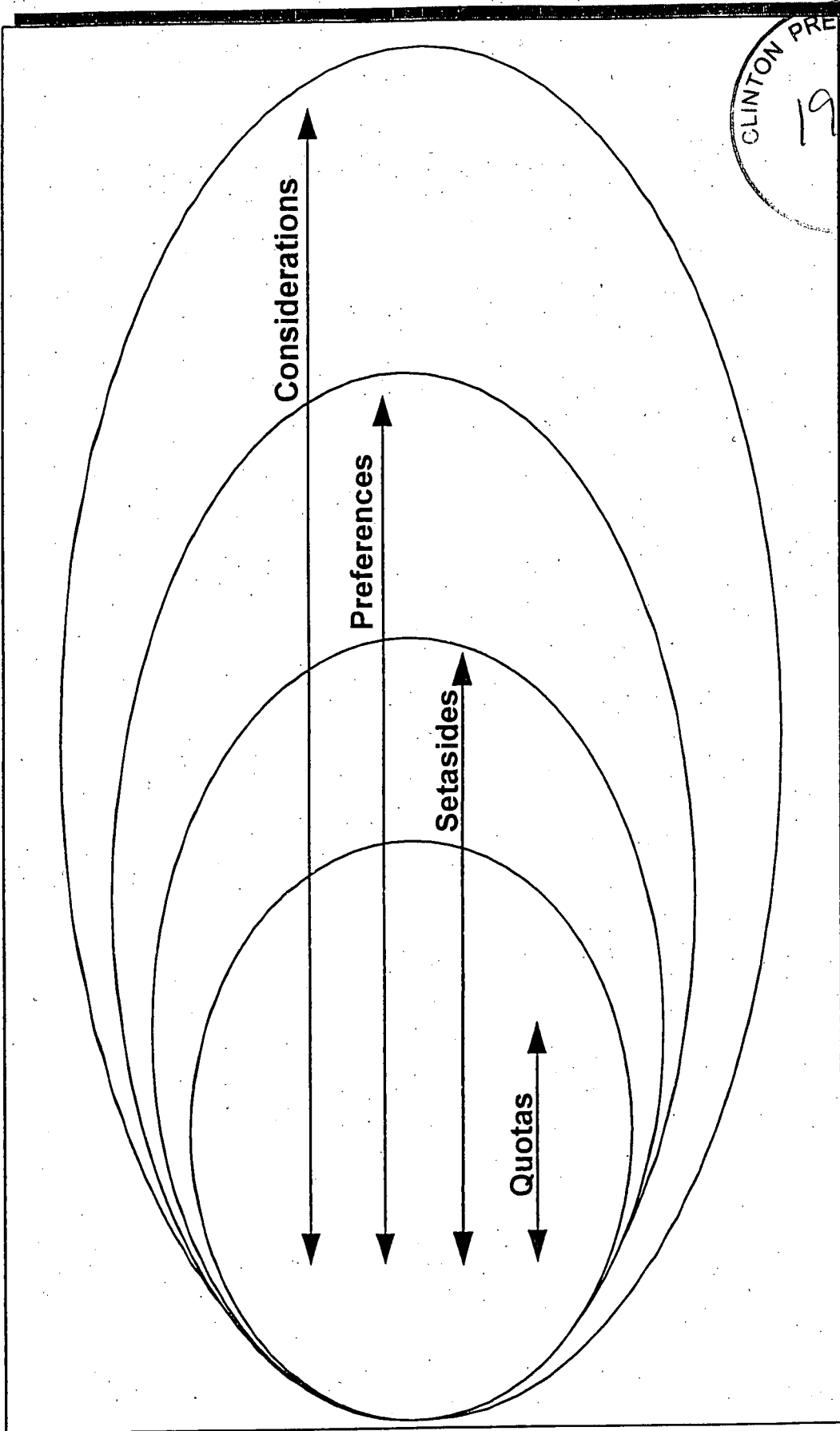
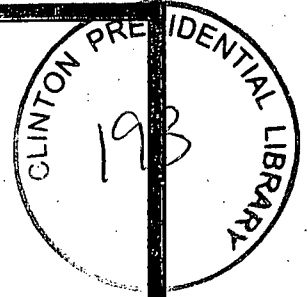


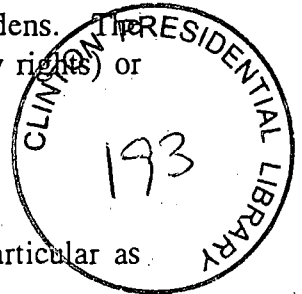
Exhibit 1

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

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

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

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



C. Policy Implications

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

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

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

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

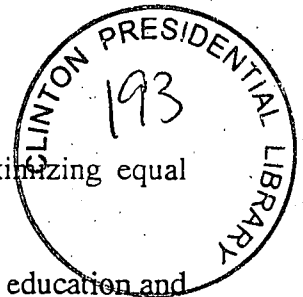
- **Implication 2:** Preferences and set-asides in education and preferences in employment are appropriate to maximize equal opportunity and inclusiveness but only if they

(a) are never awarded to unqualified persons;

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

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

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



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

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

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

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

III. Conclusion

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

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

Selected Affirmative Action Efforts

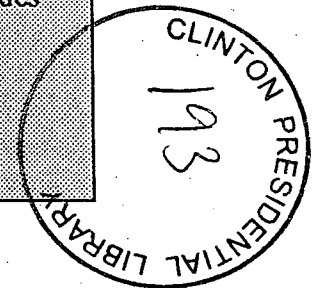
Opportunity ----- Results

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

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Results
----- Opportunity

Yu Draft/April 6, 1995 AM

Exhibit 2



Attachment A: Seven Hard Cases



Case 1. 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) the 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 support efforts to reach out to minority contractors, I do not support preferences."

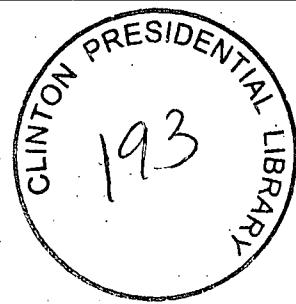
The "Alternative" Perspective:

"While I believe preferences are sometimes appropriate in the contracting arena, set-asides are only appropriate in [narrow] remedial contexts. 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.

"There's a better way that includes: (1) outreach and technical assistance to SDBs to enhance opportunity; (2) narrowly tailored preferences to SDBs to redress discrimination; and (3) a broader race-neutral program focusing on the creation of opportunity through race-neutral preferences for companies that create opportunities for disadvantaged workers and communities."

Case 2. Government Contracting & Subcontracting: Incentives.



Scenario:

Based on its finding of discrimination, Congress has established certain goals with regard to minority contracting and subcontracting. To make progress toward those goals, the Department of Transportation 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:

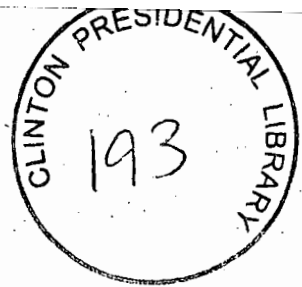
"The SCC is a preference based the race of the owner of the subcontractor. I'm generally opposed to such preferences. Let me just say that race seems truly irrelevant to the business of road-building. If there is discrimination in contracting, it should be prosecuted and eradicated. But contracting takes 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.¹ These efforts 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 it to ensure it was transitional--to make clear that the program ends when SCCs are no longer needed. I support these programs as an effort to remedy past or lingering discrimination, to level the playing field. These bonuses encourage the rethinking of old prejudices and the opening up old-boy networks."

¹Analytically, this program is a preference but not a set-aside.



Case 3. 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. 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.

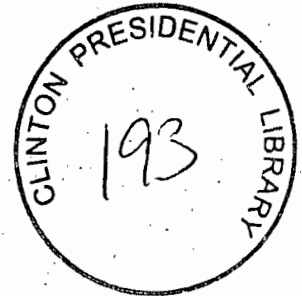
The "Dole" Perspective:

"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."

Two "Alternative" Perspectives:

A: "Race seems to be a legitimate consideration, particularly in light of the demographics. 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."

B: "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. That's why *layoffs* are different from hiring decisions."



Case 4. 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 to 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:

"The Department ignored qualifications in the name of race. The Department 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.

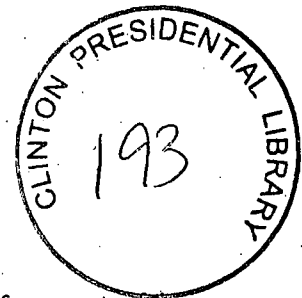
"Clearly, minorities did poorly on the promotion exam. The racial composition of the group receiving 'merit' promotions indicates to me that certain candidates received a preference--they had lower test score than white candidates but were nonetheless promoted."

The "Alternative" Perspective:

"This is a classic situation in which race is 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 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.

"The Department's real error was in ever assuming that a written test could somehow capture the full richness of what it means to be a good police officer. The initial list should have been based on the test scores and other relevant considerations."

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.

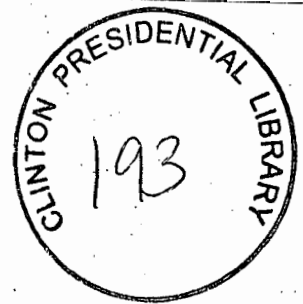
The "Dole" Perspective:

"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 how procurement set-asides differ from targeted scholarships. After more than a century of exclusion and intimidation, the University of Maryland is finally open to African-Americans. The University must put out an effective '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 targeted scholarships--like fellowships for women in basic research--serve important and legitimate purposes. I support them so long as they are flexible, tailored, and there is no comparably effective and group-neutral alternative. In that regard, I would note that the Banneker program is not a quota. There is no requirement that a fixed number of African-Americans irrespective of qualifications be admitted each year."



Case 6. 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:

	% white	% Hispanic	% Asian	% black
Entering class	40	20	28	11
Cal. H.S. grads	63	20	9	8

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:

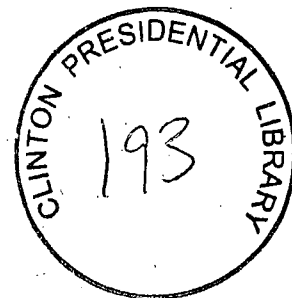
"Berkeley is clearly granting a preference to African-Americans. Competing on the merits of grades and SAT scores, whites would likely capture half or more of the spaces. It's irrelevant that race is 'one of several factors' -- it is still *the* decisive factor in many cases.

"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:

"Creating opportunity and ensuring diversity are appropriate goals--if not obligations--of our universities. Accordingly, race can be a bona fide consideration in admissions. 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 must meet strict threshold requirements, such as a B+ average."

Case 7. 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?"

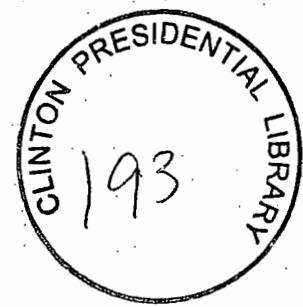
The "Alternative" Perspective:

"I oppose this program as an unnecessary race-based set-aside.

"I'm generally 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. In education, these sorts of set-asides are a little different, but still must be narrowly tailored. The Bridge and Puente programs are designed to meet the special needs of disadvantaged minority students by using familiar curricular material and new educational techniques. I support that objective entirely. It is not, however, necessary to exclude non-minority students in order to achieve these important objectives."

Attachment B

DRAFT PROCUREMENT OPTIONS



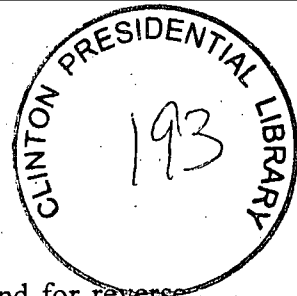
OPTION (A) -- Remedial Preferences and Empowerment Set-Asides

- **Eliminate race/sex-based quotas and set-asides, including "rule-of-two" set-aside**
- **Remedial Preferences:** Use § 1207-style bid price preferences only in modified *Croson* situations only, i.e., where there is a legislatively or administratively determined factual predicate of discrimination or lingering effects of past discrimination, and race- and sex-neutral means will be inadequate.
- **Empowerment Contracting:** Set-asides for "Most Favored Businesses" who are periodically recertified based on objective performance in a combination of (i) hiring targeted disadvantaged workers and (ii) activity in distressed communities.¹ Reform 8(a) to be focus sheltered competition and sole-source contracting for Most Favored Businesses. (Transition for current 8(a) firms.)

OPTION (B) -- Reform Current Programs to Address Perceived Unfairness and Abuses

- **Transitional:**
 - **Graduation:** Graduation requirements for all contracting programs. Link graduation to size, experience. Link "graduation" issue to the individuals, as well as to the firm; avoid churning in corporate form.
 - **Sunsets and Rheostats:** With introduction of electronic commerce, growth of the surety program, and sophistication of the technical assistance, create "rheostats" to moderate the terms of procurement preferences as conditions change. For example, electronic commerce may justify converting the preferences for small SDB contracts into technical assistance and a very short duration in sheltered competition.
- **Curb abuses:**
 - **Anti-Fraud:** Increased enforcement resources against shams and fronts; increased penalties.
 - **Need:** Economic disadvantage: tighten the test to exclude millionaires.
- **Deconcentrate Burdens and Benefits:**
 - **Disaggregate Goals:** Refine goals to incorporate concern for sectoral and regional integration - opening up opportunities outside of the customary fields, and outside of the customary regions.
 - **No Concentrated Burdens:** Limit regional set-aside "crowding," as at Barksdale AFB. No contracting entity may apply preferences to more than a set percent of contracts.
- **Enhancing the effort:**
 - **Pool Outreach/Technical Assistance:** Better linkage of technical assistance efforts with procurement opportunities. Better technical assistance for prime contractors looking for subcontractors (in part to avoid pressure to rely on fronts and shams); expand the OFCCP/GSA pilot program.
 - **Reorganization:** SBA's 8(a) program and Commerce's MBDA program at Commerce.
 - **Subcontracting Plans:** Strengthen requirements/incentives for large primes to develop plans for outreach to SDB subcontractors.

¹ This recasts the Labor Surplus Area program to make it far more effective and aggressive, focused on structural distress rather than countercyclical assistance.



DRAFT EMPLOYMENT OPTIONS

■ ***Strengthen Enforcement:***

- More enforcement resources for OFCCP -- both for compliance and for reverse discrimination.
- More enforcement resources, and added dispute resolution flexibility, for the EEOC to eliminate its backlog over three years.
- Update the statistical labor market data base used by OFCCP to determine the reasonableness of employment goals.

■ ***Reduce burdens:***

- Raise the OFCCP threshold to \$100,000 as part of paperwork reduction and procurement reform. [DOL strongly opposes.]
- Eliminate "flowdown" of OFCCP requirements to subcontractors on commercial procurements. [DOL strongly opposes.]
- Eliminate the 30-day delay for pre-contracting surveys (since adverse survey result does not, by court order, result in delay or modification of the procurement action anyway).
- Scale the reporting and audit "burden" to the size of the enterprise or the magnitude of the contract, or both. [DOL questions.]
- Relaxed paperwork and audit burden for good performers. Reduce paperwork burden otherwise -- form simplification, etc.

■ ***Clarify rights and responsibilities:***

- Revise E.O. 11246 or the regulations to require that plans expressly prohibit hiring unqualified individuals in order to achieve a plan's goals.
- Revise regulations so that, for the largest employers, plans should provide for EO training of personnel officers to prevent abuses of reverse discrimination and numerical straight jackets.
- Balanced notice. Ensure that employees receive notice about the legal limitations on affirmative action plans, and of their right to redress for discrimination *and* reverse discrimination.

■ ***Research on Diversity and Merit Selection:***

- Interagency development of alternative job-related selection devices as alternatives to, or in addition to, paper-and-pencil tests. The goal would be to develop a variety of mechanisms that would provide broader criterion on which to base merit selection, without disparate impact.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001 memo	Alexis Herman to President Clinton, re: Meeting with Jesse Jackson (1 page)	3/8/1995	P5 4236

COLLECTION:

Clinton Presidential Records
Public Liaison
Alexis Herman/Ruby Moy
OA/Box Number: 5903

FOLDER TITLE:

Memorandum to President - Meetings with Jesse Jackson

Whitney Ross
2008-0308-F
wr915

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).

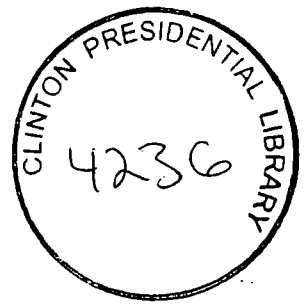
RR. Document will be reviewed upon request.

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]
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- 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]

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March 8, 1995

MEMORANDUM TO THE PRESIDENT

FROM: ALEXIS M. HERMAN

SUBJECT: SUGGESTED POTUS DROP-BY TO MEETING WITH REV.
JACKSON

Rev. Jesse Jackson and a group of others will be meeting with Leon Panetta, Harold Ickes, George Stephanopoulos and me on a long-standing request for a White House meeting to discuss a conference on jobs and Affirmative Action.

We have delayed honoring this request until we were further into our strategy on Affirmative Action.

Given our overall political strategy, it is important that you do a five - minute drop-by since this meeting request has been a long-standing request to meet with you personally. The meeting will be in the Roosevelt Room today between 2:30 and 3:30 p.m.. We would like you to drop-by between 3:00-3:15 if possible.

At the drop-by, you should convey, privately, to Rev. Jackson that you have worked out a date to meet with him, and that you are interested in having him accompany you to Haiti (per Tony Lake's suggestion).

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
0014 memo	Marcia Hale to the POTUS, re: Affirmative Action (1 page)	3/27/1995	P5 4233

COLLECTION:

Clinton Presidential Records
WHORM - Subject File General
HU012
OA/Box Number: 23338

FOLDER TITLE:

106814SS

Whitney Ross
2008-0308-F
wr853

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]
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RR. Document will be reviewed upon request.

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

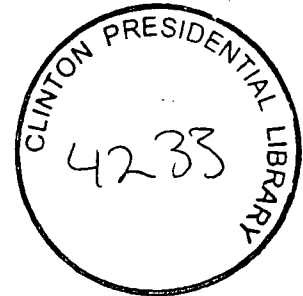
- b(1) National security classified information [(b)(1) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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THE WHITE HOUSE
WASHINGTON

106814 SS
H4012
THE PRESIDENT HAS SEEN
3/28/95

March 27, 1995



MEMORANDUM TO THE PRESIDENT

FROM: MARCIA L. HALE *MHA*
CC: ERSKINE BOWLES
HAROLD ICKES
ALEXIS HERMAN
RE: AFFIRMATIVE ACTION

Harold has told me of your interest in having a meeting while you are in Atlanta regarding Affirmative Action. I have spoken with both Gordon Giffin and Steve Wrigley (Zell's Chief of Staff) about the possibilities of doing so Tuesday evening.

It has been suggested that you hold the meeting at the Governor's mansion immediately following the reception that Zell is hosting for attendees of the economic conference. The reception is scheduled to end at 8:00 pm.

Gordon has suggested that you keep the meeting moderately small so it can be productive and still leave time for you and Governor Miller to have dinner at a reasonable hour. Suggested attendees are: Andy Young, Maynard Jackson, Bill Campbell, John Lewis (if he's in town), Jeanette Coles and Herman Russell. Is this okay with you?

You suggested to Harold that Ray McClendon be invited as well. You should know that McClendon and Mayor Campbell are in the middle of a disagreement which is playing out in the local press. McClendon is invited to the reception and economic conference, so you will see him while you are in Atlanta even if he is not part of this meeting - which is the suggestion of those consulted.

The Governor would like to know if you want to have dinner at the Mansion or go to a nearby restaurant. I think he would prefer to take you out - another argument for a smaller meeting so that you could leave for dinner around 9:00 pm. Can I tell Governor Miller that dinner at a restaurant is fine with you?

Please let me know if you have any questions.

COPY

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Todd Stern to President Clinton, re: Affirmative Action (13 pages)	6/30/1995	P5 4234
002. memo	Duplicate - Todd Stern to President Clinton, re: Affirmative Action (12 pages)	6/30/1995	P5 Dup

COLLECTION:

Clinton Presidential Records
WHORM - Subject File General
HU012
OA/Box Number: 23338

FOLDER TITLE:

118056SS

2008-0308-F
wr857

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

CS
Stephanopoulos
memo re:
Affirmative
Action

THE WHITE HOUSE
WASHINGTON

June 30, 1995

118056 SS

HU012



MEMORANDUM FOR THE PRESIDENT

FROM: TODD STERN *TDS*
SUBJECT: Affirmative Action

Attached is a Stephanopoulos/Edley decision memo on affirmative action. There are four principal decision points.

Speech site. George and Chris recommend Central High School in Little Rock for a July 19 speech, but present Constitution Hall and Atlanta as alternatives. They also mention four already scheduled conventions, none of which seems promising.

The Adarand Directive. This Directive (a draft is at Tab A) would formally establish the review process led by the Attorney General and require her to give you a progress report in 90 days. The issue is whether to issue a Directive at all and, if so, whether to do it now or defer it, probably until the time of the speech.

Procurement Setasides. Four options are presented: (1) baseline anti-abuse reforms only; (2) eliminating current SDB programs with an instruction to develop a new program meeting the broader objectives of antidiscrimination, entrepreneurial opportunity, and economic development; (3) same as option (2), but not providing as much detail about what the new program should be; (4) eliminating race-based setasides, creating a sheltered competition program based on geography only.

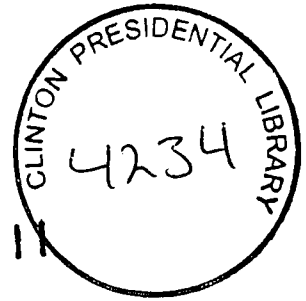
Use of Race or Gender in Layoffs -- Piscataway. The options are to allow diversity to be considered in a flexible manner and in limited circumstances -- DOJ's current *Piscataway* position; or to declare, as a matter of policy, that race or gender shouldn't be considered in layoff decisions.

We have circulated this memo to all relevant staff in the White House. Given the scope of the decisions, you may well want to have a meeting to work these issues through.

COPY

THE WHITE HOUSE
WASHINGTON

95 JUN 28 P7:11



June 27, 1995

MEMORANDUM FOR THE PRESIDENT

From: George panopoulos and Christopher Edley, Jr. 

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

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

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

I. The Speech: Content and Venue

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

Among the possible program examples are:

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

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

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



The problematic: Programs you believe need revisions include: Contracting 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*

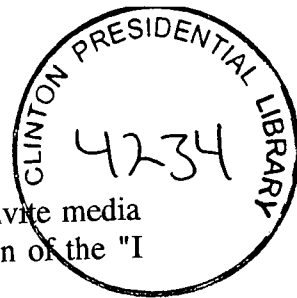
Recommended option. This site would allow your speech and the issues surrounding affirmative action to be framed within the larger context of the civil rights movement and the struggle for equal justice and opportunity. The media would use the school's history when covering the speech. When combined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

_____ Audience of church congregations
_____ Other

_____ Atlanta, (site TBD)

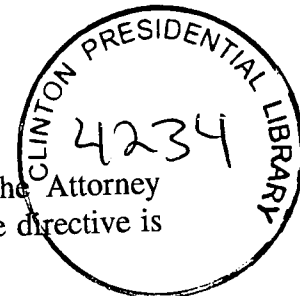
_____ Convention

_____ of Presbyterians
_____ of La Raza
_____ of black chamber of commerce
_____ of Business and Professional Women

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

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

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



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

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

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

There are three options for the Directive:

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

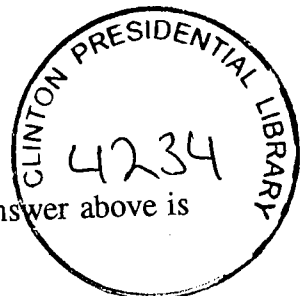
Pro: By not issuing a presidential document we avoid making White House news, and leave this as a DOJ story about legal matters. Although we have a response to a question about the relationship to the Review, that response is best delivered at the time of the speech.

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

OPTION 2: ISSUE THE DIRECTIVE NOW

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

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



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

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

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

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

Decision:

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

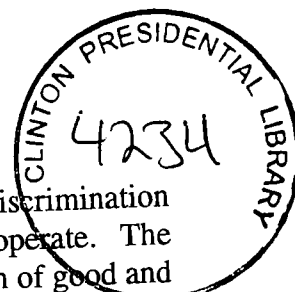
Commission. Congressional interest in a bipartisan commission has waned. Your advisers and the agencies all believe that a fact-finding commission on compliance with *Adarand* would not be helpful -- either as a practical matter of getting the empirical and legal work done, or as a matter of winning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

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

III. The Review

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

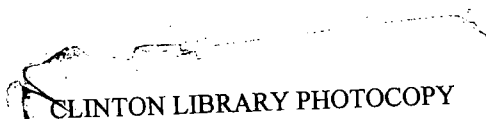
the *Adarand* case, a review of evidence documenting the continuing problem of discrimination and exclusion, and a description of the range of Federal programs and how they operate. The draft of the Review prepared prior to *Adarand* also included a balanced presentation of good and bad information collected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

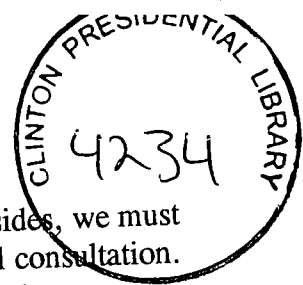


IV. Decision on Procurement Setasides

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

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





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

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

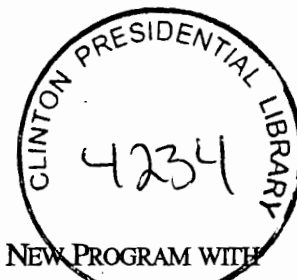
- (1) announce only the baseline anti-abuse reforms described above, leaving further reforms until after the DOJ-led review of *Adarand* compliance;
- (2) eliminate current SDB programs as being excessively rigid and exclusionary (although in DOJ's view defensible). Instruct agencies to develop a new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

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

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

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

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.

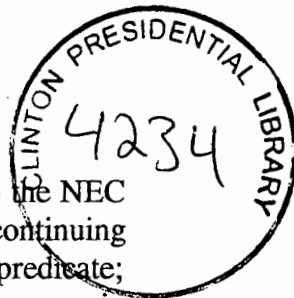
Pro: This incorporates the three key policy priorities you have expressed to us. Specificity of the objectives underscores the commitment to a follow on program, so that your critique of current programs does not signal abandonment of MBEs and WBEs. DOJ believes the resulting program design would be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

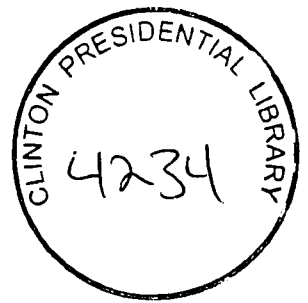
Con: With only a vague commitment about some future replacement, this option will be perceived by setaside supporters as an abandonment of minority and women entrepreneurship. More generally, the vagueness of the planned replacement will be criticized as a "dodge," and the asserted need to do careful 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.

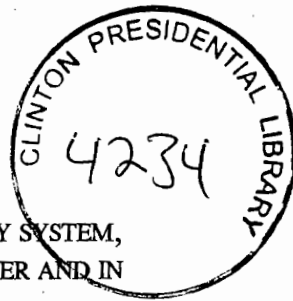
V. Decision on Use of Race or Gender in Layoffs: *Piscataway*

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.

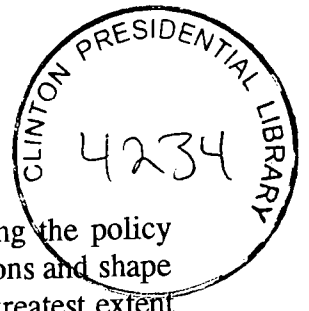
Pro: This option would issue a sharp and clear statement -- layoffs are different -- and would provide some comfort to whites, males, and their dependents, in a time of insecurity. (There would be a corresponding reinforcement of minority and women concerns about their marginality.) In the public employment 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
001. memo	Lynn Cutler to Harold Ickes et al. [partial] (1 page)	03/08/1995	P6/b(6)
002. memo	Betsy Myers to Barbara Woolley, re: Recommended Names for President's Affirmative Action Event (2 pages)	3/13/1995	P5
003. memo	Betsy Myers to President Clinton, re: Speech to DNC Chairs (1 page)	7/12/1995	P5 4235

COLLECTION:

Clinton Presidential Records
Public Liaison
Barbara Woolley
OA/Box Number: 23688

FOLDER TITLE:

Affirmative Action Documents 2 [2]

Whitney Ross
2008-0308-F
wr483

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).

DD. Document will be reviewed upon request

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

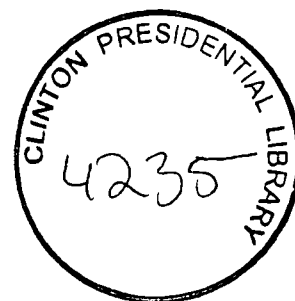
- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or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

COPY

THE WHITE HOUSE

WASHINGTON

July 12, 1995



INFORMATION

MEMORANDUM TO THE PRESIDENT

FROM: BETSY MYERS
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR FOR WOMEN'S INITIATIVES AND OUTREACH

SUBJECT: SPEECH TO DNC CHAIRS ON TUESDAY EVENING, JULY 11, 1995,
OPPORTUNITY TO MOVE OUR MESSAGE TO WOMEN

While your speech was enthusiastic and well received, I wanted to pass along to you that several women commented that they felt excluded because the speech, like others you have delivered, failed to address women directly.

I feel that we missed a tremendous opportunity to activate our state leaders about accomplishments of the Administration for women. This audience, in particular, will be moving our message.

Although this consistent omission is unintentional, the perception is not. Women are looking to be included in your speeches and "picture." Your speeches offer one of the best opportunities to show women that we not only care about them but we are aware of their concerns and that their issues and their votes are important to us.

I attach, for your convenience, my memo on "Targeting Women in Your Speeches," dated June 29, 1995.

cc: Harold Ickes

COPY

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Alexis Herman to the POTUS and VPOTUS, re: Affirmative Action Procurement Reform (6 pages)	4/8/1996	P5 4360
002. telefax	Ginger Lew to Kitty Higgins and Alexis Herman (2 pages)	03/28/1996	P5, P6/b(6)
003. memo	Richard Hayes to Kris Balderston, re: Affirmative Action (1 page)	4/12/1996	P5
004. list	Status of Affirmative Action Activities (2 pages)	4/19/1996	P5

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FOLDER TITLE:

Box 1, Folder 1: [Affirmative Action - March 20, 1995 to May 22, 1996] [3]

Whitney Ross
2008-0308-F
wr476

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)]

- 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]



MEMORANDUM FOR THE PRESIDENT AND VICE-PRESIDENT

FROM: ALEXIS HERMAN Close Hold
JACK QUINN

DATE: APRIL 8, 1996 (Draft)

RE: AFFIRMATIVE ACTION PROCUREMENT REFORM

Summary

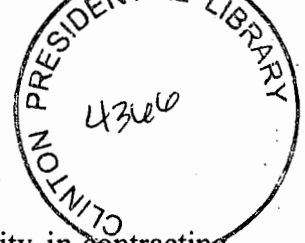
This memorandum forwards for your consideration the Justice Department's proposal for reforming federal affirmative action procurement to ensure compliance with the constitutional standards established in Adarand Constructors, Inc. V. Peña (June 12, 1995). The proposal will be published in the Federal Register for a 60-day comment period, after which its structure would form a model for setting up the affirmative action provisions of the Federal Acquisition Streamlining Act (FASA) Regulation and the Defense Federal Acquisition Regulation Supplement. The proposal is intended to take effect October 1, 1996.

Background of this Issue

On July 19, 1995, you directed the Justice Department to review federal affirmative action programs to ensure their constitutionality under the Supreme Court's Adarand decision, also their effectiveness, and fairness. The Court ruled, that federal affirmative action programs must serve a compelling government interest and must be narrowly tailored, if race and ethnicity were used as a basis for decision making. Adarand involved government contracting, but the court's decision also extends to federal employment, and health and education programs.

After a thorough review of legislative history and economic and statistical data, the Department of Justice concluded, that there still exists a compelling need for federal procurement programs that benefit disadvantaged minority businesses. Their proposal would change the administration of a wide range of race-conscious means now used in government contracting to promote minority participation, but not eliminate them. It doesn't cover affirmative action in procurement undertaken by states and localities pursuant to programs funded by federal agencies, e.g., Disadvantage Enterprise Program that the Department of Transportation administers pursuant to the Intermodal Surface Transportation Act of 1991. These programs are still under review at Justice. In 1995, only 6.5 percent of the federal government's purchasing was conducted with disadvantaged businesses even with the use of affirmative action programs.

The Department of Justice's proposal incorporates the following elements into a system



they believe is consistent with your commitment to ensuring equal opportunity in contracting, responds to the courts' narrow tailoring requirements, and is faithful to statutory authority:

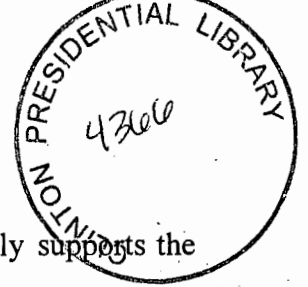
- Safeguards against fraud and abuse by firms that should not be certified as socially disadvantaged businesses and prosecution of those that intentionally abuse the system.
- System of market-sensitive benchmarks to govern the use of provisions that allow race to be considered in making federal procurement awards.
- Several race-conscious means — SBA's 8(a) program, and price and evaluation credits in subcontracting — would be permitted to promote minority procurement. Various race-neutral outreach and technical assistance activities are permitted as well to enhance contracting opportunities for SDBs.
- Use of price and evaluation credits would be governed by the level to which minority firms are actually receiving federal contracts and dollars in an industry. Where minority participation is below the benchmarks, race-conscious methods of contracting would be authorized. Where minority participation exceeds the benchmark, the use of race may be curtailed.
- Set-asides, such as the "Rule of Two" — that the Defense Department suspended last October on the advice of the Justice Department — would not be permitted, until "lesser" means have been tried for three years — e.g., prices and evaluation credits — and found unsuccessful in ensuring minority contracting opportunities.
- The 8(a) program is unaffected by the proposal, other than counting 8(a) awards to SDBs toward the benchmarks — where minority awards exceed the benchmark in an industry, SBA may cut back on 8(a) awards in that industry. There will be no moratorium on 8(a) awards or structural changes to the program.

Justice's Proposal and Clinton Administration Support for Affirmative Action

These factors are considerations in your decision to accept Justice's proposal for mending affirmative action in federal procurement and publishing it for public comment:

Pros:

- Justice believes their proposal satisfies the constitutional requirements of Adarand.
- Justice's proposal "mends, but does not end" affirmative action in federal procurement.
- Justice's proposal provides further evidence of your commitment to affirmative



action programs that are done right. Currently available evidence overwhelmingly supports the continued need for affirmative action in federal procurement.

-- Justice's proposal is generally regarded by Civil Rights Groups and the minority business community as a reasonable approach to Adarand. However, they disagree with Justice's recommendation to wait three-years, before deciding if set-asides are still needed to eliminate any remaining impediments to the development of minority-owned businesses. If not changed, this time frame would cause this issue to be raised in the third year of your second administration.

-- Justice's proposal makes it easier for individuals who do not benefit from a presumption of being socially and economically disadvantaged to qualify for the program by lowering the standard of proof SBA will require.

-- Justice's proposal provides the basis for an alternative to Dole-Canady, which Democrats and moderate Republicans can point to, as proof that your Administration is serious about "mending" affirmative action programs. If enacted, Dole-Canady would effectively overturn decades of Supreme Court decisions regarding affirmative action.

Cons:

-- Justice's proposal is being presented at a time of unprecedented and wholesale attacks on affirmative action programs in the Congress, at the state level, and in the courts. Besides Dole-Canady, which will soon be taken up by the House Judiciary Committee:

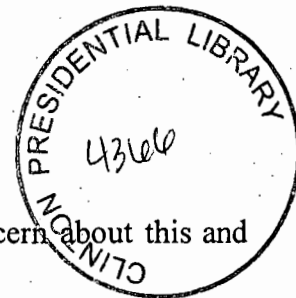
- The self-titled California Civil Rights Initiative, if enacted this fall, would ban race and gender preferences for minorities and women. Similar efforts will appear on the ballot in several states this fall and is being considered by several state legislatures.

- The Governor of Louisiana signed an executive order suspending affirmative action programs. Several states and cities are following suit.

- The Hopewood decision, if it stands, would have a sweeping impact on the ability of higher education institutions in this country to achieve the widely-recognized goal of diversity. The Attorney General of Texas is seeking a review of the Fifth Circuit's decision, and it is expected that the Justice Department would take all appropriate action to ensure that diversity in education remains a part of the fabric of our nation's law.

- There have been several court cases challenging the use of affirmative action in contracting and the constitutionality of the 8(a) program. While Justice lawyers have prevailed to date, most recently in the tenth circuit, additional challenges are likely to continue.

-- Justice's proposal focuses on the narrow tailoring requirements of Adarand, but says nothing about what the government should be to provide additional opportunities for minorities and women, considering the overwhelming evidence justifying the continued need for such



programs. *The* Former Secretary Ron Brown, among others, expressed his concern about this and argued that more should be done.

-- The Defense Department's decision to suspend the "Rule of Two" last October, has caused significant economic hardship on the minority business community. They are working hard to create additional opportunities for minority owned businesses, consistent with Adarand, but the minority business community has been quite critical of their response to date.

-- There will be budget consequences. SBA and Commerce will need additional resources to cover their increased responsibilities and to cover the cost of collecting and processing the data needed to support the new benchmarking system.

-- Justice's proposal will represent a significant departure for federal procurement agencies and will take the full commitment of the Cabinet to oversee its carrying out. Because of the uncertainty generated by Justice's review of affirmative action programs, there has been a significant drop off in government contracting with minority and SDB firms. Part of this drop off can probably be traced to problems surrounding the FY '96 budget and government shutdowns, but not all. We have heard of several instances that agencies no longer feel that they have to be as diligent about contracting with minority firms.

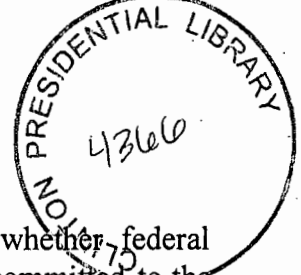
Other Affirmative Action Activities at Justice

-- The Justice Department issued detailed guidance in February setting forth how Adarand will affect the use of race in federal employment. Practically speaking, few changes are expected in the use of race in federal employment, as similar Title VII standards have applied for many years.

-- The Justice Department is working with agencies, primarily Department of Transportation and EPA, which negotiate annual goals for SDBs under grants to states and localities. They expect to have new guidance in place for FY 97 funds.

-- Justice is working to develop means to tie the goals federal agencies set with states and localities to the availability of minority-owned firms, and a factor to account for the effects of discrimination, in a manner similar to the procurement reform proposal. They are also discussing with agencies how much they should be involved in policing state and local use of federal funds, both to insure that Adarand is satisfied and that minority firms receive the full range of race-conscious competitive advantages permissible under the law.

-- Justice is reviewing several programs agencies operate that are intended to place more minorities into academic fields. While these programs are defensible, we will need to develop more information to show the manner in which discrimination has impeded the ability of minorities to enter some academic fields to provide a defense to the challenges likely to come.



-- Justice is closely monitoring the Hopewood decision to decide whether federal participation in the case is warranted. The Federal government is still firmly committed to the notion that diversity in education is an important compelling interest.

Recommendations

On balance, we believe the pros prevail and recommend that you accept Justice's proposal. There has been substantial input from outside groups, in the development of the current proposal, and the 60-day comment period will allow for additional concerns to be raised by the public before the proposal is completed. One change, which we do encourage before the proposal is published, is for the trial period to be reduced from the proposed three to two years. This should be long enough to access the workability of Justice's approach and to decide if set-asides are needed to eradicate discrimination in federal procurement.

Beyond publishing Justice's proposal, we encourage you to undertake several additional steps to reaffirm your support for affirmative action. A misleading, March 8, New York Times article, has done considerable damage to the good will the Administration has enjoyed since your July 19, 1995 "mend it, don't end it" speech and your University of Texas speech on race, which was given to general acclaim. Because of this article, which implied that your Administration was imposing a three-year moratorium on affirmative action programs and was suspending the 8(a) program, we have been flooded with calls and letters protesting this action and questioning whether the Administration is backing off its support for affirmative action. Efforts to contain this criticism by issuing talking points, conducting interviews with women's, Civil Rights Groups, and representatives of the minority business community, and African American newspapers and radio stations, have helped but additional steps are still needed to shore up our base:

-- Issue a formal statement over your signature accepting Justice's proposal and directing that it be published for public comment. In accepting the proposal, you should use this opportunity to reaffirm your support for affirmative action done right and creating legal opportunities for minority and women to pursue in government contracting. You should also note your continued support for the 8(a) program, which SBA is working hard to improve its efficiency.

-- Direct the Department of Justice to issue guidance to the federal departments and agencies as to their continued responsibilities under existing Executive Orders to provide contracting opportunities for minorities and women. You should also emphasize to the Cabinet that you expect them to redouble their efforts to provide contracting opportunities for minorities and women in all aspects of their agencies procurement activities.

-- Use the occasion of your Saturday radio address to reiterate your support for affirmative action.

-- Host a half-day White House session with leaders from academia, business and the Civil Rights community to discuss how best to preserve and strengthen the commitment to

affirmative action and diversity in higher education. The session should be chaired by Dick Riley and Janet Reno, and should conclude with a working dinner given by you and/or the Vice President.

-- Use the occasion of your (or the first lady's) speech to the Leadership Conference on Civil Rights Dinner May 14, to discuss the continued need for a "national conversation" on racial and gender justice as a follow-up to your speech last June. Our message might be, the things that affirmative action seeks to address — widespread discrimination and exclusion and their ripple effects continue to exist, and we as a nation must find ways to combat racism and enforce civil rights. Affirmative action is not about preferences, but opportunities. Critics' efforts to denounce minority-targeted scholarships, affirmative action procurement, and diversity in higher education must not be allowed to stop the progress at eliminating the last vestiges of America's legacy of discrimination.

