Responses by Ruth Bader Ginsburg to Written Questions by Senator Larry Pressler on Minority Set-Aside Programs, received July 26, 1993

You asked several related questions about the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Joining a unanimous panel and briefly concurring, I applied the teachings of *Croson* in *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992). I hope you will find in the following discussion adequate answers to your inquiries.

As you state, *Croson* dealt with "*remedial* minority set-aside programs" for the award of government construction contracts -- i.e., with a local government's adoption of a program for the purpose of remedying past discrimination. In that context, *Croson* made clear, the past discrimination to be remedied need not be the local government's *own* discrimination; it may be private discrimination (by the construction industry) in which the government had "become a 'passive participant'" through financial support, 488 U.S. at 491-92, thus "exacerbating [the private discrimination] pattern," 488 U.S. at 504. That is what I meant in *O'Donnell* when I wrote "minority preference programs" need not "be confined solely to the redress of state-sponsored discrimination." 963 F.2d at 429.

Croson also made clear that a local government, in establishing the basis for its remedial program, cannot rely on a "generalized assertion" of nationwide discrimination in an industry as a whole, 488 U.S. at 498, but "must identify [the] discrimination, public or private, with some specificity." 488 U.S. at 504. Furthermore, the program must be "narrowly tailored to remedy [the] prior discrimination." 488 U.S. at 507.

With respect to its essential, practical meaning, *Croson* explicitly stated: "Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." 488 U.S. at 509. The Court thus contemplated that its "specificity" and "narrow tailoring" standards were not impossibly restrictive, but could be met by proper showings and proper programs. My concurrence in *O'Donnell* cited an instance in which a court of appeals found, on the particular facts, that the *Croson* standards likely would be met. 963 F.2d at 429 (citing *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992)).

Finally, because *Croson* involved a city program designed as a remedy for past discrimination, the holding of the case did not address whether a race-based classification, in other contexts, can be justified on a non-"remedial" ground. In *O'Donnell*, I commented that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified." 963 F.2d at 429. I cited as support for the comment Justice Stevens' concurrence in *Croson*. Although Justice Stevens ruled out any non-remedial justification for Richmond's race-based restriction on contractors' access to the construction market, 488 U.S. at 512-13, he added that he would not "totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits" in, for example, an education setting. 488 U.S. at 511 n.1, 512 & n.2. Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 311-19 (1978), elaborated on such a non-remedial justification in a school setting. Future cases, as you know, could well present questions about the kinds of "narrow tailoring" or other requirements one might appropriately apply to a justification of the kind Justice Powell described, and it would not be appropriate for me to address -- without a record, briefs, and arguments -- what those uses might be.