

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Edley to Stephanopoulos and Waldmen, re: Conclusions and Recommendations (1 page)	6/12/1995	P5 867A
002. memo	To George, re: Executive Summary (3 pages)	04/28/1995	P5, P6/b(6) 867B
003. memo	G. Stephanopoulos and C. Edley to President Clinton, re: Affirmative Action Policy Issues (10 pages)	4/19/1995	P5 868

COLLECTION:

Clinton Presidential Records
Counsel's Office
Christopher Edley
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FOLDER TITLE:

CC - For CFE, GS 4/7/95

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RESTRICTION CODES

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

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

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

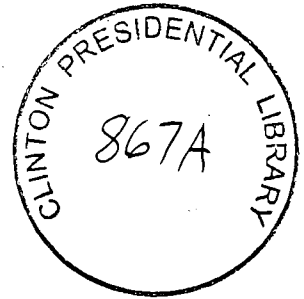
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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]

June 12, 1995



To: Padre Stephanopoulos
Miguel de Waldman

From: Edley 

Re: Inserts for the Report: Conclusions and Recommendations

I revised the "conclusions" I did last week to fold in some "recommendation" bullets. I've asked Ed Dorn to give me a couple of points from DOD, and I need to assemble my group to interrogate USDA and HUD a bit on their "careful tailoring" analyses.

At the risk of sounding like a broken record:

I continue to feel that this document should be a boring submission *to* the President, rather than a report *by* the President.

And I continue to think that we are misallocating our energy: The report should not be turned into an effective communications piece -- that goal is fundamentally inconsistent with (a) the need to have a formal, *balanced* document, and (b) the fact that we don't have clear guidance about *his* policy choices and thematic emphases.

So, I still think that, at the end of the day, we need to pull out, into a stand-alone Memo from POTUS to Cabinet, or some such, the Framework- History-Themes-Directives kind of stuff in a solid 5-6 pages.

Finally, we still have not solved the problem of how, if at all, to rollout POTUS policy issues that are not strictly within the scope of the Review. These include: *Piscataway*; the idea of a commission (might depend on *Adarand* or on a tabling strategy to combat GOP)

In the attached, you will note that I anticipate certain policy conclusions in general terms, not in programmatic details. Particular with respect to set asides.

cc: Julia Moffet, Carolyn Curiel



April 28, 1995

George:

[001]

Re: Progress Report

[REDACTED] (P6)(b)(6)

1. **Ex Summary:** I will give you selected new chapters of the Executive Summary on Saturday -- my effort to wrench more info out of the agencies to make the other chapters more like the OFCCP chapter. I really need confirmation from you that these are getting close to what you believe we need.

Meanwhile:

- Peter is working with SBA and OFPP to identify some private industry types in addition to AGC to whom he can talk quietly to confirm that we have spotted all the key issues on the set-aside matter. He will also talk to a few MBE reps for cover. I've told him to give his list of proposed industry and MBE contacts to Alexis for her clearance before executing.
 - The EEOC/Federal Civilian piece remains the most dangerously incomplete, primarily because of the coverup syndrome and the general problem of not being able to get much out of the quasi-independent EEOC staff. (And even our friends can be difficult -- member your friend Claire.) Still, I'm working this one personally. My strategy is to get methodological help from my buddy Jim King, and then to chat with a few savvy career personnel officers, as identified by some OMB old-hands in whom I have a lot of confidence.
2. **DOD/Moskos:** I had a 45 minute chat with Cliff Alexander (Carter Secretary of the Army; Johnson chairman of EEOC). He reviewed the DOD section of my draft, and had a number of useful comments. He is really pissed that we have given so much attention to Moskos, and had (until me) no substantive exchanges with him. Given his history and contributions, he has a point. I told him to chalk it up to the "Greek connection." There's particular bad blood between Cliff and Moskos because Moskos once attacked the All Volunteer Force (Alexander's baby) because, Moskos predicted, it would be "too black." Alexander wrote a scathing book review on Moskos in the early '80s. It really irks him that Moskos was invited to the POTUS dinner.
3. **Tier Two:** On the Sub-POTUS tier -- I'm continuing to push refinement of the elements, with a view to having those 1-pagers that Peter drafted for yesterday's meeting in good shape my mid-week. Then I suggest we have a tight meeting, perhaps with Leon, to make the

decisions and identify any that you want the President to resolve because of agency disagreements.

4. **Memo & Speech:** On the major POTUS issues, where is the decision memo we did? Will we have a small group discussion with POTUS about it? And I haven't heard anything clear about the speech. Yesterday I heard rumors that: (i) it may be at Michigan State after all; (ii) he may never give a speech -- just a series of dribs and drabs, plus the report; (iii) Curry is writing the speech; (iv) he will give the speech in early June. I'm still holding out for a speech to an Orthodox church group in Kiev. But it would be nice to feel a little less in the dark.

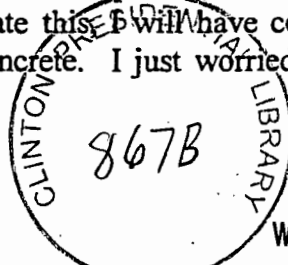
5. **Communications Rollout:** I asked Peter Yu not to start on the short PR version of the Review until we have the wonky version complete to my satisfaction. George, I think you make a mistake in asking Peter (or me) to draft the PR version. That is not our comparative advantage, and this government is big enough that we ought to be able to find a great writer to take the wonky version and take a crack at it. The whole reason I kept pressing you to get a communications person involved was so that we could have another person to do some work, not just give advice. [REDACTED] what I really want is someone who can

- (a) write (not just edit);
- (b) manage a coordinated public affairs effort at the several agencies -- including production of appropriate rollout materials by those agencies; and
- (c) make sure that surrogates and Hill friends, like Ron Klain, are appropriately armed at all times.

So how about it? Can we either make Julia do some work or find someone at an agency who can? We are running out of time. I'm happy to figure this out if you delegate it to me.

6. **Contacts:** I have too many relationships on the Hill and in the broader community to sneak this thing out without some consultations. What do I do? Starting next week I'd like to have some serious conversations with, for example: Rangel, Mfume, Payne, Kennedy, Matsui, Norton, Schumer, Barney, Dellums, Roger Wilkins, Elaine Jones, Wade Henderson, Eddie Williams, Bill Coleman, etc. The problem is that I have long-standing relationships with these folks, and will have them long after I leave this job. You have to find a way for me to get my work done for you without damaging relationships that have long term importance to me. There's a similar situation with the media. I have a few relationships that I feel like I'm screwing just so that others can do all the leaking. Is it going to stay like this? I'm feeling boxed out.

7. **Rollout:** Have you had meetings with Alexis and Pat to nail down their plans for consultations and briefings on this mess? The only conversations I have been in have been rather tentative and unfocused. Assuming we have until after Russia, I just want to register a concern that we get at least to closure on what the plan is, and I think next week is when that must happen. Again, if you want to delegate this, I will have conversations with Alexis and Pat to facilitate making all of this more concrete. I just worried about getting everything in place before ...



7. **My departure:** Since nothing has materialized -- not a single person has spoken to me about Bo's job, about Galston's job, about a continuing role working for you -- I'm planning my exit on May 15th.

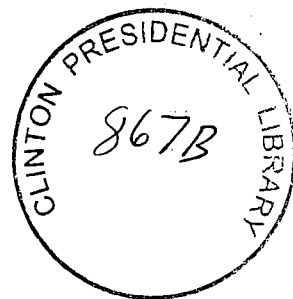


In any case, Peter is definitely out of here in two weeks. A great loss for the Administration. Another brilliant personnel move; I'm sure his replacement will be about 40 percent as good.

In summary:

ACTIONS/DECISIONS:

- ☐ Communications person who will help with the writing, and who will make sure that friends on the Hill and surrogates are appropriately armed.
- ☐ Talk with Nancy McFadden about the great opportunities in store for her.
- ☐ Schedule session with Alexis and Pat on pre-speech consultations/briefings.
- ☐ Explain to Edley what is going on. (At least with regard to POTUS decisions and speech.)
- ☐ Figure out a strategy to get Edley out of the closet with his friends and acquaintances on the Hill and in the Media.
- ☐ Decide if you will need Edley after May 15th, and if so, who will pay for it.



*



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.

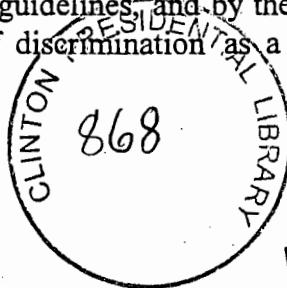
Options. The policy options include:

- 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.

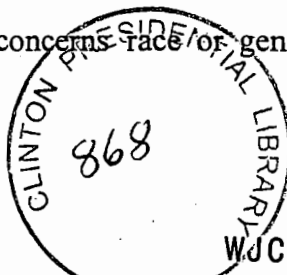
Option 1 would maintain current policy. As noted in our discussions, race- or gender-specific scholarships are small slices of a much larger pie -- much of which is administered on the basis of need. As there are so many different avenues for financial aid, it is possible to argue that race- or gender-specific 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 not withstanding the musician's affluence. In America today, it remains likely that the neurosurgeon's experiences, perspective, and aspirations will reflect some aspect of the distinctive reality facing blacks. And the college may choose to value that.

B. Employment: Race or Gender in Layoff Decisions

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



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

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

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

Options. The policy options include:

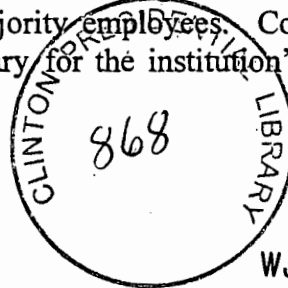
Option 1: As a policy matter, when not inconsistent with a *bona fide* seniority system, diversity may be considered in layoffs, but only in limited circumstances.

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

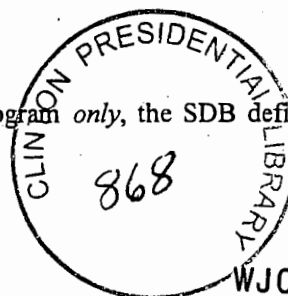
Background. Federal law establishes several goals for the distribution of federal procurement opportunities: 20% for small businesses; 5% for small disadvantaged businesses (SDBs -- virtually all of which are minority-owned¹); and 5% for women-owned businesses. There is a web of programs designed to 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.



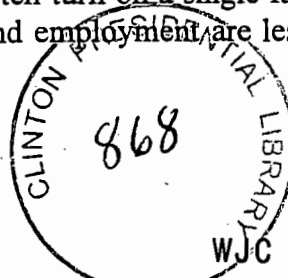
programs have had a disparate impact on particular regions and industries -- such as smaller construction projects and certain transportation sub-industries. Finally, while the 8(a) program permits nonminority firms to participate upon a showing that a firm's owners are "socially and economically disadvantaged," 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.

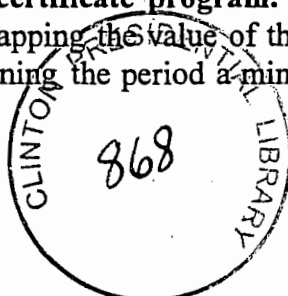
D. FCC Preferences in Broadcast Licenses

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:

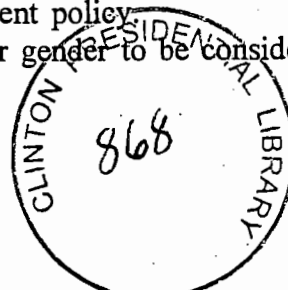
- Emphasize antidiscrimination and *opportunity*, rather than guaranteeing results.
- Stress the *remedial* justification, but also embrace the goal of *inclusion*.
- Respect the interests of *bystanders*, by crafting policies carefully and narrowly.

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):

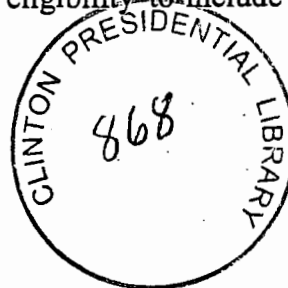
Education: Option 1 or 2 -- Maintain or tighten current policy.
Employment: Indeterminate -- Either option on consideration of race/gender in layoffs.
Procurement: Option 1 or 3 -- Reform or sharply narrow preferences and set-asides.

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.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. memo	Under Secretary of Defense to Edley, re: Affirmative Action Review (3 pages)	4/7/1995	P5 869

COLLECTION:

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

FOLDER TITLE:

Dept of Defense (Military) Affirmative Action [2]

Whitney Ross
2008-0308-F
wr898

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)]

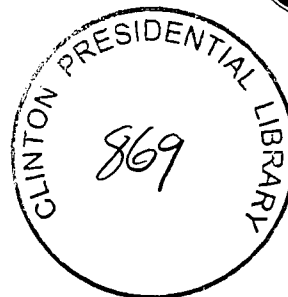
- b(1) National security classified information [(b)(1) of the FOIA]
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PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

APR 7 1995



MEMORANDUM FOR CHRIS EDLEY

SUBJECT: Affirmative Action Review

I am pleased that the President has ordered a review of affirmative action. The effort is long overdue. It should have been done in the 1980s, but the Reagan and Bush administrations lacked the interest and moral authority to treat the topic credibly. The Clinton administration has an advantage here, and should use it creatively. Beyond assessing laws and programs, President Clinton should use this occasion to renew our national conversation on race. Let me offer two observations about the review, then suggest how the President can take us to a higher plane.

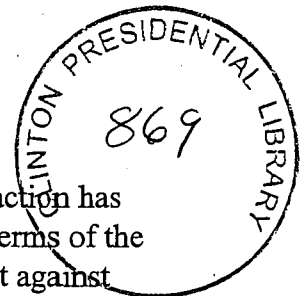
THE REVIEW

First, you and George should continue to press us to define, categorize and assess our policies and programs. Public attitudes have been skewed by the critics' success in defining affirmative action as preference. When pollsters define it that way, they find -- surprise! -- that the public opposes it (because the public opposes preferences). Rich Morin's report on a recent WP/ABC survey is a classic example. We also need a typology that, at minimum, distinguishes between remedial programs (the kind courts impose to remedy past discrimination) and inclusive programs (those that companies or colleges voluntarily undertake to achieve greater diversity or some other social good).

Our assessment of a specific program's effectiveness and legal soundness depends on how its purpose is defined. As we make those assessments, we must avoid conflating class and race. Some of the continuing argument about the Great Society stems from confusion over whether a particular program was supposed to solve a class problem or a race problem. Lyndon Johnson may have blended the two for good tactical reasons. We could do the same thing, as long as we understand the ramifications. We also must avoid a logical fallacy that many people commit when they try to distinguish between equal opportunity and equal results. That distinction holds for individuals, but not for large groups. (I wrote a book on this.)

Second, we need to put the current review into perspective. Although the public debate centers on affirmative action, the issue is driven by deep, unresolved questions about race and color in America. We could develop intellectually compelling responses to current complaints about affirmative action and still not address the visceral concerns that drive the politics of this issue. This is a case in which cogent policy analysis will be helpful only at the margin.





Therefore, we should see the review as part of a long campaign. Affirmative action has been under concerted attack for a number of years, with its critics often dictating the terms of the debate. A few speeches and policy pronouncements are not likely to have much effect against that relentless onslaught. So, in addition to good analysis, we need a multifaceted, long-term campaign to win hearts and minds. Someone needs to develop a media strategy; and someone needs to energize leaders, scholars and advocates.

PRESIDENTIAL LEADERSHIP

What should be President Clinton's public role? On this as on other controversial issues, it is more important that a President show moral conviction than that he demonstrate mastery of the subject matter. The public wants to know where the President stands and where he wants to lead the nation. He should provide the moral impetus for a national conversation on this subject.

Our nation has gone through more than two centuries of interrupted conversations about race. Virtually every generation has one; often it ends raggedly and unconstructively. But the President and many others in this Administration were members of a generation that saw struggle and sacrifice produce positive results. Many of us participated in the civil rights movement. Few of us emerged from the 1960s without having engaged in a serious conversation about race.

Since the 1960s, however, the focus has shifted from moral fundamentals to questions of enforcement and program administration; so the issue has come to be dominated by lawyers and policy experts. The public voice has surfaced only in sporadic outbursts.

The transition from movement to bureaucracy has had two unfortunate ramifications. One is that a generation has come of age without having to confront its hopes and fears about matters of race and color. When I, as a teenager, experienced discrimination, I was aware that many others were struggling with the same thing. When my teenage daughter confronts race, she does it alone, or in brief, furtive exchanges with a few friends. And, she is not dealing just with black and white; her world is a spectrum of colors. Another ramification is that the moral fundamentals have become separated from the bureaucratic details. This often happens when moral principles are digested into statistical standards; it causes political dyspepsia.

We need to remind ourselves how we got to this point and consider where we go from here. President Clinton is the perfect person to start us on that path. Few national leaders have greater moral credibility than he on this issue, or greater facility for engaging the public in dialogue. One of the keys to his campaign was the empathy he projected during town hall meetings. I do not propose the President actually conduct such a conversation. Others can do that, guided perhaps by materials from NEH, the Southern Poverty Law Center or the Kettering Foundation. The President should provide the broad moral contours.

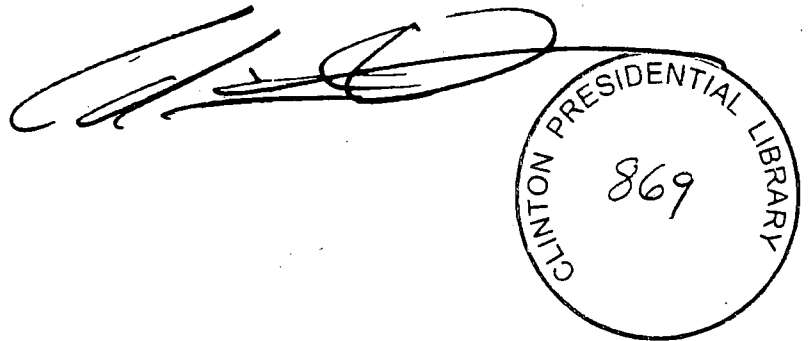
What should the President say? Think in terms of a speech (with several iterations) that allows him to reflect on generational change -- on heritage and hope. President Clinton could begin with reflections about growing up in a country where racial inequity was legally mandated and opportunities for women were greatly circumscribed. Next, he could assess our current

condition: the progress we've made; the evidence of continuing discrimination; the inequities that the current generation has inherited from the past; the complexities of race, color and gender today. Finally, he could describe the world that he would like his daughter to inherit.

CONCLUSION

In short, we need (1) a moral vision, provided by the President; (2) the review, to help clarify and refine affirmative action policies and programs; and (3) a strategy that links, in the public mind, the moral fundamentals with the program mechanics.

Thanks for including the Defense Department in this effort. I hope the materials we've provided on the military experience have been useful and that the suggestions offered above don't lead you astray. Please call me if I can help further.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	From Deval Patrick, re: AA in the Clinton Administration (3 pages)	2/6/1995	P5 870

COLLECTION:

Clinton Presidential Records
Counsel Office
Christopher Edley
OA/Box Number: 5750

FOLDER TITLE:

DOJ Affirmative Action

Whitney Ross
2008-0308-F
wr899

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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RR. Document will be reviewed upon request.

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

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

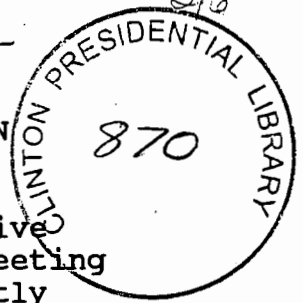
DRAFT

From David
Patrick
2/6

MEMORANDUM

~~CONFIDENTIAL~~

RE: AFFIRMATIVE ACTION IN THE CLINTON ADMINISTRATION



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

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

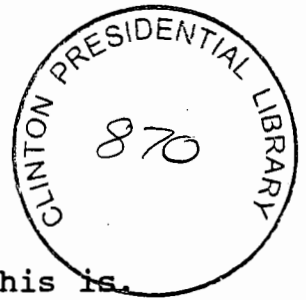
Apart from the law, we should make the case for affirmative action today. Affirmative action arose in the first place as a device for expanding the middle class to include historically excluded minorities. It was created when we realized that we would not actually change behavior and embrace communities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

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

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

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

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

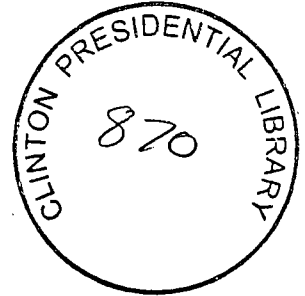
Because I believe the abuses of affirmative action, however isolated, have taken on a life of their own, we should help develop an alternative to wholesale rejection of affirmative action which explicitly rejects the abuses. These abuses occur: (1) where an unqualified person receives a benefit over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

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

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

Let me know what you think.

Attachment



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Larry Matlack to Alan Rhinesmith [partial] (1 page)	04/17/1995	P6/b(6)
002. memo	Edley to Beckel, re: Race and Layoffs (1 page)	4/18/1995	P5 871

COLLECTION:

Clinton Presidential Records
Counsel's Office
Christopher Edley
OA/Box Number: 5752

FOLDER TITLE:

Empowerment Contracting

Whitney Ross
2008-0308-F
wr459

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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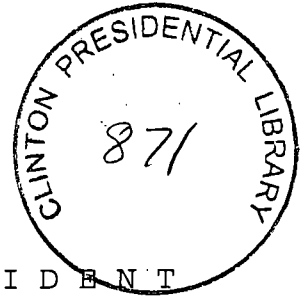
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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EXECUTIVE OFFICE OF THE PRESIDENT

18-Apr-1995 01:19pm

TO: Heather Beckel
FROM: Christopher F. Edley, Jr
Office of Mgmt and Budget, EG
CC: Peter M. Yu
SUBJECT: Race and Layoffs

George:

FYI -- At my request, DOJ's Office of Legal Counsel had quiet staff-level conversations with OPM. OPM seems to have backed off of their initial guidance.

So, we are moving forward in the materials on the assumption that, pending a decision to the contrary in Piscataway, Title VII and therefore the Federal civil service rules, do not bar a policy of considering diversity as a tie-breaker.

Note that I say "tie-breaker" because, unlike the non-unionized private sector where informal practices prevail, federal layoffs are governed by a formal hierarchy of seniority and other tests that would make diversity considerations almost always irrelevant.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. note	Mike Small to Christopher Edley, re: Race-Based Layoffs in Federal Employment (1 page)	4/15/1995	P5	872
001b. memo	From Mike Small, re: Race-Based Layoffs in Federal Employment (2 pages)	4/7/1995	P5	873
002. note	Mike Small to Christopher Edley, re: Race-Based Layoffs in Federal Employment (2 pages)	4/6/1995	P5	874
003. memo	Joseph Stiglitz to Christopher Edley, re: Next Steps on Affirmative Action (3 pages)	3/27/1995	P5	875

COLLECTION:

Clinton Presidential Records
Counsel Office
Christopher Edley
OA/Box Number: 5750

FOLDER TITLE:

Federal Civilian Employment A.A. [Affirmative Action] (EEO)

Whitney Ross
2008-0308-F
wr900

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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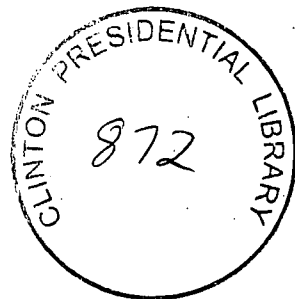
RR. Document will be reviewed upon request.

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

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April 15, 1995



NOTE TO CHRIS EDLEY

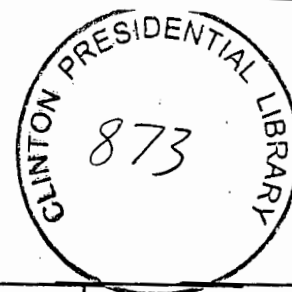
From: Mike Small *MS*

Re: Race-Based Layoffs in Federal Employment

I am attaching a file memorandum that summarizes the conversation that I had two weeks ago with Rhoda Lawrence of OPM on race-based layoffs in federal employment. The memorandum is essentially the same as the memo on that subject addressed to you that I delivered to your office, along with our HHS update, two weeks ago. The one change is in the last paragraph, which notes other cases besides Sheet Metal Workers that establish that affirmative action may benefit persons who themselves were not "victims" of discrimination.

Per the request that you made to Dawn Johnsen earlier today, I had a follow-up conversation with Ms. Lawrence this afternoon. I told her that I had advised you that I did not read 5 C.F.R. § 351.601(b) and 5 U.S.C. § 2302, in and of themselves, as establishing a prohibition on race-based layoff decisions in connection with affirmative action measures in federal employment. I told her that, in my view, the reference in 5 U.S.C. § 2302 to actions prohibited under Title VII means that one would have to look at Title VII and court decisions interpreting it to determine whether it was lawful for an agency to use race to break a tie between two employees. Ms. Lawrence did not contest my analysis, and indicated that she understood it. She thanked me for the heads-up.

Memorandum



Subject

Race-Based Layoffs in Federal Employment

Date

April 7, 1995

To

File

From

Michael Small
Office of Legal Counsel

On April 5, 1995, I had a conversation with Rhoda Lawrence of the General Counsel's Office at the Office of Personnel Management regarding the use of race to determine priority in layoffs in federal employment. Ms. Lawrence stated that it was impermissible under relevant laws and regulations for federal agencies to use race as a "tie-breaker" with respect to layoff decisions. Ms. Lawrence said that this prohibition is contained in 5 C.F.R. § 351.601(b), when read in conjunction with 5 U.S.C. § 2302. Ms. Lawrence stated that 5 U.S.C. § 2302 precludes federal employers from using race in any employment decision, not just with respect to layoffs. In short, under her reading of the statute, affirmative action in federal employment (beyond outreach and recruitment) is barred by express provisions of existing law. In my conversation with Ms. Lawrence, I expressed my disagreement with her assertion. This memorandum summarizes the bases for my conclusion.

5 C.F.R. § 351.601(b) states:

When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

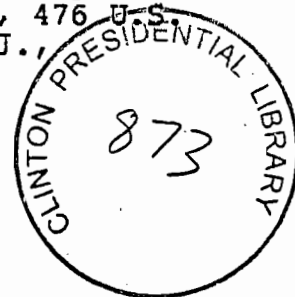
By its terms, the regulation does not prohibit the use of race to break the tie. Furthermore, nothing in 5 U.S.C. § 2302 suggests that any such prohibition should be read into the regulation. In pertinent part, 5 U.S.C. § 2302 bars agencies from discriminating against employees "on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964." (emphasis added). Section 717 extends the antidiscrimination principles of Title VII of the 1964 Civil Rights Act to employment in the federal government. In Steelworkers v. Weber, 443 U.S. 193 (1979), the Supreme Court held that those principles does not erect a per se bar on the use of racial criteria in employment decisions as part of affirmative action measures. The Court said that such measures are

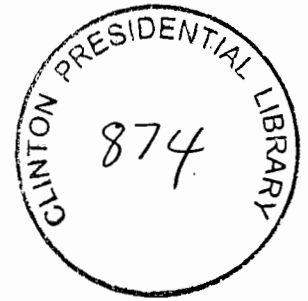
04/11/80 11:22

consistent with Title VII if they are intended to correct a manifest racial imbalance in a traditionally segregated job category, and do not unduly trammel the interests of disfavored persons. The Court reaffirmed Weber in Johnson v. Transportation Agency, 480 U.S. 616 (1987).

Thus, that part of 5 U.S.C. § 2302 that makes it unlawful for federal agencies to take actions on the basis of race "as prohibited under" Title VII must be read against the backdrop of Weber and Johnson. In short, one would have to determine whether, under the standards for assessing affirmative action measures established in those cases, the use of race to break a tie in an employment decision violates Title VII. Cf. Weber, 443 U.S. at 208 (hiring preference in question did not "unnecessarily trammel the interests of white employees" because, among other things, it "[did] not require the discharge of white workers and their replacement with new black hires"). In addition, because federal agencies are also subject to constitutional constraints, the Supreme Court's ruling in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), holding unconstitutional a race-based layoff measure in a public school would be relevant to the question whether federal employers may use race to break a tie in a layoff decision.

Finally, 5 U.S.C. § 2302(d) provides that the prohibitions in the section "shall not be construed to extinguish or lessen any effort to achieve equal opportunity through affirmative action" This provision explicitly exempts from 5 U.S.C. § 2302 those race-based employment decisions that are made pursuant to otherwise lawful affirmative action measures. Ms. Lawrence suggested that the provision merely allows a federal agency to give a racial preference to a particular minority employee or applicant who has brought a successful race discrimination challenge to a specific agency employment decision affecting that person. That is not what "affirmative action" is generally understood to mean, however. Rather, it encompasses racial preferences that benefit minorities who themselves may not have been specific victims of identified instances of racial discrimination. In fact, Ms. Lawrence's view was rejected by the Supreme Court in Sheet Metal Workers v. EEQC, 478 U.S. 421 (1986), and none of the Justices in the majority in Weber and Johnson suggested that only actual victims of discrimination may benefit from affirmative action in employment. Nor is any such requirement mandated by the Constitution. See Wygant, 476 U.S. at 277-78 (plurality opinion); id. at 286 (O'Connor, J., concurring).





April 6, 1995

NOTE TO CHRIS EDLEY

From: Mike Small *MS*
Re: Race-Based Layoffs in Federal Employment

Rhoda Lawrence of OPM advised you that it was impermissible under relevant laws and regulations for federal agencies to use race as a "tie-breaker" with respect to layoff decisions. Ms. Lawrence said that this prohibition is contained in 5 C.F.R. § 351.601(b), when read in conjunction with 5 U.S.C. § 2302. In a conversation that I had with her, Ms. Lawrence stated that 5 U.S.C. § 2302 precludes federal employers from using race in any employment decision, not just with respect to layoffs. In short, under her reading of the statute, affirmative action in federal employment (beyond outreach and recruitment) is barred by express provisions of existing law. I disagree with Ms. Lawrence's assertion.

5 C.F.R. § 351.601(b) states:

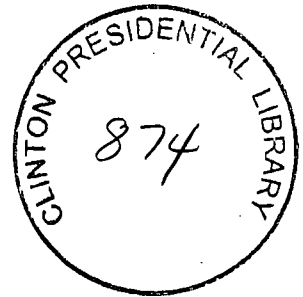
When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

By its terms, the regulation does not prohibit the use of race to break the tie. Furthermore, nothing in 5 U.S.C. § 2302 suggests that any such prohibition should be read into the regulation. In pertinent part, 5 U.S.C. § 2302 bars agencies from discriminating against employees "on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964." (emphasis added). Section 717 extends the antidiscrimination principles of Title VII of the 1964 Civil Rights Act to employment in the federal government. As you know, in the Weber case, the Supreme Court held that those principles does not erect a per se bar on the use of racial criteria in employment decisions as part of affirmative action measures. The Court said that such measures are consistent with Title VII if they are intended to correct a manifest racial imbalance in a traditionally segregated job category, and do not unduly trammel the interests of disfavored persons. Steelworkers v. Weber, 443 U.S. 193 (1979). The Court reaffirmed Weber in Johnson v. Transportation Agency, 480 U.S. 616 (1987).

Thus, that part of 5 U.S.C. § 2302 that makes it unlawful for federal agencies to take actions on the basis of race "as prohibited under" Title VII must be read against the backdrop of Weber and Johnson. In short, one would have to determine whether, under the standards for assessing affirmative action measures established in those cases, the use of race to break

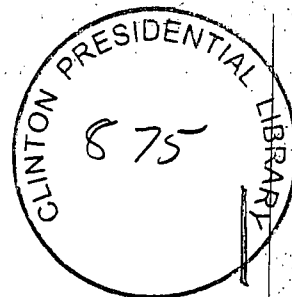
a tie in an employment decision violates Title VII. Cf. Weber, 443 U.S. at 208 (hiring preference in question did not "unnecessarily trammel the interests of white employees" because, among other things, it "[did] not require the discharge of white workers and their replacement with new black hires"). In addition, because federal employers are also subject to constitutional constraints, the Supreme Court's ruling in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) holding unconstitutional a race-based layoff measure in a public school would be relevant to the question whether federal employers may use race to break a tie in a layoff decision.

Finally, I note that 5 U.S.C. § 2302(d) provides that the prohibitions in the section "shall not be construed to extinguish or lessen any effort to achieve equal opportunity through affirmative action" This provision explicitly exempts from 5 U.S.C. § 2302 those race-based employment decisions that are made pursuant to otherwise lawful affirmative action measures. Ms. Lawrence suggested that the provision merely allows a federal agency to give a racial preference to a particular minority employee or applicant who has brought a successful race discrimination challenge to a specific agency employment decision affecting that person. That is not what "affirmative action" is generally understood to mean, however. Rather, it encompasses racial preferences that benefit minorities who themselves may not have been specific victims of identified instances of racial discrimination. In fact, Ms. Lawrence's reading was rejected by the Supreme Court in Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).





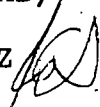
EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON, D.C. 20500



MEMBER

March 27, 1995

MEMORANDUM FOR CHRIS EDLEY (OMB)

FROM: JOSEPH STIGLITZ 
SUBJECT: Next steps on affirmative action

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

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

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

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

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

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

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

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

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

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

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

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

Possible reforms

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

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

(a) Aggressive programs for outreach in hiring

(b) Model programs for mentoring employees

(c) Demonstrated success, through training, guidance, and mentoring, in promotion programs

(d) Summer intern programs

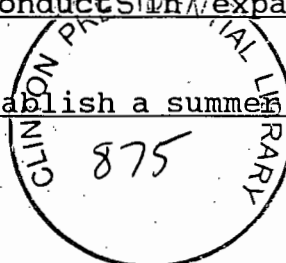
(e) High school and after-school programs

(f) Active participation in the Business/Community Equality of Opportunity Programs

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

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

4. The White House could establish a summer internship program



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

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

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

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

- An executive order, banning quotas and reinventing regulations and compliance.

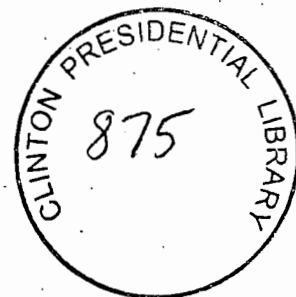
- An executive order, establishing a framework for the creation and encouragement of business-community equality of opportunity programs and a directive for relevant agencies within the Federal Government to take an active role.

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

- Collaboration with private foundations in establishing a Prize for exemplary behavior.

- Establishment of a White House Disadvantaged Students internship program.

- An executive order reforming the reporting requirements for OFCCP compliance reviews.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Christopher Edley to Margie Sullivan, re: Appropriation Amendments on Affirmative Action (1 page)	6/2/1995	P5, P6/b(6)	876

COLLECTION:

Clinton Presidential Records
Counsel's Office
Christopher Edley
OA/Box Number: 5751

FOLDER TITLE:

Legislation/Affirmative Action [1]

Whitney Ross
2008-0308-F
wr455

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).

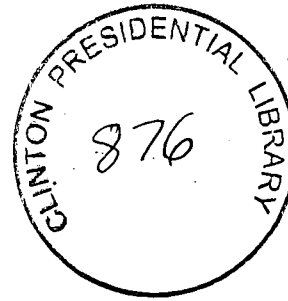
RR. Document will be reviewed upon request.

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]

WJC LIBRARY PHOTOCOPY

June 2, 1995



[00]

To: Margie Sullivan
Ed Dorn
Department of Defense

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

Subject: **Appropriation Amendments on Affirmative Action**

VIA FAX



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

We need two things rather urgently. Can you help?

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

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

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

Would someone give me a call to confirm? Thanks.

cc: George Stephanopoulos
Alexis Herman
Cassandra Pulley

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Under Secretary of Defense to Christopher Edley, re: Affirmative Action Review (3 pages)	4/7/1995	P5 877

COLLECTION:

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

FOLDER TITLE:

Military (Dept of Defense) Affirmative Action [3]

Whitney Ross
2008-0308-F
wr901

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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- 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.

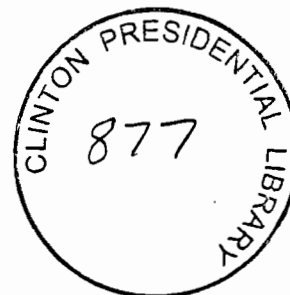
Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
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APR 7 1995

**MEMORANDUM FOR CHRIS EDLEY****SUBJECT: Affirmative Action Review**

I am pleased that the President has ordered a review of affirmative action. The effort is long overdue. It should have been done in the 1980s, but the Reagan and Bush administrations lacked the interest and moral authority to treat the topic credibly. The Clinton administration has an advantage here, and should use it creatively. Beyond assessing laws and programs, President Clinton should use this occasion to renew our national conversation on race. Let me offer two observations about the review, then suggest how the President can take us to a higher plane.

THE REVIEW

First, you and George should continue to press us to define, categorize and assess our policies and programs. Public attitudes have been skewed by the critics' success in defining affirmative action as preference. When pollsters define it that way, they find -- surprise! -- that the public opposes it (because the public opposes preferences). Rich Morin's report on a recent WP/ABC survey is a classic example. We also need a typology that, at minimum, distinguishes between remedial programs (the kind courts impose to remedy past discrimination) and inclusive programs (those that companies or colleges voluntarily undertake to achieve greater diversity or some other social good).

Our assessment of a specific program's effectiveness and legal soundness depends on how its purpose is defined. As we make those assessments, we must avoid conflating class and race. Some of the continuing argument about the Great Society stems from confusion over whether a particular program was supposed to solve a class problem or a race problem. Lyndon Johnson may have blended the two for good tactical reasons. We could do the same thing, as long as we understand the ramifications. We also must avoid a logical fallacy that many people commit when they try to distinguish between equal opportunity and equal results. That distinction holds for individuals, but not for large groups. (I wrote a book on this.)

Second, we need to put the current review into perspective. Although the public debate centers on affirmative action, the issue is driven by deep, unresolved questions about race and color in America. We could develop intellectually compelling responses to current complaints about affirmative action and still not address the visceral concerns that drive the politics of this issue. This is a case in which cogent policy analysis will be helpful only at the margin.



Therefore, we should see the review as part of a long campaign. Affirmative action has been under concerted attack for a number of years, with its critics often dictating the terms of the debate. A few speeches and policy pronouncements are not likely to have much effect against that relentless onslaught. So, in addition to good analysis, we need a multifaceted, long-term campaign to win hearts and minds. Someone needs to develop a media strategy; and someone needs to energize leaders, scholars and advocates.

PRESIDENTIAL LEADERSHIP

What should be President Clinton's public role? On this as on other controversial issues, it is more important that a President show moral conviction than that he demonstrate mastery of the subject matter. The public wants to know where the President stands and where he wants to lead the nation. He should provide the moral impetus for a national conversation on this subject.

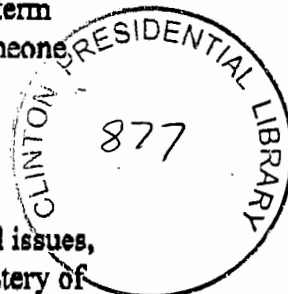
Our nation has gone through more than two centuries of interrupted conversations about race. Virtually every generation has one; often it ends raggedly and unconstructively. But the President and many others in this Administration were members of a generation that saw struggle and sacrifice produce positive results. Many of us participated in the civil rights movement. Few of us emerged from the 1960s without having engaged in a serious conversation about race.

Since the 1960s, however, the focus has shifted from moral fundamentals to questions of enforcement and program administration; so the issue has come to be dominated by lawyers and policy experts. The public voice has surfaced only in sporadic outbursts.

The transition from movement to bureaucracy has had two unfortunate ramifications. One is that a generation has come of age without having to confront its hopes and fears about matters of race and color. When I, as a teenager, experienced discrimination, I was aware that many others were struggling with the same thing. When my teenage daughter confronts race, she does it alone, or in brief, furtive exchanges with a few friends. And, she is not dealing just with black and white; her world is a spectrum of colors. Another ramification is that the moral fundamentals have become separated from the bureaucratic details. This often happens when moral principles are digested into statistical standards; it causes political dyspepsia.

We need to remind ourselves how we got to this point and consider where we go from here. President Clinton is the perfect person to start us on that path. Few national leaders have greater moral credibility than he on this issue, or greater facility for engaging the public in dialogue. One of the keys to his campaign was the empathy he projected during town hall meetings. I do not propose the President actually conduct such a conversation. Others can do that, guided perhaps by materials from NEH, the Southern Poverty Law Center or the Kettering Foundation. The President should provide the broad moral contours.

What should the President say? Think in terms of a speech (with several iterations) that allows him to reflect on generational change -- on heritage and hope. President Clinton could begin with reflections about growing up in a country where racial inequity was legally mandated and opportunities for women were greatly circumscribed. Next, he could assess our current

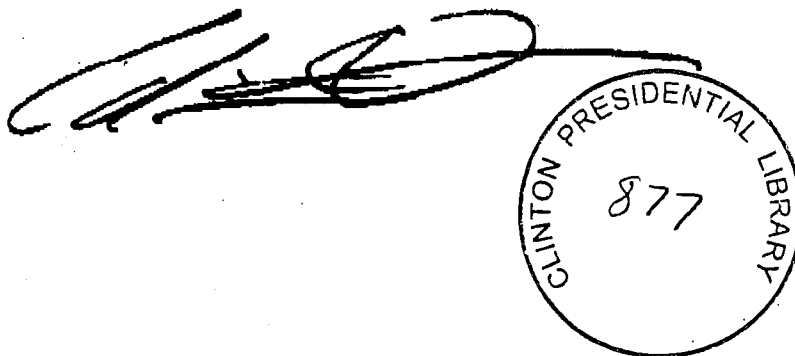


condition: the progress we've made; the evidence of continuing discrimination; the inequities that the current generation has inherited from the past; the complexities of race, color and gender today. Finally, he could describe the world that he would like his daughter to inherit.

CONCLUSION

In short, we need (1) a moral vision, provided by the President; (2) the review, to help clarify and refine affirmative action policies and programs; and (3) a strategy that links, in the public mind, the moral fundamentals with the program mechanics.

Thanks for including the Defense Department in this effort. I hope the materials we've provided on the military experience have been useful and that the suggestions offered above don't lead you astray. Please call me if I can help further.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	W. Bowman Cutter and Dorothy Robyn to NEC Principals, re: Procurement Reform (10 pages)	9/28/1993	P5	878
002. memo	Re: Procurement Reform - Draft (8 pages)	9/22/1993	P5	879

COLLECTION:

Clinton Presidential Records
Counsel Office
Christopher Edley
OA/Box Number: 5752

FOLDER TITLE:

Procurement Contracting (General) [Folder 2] [2]

2008-0308-F
wr902

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

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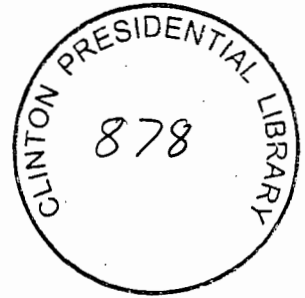
Freedom of Information Act - [5 U.S.C. 552(b)]

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

WASHINGTON

September 28, 1993



MEMORANDUM FOR: NEC Principals

FROM: W. Bowman Cutter and Dorothy Robyn
National Economic Council

SUBJECT: Procurement Reform

The following is a briefing memorandum for the Wednesday meeting of NEC principals (3:30 in Old Executive Office Building, Room 276). The purpose of the meeting is to consider procurement reform proposals to relax socioeconomic requirements on government contractors.

SUMMARY

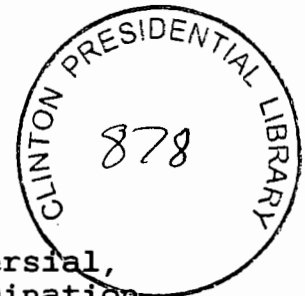
In early October, the President and the Vice President, together with key congressional Members, will announce a major effort to reform the federal government's procurement system. Procurement reform is central both to "reinventing government" and to the Administration's Defense Reinvestment and Conversion Initiative.

Two proposed changes constitute the heart of statutory procurement reform. The first would lift the threshold for conducting simplified purchases from \$25,000 to \$100,000. The second would make it easier for the government to buy commercial products.

Both proposals involve relaxation of statutory socioeconomic requirements on federal contractors. The "Simplified Acquisition Threshold" would raise the coverage level for certain requirements. Proposals regarding "Commercial Items" would waive the requirements for commercial purchases.

The proposed relaxation of two types of socioeconomic requirements is problematic for some agencies. The first are the labor standards laws, such as Davis-Bacon. The second are the affirmative action requirements, particularly EO 11246. The labor standards laws are affected primarily by proposals to raise the threshold. The affirmative action requirements are affected by both the threshold increase and commercial item waivers.

Conclusion and Options. There is a strong case for raising the threshold for simplified purchases from \$25,000 to \$100,000 for both the labor standards and affirmative action requirements. That change would streamline a large fraction of procurement actions but affect only a small percent of contract dollars.



The case for commercial item waivers is more controversial, particularly with respect to EO 11246. At a minimum, elimination of "flowdown requirements" on subcontractors, which can be accomplished administratively in most cases, seems warranted.

As for government contractors themselves, there are three possible approaches to commercial item acquisition: One option is the status quo. A second option is to exempt them from affirmative action requirements for commercial contracts. A third, compromise option is to continue to require contractors to pursue a policy of affirmative action but eliminate the monitoring and recordkeeping requirements in favor of a system like that of the Internal Revenue Service, which relies on self-policing and the threat of audit.

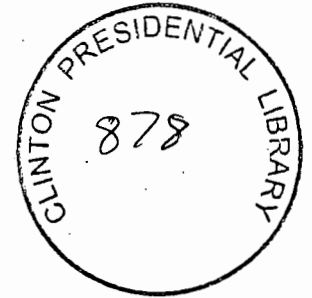
DISCUSSION

Section 800 Panel

Current procurement reform proposals draw on the work of the DoD Advisory Panel on Streamlining and Codifying Acquisition Law. Known as the Section 800 Panel after its enabling law, this group examined more than 600 statutes affecting the defense procurement process. The Panel's recommendations, in the form of an 1,800 page report, were submitted to Congress in January 1993.

First, to reduce administrative overhead, the Panel recommended raising the threshold for many socioeconomic requirements to \$100,000. This change would streamline more than 50 percent of all DoD contract actions over \$25,000 (the existing threshold for simplified purchase procedures) while affecting less than five percent of the contract dollars. In keeping with existing policy, the Panel recommended reserving all purchases under the threshold for small businesses, including small disadvantaged businesses.

Second, the Section 800 Panel recommended that many government-unique socioeconomic requirements be waived for acquisition of commercial items. Such waivers were necessary to enhance DoD's access to cutting-edge commercial technology, the Panel argued. They would also permit some firms that must now maintain separate facilities and accounting systems to integrate their commercial and military production. These changes, moreover, would allow DoD to fulfill its requirements at far lower costs.



National Performance Review

The National Performance Review, in its September report, embraces these two key recommendations of the Section 800 Panel and extends them government-wide. NPR recommends that all agencies, not just DoD, be allowed to make purchases under \$100,000 using simplified purchase procedures. The NPR report explicitly recommends raising the threshold for Davis-Bacon to \$100,000.

The NPR report also calls for more reliance throughout the federal government on the commercial marketplace. Although the NPR's published report is less explicit than the Section 800 report, the "backup" documents recommend the same waivers as the Section 800 report.

Department of Labor Objections

The Department of Labor, although in agreement with the goal of integrating the commercial and defense sectors of the U.S. industrial base, strongly objects to relaxation of several socioeconomic requirements.

Commercial Items. Of greatest concern to DOL are the proposed waivers of three affirmative action requirements from contracts to purchase commercial items:

1. Executive Order 11246, which requires federal contractors and subcontractors to take affirmative steps to assure equal employment opportunity without regard to race, color, religion, sex or national origin.

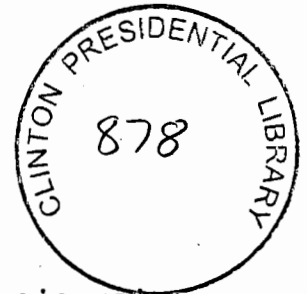
[Although EO 11246 includes a waiver for commercial item acquisition, DOL has never implemented the regulations.]

2. Section 503 of the Rehabilitation Act of 1973, which requires federal contractors and subcontractors to apply a policy of affirmative action to the employment of qualified individuals with disabilities.

3. The Vietnam Era Veterans' Readjustment Assistance Act of 1974, which mandates a similar policy of affirmative action toward the employment of disabled and Vietnam era veterans.

(DOL also has concerns about commercial-item waivers of the Buy American Act, Copeland Anti-Kickback Act, and Drug-Free Workplace.)

Although all employers are barred by law from discrimination, federal contractors have an affirmative obligation under these requirements. (EO 11246 has the most



extensive requirements: Firms must do a workforce analysis using census data to determine the appropriate representation of minorities and women by job category in their geographic area. They must have a written plan, updated annually, with goals and timetables for increasing the participation of those groups.) DOL believes it is a fundamental principle that in expending taxpayers' funds, the federal government may seek to promote important social goals by holding federal contractors to higher standards than the private sector generally.

Simplified Acquisition Threshold. The Labor Department is also concerned about raising the simplified acquisition threshold to \$100,000, which would affect two longstanding labor standards as well as the affirmative action requirements discussed above:

1. Labor standards laws: Davis-Bacon Act (current threshold, \$2,000) and the McNamara-O'Hara Service Contract Act (current threshold, \$2,500), which require the payment of prevailing wages and fringe benefits on federal construction and service contracts, respectively;
2. Affirmative action requirements:
 - a. EO 11246 (current threshold, \$10,000)
 - b. Sec. 503 of the Rehabilitation Act of 1973 (current threshold, \$10,000)
 - c. Vietnam Era Veterans' Readjustment Assistance Act of 1974 (current threshold, \$10,000)

The Labor Department is not opposed in principle to raising the coverage threshold under some of these laws, and in fact, DOL gave "qualified support" to the NPR recommendation to raise the threshold on the Davis-Bacon and Service Contract Acts to \$100,000. However, DOL believes such a change should be accomplished through amendments to the laws themselves rather than through procurement reforms.

Concerns of Other Agencies

Although the Department of Labor has been the most vocal critic of proposals to limit or waive socioeconomic requirements, DOL is not alone. The Department of Veterans Affairs vehemently opposes any dilution of the Vietnam Era Veterans' Readjustment Assistance Act of 1974; V.A. views the preference under federal contracts as a veterans' benefit and therefore not an appropriate concern of procurement reform legislation. The U.S. Commission on Civil Rights opposes, in particular, proposed changes to EO 11246, which it believes would signal a retreat from well-established and vital Federal civil rights policies. Several other agencies also oppose limits/waivers on certain socioeconomic requirements.



Congressional Action on Procurement Reform

Although the socioeconomic requirements have strong supporters on the Hill as well, key Senate sponsors are considering a government-wide procurement reform bill that would codify virtually all of the Section 800 Panel's recommendations. Committee staff have worked for eight months to draft this 300 page bill, which will be championed by Democrats John Glenn (chair, Government Affairs), Sam Nunn (chair, Armed Services), Dale Bumpers (chair, Small Business), Jeff Bingaman and Carl Levin, as well as Republicans William Roth and William Cohen.

In its present form, the Senate draft adopts the Section 800 recommendations on all of the controversial socioeconomic requirements save one -- Buy America. It is silent on EO 11246. In other words, the bill would raise the threshold to \$100,000 for the Davis-Bacon and Service-Contract Acts. On the affirmative action statutes covering the disabled and Vietnam veterans, the draft would both raise the simplified acquisition threshold to \$100,000 and provide for an exemption for commercial item acquisition.

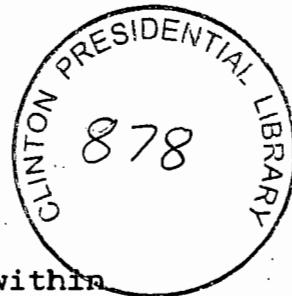
Although the Members have not signed off on these provisions, the draft represents a significant change from the Senate position on these issues several years ago, particularly for the Government Affairs Committee. (Glenn, Levin, Nunn and Cohen are members of both Armed Services and Government Affairs.)

The House procurement reform bill, H.R. 2238, is championed by Rep. John Conyers, chairman of the Government Operations Committee. As approved by the committee in July, H.R. 2238 raises the simplified acquisition threshold to \$100,000 for many statutes but not for the controversial socioeconomic requirements.

Arguments in Favor of Socioeconomic Waivers/Limits

1. Access to Cutting-Edge Technology. The socioeconomic waivers are among the reforms needed to allow DoD to get access to cutting-edge technology, products and processes, which are increasingly located in the commercial sector. Electronics, software, computer systems and telecommunications are areas where commercial technology is now more advanced than military technology.

The current procurement system impedes DoD access to commercial technology in three ways. First, some high tech firms shun business with the government altogether, because of the burden of government-unique requirements. Second, most government contractors segregate their defense business to some degree to avoid "contaminating" their commercial business; this



limits economies of scale and blocks technology transfer within the firm -- a problem for DoD because the innovations increasingly come out of the contractors' commercial division. Although the socioeconomic requirements are not the major culprit (cost-accounting standards and milspecs are more significant), they are a factor.

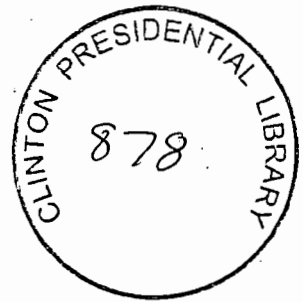
Third, socioeconomic and other requirements, which are generally required to "flow down" to all subcontractors, prevent contractors from using their commercial suppliers for government work. For example, the Air Force wants to buy commercial derivative aircraft from Boeing and McDonnell Douglas, both of whom segregate their commercial and government production. Although Boeing and McDonnell Douglas could live with the socioeconomic requirements (large government contractors must have affirmative action programs in place even in their commercial divisions), many of their commercial subcontractors cannot comply.

Although access to commercial technology is a problem primarily for DoD now, civilian agencies increasingly need the same, flexible access to leading-edge commercial technology for such things as advanced air traffic control systems and intelligent vehicle highway systems (DOT), next generation software (Education) and solar powered cars (DOE).

2. Cost savings. Significant savings are possible if DoD and other federal agencies can act more like commercial buyers. A July 1993 study by the Defense Science Board estimates that DoD can save \$2.1 billion a year (after five years) from better use of commercial items and practices. Additional savings of \$11.8 billion a year are possible from DoD reliance on "commercial-like" or dual-use items, such as the commercial derivative aircraft.

The socioeconomic requirements are by no means the only obstacle -- or even the major obstacle -- to realizing such savings. But as the Boeing example illustrates, the socioeconomic requirements would limit commercial purchases even if other obstacles were removed. Stated differently, removal of the socioeconomic requirements -- at least for subcontractors -- is necessary, if not sufficient, to allowing the federal government to buy commercial.

3. Reduce Overhead. The Carnegie Commission on Science, Technology and Government estimated that up to 40 percent of DoD's FY91 acquisition budget, \$50 billion, went for personnel in DoD and the defense industry dedicated to management and control. As DoD's budget falls, that figure will rise even higher if the current overhead structure is left in place.



Here again, it is difficult to isolate the burden of the socioeconomic requirements. As one measure, the Labor Department estimates that the three affirmative action programs it oversees (EO 11246 and preference for Vietnam veterans and the disabled) impose a paperwork burden on industry of 20 million hours.

4. Defense Conversion. Although many defense firms have tried to convert to the production of commercial products in response to reduced military spending, few have succeeded because of the overhead burden and inefficient processes associated with the existing defense acquisition system. As DoD's budget continues to drop, the Administration must unshackle these firms. Defense procurement reform will mean the most to firms and workers in California, where the unemployment rate is above 9 percent.

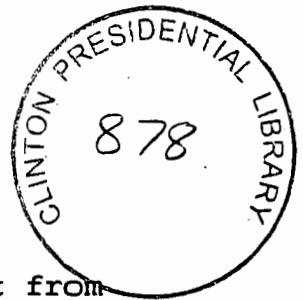
5. Broader Domestic Production Base. As military downsizing continues, our defense industrial base will be too small to meet the potential need for a reconstitution of defense production capability. DoD must be able to draw on the commercial industrial base, just as it did at the beginning of World War II. The current acquisition system -- with its morass of government-unique requirements -- makes that impossible.

6. Don't Undermine the Senate. For many years, socioeconomic requirements such as Davis-Bacon have been politically untouchable. This year, Senate Democrats appear willing to challenge that traditional view with a courageous bill. Given the Senate's apparent willingness to take a courageous stance on reforming socioeconomic requirements, the Administration cannot do less.

If the Administration were to take a less aggressive stance on reforming the socioeconomic requirements, it would not only undermine the Senate position, it would sacrifice the Administration's claim to leadership on procurement reform, jeopardize Republican support for a Senate/Administration bill, and encourage others to break rank to protect their favorite procurement regulation. The Section 800 report is the benchmark (it is the procurement equivalent of the Base Closure Commission), and any significant departure from its recommendations will be perceived as a retreat.

7. Issue is Ripe. Courage aside, the Senate draft bill position on the socioeconomic requirements reflects the fact that procurement reform is a politically ripe issue. The intellectual case for reform has been made, and several factors -- including a shrinking defense budget and a sense of crisis over the health of U.S. industry -- create the potential for sweeping legislative changes in the next two years.

8. Social Goals are Still Met. The proposals to limit the



socioeconomic requirements ought not be seen as a retreat from civil rights and other social goals. First, EO 11246 provides for a waiver for commercial item acquisition, even though the Labor Department has never implemented it. Second, some of the socioeconomic requirements have been preempted by subsequent legislation (e.g., the Americans with Disabilities Act provides many of the protections covered by the Rehabilitation Act of 1973). Third, procurement reform will benefit the small minority- and women-owned firms that cannot now do business with the government because it is too expensive to comply with scores of government-unique requirements.

Arguments Against Socioeconomic Waivers/Limits

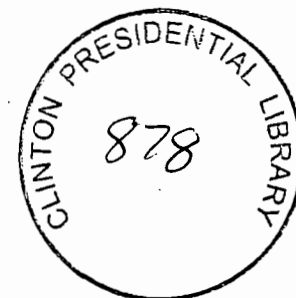
1. Federal Contractors Should be Held to Higher Standards.

While considering the Civil Rights Act of 1964, Congress expressly recognized that the equal opportunity obligations of those who do business with the federal government should be greater than those of other private employers. More generally, use of the procurement system to achieve diversity and other social goals is key to ensuring that all American citizens have a fair chance of sharing the economic benefits produced by federally-funded projects.

2. EO 11246 is More Important Now than Ever. Drawing back from EO 11246 at this time would be particularly undesirable. As reported two weeks ago in the Wall Street Journal, essentially all of the job loss in the last recession was among African Americans. The data are sobering, and they point to the need to keep government at the forefront of equal opportunity.

3. Socioeconomic Requirements are Not the Major Overhead Burden. Socioeconomic requirements are not the major source of overhead costs, and proponents of change lack firm estimates of what costs socioeconomic requirements do impose. Moreover, proposals to limit/waive socioeconomic requirements do not consider the long-term social and economic benefits that these requirements produce.

4. Socioeconomic Requirements are Not the Major Impediment to Technology Access. Similarly, socioeconomic requirements are not the major cause of problems DoD may have in getting access to cutting-edge commercial technology. When contractors segregate their government and commercial business, or refuse to do business with government altogether, they do so principally for reasons other than the socioeconomic requirements (typically, cost-accounting standards and milspecs). Moreover, because large government contractors must abide by affirmative action requirements even in their commercial division, such requirements are not an obstacle to commercial-military integration.



5. DOL is Revising its Requirements. The Labor Department is examining its labor standards laws (Davis Bacon and Service Contract Acts) and affirmative action requirements. As part of that review, DOL is likely to consider higher and uniform coverage thresholds for these requirements. As for the recommended waivers for commercial item acquisition, some compromise might also be possible -- e.g., eliminating the "flow-down" requirements, which extend (by regulatory action) the socioeconomic requirements to all subcontractors.

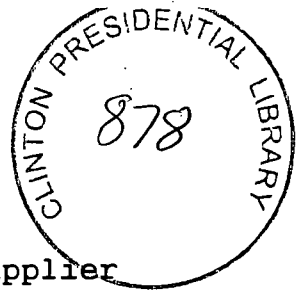
6. Changing Socioeconomic Requirements is not Good Politics. The groups that will be affected by proposed changes to the socioeconomic requirements -- minorities, veterans, the disabled, unions -- are traditional Democratic constituencies. Why alienate them, particularly when it is not clear that the socioeconomic requirements are the major obstacle to procurement reform? The disparate impact of the recession on minorities makes this a particularly inopportune time to draw back from EO 11246. The President's procurement reform announcement might be overshadowed by news stories on Democrats' retreat from longstanding civil rights policies.

As for the argument that reforming the socioeconomic requirements will mean more and better jobs for all, whatever its merits, that argument has been tainted by its past association with conservative and anti-labor Republicans.

Conclusion and Options

There is a strong case for raising the threshold for simplified purchases from \$25,000 to \$100,000 for both the labor standards and affirmative action requirements, with continued reservation of all purchases below the threshold for small and small disadvantaged businesses. That change would streamline a large fraction of procurement actions but affect only a small percent of contract dollars. It does not challenge the principle that the procurement system should be used to achieve social goals, but merely raises the level at which that principle kicks in.

The case for commercial item waivers is more controversial, particularly with respect to EO 11246. Socioeconomic requirements are not the major obstacle to commercial-military integration among the primes, although they are a factor. However, such requirements are a definite obstacle both to contractors' use of their commercial suppliers and to government purchases above the simplified threshold level from purely commercial firms. At a minimum, elimination of the "flowdown requirements" on subcontractors, which can be accomplished administratively in most cases, seems warranted. This would not exempt subcontractors that are otherwise covered, but it would



allow companies such as Boeing to use their commercial supplier base for government contracts.

As for government contractors themselves, there are three possible options under commercial item acquisition:

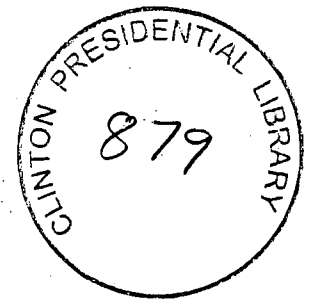
Option 1 (Status quo): Contractors remain subject to the three controversial affirmative action requirements, including existing monitoring and reporting requirements.

Option 2 (Section 800): Contractors are exempt from affirmative action requirements for commercial contracts.

Option 3 (Compromise): Contractors are still obligated to pursue a policy of affirmative action toward protected groups, but monitoring and recordkeeping requirements are eliminated in favor of a system like that of the Internal Revenue Service, which relies on self-policing and the threat of audit.

CLOSE HOLD

DRAFT



September 22, 1993

MEMORANDUM FOR:

FROM:

SUBJECT: Procurement Reform

During the week of October 4, the President and the Vice President, together with key congressional Members, will announce a major effort to reform the federal government's procurement system. Procurement reform is central both to "reinventing government" and to the Administration's Defense Reinvestment and Conversion Initiative.

One aspect of proposed changes to procurement law -- namely, relaxation of certain socioeconomic requirements on federal contractors -- remains problematic for some agencies. This memo traces the recent roots of proposals to relax socioeconomic requirements and summarizes the arguments for and against such proposals.

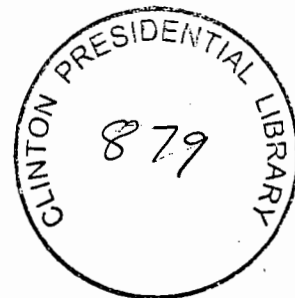
The Heart of Reform: Simplified Acquisition Threshold, and Commercial Item Acquisition

Two proposed changes constitute the heart of statutory procurement reform. The first would lift the threshold for conducting simplified purchases from \$25,000 to \$100,000. The second would make it easier for the government to buy commercial products. Both features involve relaxation of certain statutory socioeconomic requirements.

Section 800 Panel. These and other proposals draw on the work of the DoD Advisory Panel on Streamlining and Codifying Acquisition Law. Known as the Section 800 Panel after its enabling law, this group examined more than 600 statutes affecting the defense procurement process. The Panel's recommendations, in the form of an 1,800 page report, were submitted to Congress in January 1993.

First, to reduce administrative overhead, the Panel recommended raising the threshold for many socioeconomic requirements to \$100,000. This change would streamline more than 50 percent of all DoD contract actions over \$25,000 (the existing threshold for simplified purchase procedures) while affecting less than five percent of the contract dollars. In keeping with existing policy, the Panel recommended reserving all purchases

under the threshold for small businesses, including small disadvantaged businesses.



Second, the Section 800 Panel recommended that many government-unique socioeconomic requirements be waived for acquisition of commercial items. Such waivers were necessary to enhance DoD's access to cutting-edge commercial technology, the Panel argued. They would also permit some firms that must now maintain separate facilities and accounting systems to integrate their commercial and military production. These changes, moreover, would allow DoD to fulfill its requirements at far lower costs.

National Performance Review

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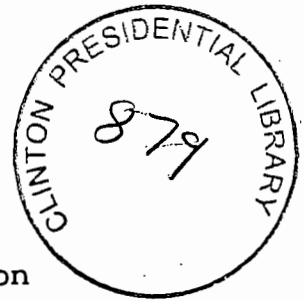
Commercial Items. Of greatest concern to DOL are the proposed waivers, for commercial item acquisition, of three affirmative action requirements:

1. **Executive Order 11246**, which requires federal contractors and subcontractors to take affirmative steps to assure equal employment opportunity without regard to race, color, religion, sex or national origin.

[Although E.O. 11246 includes a waiver for commercial item acquisition, DOL has never implemented the regulations.]

2. **Section 503 of the Rehabilitation Act of 1973**, which requires federal contractors and subcontractors to apply a policy of affirmative action to the employment of qualified individuals with disabilities.

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1974, which mandates a similar policy of affirmative action toward the employment of disabled and Vietnam era veterans.

DOL also has concerns about commercial-item waivers of the Buy American Act, Copeland Anti-Kickback Act, and Drug-Free Workplace.

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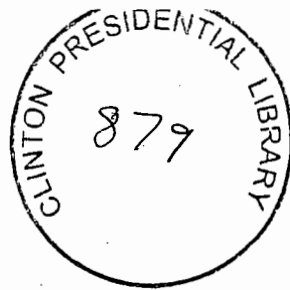
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The Labor Department is not opposed in principle to raising the coverage threshold under some of these laws, and in fact, DOL gave "qualified support" to the NPR recommendation to raise the threshold on the Davis-Bacon and Service Contract Acts to \$100,000. However, DOL believes such a change should be accomplished through amendments to the laws themselves rather than through procurement reforms.

Concerns of Other Agencies

Although the Department of Labor has been the most vocal critic of proposals to limit or waive socioeconomic requirements, DOL is not alone. The Department of Veterans Affairs vehemently opposes any dilution of the Vietnam Era Veterans' Readjustment Assistance Act of 1974; V.A. views the preference for veterans under federal contracts as a veterans' benefit and therefore not an appropriate concern of procurement reform legislation. The U.S. Commission on Civil Rights opposes, in particular, proposed



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changes to E.O. 11246., which would signal a retreat from well-established and vital Federal civil rights policies. Several other agencies also oppose limits/waivers on the socioeconomic requirements.

Congressional Action on Procurement Reform

Although the socioeconomic requirements have strong supporters on the Hill as well, key Senate sponsors are considering a government-wide procurement reform bill that codifies virtually all of the Section 800 Panel's recommendations. Key committee staff have worked for eight months to draft this 300 page bill, which will be championed by Democrats John Glenn (chair, Government Affairs), Sam Nunn (chair, Armed Services), Dale Bumpers (chair, Small Business), Jeff Bingaman and Carl Levin, as well as Republicans William Roth and William Cohen.

In its present form, the Senate bill adopts the Section 800 recommendations on all of the controversial socioeconomic requirements save one -- Buy America. It is silent on E.O. 11246. In other words, this bill raises the threshold to \$100,000 for the Davis-Bacon and Service-Contract Acts. On the affirmative action statutes covering the disabled and Vietnam veterans, the Senate bill both raises the simplified acquisition threshold to \$100,000 and provides for an exemption for commercial item acquisition.

This represents a significant change from the Senate position on these issues several years ago, particularly for members of the Government Affairs Committee. (Glenn, Levin, Nunn and Cohen are members of both Armed Services and Government Affairs.)

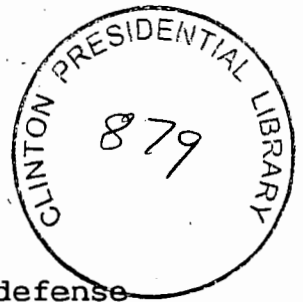
The House procurement reform bill, H.R. 2238, is championed by Rep. John Conyers, chairman of the Government Operations Committee. As approved by the committee in July (?), H.R. 2238 raises the simplified acquisition threshold to \$100,000 for many statutes but not for the controversial socioeconomic requirements.

Arguments in Favor of Socioeconomic Waivers/Limits

1. Access to Cutting-Edge Technology. The socioeconomic waivers are part of what's needed to allow DoD to get access to cutting-edge technology, which is increasingly located in the commercial sector. The linkages are three: First, some high tech firms shun business with the government altogether; although the socioeconomic requirements are not the major reason (cost-accounting standards and milspecs are more significant deterrents), they are a factor.

govt at mercy of firms

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Second, most government contractors segregate their defense and commercial business to some degree to avoid imposing the costs of government requirements on commercial customers; as a result, technology transfer within the firm is blocked -- a problem for DoD because the innovations increasingly come out of the contractors' commercial division.

Third, procurement requirements, which are generally required to "flow down" to all subcontractors, prevent contractors from using their commercial suppliers for government work. For example, the Air Force wants to buy commercial derivative aircraft from Boeing and McDonnell Douglas, both of whom segregate their commercial and government production. Although Boeing and McDonnell Douglas could live with the socioeconomic requirements (large government contractors must have affirmative action programs in place even in their commercial divisions), many of their commercial subcontractors cannot comply.

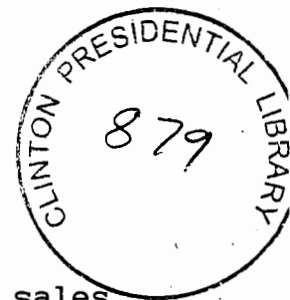
Although this is a problem primarily for DoD now, civilian agencies increasingly need the same, flexible access to commercial technology for such things as advanced air traffic control systems and intelligent vehicle highway systems (DOT), next generation software (Education) and solar powered cars (DOE).

2. Broader Domestic Production Base. DoD cannot now count Boeing or McDonnell Douglas' commercial subcontractors as part of its production base. But as the number of defense subcontractors declines, DoD must expand its base to include commercial subcontractors, if it is to meet potential surge requirements.

3. Cost savings. Significant savings are possible if DoD and other federal agencies can act more like commercial buyers. A July 1993 study by the Defense Science Board estimates that DoD can save \$2.1 billion a year (after five years) from better use of commercial items and practices. Additional savings of \$11.8 billion a year are possible from DoD reliance on "commercial-like" or dual-use items, such as the commercial derivative aircraft.

The socioeconomic requirements are by no means the only obstacle -- or even the major obstacle -- to realizing such savings. But as the Boeing example illustrates, the socioeconomic requirements would limit commercial item acquisition even if other obstacles were removed.

4. Reduce Industry Overhead. Contractor overhead is a major reason procurement costs are high. The Center for Strategic and International Studies surveyed firms with both commercial and defense business. Although the results vary widely, the pattern



suggests that commercial divisions spend 5 to 10 percent of sales on administrative costs, whereas defense divisions spend 20 to 30 percent.

Here again, it is difficult to isolate the burden of the socioeconomic requirements. However, the Labor Department estimates that the three affirmative action programs it oversees (E.O. 11246 and preference for Vietnam veterans and the disabled) impose a paperwork burden on industry of 20 million hours.

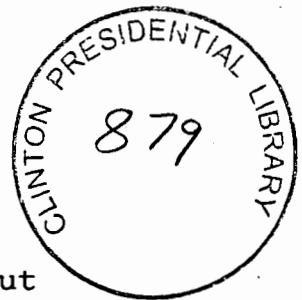
5. Defense Conversion. Defense firms large and small are laying off workers by the thousand. These firms are pleading with the Administration to remove onerous procurement regulations so that they can compete commercially. As the defense budget continues to drop, the Administration must unshackle these firms. Defense procurement reform will mean the most to firms and workers in California, where the unemployment rate is 9.8 percent.

6. Don't Undermine the Senate. For many years, socioeconomic requirements such as Davis-Bacon have been politically untouchable. This year, liberal Senate Democrats such as Carl Levin are challenging that traditional view with a courageous bill. Given the Senate's courageous stance on reforming socioeconomic requirements, the Administration cannot do less.

If the Administration were to take a less aggressive stance on reforming the socioeconomic requirements, it would not only undermine the Senate position, it would sacrifice the Administration's claim to leadership on this issue. The Section 800 and NPR reports are the benchmark, and any significant departure from their recommendations will be perceived as a retreat.

7. Issue is Ripe. Courage aside, the Senate's stance on the socioeconomic requirements reflects the fact that procurement reform is a politically ripe issue. The intellectual case for reform has been made, and several factors -- including a shrinking defense budget and a sense of crisis over the health of U.S. industry -- create the potential for sweeping legislative changes in the next two years.

8. Social Goals are Still Met. The proposals to limit the socioeconomic requirements ought not be seen as a retreat from civil rights and other social goals. First, E.O. 11246 provides for a waiver for commercial item acquisition; although the Labor Department has never implemented that waiver, it is consistent with the original authors' intent. Second, some of the socioeconomic requirements have been at least partially preempted by subsequent legislation; for example, the Americans with Disabilities Act provides many of the protections covered by the Rehabilitation Act of 1973. Third, many government contractors -



- particularly the large ones -- would continue to carry out affirmative action employment policies. It is not the policy they fund burdensome, but rather the monitoring and reporting requirements.

In sum, rather than a retreat from social goals, changes in the socioeconomic requirements should be seen as an adaptation to a dynamic system that has, in fact, made significant progress toward those goals. Rather than a zero-sum game, this should be seen as a positive-sum activity that will mean more jobs and better jobs for American workers.

Arguments Against Socioeconomic Waivers/Limits

1. Federal Contractors Should be Held to Higher Standards.

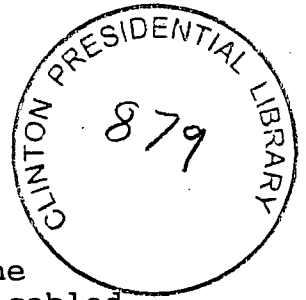
While considering the Civil Rights Act of 1964, Congress expressly recognized that the equal opportunity obligations of those who do business with the federal government should be greater than those of other private employers. Vigorous enforcement of such obligations is essential to ensuring that all American citizens have a fair chance of sharing the economic benefits produced by federally-funded projects.

2. Requirements are Not a Major Burden. There is no concrete evidence that socioeconomic requirements impose significant costs on government contractors or lead to wasteful business practices such as segregated production facilities. Nor do proposals to limit/waive such requirements consider the long-term social and economic benefits that these requirements produce.

3. Requirements do Not Impede Access to Technology. When contractors segregate their government and commercial business, or refuse to do business with government altogether, they do so principally for reasons other than the socioeconomic requirements (typically, cost-accounting standards and milspecs). Therefore, these requirements are not a major cause of problems DoD may have in getting access to cutting-edge technology.

4. DOL is Revising its Requirements. The Labor Department is examining its labor standards laws (Davis Bacon and Service Contract Acts) and nondiscrimination and affirmative action requirements. As part of that review, DOL is likely to be considering higher and uniform coverage thresholds for these requirements. As for the recommended waivers for commercial item acquisition, some compromise might also be possible -- e.g., eliminating the "flow-down" requirements, which extend (by regulatory action) the socioeconomic requirements to all subcontractors.

5. Changing Socioeconomic Requirements is not Good Politics.



The groups that will be affected by proposed changes to the socioeconomic requirements -- minorities, veterans, the disabled, unions -- are traditional Democratic constituencies. Why alienate them, particularly when it is not clear that the socioeconomic requirements are the major obstacle to procurement reform? Davis Bacon, E.O. 11246, and other socioeconomic requirements are important symbolically; thus we would have to spend a great deal of political capital on those issues -- capital that would be better spent on core problems.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Douglas Letter to Abner Mikva, re: Appointment of a Presidential Diarist (2 pages)	3/7/1995	P5	880
002a. fax	Charles Moskos to George Stephanopoulos [partial] (1 page)	<u>2/27/1995</u>	P6/b(6)	
002b. paper	Affirmative Action: The Army Way [partial] (1 page)	<u>2/1995</u>	P6/b(6)	

COLLECTION:

Clinton Presidential Records
Counsel's Office
Klein, Joel
OA/Box Number: 6039

FOLDER TITLE:

Affirmative Action [1]

Whitney Ross
2008-0308-F
wr441

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

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THE WHITE HOUSE
WASHINGTON

March 7, 1995

Misc
JWP



MEMORANDUM FOR ABNER MIKVA
Counsel to the President

JOEL KLEIN
Deputy Counsel to the President

FROM: DOUGLAS LETTER
Associate Counsel to the President

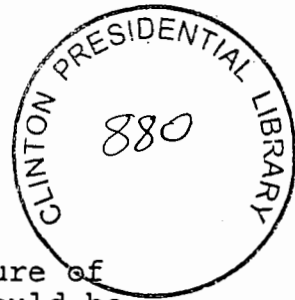
SUBJECT: Confidentiality Issues Concerning Possible
Appointment of a Presidential Diarist

You had asked me to consider possible confidentiality issues if the President decided to hire a diarist. As discussed below, I do not believe that confidentiality could be assured by any type of contract or agreement. Thus, protection of Presidential confidences would best be achieved by selection of a reliable person.

My understanding is that a diarist might be assigned for historical purposes to keep a record of non-public meetings and events involving the President as he carries out his duties. I assume that such a diarist would be part of the President's personal staff.

The specific question raised was whether this employee should be required to sign a confidentiality agreement to protect against premature disclosure of Presidential confidences. (The diarist's work would presumably be Presidential records that, through the Archives, would be available to the public eventually with other confidential Presidential records.)

I have found no case law directly on point for this issue. The most relevant cases involve secrecy agreements signed by CIA employees. Decisions by the D.C. Circuit and the Fourth Circuit have upheld secrecy agreements under which CIA employees and former employees agree to submit works for pre-publication review. Under these agreements, the CIA is entitled to pre-screen the proposed publications in order to look exclusively for classified information. In dicta, both courts cast serious doubt on the validity of any agreement that would allow censorship of non-classified material. United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972) ("We would decline enforcement of the secrecy oath signed when [the employee] left the employment of



the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights"), cert. denied, 409 U.S. 1063 (1972); McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983) ("The government may not censor [non-classified] material, contractually or otherwise. The government has no legitimate interest in censoring unclassified materials").

In Snepp v. United States, 444 U.S. 507 (1980), the Supreme Court also upheld an award of damages for violation of a CIA pre-publication agreement. The Court's enforcement of the agreement did not depend upon whether Snepp's book actually contained classified information. The opinion makes clear though that the CIA was entitled to undertake its review so that it could look for classified information.

An argument could be made that a diarist working closely with the President is in a unique position, and that a secrecy agreement covering non-classified Presidential confidences should be enforceable because of the important historical interests and the President's need for confidentiality. Given the statements above from Marchetti and McGehee, there is doubt that we could enforce such a broad confidentiality agreement even if we sought only damages after the fact. If such an agreement were found to be enforceable, it would be very uncertain that a court would issue an order enjoining a publication that the President contended revealed his confidences. Thus, meaningful enforcement would be very questionable. It seems to make no difference if the confidentiality agreement were made an explicit condition for getting the diarist position. See McGehee, 718 F.2d at 1141 n.10; Marchetti, 466 F.2d at 1317 n.6.

General federal regulations (5 C.F.R. § 2635.703) do restrict use of non-public information by federal employees, and are likely valid. See United States v. NTEU, 63 U.S.L.W. 4133, 4137 (Feb. 22, 1995). However, they apply only to current employees, and it is not clear anyway that an injunction against publication could be obtained using them.

In sum, I am not aware of any precedents that a broad confidentiality agreement would be enforced by the courts, much less in a practically meaningful way. If a diarist for Presidential activities is to be utilized and confidentiality is a concern, the best protection would seem to be the same as that for the President's closest aides and advisers; i.e., selection of a trustworthy individual.

Please let me know if you want anything further on this question.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. fax	Jay Gourley to Joel Klein [partial] (1 page)	01/25/1995	P6/b(6)
002. memo	John Podesta and Tod Stern for the POTUS, re: Information Items (1 page)	1/27/1995	P5 881
003. note	Jay Gourley to Joel Klein [partial] (1 page)	01/25/1995	P6/b(6)
004. memo	Jeff to Joel, re: Race-Conscious Remedies (2 pages)	1/9/1995	P5 882

COLLECTION:

Clinton Presidential Records
Counsel's Office
Klein, Joel
OA/Box Number: 6039

FOLDER TITLE:

Affirmative Action [3]

Whitney Ross
2008-0308-F
wr438

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

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

RR. Document will be reviewed upon request.

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

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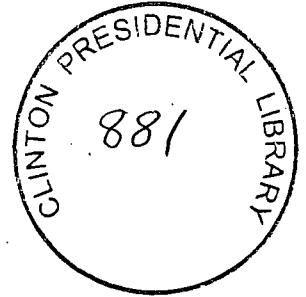
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THE WHITE HOUSE
WASHINGTON

THE PRESIDENT HAS SEEN

1/27/95

January 27, 1995



MEMORANDUM FOR THE PRESIDENT

FROM: JOHN PODESTA
TODD STERN *TS*

SUBJECT: Information Items

The following are information items we have received in the past few days:

(A) **McCurry memo on Clayton Willis.** This is in response to your request for a report on Willis, of the Evening Broadcasting Company. Bottom line: Mike recommends that, although the Secret Service has approved Willis for access to the White House, we continue our policy of reserving space for more legitimate news organizations.

*Should be
this morning
improvement
Luph*
(B) **Note from Deval Patrick.** He congratulates you on your MLK Day speech and requests a meeting to discuss the Administration's civil rights agenda. We have sent a copy of the note to Billy Webster for his information.

*Curried
to Deval
Wry Graham
This sum*
(C) **Letter from Bud Stack, forwarded by Mack.** The letter is a plea from Stack to be favorably considered for appointment to the Eleventh Circuit Court of Appeals and an argument as to why his former membership in the Riviera Country Club shouldn't bar his nomination. Mack notes that he thinks this is a judgment call and that it's down to your decision. Mack copied Leon and Bruce. We have copied Vicki as well.

(D) **Weekly Political Report by Ickes/Political Affairs.** (This report is dated January 14, but was received by our office this week.)

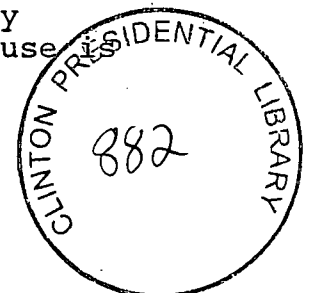
To: Joel
From: Jeff
Date: January 9, 1995
Re: Race-Conscious Remedies

open file
Affirmative Action

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:

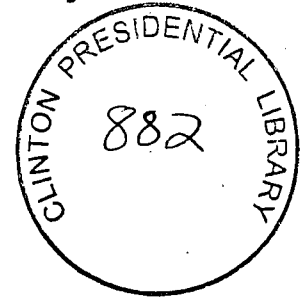
- * Does the Constitution limit the use of race-conscious remedies to contexts with a proven remedial purpose?
- * Or does the goal of promoting racial diversity, even in a nonremedial context, represent a sufficiently compelling governmental justification that satisfies constitutional scrutiny?
- * 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 the program's 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 (i.e., do Congress's implicit factual findings justifying the policy limit the scope of the agency's implementation of the program)?
- * 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	Bill Galston to President Clinton, re: Forthcoming Dept of Education Guidance Concerning Race-Targeted Financial Aid (3 pages)	1/27/1994	P5	883
002a. memo	H. Jefferson Powell to Webster Hubbell, re: Final Policy Guidance on AA (4 pages)	12/30/1993	P5	884
002b. memo	For the Associate Attorney General, re: Dept of Education's Race-Targeted Financial Aid (4 pages)	12/23/1993	P5	885
002c. memo	H. Jefferson Powell to Judith Winston, re: Policy Guidance on AA (2 pages)	1/4/1994	P5	886

COLLECTION:

Clinton Presidential Records
Counsel Office
Joel Klein
OA/Box Number: 7036

FOLDER TITLE:

Affirmative Action Dep't of Education--Minority Fellowships

Whitney Ross
2008-0308-F
wr903

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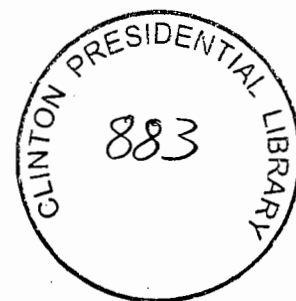
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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

THE WHITE HOUSE
WASHINGTON
January 27, 1994



MEMORANDUM FOR THE PRESIDENT

FROM: BILL GALSTON ^{WAG}
SUBJECT: FORTHCOMING DEPARTMENT OF EDUCATION GUIDANCE
CONCERNING RACE-TARGETED FINANCIAL AID

Introduction

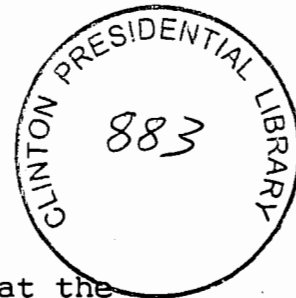
The Department of Education will soon issue a final policy guidance on the use of race-targeted financial aid by colleges and universities under Title VI of the 1964 Civil Rights Act. This move raises a number of constitutional, policy, and political issues. The purpose of this memorandum is to review these issues and to alert you to the controversy that will be sparked by issuance of the final guidelines.

Background

During the 1970s and 1980s, many colleges and universities offered financial aid targeted to racial minorities, usually African-Americans. They did so for two principal reasons: first, to remedy the effects and eliminate the vestiges of past discrimination; and second, to increase and enhance diversity, even when there was no finding of past discrimination. Under both these types of programs, race was a condition of eligibility for financial aid, not just one of many factors to be taken into account.

At the close of 1990, the Office of Civil Rights (OCR) at the Department of Education attempted to change these longstanding practices by asserting that racially-targeted financial aid was permissible only to address past discrimination. To enhance diversity, race could be a "plus factor"--one of many considerations--but could not serve as an absolute condition of eligibility. If this change had taken effect, many institutions would have been forced to curtail their pro-diversity programs.

This OCR move created a firestorm of protest from educational institutions and the civil rights community. The Bush administration quickly distanced itself from the proposal, and the administration's subsequent appointee as Secretary of Education, Lamar Alexander, managed to delay issuance of final guidelines pending completion of a GAO report on minority scholarship programs. Although that report was expected in 1992, it was not finished and made public until last week. The Department of Education now intends to proceed without further delay to issue revised final guidelines governing racially-targeted college scholarships.



The current Department of Education proposal

Secretary Riley and his leadership team at OCR believe that the proposal made by the Bush Department of Education was mistaken on grounds of both law and policy. They argue that as a matter of constitutional law, race may legitimately serve as a condition of eligibility to promote diversity as well as to remedy past discrimination. And citing the recently released GAO report, they argue that as a matter of policy, such race-targeting is needed to promote diversity, because programs utilizing race as just one plus factor among many have proven ineffective in expanding minority enrollment.

Constitutional issues

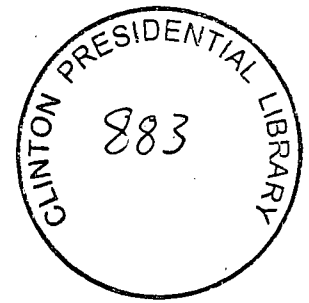
There is no court decision that definitively resolves the constitutional question whether race may be a strict condition of eligibility for financial aid intended to promote diversity. The most relevant opinion remains that of Justice Powell in Bakke, which recognized that the promotion of diversity in higher education is a compelling interest--a position that has not been invalidated in subsequent Supreme Court decisions. Powell's opinion also stated, however, that it was not permissible to promote such a diversity interest through programs that make race a condition of eligibility for slots in the admissions process.

The Department of Education distinguishes its financial aid guidelines from the admissions program invalidated in Bakke on the ground that narrowly tailored race-targeted financial aid "does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race." The Justice Department's Office of Legal Counsel has formally reviewed OCR/Education's legal analysis and deems it "basically sound" and "defensible." The White House Counsel's Office concurs but also recognizes that this is a litigable constitutional issue the ultimate outcome of which cannot be guaranteed. My personal view is that while the Department of Education has made a plausible case, we will have at best an even chance of sustaining it in the face of constitutional challenge.

Political issues

Publication of the Department's final guidelines is sure to elicit a strongly negative reaction from conservatives in Congress, think-tanks, and the legal academy. In all probability, the administration will be accused of skating on thin legal ice and even of advocating "quotas." Media coverage may well be intense. On the other hand, were we to take the other tack and determine that race could not be a condition of eligibility for financial aid to promote diversity--a position that the Bush White House declined to support--we would arouse the ire of hundreds of academic institutions around the country and of the entire civil rights community.

As far as we can see, there is no middle ground between the Department's current proposal and the politically unsustainable Bush proposal. For that reason, George Stephanopoulos believes that we must support the Department's position and accept the ensuing furor. I concur, although I believe that the short-term political fallout will be considerable and that a long-term constitutional challenge--the outcome of which cannot be predicted with confidence--is virtually inevitable.





U. S. Department of Justice

Office of Legal Counsel

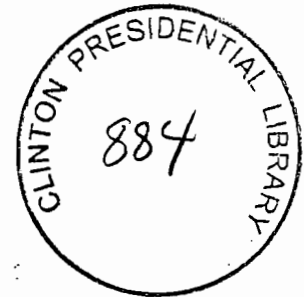
Washington, D.C. 20530

December 30, 1993

Do of Educ -
Ministry
Belmont

**MEMORANDUM TO WEBSTER HUBBELL
ASSOCIATE ATTORNEY GENERAL**

From: H. Jefferson Powell
Michael C. Small



We have reviewed the draft Final Policy Guidance (the "FPG") regarding affirmative action in college financial aid programs that has been prepared by the Office of Civil Rights in the Department of Education ("OCR"). The FPG sets forth five "principles" that reflect the circumstances under which OCR believes that colleges may award financial aid to students on the basis of race or national origin, consistent with Title VI of the 1964 Civil Rights Act and court decisions setting the legal ground rules for affirmative action.¹ In our view, the legal analysis underpinning each of the five principles is basically sound. We do, however, have the following comments.

Principle 2: Race-Based Financial Aid Authorized by Federal Statute

Principle 2 of the FPG states that a college may award financial aid on the basis of race or national origin when authorized to do so by an act of Congress. The premise of principle 2 is that federally-authorized affirmative action cannot be considered to violate Title VI in light of a canon of statutory construction under which "the specific provisions of a statute prevail over the general provisions of the same or a different statute." (FPG at 10) Reliance on that rule of statutory construction is somewhat misleading here, because there is a split in the caselaw as to whether Title VI even applies to the award of federal financial assistance by an executive branch agency. Thus, race-based grants made by the Secretary of Education to higher education institutions under the Patricia Roberts Harris Fellowship program (the one example of federally-authorized affirmative action in college financial aid that is mentioned in the FPG) may not be subject to Title VI in the first place.

¹ Title VI prohibits college and universities that receive federal funds from discriminating on the basis of race or ethnicity. As indicated in the FPG, Title VI imposes the same constraints on affirmative action as does the Constitution. Thus, in ascertaining whether affirmative action in a college financial aid program is permissible under Title VI, it is appropriate to look to constitutional precedents.

Even though Title VI may not be applicable, an affirmative action program is not automatically legal simply because it is permitted by an act of Congress; the program must still meet the applicable constitutional standards for race-based action authorized by federal statutes that were established in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), and Fullilove v. Klutznick, 448 U.S. 448 (1980). Those two cases are cited in the FPG (at 10) for the proposition that federally-authorized affirmative action in college financial aid "prevails over the general prohibition of discrimination in Title VI." That is not what those cases say, however. We suggest that the FPG be revised to make clear that although Title VI itself may not be a bar to federally-authorized affirmative action in college financial aid programs, such programs are still subject to the constitutional standards of Metro Broadcasting and Fullilove.

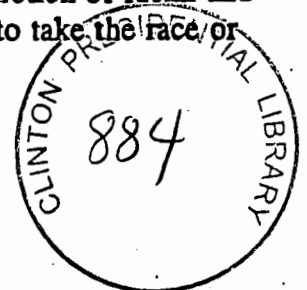
Principle 3: Race-Based Financial Aid to Remedy Discrimination

Principle 3 provides that the use of racial classifications is subject to strict scrutiny, the most exacting standard of judicial review. In order to satisfy strict scrutiny, a racial classification must serve a "compelling interest" and be "narrowly tailored" to achieve that interest. The FPG observes that the Supreme Court has held that remedying the effects of past discrimination is a compelling interest that justifies the use of racial classifications. Principle 3 therefore states that a college may award financial aid on the basis of race or national origin to eliminate the vestiges of its past discrimination. All of this is correct.

✓ 11 Principle 3 also provides (again, correctly in our view) that a college does not have to wait for a court or OCR to make findings of discrimination before undertaking affirmative action measures -- the college may make such findings for itself. As the FPG observes, the Supreme Court's decisions in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), require remedial affirmative action measures to be based on "strong evidence of discrimination." (FPG at 12) In explaining that requirement, the FPG points out that "evidence of a statistically significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of college-bound high school graduates" may constitute a finding of discrimination on which race-based action may be predicated. (*Id.*) That is the only indicia of discrimination mentioned in the FPG, however. Since the purpose of the FPG is to assist colleges in "fashioning legally defensible" affirmative action in their financial aid programs (*id.* at 2), it might be useful if other examples were provided. In particular, the FPG could list the type of evidence to which OCR itself looks in ascertaining whether the vestiges of past discrimination are still present at an institution.

Principle 4: Race-Based Financial Aid to Create Diversity

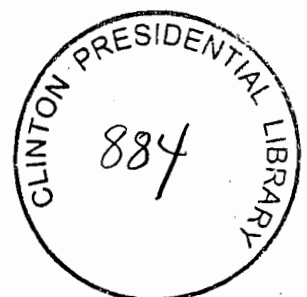
Relying on Justice Powell's controlling opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), principle 4 states that the promotion of racial and ethnic diversity on campus is a compelling interest that permits a college to take the race, or



national origin of students into account in awarding financial aid, even where there is no evidence of past discrimination by the college against minorities. This is consistent with the position of OCR during the Bush Administration. During the Bush Administration, however, OCR took the view that where diversity is the objective, race or national origin could only be one factor in the financial aid decision. That view was at odds with the longstanding OCR position. Principle 4 reverses the Bush Administration stance and adopts the prior OCR position. It states that race or national origin can be the sole factor in the financial aid decision, provided that this form of affirmative action is "narrowly tailored" to achieve the goal of academic diversity. Principle 4 goes on to list certain factors that should be considered in determining whether race-targeted financial aid satisfies the narrowly tailored inquiry.

→ [Principle 4 is the most controversial aspect of the FPG: simply put, it would allow a university to seek academic diversity through the use of scholarships for which only minorities are eligible. This is politically charged, because it opens up the Clinton Administration to charges that is advocating "quotas." As a legal matter, however, principle 4 is defensible. In his Bakke opinion, Justice Powell said that a university has a compelling interest in promoting diversity among the student body, but that it was impermissible to attempt to achieve that interest by making race the exclusive factor in the admissions process and allocating a fixed number of places to minorities. During the Bush Administration, OCR construed Justice Powell's opinion to preclude minority-limited financial aid, even though OCR had never read the opinion in that manner. In the explanation of principle 4, the FPG states that Justice Powell's opinion in Bakke does not necessarily prohibit minority-limited financial aid. It distinguishes set-asides in college admissions from financial aid programs in which race is a condition of eligibility and concludes that, in certain circumstances, it is permissible to make race the sole factor in a financial aid decision in order to promote diversity on campus. We agree with that analysis. We suggest, however, that the FPG state more explicitly that (a) the affirmative action program in admissions that was struck down in Bakke had the effect of excluding nonminorities from the university altogether on the basis of their race; and (b) by contrast, minority-limited scholarships operate only after a student has been admitted to the university and thus do not, in and of themselves, dictate that a nonminority will be foreclosed from attending the university. This statement would provide further support for the argument (FPG at 18) that race-targeted financial aid satisfies the factor of the narrowly tailored inquiry that focuses on the degree of burden that an affirmative action measure imposes on nonminorities.

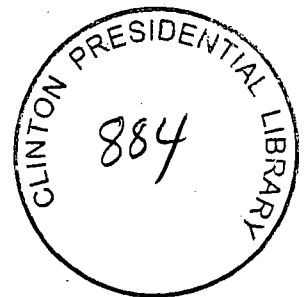
✓ { Finally, we note that in Croson, the Supreme Court said that affirmative action must be "strictly reserved for the remedial setting." 488 U.S. at 469. In his Croson concurrence, Justice Stevens interpreted that statement to mean that the Court had rejected the notion that efforts to promote diversity in higher education institutions or other sectors of society can constitute a compelling interest. Id. at 511 & n.1. If that is a correct reading of Croson,



then the Court was also necessarily rejecting Justice Powell's opinion in Bakke, and the foundation of principle 4 of the FPG has been undermined.²

Most lower courts and academic commentators have speculated that the Court in Croson did not intend to discard Justice Powell's Bakke opinion. That is our view as well. To begin with, Croson did not involve a nonremedial affirmative action program. Thus, the Court had no occasion to consider the issues posed in Bakke. Moreover, the author of the principal opinion in Croson was Justice O'Connor; in a concurring opinion in Wygant, which was decided three years prior to Croson, Justice O'Connor had accepted Justice Powell's view that racial diversity in higher education is a compelling interest. Wygant, 476 U.S. at 286 (O'Connor, J., concurring). Because of the uncertainty created by Croson, however, we believe that the FPG should acknowledge the question of the current status of Justice Powell's opinion in Bakke. We believe that this can be done in a short footnote along the following lines:

Bakke was the Supreme Court's first decision in an affirmative action case; the Court has decided a number of affirmative action cases since then. Nevertheless, the subsequent cases have not invalidated Justice Powell's opinion in Bakke that the promotion of diversity in the higher education setting is a compelling interest.

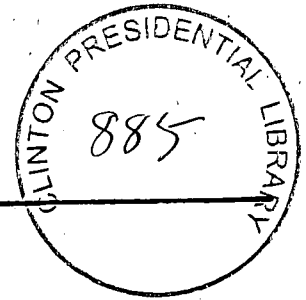


² In Metro Broadcasting, which was decided the Term after Croson, the Court upheld by a 5-4 vote a congressionally-mandated affirmative action program in the FCC's allocation of radio and television licenses that was intended to promote a nonremedial objective, diversity in broadcasting. In so doing, the Court relied on and reaffirmed Justice Powell's ruling in Bakke. Metro Broadcasting, 497 U.S. at 568. On the other hand, the Court did not apply strict scrutiny. Instead, it decided the case under the more lenient standard of intermediate scrutiny, which requires racial classifications to be based only on an "important" interest, rather than a "compelling" interest. In a dissenting opinion joined by three other Justices, Justice O'Connor expressed the view that strict scrutiny should apply to congressionally-mandated affirmative action. More fundamentally, she said that under strict scrutiny, only one interest has been "recognized" as compelling enough to justify racial classifications: "remedying the effects of racial discrimination." Id. at 612 (O'Connor dissenting). This might be seen as further repudiation of Justice Powell's position in Bakke.



U.S. Department of Justice

Civil Rights Division



Office of the Assistant Attorney General

Washington, D.C. 20530

December 23, 1993

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

Re: Department of Education's Race-Targeted Financial Aid
Notice of Final Policy Guidance and Fordice Notice
INFORMATION MEMORANDUM

We have reviewed the draft notices prepared by the Department of Education. We generally agree with the discussion in the drafts, and offer the following comments.

A. Guidance On Race-Targeted Financial Aid

The Department of Education's draft of its Final Policy Guidance (FPG) on the application of Title VI of the Civil Rights Act of 1964 is a modified version of the Proposed Policy Guidance issued in December 1991. The FPG, which consists of five "Principles" and a legal analysis, is consistent with existing law.

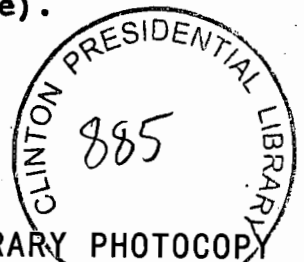
1. Principle 1 states that a college may award non-race-based financial aid that is limited to disadvantaged students, even if such aid goes disproportionately to minority students. We agree. Since aid of this type does not discriminate "on the ground of race, color, or national origin," 42 U.S.C. 2000d, it does not violate Title VI.

2. Principle 2 states that a college may award aid based on race or national origin when such aid is authorized by a federal statute (for example, under the federally funded Patricia Roberts Harris Fellowship program for minority graduate students). In other words, Congress itself may (within constitutional limits) specifically authorize aid programs that, if instituted by an individual college, might violate Title VI. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563-565 (1990) (even if not designed to compensate victims of past discrimination, "benign race-conscious measures mandated by Congress * * * are constitutionally permissible to the extent that they serve important governmental objectives"). We agree with this conclusion.

3. Principle 3 deals with an issue more closely related to our enforcement responsibilities -- the propriety of using race-targeted aid to remedy past discrimination. The FPG states that a college or state may award race-based financial aid when necessary to overcome the effects of past discrimination. This statement is clearly correct. Indeed, the implementing regulations for Title VI require a recipient of federal financial assistance that has previously discriminated to take affirmative action to overcome the effects of that discrimination. See 34 C.F.R. 100.3(b)(6)(i); see also United States v. Fordice, 112 S. Ct. 2727, 2743 (1992) (requiring state to take affirmative steps to achieve full dismantlement of prior dual system). The statement that a race-based financial aid program is permissible if necessary to remedy continuing effects of past discrimination also is consistent with Supreme Court precedent interpreting the Fourteenth Amendment. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-278 (1986) (opinion of Powell, J.).

The FPG reflects one change from the earlier proposed policy guidance: it no longer requires that a formal finding of discrimination have been made by a court, administrative agency, or legislative body, but rather permits a college to take remedial action on its own initiative where it has "a strong basis in evidence" for concluding that such action is necessary to remedy the effects of its past discrimination. We regard this change as an improvement, since the obligation to remedy past discrimination does not depend on a finding by a court. It also is consistent with existing law. See Wygant, 476 U.S. at 289-290 (O'Connor, J., concurring) (contemporaneous finding by court of past discrimination is not constitutional prerequisite to public employer's voluntary agreement to affirmative action plan); Podberesky v. Kirwan, 956 F.2d 52, 56-57 (4th Cir. 1992) (constitutionality of minority scholarship program depends on whether state could show that program was necessary at given time to remedy present effects of past discrimination, in absence of prior court or agency finding to that effect).

4. Principle 4 permits a college, in the absence of prior discrimination, to use race-targeted financial aid to achieve the goal of a diverse student body. The college's use of such aid must be narrowly tailored to achieve this goal. This principle appears to us consistent with Title VI regulations and Supreme Court precedent. See 34 C.F.R. 100.3(b)(6)(ii) (recipients of federal assistance may take voluntary affirmative action in the absence of prior discrimination "to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin" in the recipient's programs); Regents of the Univ. of California v. Bakke, 438 U.S. 292, 311-314 (1978) (Powell, J., concurring) (diversity is constitutionally permissible goal for institution of higher education); Metro Broadcasting, 497 U.S. at 568 (same).



While it seems well-established that diversity provides a sufficient constitutional justification for some forms of affirmative action by colleges, it is still unclear how this rationale applies in the context of financial aid. Unlike the proposed policy guidance, which permitted a college to use race only as one "plus" factor among others in awarding aid, the FPG allows a college to award aid limited to members of particular racial groups in order to achieve diversity. The Department has determined that, in some instances, specifically designated minority scholarships may be necessary to recruit and retain a sufficient number of minority students, and we agree that there is some basis for this determination. The Department has further concluded that aid of this type, if narrowly tailored, does not necessarily violate the constitutional standard set forth in Bakke because financial aid policies and admissions policies have differing impacts on the rights of third parties. We believe that the Department's interpretation of the law on this point is probably correct. We note, however, that no court has yet applied the Bakke rationale to minority-restricted financial aid, and that some courts may take a more restrictive view of permissible uses of such aid. See Podberesky, 956 F.2d at 56 n.4 (not reaching issue, but noting that race is only one element of the diversity that could constitute a compelling state interest).

5. Principle 5 clarifies that a college may award privately-donated funds that are limited to students of a particular race or national origin if the college's use of such funds complies with Principles 3 or 4. We agree that a college receiving federal financial assistance must comply with Title VI even in awarding funds received from private donors.

The FPG modifies the proposed policy guidance by permitting historically black colleges and universities (HBCUs) to participate in race-targeted student aid programs administered by third parties, even though the use of such aid does not satisfy any of the FPG principles. The Department notes that if HBCUs are prohibited from participating in such programs they will be unable to attract the most talented black students, and that such a result would frustrate Congress's efforts to strengthen and enhance HBCUs.

This exception raises issues not yet directly addressed by the courts. As the Department of Education notes, Congress has found that HBCUs suffered from past discrimination by state and federal governments. These findings may support differential treatment to remedy the present effects of that discrimination on students at those institutions. See Fullilove v. Klutznick, 448 U.S. 448, 482-484 (1980) (opinion of Burger, C.J.) (Congressional findings of past discrimination justify legislation giving preference to minority business enterprises). It might be useful for the Department to develop in more detail how these programs operate in order to determine whether a distinction should be

drawn between allowing students to receive such scholarships and institutional contributions to race-based scholarships. In addition, the Department should give further thought to whether the use of race-targeted scholarships is a sufficiently narrowly tailored means of achieving its goal. (Indeed, the FPG states that participation of HBCUs in these programs "will be subject to periodic reassessment.")

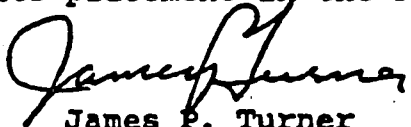
B. United States v. Fordice

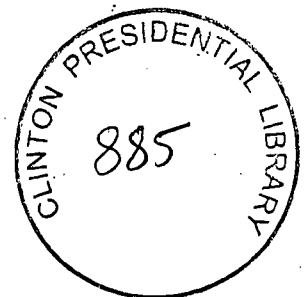
The Notice concerning United States v. Fordice, 112 S. Ct. 2727 (1992), describes the way in which the Department of Education intends to apply that decision in enforcing Title VI, 42 U.S.C. 2000d, in the higher education desegregation context. Addressing the duties of a State in dismantling a racially dual system of higher education, Fordice held that (112 S. Ct. 2737):

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects -- whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system -- and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.

As the Notice states, Fordice is consistent with the Department's "Revised Criteria" for higher education desegregation plans (see 43 Fed. Reg. 6658 (1978)), in that it requires States to do more than adopt racially neutral admission policies, necessitates the examination of a broad range of factors affecting desegregation, and places the burden on States to establish that they have met their affirmative duty.

We believe the Notice's treatment of Fordice is correct, and have no objection to its placement in the Federal Register.


James P. Turner
Acting Assistant Attorney General
Civil Rights Division



cc: Drew S. Days, III
Walter E. Dellinger

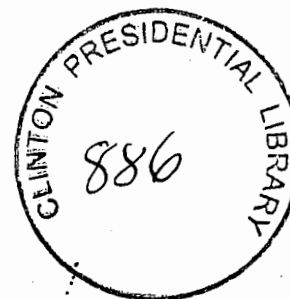


U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

January 4, 1994



MEMORANDUM TO JUDITH WINSTON
GENERAL COUNSEL, DEPARTMENT OF EDUCATION

From H. Jefferson Powell 
Michael C. Small

By way of follow-up to your telephone call to our office this morning, we are writing to clarify one of the points that was made in our December 30, 1993 memorandum to Associate Attorney General Hubbell concerning the Department of Education's draft Final Policy Guidance (the "FPG") setting forth the circumstances under which higher education institutions that receive federal funds may award student financial aid on the basis of race, consistent with Title VI of the 1964 Civil Rights Act.

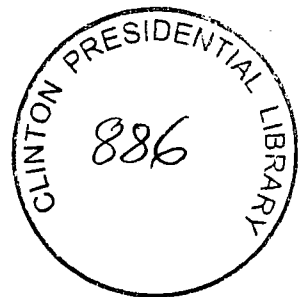
Principle 2 of the FPG states that a college may award financial aid on the basis of race or national origin when authorized to do so by an act of Congress. The premise of principle 2 is that federally-authorized affirmative action measures cannot be considered to violate Title VI in light of a canon of statutory construction under which "the specific provisions of a statute prevail over the general provisions of the same or a different statute." (FPG at 10) In our December 30, 1993 memorandum, we stated that reliance on the rule of statutory construction was somewhat misleading. Our point was that even where Title VI is overridden by a more specific statute, the award of race-based financial aid pursuant to that statute would still be subject to the constitutional standards, established in Fullilove v. Klutznick, 448 U.S. 448 (1980), and Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), governing congressionally-authorized affirmative action programs.

Challenges to the affirmative action mandates in the Surface Transportation and Uniform Relocation Assistance Act (the "STURAA") are illustrative of our point. STURAA imposes affirmative action obligations on states that receive funds awarded by the Department of Transportation under the statute. In a series of cases in which states were sued for carrying out the requirements of STURAA, courts did not address whether the specific affirmative action provisions in STURAA prevail over the general antidiscrimination provisions of Title VI. Indeed, there was no mention of Title VI in the court decisions. It is unclear whether the plaintiffs brought any Title VI claims against the states. What is clear, however, is that the plaintiffs asserted constitutional claims. In defending against those claims, the states relied on the affirmative action mandates of STURAA, and argued that the

statute (and hence the conduct of the states in implementing the statute) satisfied the constitutional standards established in Fullilove and Metro Broadcasting. The courts accepted that argument, at least insofar as the states were simply implementing STURAA and not exceeding the statutory requirements. See Harrison & Burrowes Bridge Constructors Co. v. Cuomo, 981 F.2d 50 (2d Cir. 1992); Ellis v. Skinner, 961 F.2d 912 (10th Cir. 1992); Tennessee Asphalt Co. v. Farris, 942 F.2d 969 (6th Cir. 1991); Milwaukee County Road Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1991).

Of course, since the FPG is intended to address the Title VI implications of race-based financial aid, it is entirely appropriate for the Department of Education to express its view that race-based financial aid decisions taken pursuant to another federal statute do not violate Title VI. We agree with that view.¹ However, so as not to give institutions the impression that federal statutory authorization shields race-based financial aid decisions from legal challenge, our memorandum recommended that the FPG make clear that such decisions may still be subject to constitutional attack under the Fullilove and Metro Broadcasting standards. On balance, this is a relatively minor point, and it can be addressed in a brief footnote. To reiterate what was stated in our December 30 memorandum, we believe that the legal analysis in the FPG -- including principle 2 -- is essentially sound.

cc: Webster Hubbell



¹ In our memorandum, we did not mean to suggest that Title VI does not apply to the award by higher education institutions of race-based financial aid pursuant to a federal statute authorizing such aid. Title VI does apply, but its requirements are overridden by the more specific federal statute -- as the FPG concludes. The reference in the memorandum to a "split in the caselaw" on the question of the applicability of Title VI was directed to the question of whether the Department of Education itself could be sued under Title VI for making race-based financial aid available to higher education institutions. See Latinos Unidos de Chelsea v. Secretary of HUD, 799 F.2d 774, 783 n.17 (1st Cir. 1986) (declining to decide "the difficult question" of whether federal agencies may be sued under Section 601 of Title VI).

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	re: Preferences - draft (2 pages)	n.d.	P5 887

COLLECTION:

Clinton Presidential Records
Counsel Office
Joel Klein and Doug Letter
OA/Box Number: 6462

FOLDER TITLE:

Joel Klein and Doug Letter's Affirmative Action Documents [1]

Whitney Ross
2008-0308-F
wr904

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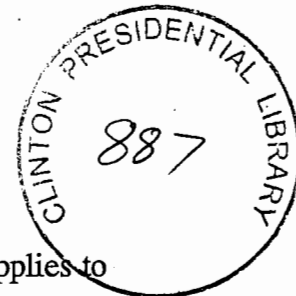
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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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- 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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Preferences

This memo addresses the concept of affirmative action "preferences" as it applies to the selection of individuals for education, jobs, contracts, licenses, etc. In that context a preference means that an applicant either gets additional points because of his/her status (race, gender, disability) or a portion of the available slots are "set-aside" for persons of the designated status.

Such preferences have one clear, immediate, tangible cost: they disadvantage other applicants who, at least as individuals, cannot be said to be at fault. Consequently, to be morally legitimate, much less politically acceptable, the use of such preferences must be convincingly justified.

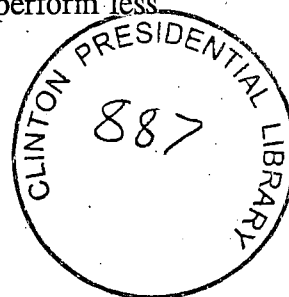
As I see it, the only potential justifications for preferences are: (a) a finding of current discrimination; (b) a prophylactic against current discrimination that would otherwise go undetected or unproven; and (c) "compensation" for past societal discrimination against the affected group that has continuing effects in terms of its members' ability to compete without the benefit of preferences. (I do not think this kind of preference can be justified on "diversity" or "inclusion" grounds absent some element of past or present discrimination. If there are no discriminatory "barriers to entry," then it is difficult to see why some diversity would not occur unless certain groups simply had no interest in the job. In fact, today some amount of diversity has been achieved in virtually every field of endeavor.)

In addition to the question of justification, preferences also raise the issue of effects. Here, the landscape is much more difficult to tease out with confidence. On the positive side, preferences give certain groups that have been disproportionately excluded the opportunity ^{for} meaningful ^{inclusion} conclusion. This has secondary benefits as well: grounds ^{PS} that are

alienated or disaffected are likely to have more hope if they see more of their members in prominent, or at least visible, positions. In this way, we help restore the American dream for those who have too long been denied it. In addition, as members of particular groups advance, they are more likely to ^{invest} ~~replace~~ their time, money, and effort into their own communities, and also to develop the kind of networks that traditionally ^{have} ~~help~~ groups ^{move ahead} ~~advance~~.

The other variable in the equation is the effect on inter-group relations -- black-white, male-female, etc. Here, the signals are mixed: to the extent people work together, it is hoped, they are more likely to become acquaintances if not friends and thus less likely to see each other as stereotypes. On the other hand, if the majority groups thinks members of a minority group got an unfair advantage (at their expense) this may increase hostility. Also, if the preference means that certain members of the preferred group ultimately perform less well, this can reinforce negative stereotypes and prejudice.

* * *



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Peter Yu to Deval Patrick, re: Thoughts on Draft Testimony (2 pages)	3/21/1995	P5 888
002. memo	William Julius Wilson to George Stephanopoulos, re: In response to your request for a memo on how President Clinton should respond to the Affirmative Action challenge (8 pages)	3/20/1995	P5 889
003. fax	Doug Letter to Joel Klein [partial] (3 pages)	3/14/1995	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Klein, Joel; Letter, Doug
OA/Box Number: 6462

FOLDER TITLE:

Joel Klein's and Doug Letter's Affirmative Action Background Documents [4]

Whitney Ross
2008-0308-F
wr440

RESTRICTION CODES

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

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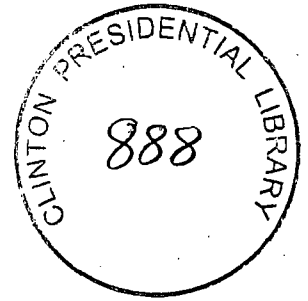
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THE WHITE HOUSE
WASHINGTON

March 21, 1995



MEMORANDUM FOR DEVAL PATRICK

CC: GEORGE STEPHANOPOULOS, CHRIS EDLEY
FROM: PETER YUNG
SUBJECT: THOUGHTS ON DRAFT TESTIMONY

Chris shared with me your draft testimony; this memorandum offers some comments.

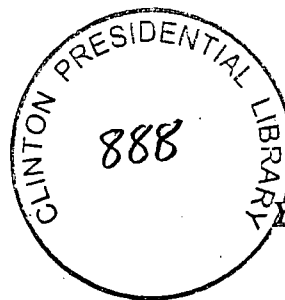
The draft is a strong and eloquent statement of current policy and its legal and policy foundations. In light of the context, I would ask a strategic question:

- What would we like the next day's headline to be?

"Clinton's Top Civil Rights Aide Defends Affirmative Action" seems the most likely headline after the testimony. Does this fit with the pending review? with an imminent Presidential announcement?

My initial intuition is that the President may be better served, at this time, by an admittedly less positive headline (such as "DOJ Official Parries with House Panel"). If you agree, I would suggest that the penultimate paragraph of your draft be replaced with a paragraph such as:

My statement offers some of the legal basis for affirmative action as well as my office's current policy regarding affirmative action. But I want to emphasize what my statement does not include or purport to offer. As has been widely reported, the President is currently undertaking a comprehensive review of affirmative action programs in many sectors of federal policy. He has stated his objective as determining what works and what doesn't. My staff and I have been working closely and diligently on that review, as have many others. At this point, however, as I am sure you understand, it would be inappropriate for me to anticipate the President's views. Accordingly, until the President issues a complete statement of his views on these critical policy areas, I will limit my comments on affirmative action to the legal dimensions and basis of that important policy and my office's current practices.

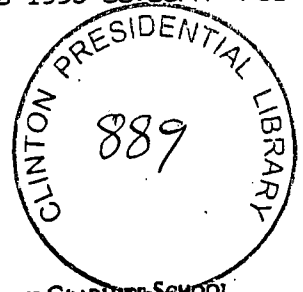


Yu Draft--3/21/95

Potential Questions for Assistant Attorney General Patrick

- In your written statement, you say that affirmative action is misused if it "is of indeterminate length, such that it outlasts achievement of its goals." Last year, Hispanics, Asians, and African Americans made up a majority of the students at UC-Berkeley. White students were a minority. Do you think that affirmative action is being "misused" at UC-Berkeley?
- Sticking with the case of Berkeley: in 1990, 14% of the black students came from families with incomes of more than \$75,000 per year. In that same year, Berkeley rejected 3,000 students with perfect 4.0 averages--most of them non-minorities. I suspect that many of those students came from less affluent backgrounds. So my question is: Is it fair that a white student with a 4.0 average from a blue-collar background be rejected in favor of a minority student with a 3.5 average from an upper-middle-class family?
- You talked about race and gender. What do you think about affirmative action based on sexual orientation? Is that legal? Is it desirable?
- Your statement talks about the persistence of discrimination. What can you tell us about either the costs or benefits of affirmative action? Have these programs made a difference? And, if so, at what cost? Do you believe there are legitimate concerns that affirmative action harms either individuals or our broader social understanding of fairness and individual opportunity?
- Do you think that the promotion of supervisors should be based on their hiring of minorities and women?
- Do you think that race and gender should be treated differently than physical disability?
- President Bush used to like to say to the unemployed person the unemployment rate is 100%. I think the same sort of thing is true in affirmative action. When you fire someone based on their race--as happened in the Piscataway case--I don't care whether you call it affirmative action or equal opportunity, it feels like a quota to her. Do you agree? How can you defend that practice?

1
UNIVERSITY OF CHICAGO
CENTER FOR THE STUDY OF URBAN INEQUALITY
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MEMORANDUM

TO: George Stephanopolous (The White House)

FROM: William Julius Wilson

SUBJECT: In response to your request for a memorandum on how President Clinton should respond to the Affirmative Action challenge.

DATE: March 20, 1995

Sent to: Edley
 Patrick
~~McGowan~~
 Sperling
 Galston
 Curriel

I am sorry that I was unable to fax you this memorandum over the weekend. I arrived in New Mexico (my second home) on Sunday, and I forgot to bring my fax machine with me from Chicago. So I had to wait until today to fax this to you.

How should the President respond to the current attacks on affirmative action?

The core dilemma is this: if the President is to defend policies to lift the burdens of segregation and discrimination that limit the life chances of black Americans, he risks further alienating the very white voters he needs to win in 1996. But if he offers a response that signals a weakening of resolve to support civil rights policies, he risks alienating constituencies he cannot afford to lose in 1996: party activists, women and minority voters.

The only way out of this dilemma is to confront, head on, two distinct but politically intertwined issues:

1) the President should address the economic insecurities of working class Americans by making the case that his policies to create jobs and raise incomes are the only real solutions to their problems being offered. Republican policies to cut welfare, cut support for education, deny social benefits to immigrants and end affirmative action will do nothing to alleviate the economic squeeze faced by so many in the working class. They are victims of global economic change, not affirmative action.

2) the President should rededicate the moral force of the federal government to fundamental principles of equality of opportunity in life, the right to be judged on the basis of merit and the right to be free from racial discrimination. To do this, he should present to the public the concept of *affirmative opportunity*.

These two issues are tightly intertwined because political support for affirmative action among whites is related to their sense of prosperity. Let me elaborate on each of these points.

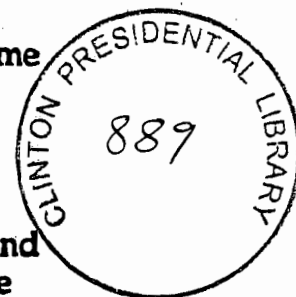
Addressing the Economic Insecurities of Working-Class Americans

When affirmative action and compensatory remedies for the social and psychic damage inflicted by segregation were first discussed in the 1960's, the economy was expanding and incomes were rising. It was a time of hope, a time of optimism, a time when most Americans believed their children would have better lives than they had. During such times a generosity of spirit permits consideration of sharing an expanding pie.

But since the late 1970's, real wages have fallen. Wage disparities between those with college degrees and those without have widened considerably. Working class Americans today feel economically pinched, barely able to maintain current standards of living even on two incomes. Many are insecure about keeping their jobs and fear they will never be able to afford to send their kids to college. Many believe that for all their hard work, their children's lives will be worse than theirs.

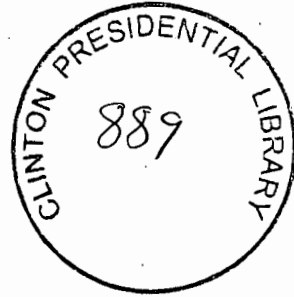
This is not a receptive climate for a national seminar on the moral underpinnings of affirmative action. The President will first have to persuade working class white Americans that he knows what is pressing in on them. He needs to convince them that he is working hard to relieve the pressure and to build a better future for their children. He needs to acknowledge the legitimacy of their fears, but to challenge forcefully Republican claims that their economic insecurity is the result of blacks, women and immigrants taking away their jobs. He needs to expose the falseness of arguments that white working class Americans' lives will be improved by eliminating school lunches, reducing educational opportunities, cutting off welfare benefits to teenage mothers, and cutting taxes for the affluent.

The President should reassert his support of policies to expand educational opportunities, to expand job training programs to raise skills and thereby raise incomes. He should point out that his economic and trade policies have created an unprecedented numbers of jobs and brought unemployment to its lowest levels in years, both while keeping inflation down. In short, he should make the case that *his* policies, not the Contract with America, promise to restore confidence in the present and hope for the future for American workers. There is an opportunity for the President to begin to change the debate over affirmative action with a forceful populist rebuttal to Republican policies that reward the wealthy and punish the



parents and children of working class Americans.

Reassuring the white working class about their economic futures is a prerequisite for making the case for *affirmative opportunity*.



The Case for Affirmative Opportunity

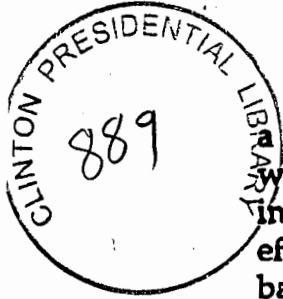
By contrasting "opportunity" with "action", the concept "affirmative opportunity" distinguishes this approach from a guarantee of equality of results, which is how "affirmative action" has come to be understood. It echoes the phrase "equal opportunity," which connotes a principle most Americans still support, and it avoids the connotations of quotas, standard-lowering and reverse discrimination, which most Americans now detest (regardless of whether they fairly characterize affirmative action).

However, by retaining the term "affirmative," the concept retains the connotation that something more than offering formal, legal equality is required to overcome the legacy of slavery and Jim Crow discrimination. We also have the continuing moral obligation of society to compensate for the enduring burdens -- the social and psychological damage -- of segregation, discrimination and bigotry. "Affirmative opportunity" means to renew the nation's commitment to enable all Americans, regardless of income, race, or other attribute, to achieve to the highest level their abilities will permit. In this sense, the phrase echoes President Johnson's 1965 Howard University speech.

What, precisely, does affirmative opportunity mean? How would such a policy be put into practice?

- 1) Affirmative opportunity represents a movement from an affirmative action based on solely on race to one based on the principle of equality of life chances. The major distinguishing factor of affirmative opportunity is the recognition that the problems of disadvantaged individuals--class background, low income, a broken home, inadequate housing, poor education, or cultural and linguistic differences--may not be clearly related to the issue of previous discrimination. Nevertheless, children who grow up in homes plagued by these disadvantages are more likely to be denied an equal chance in life because the development of their aspirations and talents is effectively hindered by their environments. Minorities would benefit disproportionately from this position because so many of them suffer from these handicaps, but the problems of disadvantaged whites would be addressed as well.

However, affirmative opportunity extends the principle of equality of life chances to include race--so that in addition to class background, low income,



a broken home, poor education, or cultural and linguistic differences, one would also add racial background. The reason for adding race is to insure that individual minorities do not "slip through the cracks." The cumulative effects of race are not captured when one uses the standard measures of class background such as parental occupation, education, and income. By the cumulative experiences of race, I include the long-term effects of living in certain neighborhoods, the cultural milieu, the quality of schooling, the nurturing of parents, the resources that parents are able to spend or pass on to their children and so on. For example, if we were to rely solely on the standard measures for college admission--such as SAT scores--even many children from black middle income families would be denied admission in favor of more privileged whites who are not weighed down by this accumulation of disadvantages and who tend to score higher on these standard measures as a result. Moreover, blacks and many other minorities continue to experience racial discrimination. Explicitly including race under the principle of equality of life chances would continue to help offset or minimize these practices.

The principle of equality of life chances is a promise that all Americans will compete on an even playing field on the basis of merit. It represents simple fairness. It would be hard for Republicans to challenge this proposition. Polling data suggest that Americans support the idea of affirmative programs to enable people to overcome disadvantages that are not of their own making. The aim of affirmative opportunity is to expand the pool of disadvantaged Americans of all racial backgrounds who are qualified or have the potential to qualify for positions in education and the labor market. Since race is one of the components of "disadvantaged" affirmative opportunity ensures that race does not exclude qualified minorities. *This would be done, however, through the use of flexible criteria of evaluation, not through numerical guidelines or quotas.* The obvious rejoinder is that "use of flexible criteria" is another way of saying that you want to lower standards. On the contrary, the use of flexible criteria of evaluation is to make sure that you are measuring merit or potential to succeed rather than privilege. In other words we want to use criteria that would not exclude people who have as much potential to succeed as those admitted from more privileged backgrounds. This brings me to programmatic strategies for each of the components of affirmative opportunity.

To implement the principle of affirmative opportunity, we must recognize that most promising strategy for increasing competitiveness for scarce places in higher education and the labor market is investment in human capital -- developing the capacities of the economically and culturally disadvantaged by encouraging their acquisition of skills. Five basic strategies are recommended, the first four of which are not necessarily tied to racial criteria:

(A) Redouble the nation's commitment to nurturing the minds of the very young. We should commit ourselves to stimulating children early, before despair

and hopelessness rob them of their futures. There is a growing consensus in the social and behavioral science community that the key to stimulating a desire for lifelong learning is to motivate the very young to learn. Lack of sufficient stimulation early on defeats interest in learning. Returns to dollars spent on Headstart-type programs, enriched day care and kindergartens, parenting training, health care, nutritional support and other interventions designed for the very young will be much higher than returns to dollars spent on job training for teens and young adults.

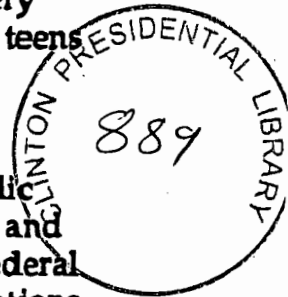
(B) Press for public school reforms. Gains made by early childhood interventions are all too often undermined by poor schooling later on. Public schools must not only prepare graduates for the world of work, community and citizenship, they must also nourish children's appetites for learning. The federal government should be monitoring and funding local school reform innovations, funding valid assessments, and encouraging the replication of successful models.

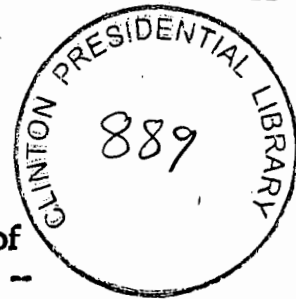
(C) Expand financial opportunities for the economically disadvantaged to go to college. Labor market returns to higher education continue to rise faster than returns to high school degrees, but the rapid rise of college costs will squeeze more working and middle class Americans out of higher education.

(D) Expand access to job training. There are two important points to make about job training. First, the administration should stimulate the provision of training by the private sector, perhaps through tax incentives. There is evidence that the returns to private sector training are higher than returns to government training programs. Second, special attention should be paid to dislocated workers. They are most likely to benefit from retraining and doing so according to non-racial criteria would address directly a major source of the economic insecurity driving white male opposition to affirmative action.

(E) Encourage the use of flexible criteria for evaluating merit. This should replace a reliance on racial quotas while preserving a mechanism for providing entry to qualified minorities and women. Psychometric test scores should not be relied upon as the sole, or dominant, determinant of entry to higher education or employment. While some test scores may correlate well with performance, they often fail to measure important attributes that also determine ability to perform, such as motivation, leadership skills, interpersonal ability, perseverance and reliability.

Recent claims that on average blacks are less intelligent than whites and that compensatory social programs cannot work have gained currency among those attacking affirmative action. These claims do not withstand scientific scrutiny. Rigorous analysis by a growing number of social scientists finds that such arguments, premised on racial disparities in average test scores, seriously understate the role of environment -- families, schools and neighborhoods -- in shaping outcomes in life.





The difference in average test scores touted by some opponents of compensatory social programs and affirmative action are largely measures of differences in opportunities between the advantaged and the disadvantaged -- especially factors early in life like access to high quality child care and good schooling. The concept of flexible criteria is to design metrics of ability that predict success that are not captured by such tests.

Indications of these attributes may be obtained from letters of recommendation, past performance or other measures. Mayor Daley's recent use of "merit promotions" in the Chicago police Department, based on such factors as job performance and leadership ability, is an example of how such criteria can be used.

Some Final Remarks about Race

Let me end this memorandum with a few reflections on the sensitive issue of race. Affirmative opportunity offers a principled basis for preferential treatment on the basis of race in certain contexts. This principle can be justified in several ways. One justification is simply that discrimination continues to exclude blacks from positions for which they are qualified and that special efforts are still required to overcome it. That is powerfully illustrated by the release this week of the so-called Glass Ceiling Commission report, which demonstrates that white men constitute 95% of top management but only 43% of the workforce. Newspaper accounts of the report describe various ways the social structure of corporate management works to perpetuate the effects of past forms of legal discrimination. Senator Dole advocated creation of this commission in the 1980's and the Clinton Administration should aggressively expose his hypocrisy in now attacking the very remedies that would be required to eliminate the lingering effects of previous forms of discrimination.

Another justification for preferential treatment in this form is that ethnic diversity is socially valuable. In the cases of policing, fire fighting and teaching, racial diversity contributes to stable community relations. A third justification is that access to such professions and other municipal and government occupations has been a major vehicle for upward social mobility for black Americans. A fourth justification is the "role model" argument: strong representation by minorities in the professions helps to motivate younger people to pursue high aspirations for themselves, by demonstrating that race is not a barrier to entry. The use of flexible criteria may be a way to replace the goals and timetables currently used by government agencies and contractors.

Having said that, it will be extremely important to calibrate the use of flexible criteria in practice. They must not be perceived as a ruse for lowering standards for blacks. They must be presented as a way to expand the pool of qualified applicants by making attributes other than raw test scores count more. Flexible criteria must be applied in predictable, non-subjective ways. Otherwise, the practice will be infected with arbitrariness, which will quickly undermine public support. In this

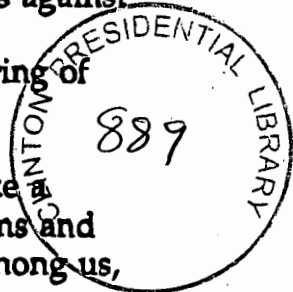
connection, the President should also be forthright about the fact that clumsy applications of the principle of affirmative action have, in the past, led to abuses. Admitting, hiring or promoting unqualified blacks over qualified whites is wrong and should not be permitted. The President's commitment to enforce laws against race discrimination should include a pledge to prosecute clear cases of discrimination against whites. He should pledge to fight against the lowering of admission standards and qualifications.

I want to mention a final justification for the administration to make a serious commitment to affirmative opportunity, backed up by real programs and real dollars. That is the need to restore hope to the most disadvantaged among us, particularly low-income young blacks. Growing numbers of young people are deeply alienated from mainstream society. For them the hopes of the civil rights era were never to be fulfilled; the promises always to be broken.

Since the days when Dr. King offered black Americans his dream of a society in which merit, not skin color, would determine how far one could go in life, a new generation has grown up tasting the bitter truth that the privileges of American life are still reserved for whites. Job opportunities have vanished for millions of blacks living in our cities. Street violence and crack have ravaged once thriving, if poor, black neighborhoods. Housing segregation still prevents most black Americans from choosing where to live. The deterioration of the public schools, except in affluent, mostly white, suburban communities, abandons black children to illiteracy and innumeracy, unable to get or to keep jobs that require basic skills. More black males between the ages of 18 and 24 are in jail than college. Homicide is the leading cause of death in this age group.

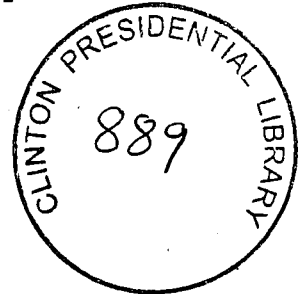
The rhetoric from our political leaders today demonizes black Americans as "welfare dependent," immoral, and now, unintelligent. These are the verbal equivalents of the police dogs in Birmingham and firehoses at the Edmund Pettus bridge. But the hopelessness and alienation of today is far more dangerous than the frustration and moral outrage of the civil rights era because a generation of black Americans has grown up with no stake in their futures. They have nothing to lose by acting on their rage. Failure to respond vigorously to this assault on the principles of fairness and equality for all Americans regardless of race will only confirm what many black Americans have come to believe -- that America has no stake in them. The result could be a firestorm of civil strife compared to which the 1992 rebellion in Los Angeles was merely a brush fire.

I won't presume to suggest a political strategy to educate the public on these matters. However, it seems to me that the President should enlist highly respected white male leaders in this effort. To the extent this message can be communicated by white leaders of corporations and unions it will receive a better hearing. Also, the President is at his best in town meeting settings in which he has an opportunity to respond spontaneously to questions. He projects empathy well and he is able to communicate subtle and complicated ideas in these settings without seeming to talk



down to the public. It might be that a major national address to set forth the major themes of affirmative opportunity, followed quickly by a series of televised town meetings, would be effective. This would enable the President to communicate these points in a forum in which the message would directly reach the public and would not be filtered through the media

I hope you find this helpful.



Withdrawal/Redaction Sheet

Clinton Library

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001. memo	Doug Letter to Stephanopoulos, Edley, Yu, and Mikva; re: Affirmative Action Policy (3 pages)	4/13/1995	P5	890
002. memo	Doug Letter to Stephanopoulos, Edley, Yu, and Mikva; re: Affirmative Action Policy (3 pages)	4/13/1995	P5	891

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Counsel Office
Doug Letter
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[Affirmative Action Review Materials] [2]

Whitney Ross
2008-0308-F
wr905

RESTRICTION CODES

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

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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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WASHINGTON



EXECUTIVE OFFICE OF THE PRESIDENT

13-Apr-1995 12:04pm

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

FROM: Douglas N. Letter
Office of the Counsel

CC: Cheri Sweitzer

SUBJECT: Affirmative Action policy

*To: Doug
Fr. Gr
I couldn't agree
more. Thank you
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(C)*

George, Ab, Chris, and Peter:

I had wanted to make a point at the meeting yesterday at 11 regarding Administration strategy in the Affirmative Action debate, but time ran out. So, I will pass it along in this form.

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

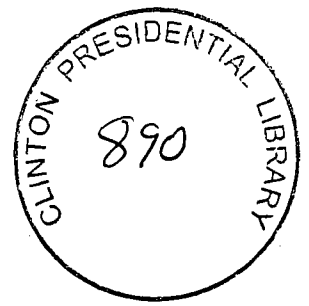
I have gathered from the various sessions we have had on this topic that many minorities would identify themselves first or primarily by their minority group status: black, hispanic, etc. (I have no idea if this is true for women too; i.e, would they first identify themselves as women. For many, I suspect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

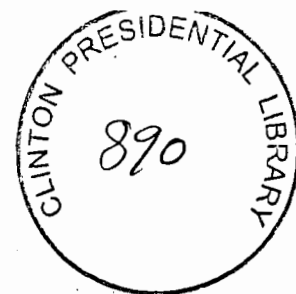
I can illustrate with a personal example. I identify myself first as a Jew. This raises a host of ethnic, historical, religious, and other issues. It means that I view myself primarily as part of a very tiny minority group in American society, alien from a large conglomeration of groups -- white, black,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

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

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

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

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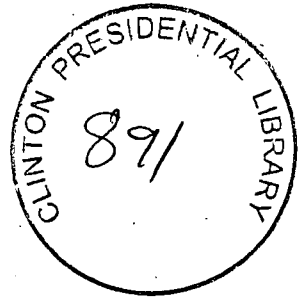
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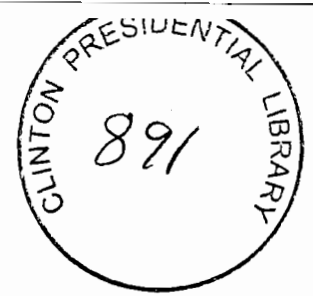
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