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Race-Affirmative Action

Race - affirmative action

"Christopher Edley, Jr." <edley @ law.harvard.edu>
01/27/99 10:23:45 AM

Record Type: Record

To: Maria Echaveste/WHO/EOP, Edward W. Correia/WHO/EOP

cc: Clara J. Shin/WHO/EOP, Scott R. Palmer/PIR/EOP, felicia.wong @ npr.gov, Elena Kagan/OPD/EOP
Subject: Higher Ed Craziness

Just a clarification:

In my view, the book team got out of the outreach/sectoral strategy business when the PIR staff disappeared back in October/November. We are trying (although too often failing) to focus on getting the book done.

In my view, ACE, Rudenstine, et al. have fumbled the ball for 15 months. I, course, blame the White House for pursuing a predictably bad strategy in working with those characters and refusing to set a POTUS meeting to drive things, in order to avoid making him the nation's admissions dean. Meanwhile, the situation worstens by the month.

I've reiterated to Scott my direction that he not spend any more time flogging this lame horse. If, rather than just being reactive, the Administration is going to move aggressively to help save affirmative action in higher ed and K-12, the leadership is going to have to come from you.

If there is doubt about whether this should be a priority, I recommend you ask the President whether he wants to preside over the dismantling of inclusionary practices in the face of coordinated, withering assault by the other side in every forum they can find.

Eddie's chat with Scott this morning about moving forward was very, very heartening. Maybe it isn't too late.

Race - affirm action

[redacted]

Edward W. Correia

01/27/99 11:34:00 AM

Record Type: Record

To: "Christopher Edley, Jr." <edley @ law.harvard.edu>

cc: See the distribution list at the bottom of this message

Subject: Re: Higher Ed Craziness

In retrospect, I do believe we made a mistake in relying on the university community to show more initiative on affirmative action. I also think we need to have a more public administration message about diversity in university admissions. Although we are sponsoring technical assistance conferences around the country, these fall below the radar screen of the media and public debate. I think our role in this area should emphasize persuasion and good educational policy rather than law enforcement, but that is something that warrants discussion.

For now, I suggest three things. First, in the short term, there should be a response to the CIR initiative. Part of it can come from the university community, even without a real organization in place, and we can encourage them to do that. Second, we should revisit the issue of an event with the President and university presidents that talks in a fairly general way about the importance of diversity and the idea of Bakke. There may be a reason not to do such an event, but it is not that we should wait around for university presidents to put together an organization. Third, whether or not there is such an event, I think we should elevate the level of our message. For example, Sec. Riley, and the AG, could make some speeches and explain our technical assistance efforts and our support for Bakke.

Perhaps this is a good time to have another discussion on higher ed. admissions.

Message Copied To:

Maria Echaveste/WHO/EOP
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Race - affirmative action

I-200: THE WASHINGTON ANTI-AFFIRMATIVE ACTION INITIATIVE

Voters in Washington will go to the ballot this fall to vote on an initiative, I-200, that would eliminate affirmative action programs conducted by state and local government. The initiative is almost identical to Proposition 209, which was approved in California. The polls show that a significant majority of the public supports the initiative. However, other research shows that voters change their minds when they understand its impact. This paper provides some background information about the initiative.

Legal Impact

The stated purpose of the initiative is to prevent the state as well as local governments from granting a preference to any person based on race or gender. Washington state law and federal law already bar discrimination based on race and gender, so there is no need to amend current law to bar discrimination. The initiative changes current law, however, by preventing the government from implementing affirmative action policies that take race or gender into account, even if they accomplish important social policy objectives and comply with constitutional requirements.

There are many circumstances under which affirmative action programs are constitutional. First, a state may decide to remedy prior discrimination. For example, it might provide targeted assistance to minority or women-owned businesses in response to a history of discrimination against these firms. Or, a state agency might set a goal to increase the hiring of minorities if the number of minorities employed by the agency is clearly disproportional to the labor force in the community. Second, governments can use affirmative action to achieve diversity under some circumstances. For example, a state university may decide to enroll a diverse student body by taking race or gender into account. All these programs have been upheld by the courts. I-200 would have the effect of eliminating them, except under narrow circumstances when they are required by federal law or court order.

Based on the California experience, we know that the initiative would eliminate many valuable programs now operated by the state. For example, Washington provides a special program to encourage girls in grades 6-12 to go into math, science and engineering fields. The Early Identification Program (EIP) is intended to increase the number of minority teachers in college and graduate schools by providing mentor programs, special counseling and other assistance to undergraduates. Another program reaches out to minority students in middle schools to provide support in math and English and to provide a special summer enrichment program. The University of Washington takes race into account in its admissions process, along with many other factors, in an effort to achieve a diverse student body. All these programs would be barred if I-200 is adopted. Although supporters of I-200 say that they do not intend to end recruiting and outreach, the initiative would create substantial uncertainty about these efforts, too.

Status of the Campaign

Governor Gary Locke, Senator Patty Murray, Congressmen McDermott, Dicks, and Smith, King County Executive Ron Sims, and many other senior officeholders in the state have stated their opposition to I-200. In addition, major civil rights organizations, women's groups, religious organizations and many other groups are opposed. A number of major corporations have also announced that they are working to defeat I-200, including Boeing, Starbucks, Hewlett-Packard, and others.

A non-profit organization, the "No! 200 Campaign," was created exclusively to defeat I-200. As of August 1998, No-200 had raised about $750,000. It has worked extensively with the Governor's Office, civil rights groups, and women's organizations in Washington and across the country to encourage opposition to I-200. The Executive Director of No-200 is Kelly Evans, 206/441-9569. The campaign is actively seeking help from the administration, for example, public statements by administration officials who visit the state.

The Arguments against I-200

Proponents of I-200 want to portray their initiative as a simple bar on preferences. When viewed this way, most of the public agrees. However, I-200 has drastic effects on government policy, which most of the public does not understand. Consequently, the most effective way to defeat I-200 is to explain its impact. These are suggested points to make:

-- Affirmative action programs have been upheld by the courts as long as they are carefully designed to remedy prior discrimination or to achieve other important government objectives. The approach to affirmative action programs that do not meet these requirements should be to mend them, not end them altogether. I-200 goes too far.

-- The state sponsors a large number of valuable programs targeted at persons who have been shut out of opportunities in the past, including women who want to break into the labor market, African-Americans, Latinos, and others. I-200 would eliminate these programs even if they are implemented in order to remedy prior discrimination.

-- Washington colleges and universities now take race into account, along with other factors, in order to enroll a diverse student body. The California experience has shown that eliminating any consideration of race can drastically reduce the number of minorities who are able to attend certain colleges and professional schools. Achieving diversity in higher education is particularly essential in a state such as Washington where many of the largest employers depend on large numbers of highly skilled, well educated employees.

-- The eyes of the country will be on Washington this fall. Washington's tradition of progressiveness and tolerance can provide a powerful message to the rest of the nation about opening up opportunities to persons who have felt the effects of discrimination.

Race - affirmative action

Feb. 13, 1998

MEMORANDUM

TO: SYLVIA MATHEWS
DEPUTY CHIEF OF STAFF
FROM: EDDIE CORREIA
SPECIAL COUNSEL TO THE PRESIDENT
SUBJECT: AFFIRMATIVE ACTION STRATEGY

These are some preliminary thoughts regarding an overall conception of the administration's approach to affirmative action. I have also made a few specific recommendations about steps that can be taken. I welcome your suggestions for further development of these ideas as well as specific steps I can take.

I. AFFIRMATIVE ACTION: AN OVERALL STRATEGY

Affirmative action efforts have been a major part of administration policy in several areas, including public and private employment, procurement, education, and voting. In all of these areas, the courts have narrowed the range of situations when government can take race or gender into account in developing and implementing public policy.

This evolving legal climate means that two parallel policy tracks must be followed simultaneously. One track involves defending traditional affirmative action programs and revising them where possible to meet constitutional requirements. The second track involves strengthening our efforts to achieve the goal of equality through race and gender neutral programs. Above all, we must do more than simply defend traditional programs.

There are several basic components to this approach.

1. **The President's Leadership**. The President has been consistently strong on his "mend it, don't end it" position and he gets high marks for commitment on this issue. This message needs to be refined with a view toward changing the terms of the debate. Affirmative action is not about preferences for one group over another. Instead, it's important for three reasons. First, we need it in cases where there has been past discrimination and we have to have a remedy. Second, we need diversity in the workplace because it makes our companies and employees more productive. Third, we need diversity in schools because it improve the educational experience and it helps us learn to live together. Another part of his message should be that the administration is committed to finding ways to achieve equality that supplement traditional affirmative action. Equality -- and a unified America -- are the ultimate goals, not any particular program or policy.

One major avenue for involvement by the President and others in the administration will be the state initiatives. The Washington initiative on the ballot for the fall of 1998 will be a key battleground. Losing Washington will hurt a lot because it will give a boost to efforts around the country. Winning will help a lot because it will show that the public is supportive of carefully drawn and sensible affirmative action efforts. The stakes are high enough that there will be significant involvement by many groups outside the state. We meet on the Washington initiative Tuesday, Feb. 17, to talk about specific steps.

2. **Review and Coordination of Existing Affirmative Action Policies**. We should ensure that affirmative action policies throughout the federal government are under review with the goal of modifying them if appropriate. Much of this work has been done through a comprehensive review by DOJ. However, there is inherently a need to have ongoing review as the courts provide additional guidance.

Revised programs should meet these requirements: 1) DOJ must endorse the underlying legal basis and the SG must be willing to defend them in court; 2) the administration must be able to explain and defend them to the public, to Congress and the groups who will be benefited by them; and 3) there should be consistency in basic principles across the agencies as revised programs are put in place. (For example, the methodology we use to support bench marking for SBA needs to be consistent with the arguments we make for DOT programs, and so on.)

3 **Justice Department Policy.** The Justice Department will have to make a decision over the next few months on its litigation position in many cases involving affirmative action. These will include hiring diversity cases (there is a recent one from Nevada); university admissions (e.g., the Michigan case); and others. We do not have to get involved in every case, but, if we do, the litigation position must be consistent with the President's position. Opponents may use these cases as an opportunity to attack the administration and Bill Lann Lee himself. This is inevitable. The answer is not to change our litigation position but to develop the best arguments for each one and to put whoever must defend it in the strongest possible position. Our overall goal should be to establish the long term viability of our affirmative action efforts. Future administrations may attempt to dismantle affirmative action, but they should not be forced to do so by the courts.

4. **Information Gathering and Research**. We should expand our base of information in two ways. First, we need to find out what race and gender conscious policies are effective and have the best chance of satisfying constitutional requirements. Second, we need to develop new and creative approaches to achieving quality that do not take race and gender into account. These research efforts should be institutionalized, i.e., they should be made an ongoing part of agency programs. The race initiative is also generating a host of new ideas that warrant consideration. (There may be a need to have legal review of these before they are recommended to the public, e.g., on the website.)

5. **Developing and Strengthening Race and Gender-Neutral Policies**. We should move quickly to devise and put in place race and gender neutral policies that supplement traditional

affirmative action efforts. Where possible, these should be developed and announced simultaneously with revisions in affirmative action policies. However, we must not feel pressure to move so fast that we call for efforts that are destined to have little effect. It is better to announce that efforts to develop new approaches are under way than to use scare resources on high risk efforts.

In general, these points apply across all policy areas. Below I offer some comments on how they apply in two areas which require early administration action -- higher education and procurement.

II. HIGHER EDUCATION

There are two underlying considerations. First, eliminating affirmative action in the traditional admissions process has the potential to drastically limit African-American and Latino enrollment in graduate schools and the top tier universities (e.g., the top 20%). Second, there is a realistic chance that the Supreme Court will eventually say that universities simply cannot use diversity as a basis for taking race and gender into account in admissions. In the meantime, we may face one court of appeals after another taking that position for its circuit.

Presidential Leadership

The public tends to see affirmative action in the university setting as simply a matter of preferential admissions standards. We need to revise that view. Diversity should really be about improving the quality of education and learning to live together. The original Bakke decision was grounded on that idea. The equality aspect of higher education is, of course, implicated by admissions policies, but I think the long term solution to equality in higher education must come from race and gender neutral efforts. In a very real sense, fixing the inner city schools is one of the most important components of affirmative action.

Peter Rundlet has outlined a proposal for campus dialogues during April and a Presidential meeting with higher education leaders. This group will have valuable information to share, not only about what works but about how to involve their counterparts in other universities to fend off attacks on affirmative action in higher education. It also provides a forum for the President to elevate the plane on which this issue is addressed. Diversity in higher education is not fundamentally about preferences or admissions criteria. It is about learning to live together. This is a message he has stated many times, and it applies well here.

Admissions Standards

The university community -- for example, ACE -- is busy trying to revise its admissions criteria to satisfy constitutional standards and still achieve a diverse student body. We can be

helpful in this effort to some extent. The Justice Department can defend our interpretation of Title VI and the Equal Protection Clause, which endorses the diversity rationale. DOE will soon issue a "self-assessment guide" to be used by colleges in determining whether their policies comply with constitutional and statutory requirements. This document is currently under review by DOJ and others. We can also facilitate the exchange of information about how to revise admissions criteria. For example, we can help develop a more useful and more realistic notion of "merit," which goes beyond standardized tests. By and large, however, revising admissions policies is a problem that the universities themselves and, to some extent, state legislatures will have to solve.

Developing Race and Gender Neutral Approaches

We need to strengthen our efforts to identify and develop ways to achieve equality in higher education that do not rely on traditional affirmative action. These should be designed to help disadvantaged groups get admitted in the first place, to successfully complete a degree program, and to find employment when they are ready. This doesn't mean that the policies must literally be "colorblind." For example, outreach and mentoring do not raise significant legal questions. It does mean that they would not rely on different admissions standards or earmarking assistance for certain groups. My tentative assessment is that there too little in the way of developing creative ways to achieve diversity in enrollment and assist disadvantaged minority students that are race and gender neutral. There are more good ideas than hard data about what works. I am currently surveying agencies to get a sense of our efforts in this area.

Legislation

On the political and legislative front, there is likely to be an effort to limit affirmative action when the higher education bill reaches the Senate floor in March or April. The Republicans will say they are concerned about disadvantaged students, too, but they have a better answer -- targeting assistance to the economically disadvantaged. We should take advantage of their rhetoric insofar as it can be used to strengthen the case for aid to poor families. However, we need to have an answer as to why "class-based affirmative action" is inadequate to achieve race and gender equality. We already have numbers from DOE that tell us that systematically expanding the number of poor students in a class does not result in a racially diverse student body. We have to make the case that diversity itself is important, too.

III. PROCUREMENT

As you know, the bench marking methodology is up for review in a senior staff meeting Tuesday, Feb. 17. It is possible to criticize this methodology, but it appears to be the best that could be developed after enormous effort by the most knowledgeable people around. Endorsing

this methodology raises some important considerations for how the program is explained and defended.

1. **Implications for Other Programs**. It is hard to explain (and understand) benchmarking. For example, the Commerce figures will show that there is no gap between utilization and capacity in several SIC codes. That conclusion in turn could have implications for procurement assistance by any federal agency in that industry and even by state and local programs. We should be prepared to explain why our benchmarks are only one approach to identifying past discrimination.

2. **Justifying the Program**. The benchmarks justify price credits in many industries. However, the effects of price credits are small. The Commerce Department analysis suggests that the price credit program will be of limited usefulness -- increasing the share of SDB dollars from 6.9% to 7.6%. In many industries, there are no benefits at all. We may well face a situation where both opponents of affirmative action and members of the minority business community are criticizing administration efforts at the same time. We need to be ready to announce other efforts that can be helpful in expanding minority business opportunities. For example:

-- we should expand the technical assistance program in SBA; it's currently about $7 million

-- we need expanded outreach to minority firms to let them know about opportunities and to get them in the door

-- the SBA bonding program has a default rate that is lower than private industry; this means that it is being administered too conservatively

-- other efforts, such as the mentoring initiative can be announced simultaneously

-- we should recommend some statutory changes that can make price credits more effective; one possibility is to raise the 10% cap; another is to provide greater discretion to agency administrators to use other means besides price credits. These changes may not be politically realistic, but they make our message more plausible. (It may be hard to understand why we have spent so much effort on allocating 10% price credits when doing so will shift very few dollars.)

-- the administration is making the loan application process easier and more accessible to minority-owned firms

-- there is a need for more general SBA reform, including improving its credibility and management and increasing the number of firms that are benefited (A high percentage of SBA assistance goes to a small number of firms.)

IV. CONCLUSION

These are tentative thoughts on a very large problem. There is a huge array of efforts underway which might be characterized as "affirmative action." Over the next few weeks, I will try to get a better overall sense of these. No doubt, more comprehensive strategy memos will follow.

Race - affirmative action

UPCOMING ACTIONS RELATING TO AFFIRMATIVE ACTION

ACTION	GOAL
I. Congressional Actions	
DOT's Reauthorization and the DBE Program	Preserve DBE program
Higher Education Reauthorization	Preserve diversity as permissible goal for colleges; preserve targeted federal programs
Pending Nomination of Bill Lann Lee	Confirmation
II. Rulemaking and Regulatory Actions	
DOT Rules	Promulgation this spring
Benchmarking and Related Rules	Promulgation later this year
III. Programmatic Changes in Response to Adarand	Continue DOJ Review
IV. DOJ/Litigation	
General	Preserve programs consistent with mend, not end; intervene selectively
Employment	Preserve diversity as permissible goal under Title VII/14th Amend.
Higher Education	Preserve diversity as permissible goal under Title VI/14th Amend. Provide guidance to colleges
Procurement and Business Opportunities	Preserve remedial programs
V. State Initiatives	
Washington	Defeat I-200 with alternative
VI. Longer Term Policy Development	Pursue parallel track to achieve equality through race/gender-neutral means
VII. Presidential Leadership	
Possible Settings: Procurement and Business Opportunities Higher Education and Diversity Other (commencement?)	Maintain and strengthen mend/not end message

Race-affirmative actio

DRAFT

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
House of Representatives
Washington, DC 20515

Dear Chairman Hyde:

I am writing to express my strong opposition to the passage of H.R. 1909, the "Civil Rights Act of 1997." This legislation, like its Senate counterpart, would be detrimental to the goal of ensuring equal opportunity. As Secretary of Labor, I am responsible for the Office of Federal Contract Compliance Programs (OFCCP), the program that enforces equal opportunity laws covering Federal contractors. Since H.R. 1909 would compromise contractors' ability to recruit qualified women and minorities and curtail the Government's ability to obtain full relief in proven cases of racial and other unlawful discrimination, ~~I would recommend a veto should the legislation pass in its current form.~~ * The President has indicated that if HR 1909 is presented to him in its current form, he will veto the bill.

The bill's stated purpose seems reasonable on its face: to "prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex" in connection with Government contracts, employment, licensing or financial assistance. Indeed, this is the function of the long-standing Executive Order 11246, which prohibits discrimination based on race, color, religion, sex or national origin in the employment decisions of covered Federal contractors. As with all Federal civil rights laws, protection under the Executive Order extends to the employees or applicants regardless of race or gender, including white males.

However, the term "preference" is defined in the bill to mean "an advantage of any kind, and includes a . . . numerical goal, timetable, or other numerical objective." The stated purpose of H.R. 1909 is to prohibit the use of numerical objectives, such as quotas and set-asides, that result in the granting of preferences based on race, color, national origin, and sex. However, the bill's definition of "preference" is broad enough to ban the use of numerical objectives that neither require nor permit preferential treatment based on these factors.

As was stated in the 1995 Affirmative Action Review Report To The President, the numerical goal setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. H.R. 1909 would outlaw the numerical goals used in affirmative action programs developed under Executive Order 11246. The numerical goals component of affirmative action programs is not designed to be, nor may it lawfully be interpreted as permitting preferential treatment and quotas in the selection process based on race, color, religion, sex or national origin. In fact, the regulations implementing

Executive Order 11246 expressly prohibit employment discrimination and the use of goals as quotas.

H.R. 1909 is a legislative attempt to tar legitimate goals and timetables with the brush of illegitimate "quotas." Federal contractors are never penalized solely for failure to meet numerical goals -- only for failure to make good faith efforts to implement their affirmative action plans. Furthermore, it is standard corporate practice for businesses to set goals and timetables to measure significant aspects of their operation. Private businesses can and do use numerical goals. The legislation would strip businesses of an appropriate tool to measure their own progress in the EEO arena -- thereby constraining corporate freedom to ensure nondiscrimination and encourage equal opportunity in the workplace.

I respectfully urge you to reconsider this legislation and thank you for your consideration of these remarks.

The Office of Management and Budget states that there is no objection to the submission of this report from the standpoint of the Administration's program and that enactment of H.R. 1909 would not be in accord with the program of the President.

Sincerely,

Alexis M. Herman

cc: John Conyers, Jr., Ranking Minority Member

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210

JUL - 9 1997

The Honorable Charles T. Canady
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Chairman Canady:

I am writing to express the Department of Labor's strong opposition to the passage of H.R. 1909, the "Civil Rights Act of 1997." I believe the legislation that you have introduced, like its Senate counterpart, would be detrimental to the goal of ensuring equal opportunity, and if presented to the President in its current form, the Secretary of Labor would recommend that it be vetoed. As Assistant Secretary of Labor responsible for the Office of Federal Contract Compliance Programs (OFCCP), the federal agency that enforces equal opportunity laws covering federal contractors, I am concerned that the legislation would compromise contractors' ability to recruit qualified women and minorities and curtail the Government's ability to obtain full relief in proven cases of racial and other unlawful discrimination. The President has indicated that if H.R. 1909 is presented to him in its current form, he will veto the bill.

The bill's stated purpose seems reasonable on its face: to "prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex with respect to Federal . . . contracts." But Executive Order 11246 already prohibits discrimination based on race, color, religion, sex or national origin in the employment decisions of covered federal contractors. As with all federal civil rights laws, protection under the Executive Order extends to employees or applicants regardless of race or gender, including white males. The bill would ban practices that are already unambiguously prohibited under the law -- such as "quotas" or fixed numerical targets. The Executive Order regulations are explicit that "goals" may not be rigid and inflexible quotas, but rather targets, reasonably attainable by means of applying good faith efforts to make the affirmative action program work.

This bill would eliminate some of OFCCP's most effective measures of federal contractor compliance, including flexible goals and

timetables. The bill prohibits the granting of a preference and defines the term "preference" to mean "An advantage of any kind [including] a quota, set-aside, numerical goal, timetable, or other numerical objective." This definition is so broad as to sweep away approaches that are lawful, standard corporate practice. Thus, not only does H.R. 1909 purport to "fix" what is not broken, it also breaks what is working well.

The legislative attempt to tar legitimate goals and timetables with the brush of illegitimate "quotas" belies the important legal and conceptual distinctions between the two. First, federal contractors are never penalized solely for failure to meet numerical goals -- only for failure to make good faith efforts toward ensuring equal opportunity. Furthermore, it is standard corporate practice for businesses to set goals and timetables to measure significant aspects of their operation. Private businesses can and do use numerical goals. Your legislation would strip businesses of an appropriate tool to measure their own progress in the EEO arena -- thereby constraining corporate freedom to ensure nondiscrimination and encourage equal opportunity in the workplace.

I respectfully urge you to reconsider this legislation and thank you for your consideration of these remarks.

The Office of Management and Budget states that there is no objection to the submission of this report from the standpoint of the Administration's program and that enactment of H.R. 1909 would not be in accord with the program of the President.

Sincerely,

Bernard E. Anderson

U. S. Department of Justice

Office of Legislative Affairs

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

July 9, 1997

The Honorable Charles Canady
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter provides the Department's initial comments on H.R. 1909, the "Civil Rights Act of 1997," which would prohibit the Federal government from using any race or gender conscious affirmative action programs in Federal contracting, employment or any other federally conducted program or activity. This bill was the subject of a Subcommittee hearing on June 26, 1997. Because H.R. 1909 is substantially similar to H.R. 2128, a bill that was considered by the Subcommittee during the 104th Congress, and which the Administration strongly opposed, our position remains unchanged. The reasons for this opposition were the subject of testimony presented before the subcommittee on December 7, 1995 by then Assistant Attorney General Deval Patrick. That testimony is attached to this letter. As Mr. Patrick stated, if H.R. 2128 had been presented to the President, the Attorney General would have recommended a veto. That recommendation would apply with equal force to H.R. 1909 and the President has indicated that he would veto the bill.

The Department opposes the bill for several reasons. First, there is compelling evidence of both historic and current discrimination against minorities and women. Second, the President's conviction that affirmative action is still necessary and that affirmative action programs should be "mended, not ended" remains unchanged. And third, the Administration has made significant progress in its efforts to implement the President's "mend, don't end" mandate and to bring affirmative action programs into compliance with the Supreme Court's decision in Adarand v. Pena.

There is an overwhelming body of evidence to support the assertion that discrimination against minorities and women still exists and that there is a compelling governmental interest in addressing this problem. This evidence was set forth in the

Department's 1995 testimony before this Subcommittee, in the statements of other witnesses, and in our May 1996 proposal to reform Government contracting programs (see attached).

Briefly, evidence convincingly demonstrates that minority business entrepreneurs still face competitive disadvantages because of their race. Additionally, minorities still face discrimination in seeking to secure capital for business formation and expansion, and with bonding requirements, which often exacerbate the hindrances small, minority-owned businesses face in securing necessary capital for business expansion, and make it impossible or extremely difficult for minority-owned firms to satisfy bidding specifications. Moreover, discrimination in employment by employers and trade unions has hindered minorities from obtaining the technical and professional experience necessary for business formation and success. Discrimination by business suppliers also makes it difficult for minority-owned firms to proffer competitive bids, even when processes are open to them.

The Federal government can help to overcome minority firms' inability to achieve competitive success in Government contracting by using a narrowly-tailored affirmative action program that gives those firms a fair opportunity to compete. Indeed, the evidence shows that when States or localities have eliminated affirmative action requirements in their contracting rules, the use of minority firms has plummeted. This uncontradicted evidence demonstrates convincingly that affirmative action requirements are an essential mechanism to ensure that small, minority-owned firms have a reasonable way to enter into the arena of government contracting, and to establish a record of government contracting that will permit them to compete on a level playing field.

Statistics on business revenues further establish the continuing need for affirmative action in contracting. A recent study by the Urban Institute found that minority-owned firms receive only 59 percent of State and local expenditures that their availability suggests they should be receiving. While minorities are 20 percent of the population, they own only 9 percent of all U.S. businesses, and receive less than 4 percent of all business receipts. Minority firms receive, on average, only 34 percent of the gross receipts of non-minority firms. The continued use of race-conscious affirmative action is essential if minority-owned firms are ever to overcome the continuing effects of racial discrimination on economic competition.

Since the Subcommittee's hearing in 1995, significant progress has been made on fulfilling the President's pledge to "mend, not end" affirmative action. To begin with, the

Department has coordinated an ongoing effort with Federal agencies to examine their programs to ensure that they meet the requirements of Adarand. For example, the Department of Defense suspended the so called "Rule of Two," a contracting set-aside program for socially and economically disadvantaged businesses (SDBs), almost all of which are minority-owned businesses. We also worked with a number of agencies to ensure that subcontracting efforts were being carried out in ways that satisfied constitutional strict scrutiny. In addition, we worked with both the Department of Transportation and the Environmental Protection Agency to ensure that Federal aid programs would be implemented by both Federal and State officials in ways that satisfied the standards of Adarand. And in July of 1995, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) reissued its policy statement prohibiting the use of Executive Order 11246 goals as employment quotas. Indeed, the Transportation Department recently published proposed regulations that reflect that effort. The Department of Justice has provided the Subcommittee with the letters sent to departments that reflect the results of these reviews.

The Department also issued written guidance to executive branch agencies on affirmative action in employment that sets forth limits on the ability of agencies to use race as a factor in employment decisions. This guidance has resulted in many agencies reviewing their use of affirmative action in employment to ensure that their efforts will satisfy strict scrutiny, and we are confident that changes in these areas have been made. The Office of Personnel Management and the Equal Employment Opportunity Commission are working with this Department in reviewing guidance for Federal agencies in this area. By banning the use of all numerical indicators and goals, the legislation will eviscerate the Executive Order 11246 program. Without the use of numerical indicators, the OFCCP would have no way to measure progress or to identify which employers to review.

Most significantly, the Federal Acquisition Regulation (FAR) Council published in the Federal Register on May 9, 1997, a proposed rule that will modify the way in which the Government can use race-based affirmative action measures in procuring goods and services from contractors. This proposed rule is based on the May 1996 Justice Department proposal that concluded that race-conscious affirmative action in Federal procurement is still needed in order to help eliminate discriminatory barriers that impede opportunities for minority-owned businesses. This proposal documents historical and continuing discrimination in the area of Government contracts and sets forth the compelling

governmental interest for continuing the use of race conscious remedies.

Under the proposal, race will never be the exclusive factor when a contract is awarded. The use of price credits authorized under the Federal Acquisition and Streamlining Act (FASA) means that race-conscious affirmative action is considered only in the process of assessing bids from all firms eligible to bid, minority and non-minority alike. While affirmative action may be a factor in some contracts, the bidding process is open to all. To the extent that contracts are awarded by taking account of considerations other than price, those considerations will be unaffected by the use of racial factors, ensuring that race is never elevated above qualifications for Federal contracts.

In addition, the use of benchmarks ensures that where race-conscious affirmative action measures are used, they are used in a manner that satisfies strict scrutiny. The use of benchmarks ensures that affirmative action is used only where analysis of minority-owned firms' participation in any given industry demonstrates that, without the use of affirmative action, minority-owned firms would not secure contracts at a level commensurate with their availability and capacity. This is not a quota; minority firms are not limited to contracts at the benchmark level, nor are they guaranteed to obtain contracts up to the benchmark level. The use of benchmarks ensures that when the Government allows affirmative action to be a factor in a contract award, it is used only where we have proof that, without such consideration, minority firms will fail to receive Federal contracts at a level one would expect in a system free of discrimination. That, of course, is the aim of all of affirmative action; to achieve a system free of discrimination. Affirmative action is a means to insure that end ultimately is reached.

The proposed rule issued by the FAR Council on May 9 of this year reflects the Justice Department proposal and the numerous comments received on the proposal. This is a comprehensive proposed rule that would affect the contracting practices of every executive branch agency. It will affect a broad range of affirmative action programs that target assistance to small firms that are owned by socially and economically disadvantaged individuals. It is a major effort by this Administration to mend affirmative action.

Thank you for the opportunity to provide the Department's initial comment on this bill. The Office of Management and Budget has advised us that there is no objection to submission of

this letter from the standpoint of the Administration's program. I ask that this letter be made part of the hearing record.

Sincerely,

Andrew Fois
Assistant Attorney General

Enclosure

cc: The Honorable Robert Scott
Ranking Minority Member
Subcommittee on the Constitution

SBA Meeting 8-20

1. Capacity approach - most impact on AA
   Six inds have overutilization - 52%
   No price credits in 52%

2. Bidders data - least impact on AA
   Many large inds have underutil
   Some OK/ 2 or 3 still have probs
   2 not the same inds
   Less (originally) than 52%

3. Regression analysis - middle/close to (2)
   Again, less than 52% - but prob more than bidders data

Final mix of #s by end of month ??
2 who to recheck

Integration of models??

Race-affirmative actio

9-18-97 Affirmative Action Meeting -

Brief due by 29th

WH: Strong desire that Admin send unanimity signal- continued support for a.a. 209 - one op.
Some look at case as litmus test.
Some think need to be consistent w/ past positions
At same time, some believe - other courts to affect decision.

CR: No consensus yet - or even indiv. fixed opinions.
As tough a decision as I can recall
SG rarely like brief in such cases.
Recitation of various issues - process on filing.

Counsel team: Vy imp for gvt to weigh in at this stage
Cathy Rogers - Unusual circ where this unusual move is approp.
NOW LDF: Dept should maintain consistency - that supports credibility.
We have strong arg - good chance of getting favorable decision
This is place where we have control - we won't have it when cases popping up all over - many a applied.

CR: Where's the coalition to overturn 9C

Cathy Rogers → Pivotal vote is O'Connor. Not a pt friend of AA. And has dissent in Seattle case. Point is record wholly closed here. And Seattle case should be controlling.

LM: If this is not the case, what case would be better?
Already more states are putting this on ballot.
Die now or die slowly on vine.
SOC might be still more unwilling to vote w/ us if 20 states go this way

Sth seemed to be concerned abt maintaining credibility in dir rts cases.
If you don't like, you should reaffirm everything you said so passionately about this issue.

NS: We had many calls after Pincataway. Imp to send a clear signal.

RW: How does our decision affect initiative process?

WH: Houston initiative on ballot on Nov 4.
WA, FL - likely to have initiatives Nov 98.
Resources is key - failure to set rules financing - incl. from Dem pty - was key to our loss in CA.

CM: Lots of frustration abt Pres's role re 209 - didn't make statements often enough - didn't use bully pulpit.
This is perception among Californians.

MB: Rather wait - but not same cert politically - is achieving
" " we'll lose
But mostly - we have to find a way to win - That's most imp't thing - Houston

SL: Six. Shd to go - Have to show flag in big way - public kind of leadership.
Major lib donors were told that camp. didn't want this to be a big issue + to turn off flow of funds.
S. Jackson - Leigh heading a coalition - Bob Lanier (mayor)
Efforts need to be harmonized

JC: You can be helpful w/ bus. commun
All oil companies -

CB: Support this strategy on Hopwood
If you don't file brief - you have to send msg as to why not
Lots of attn, partic after Piscataway
Need very clear statement - support for position Admin has held.

CR: What can we do to address AA in higher ed generally - w/ near-term substance.
WH: Riggs Amend - but now off the table

LM: Make sure ags have confidence/resources to deal w/ complaints in Tx + CA.

CB: Admin needs to partner w/ ed. commun - e.g. ACE
on: what are benefits of diversity?
what do admissions stds really mean?

JL: Begin by having conv w/ DOEd - make sure these issues are a priority for them.
Targeted toward coming up w/ set of action steps -
not just as it relates to any partic case.
Secy of Ed doesn't care about these issues - if he does, no way to run.

NZ: Title IV - no $ for state deseg centers
14m request ⟹ 7m.
Pres. can say - w/ DOEd - we are doing this - part of our effort.

Re Riggs Amend - Admin not visible enough.

UH: No articulation from Secy — re importance of this issue.

MG: On testing — easy to lull into trap that these are ultimate measure.
Effort on tests inadvertantly undermines position on AA.
Can be caricatured — but need to work through how. Headed for real clash.

LM: Real disconnect b/w your talk about testing and your position on AA

NZ: Real op for testing position to feed into AA position —
Need to be combined w/ other actions to raise stds, etc.

WH: Longer-term problem re legal rep in CA.
Many as applied challenges coming.
Need DOT help — resources/assistance
Set up task force to deal w/ litigation
CA rts enf ags can help find the good-fact cases.
work w/ DOT. Affirm legal strategy to build these cases.

Race-affirmative action

U. S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, D.C. 20530*

Bruce—

FYI. I think this is exactly the right position — as a legal matter, as a policy matter, and as a political matter.

Elena

July 29, 1997

TO: THE ATTORNEY GENERAL

FR: WALTER DELLINGER WED

RE: No. 96-679, Piscataway Bd. of Education v. Taxman

BACKGROUND

The Piscataway Board of Education decided to eliminate a position in the Business Education Department of the Piscataway High School. The two teachers with the least seniority in that Department were Sharon Taxman, who is white, and Debra Williams, who is black. Having started the same year, they had equal seniority. Rather than breaking the seniority tie by random selection as it had done in the past, the Board, invoking its affirmative action policy, used race as the deciding factor and laid off Taxman and retained Williams.

The United States (under the Bush administration) filed suit against the Board, alleging that Taxman had been subjected to discrimination on account of race in violation of Title VII. Taxman intervened, asserting her own claim under Title VII. The Board sought to defend its decision by arguing that retaining Williams rather than Taxman furthered its interest in a diverse faculty. The district court found in favor of the United States and Taxman. By then, Taxman had been rehired, and the Board was in the process of eliminating its affirmative action policy. The district court awarded Taxman backpay and other monetary relief.

When the Board appealed that money judgment, the United States (under the Clinton Administration) attempted to file a brief supporting the Board. The Third Circuit rejected the brief, but allowed the United States to withdraw as a party. With only the Board and Taxman remaining in the case, the Third Circuit affirmed the judgment awarding Taxman monetary relief. The Third Circuit agreed with the district court that Title VII does not permit non-remedial affirmative action and that race may not be used in layoff decisions.

After the Board petitioned for certiorari, the Court invited the United States to express its views on whether certiorari should be granted. Although we urged the Court not to grant certiorari, certiorari was granted. The Board's brief is due on August 25, 1997, and Taxman's brief is due approximately 30 days thereafter.

DISCUSSION

The Attorney General has primary responsibility for enforcing Title VII against public employers, and the EEOC has primary responsibility for enforcing Title VII against private employers. Consistent with those responsibilities, we have participated in the Supreme Court either as a party or as amicus curiae in almost every (if not every) Title VII case. Given the government's role as primary enforcer of Title VII, our tradition of participation in the Supreme Court, and the importance of the Piscataway case, we have a responsibility to the Court and to the public to file a brief stating the views of the United States.

The question of what our brief should say is a sensitive one. After weighing several options and consulting with representatives of major civil rights litigation groups, I have concluded that we should file a brief arguing that the money judgment awarded to Taxman in this case should be affirmed on the narrow ground that the Board failed to offer or defend an adequate justification for this particular race-based layoff decision. The Court would then not have to reach the broad question whether Title VII always precludes non-remedial affirmative action. Several considerations have persuaded me of the wisdom of that course.

1. Most important, it is consistent with my understanding of the law. The use of race in layoffs generally imposes greater burdens than the use of race in hiring and promotion and therefore calls for a correspondingly greater justification. In this particular case, the Board clearly failed to satisfy that burden. Although the Board, in the course of litigation, asserted an interest in faculty diversity, it did not offer any evidence that such an interest could not be achieved through hiring and assignment policies, which are less burdensome than the use of layoffs. In fact, the record showed that the faculty at Piscataway High School was already diverse. The Board asserted an interest in diversity in the Business Department itself, which contains nine of the high school's 141 teachers. But no evidence was offered that diversity in the Business Department would promote any compelling educational objective that would not be served adequately by having a faculty that was generally diverse, as the faculty already was. What is worse, the Board did not even offer any evidence that it actually relied upon a "department diversity" rationale when it made the layoff decision. Thus, while the opinions of the courts below were incorrect in concluding that Title VII forbids all non-remedial affirmative action, the actual judgment awarding Taxman monetary relief should nonetheless be affirmed because of the Board's failure to offer any adequate justification for using layoffs to achieve diversity among this particular small subset of the faculty.

2. There is a strong likelihood that five Justices will be inclined to agree with the Third Circuit's broad opinion that Title VII never permits non-remedial affirmative action. Such a holding would be a disaster for civil rights in employment, rendering unlawful even the most carefully designed non-remedial affirmative action plans. Our best chance of avoiding that outcome is to persuade one or more of those five Justices that the case can be resolved against the Board on narrower grounds, and that the broader issue need not be reached. The Court is sometimes receptive to the argument that a case should be decided on the narrowest possible grounds. And at least one of the Justices inclined to construe Title VII to bar all non-remedial

affirmative action may be concerned about the consequences of such a broad holding and therefore willing to put off that issue.

Like our brief at the certiorari stage, the brief I propose would also argue our strongly held belief that Title VII does not preclude all non-remedial affirmative action. The Court may resolve that issue even if we urge it not to. We therefore need to address it. Equally important, unless the Court believes that there is a strong argument for non-remedial affirmative action in some circumstances, it will have no incentive to decide this case on narrower grounds.

I believe that the Court is virtually certain to rule against the school board in this case. Our best opportunity to avoid a broad and harmful ruling invalidating non-remedial affirmative action in employment is to persuade the Court that there is a clear basis for affirming the money judgment on narrow grounds.

3. The approach I propose demonstrates that we are serious in our commitment to mend (without ending) affirmative action. The Board's claim that it fired Taxman in order to further Business Department diversity, in a school that was itself already diverse in its teaching faculty, will be viewed by most members -- perhaps every member -- of the Court as indefensible. If we nonetheless attempt to support the Board, the Court is apt to conclude that we will support any use of race that is labelled affirmative action.

4. At a recent meeting in my office with representatives of civil rights litigating groups, I outlined the approach I am recommending here. No person at the meeting objected, and several offered encouragement. All agreed that the Board's decision is not defensible based on the record in this case. My strong perception is that, while the groups may take a somewhat different position in their own filing, they agree that it is important for the United States to take the position I am recommending.

5. While the position I am advocating with respect to the narrow issue of Taxman's layoff is at variance with the brief that the government attempted to file in the Third Circuit, that brief was written before the government reexamined its policies on affirmative action in the wake of the Supreme Court's decision in Adarand. As a result of that through reexamination, the Department of Justice issued a fully vetted memorandum that offered extensive guidance to federal agencies on the legal standards governing affirmative action. Thus, our revised position on the narrower question is fully consistent with the conclusions of the Adarand memorandum. More significantly, we will strongly reaffirm our previously stated views about the legitimacy of non-remedial affirmative action under appropriate circumstances.

6. Our brief at the certiorari stage has already paved the way for such a brief on the merits. In that brief, we stated that our present views on affirmative action are contained in the Department of Justice Adarand memorandum. Consistent with that memorandum, we argued that a school board has an obligation to justify any use of race and that the mere assertion that race-based personnel decisions promote diversity is insufficient, standing alone. We noted that the use of race in layoffs imposes a different burden from the use of race in hiring or promotion. And we pointed out that the Board in this case had failed to produce evidence that diversity in

the Business Department served any educational goal that was not already served by diversity in the school as a whole. The brief I propose would simply add to those points the logical conclusion that the Board violated Title VII.

7. The brief I am proposing would be called a Brief for the United States In Support of the Affirmance of the Judgment. While we could delay filing such a brief until Taxman's brief is due in late September, I propose that we file it when the Board's brief is due, on August 25. Because the brief I propose will attack the Third Circuit's reasoning while defending its judgment, it is appropriate to give both parties an opportunity to respond to it. Such a filing also eliminates unnecessary speculation that would arise with respect to the Government's position if the August 25 date for filing in support of the School Board passed without our participation. By filing on that date we can let a carefully crafted brief speak for itself, strongly defending affirmative action generally while finding that a proper justification was lacking for the particular use of race at issue in this case.

Race - affirmative action
and
Race - minority enrollment

American Civil Rights Institute

Bruce -
F41.
Elena

July 30, 1997

The Honorable William Jefferson Clinton
President
United States of America
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Clinton:

When you delivered your "race relations" speech at the University of California (UC) on June 14, 1997, I, like most Americans, listened with an open mind to your message. You rightfully pointed to race relations as one of America's greatest challenges. While you and I do not agree about how to heal race tensions, I believed that our goals for our nation and its people were shared ones.

When you announced the appointment of your Presidential Advisory Panel on Race, although I was deeply concerned about the one-sided composition of that panel, I essentially reserved public comment because of your assurance that the panel would "listen to Americans from all races" and "promote a dialogue in every community" as well as "help educate Americans about the facts surrounding the issues of race."

Yet, in the weeks following your San Diego speech, you, your panelists, and members of your administration, have given speeches and made public remarks which demonstrate that this endeavor is anything but open-minded and objective.

Let me give you some examples. First, during your San Diego speech and your recent appearances before the National Association for the Advancement of Colored People (NAACP) and the National Association of Black Journalists (NABJ), you made highly critical remarks about California's Proposition 209, as well as about the proponents of that Initiative.

Those of us who voted for Prop. 209 know why we supported this measure. For you to tell the nation that the vast majority of Californians voted for the measure "with a conviction that discrimination and isolation are no longer barriers to achievement"

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is just plain wrong. Your statement to the NABJ - "I don't know why the people who promoted 209 in California think it's a good thing to have a segregated set of professional schools"- is just plain irresponsible.

No one "promoted" 209 more than I, so I believe it is fair to assume that you are characterizing me as a proponent of racial segregation. This is not my position nor that of anyone I know who was involved in the Prop. 209 campaign. We do not believe a segregated set of professional schools is a "good thing"; that is why we are the ones in this debate who are fighting to unify Americans by having our government treat everyone as equals regardless of race--as the U.S. Civil Rights Act of 1964 intended. We acknowledge that discrimination still exists and we call on you to strengthen the enforcement of those anti-discrimination laws that are on the books.

No one of goodwill wants our public institutions segregated. Yet, under your leadership the federal government continues to give financial support to historically black colleges. Are you not offended by government supporting the segregation manifested in these schools? Wouldn't your leadership be better demonstrated by encouraging those black students who were admitted to Boalt Hall, but who chose not to attend, to enroll at Boalt.

You know as well as I that few public institutions -- even those with a prestigious reputation like Boalt -- can compete with the financial packages offered by Yale, Harvard, Columbia, Duke and the other private schools which most of those fourteen black students admitted to Boalt will be attending. The only way we can come close to matching such packages is to provide massive race-based scholarships -- and, this we will not do.

Instead of making inflammatory statements about "resegregation," why aren't you talking about what America needs to do to make black and Latino students competitively admissible without the need for "bonus" points based on race, or without our having to lower or change the academic standards for students based on race? Wouldn't it be more productive to engage the nation in a discussion on school reform -- including the benefits of magnet schools, charter schools and school choice?

You went on to say, in speaking to the NABJ, "It would seem to me that, since these professionals are going to be operating in the most ethnically diverse state in the country, they would want them to be educated in an environment like they're going to operate." Of course, we do. But, we are not prepared to abandon our commitment to the moral principle of equal treatment under the law in order to achieve that diversity.

I am including in this transmittal a paper written by one of the most preeminent political science professors at the UC Berkeley

Graduate School of Public Policy, Martin Trow. Trow's paper - Racial and Ethnic Preferences in Admissions to the Law School of the University of California, Berkeley (Boalt Hall) in 1996 and 1997 - should dispel any doubt about the extent of the discrimination against Asians and whites which has been occurring at Boalt Hall in the name of "diversity."

If after reading this report you are still inclined to blast Prop. 209 - which hasn't even taken effect, due to efforts on the part of your administration to thwart implementation of the measure - then I can only assume that you are, indeed, a proponent of preferences and discrimination.

In your speech to the NAJB, You said that "...a lot of people who even voted for Proposition 209 have been pretty shocked at what happened, and I don't believe the people of California wanted that to occur. I think the rhetoric sounded better than the reality to a lot of people."

What "shocks" us, Mr. President, is finding out that the magnitude of the preferences has been so obscene. What "shocks" us is that you and others are so content to allow so many black and Latino students suffer the illusion that they were academically competitive when they were not. What "shocks" us is the predisposition of some, led by you, to maintain this fraud without honestly confronting the problem.

What "shocks" me is that the President of the United States and his Education Department believe that race-neutral criteria (such as grade point averages and standardized tests) are discriminatory solely against blacks and Latinos - a position which the Sacramento Bee characterizes as "an Orwellian misreading of the law." I am "shocked" that your administration would foster the notion that black and Latino high school and college graduates should not have academic criteria applied to them , and that they are incapable of competing in an open academic competition against Asians and white applicants?

As the dean of admissions at UCLA law school, Michael Rappaport, said, "I hope ... the federal government is not suggesting an academic institution can't use academic criteria when evaluating candidates for its academic programs?" And, yet, that is precisely what you are suggesting, and it is truly "shocking."

Yes, I am "shocked" that an American President would say that he is looking for "ways to get around" a vote of the electorate (Prop. 209) and a decision of a Circuit Court (Hopwood).

Which brings me to my concern about your race panel. Recent statements by the panel, including "one of America's greatest scholars, Dr. John Hope Franklin," give an indication that this panel is not, in fact, approaching its task with open minds.

For example, Dr. Franklin, upon learning of your scheduled appearance at the NAACP conference, said, "The white side (emphasis added) has been in control of everything, so they're the ones who need educating on what justice and equality mean." Do you seriously think comments like this will inspire all Americans -- including white Americans -- to join in this "great and unprecedented conversation about race?" I think not.

I am not the only one who is recognizing a bias on the part of your race panel. Ronald Brownstein of the Los Angeles Times reported last week that the message coming from the first meeting of the race panel was that "America is a racist country. Deeply, broadly racist. Perhaps irredeemably racist."

Angela Oh, the only Californian on the panel - and one whose views do not represent the mainstream of her state on this subject - commented that the panel should not waste its time documenting the extent of discrimination because, in Brownstein's words, "it is so widespread." Oh herself said, "I don't need the data. I don't think any of us need the data; we know it's there." How does that square with your statement that this panel will help "educate Americans about the facts surrounding issues of race?" Clearly, at least one member of your advisory board is not interested in facts.

Dr. Franklin then described American culture as pervasively racist. "Our whole country, our whole practices are suffused with it," he said. "...Wherever you go, you are going to see this." I and the majority of Americans take great issue with this comment. America is not a racist nation. We surely have people--of all colors--who are racists, but our nation is not racist.

These statements confirm that you and your panel seem to be less concerned with improving race relations than you are with derailing the national movement to eliminate affirmative action preferences. This has to be what you meant when you called on the NAACP to help you "turn this thing around."

On the day that you told the NABJ and the NAACP that you were trying to get around Prop. 209, the UC Regents approved a plan, developed by a Task Force which my resolution (SP-1) created, to improve the academic performance of black and Latino students so that they won't need preferences based on their skin color and ethnic background. Why can't you applaud our efforts to engender diversity at UC the right way instead of complicating them?

I sent you a letter before your speech in San Diego which articulated a perspective shared by the supporters of Prop. 209. It is clear from your comments of late that either you did not read the letter or that you simply chose to ignore the alternative perspective presented (a perspective, I might add, that is shared by a majority of Americans).

One paragraph from that letter bears repeating: "If your legacy is to be that of a president who provides leadership in improving race relations among our people, I respectfully submit, Mr. President, that it must be as one who smoothed the transition from race matters ideology to a less race- and color-conscious America, and eventually to a nation where race and skin color are as irrelevant as our blood type in American life and law."

Until now, I have been hopeful that your 11th-hour entry into the debate about race in America would advance the issue and move us forward toward one nation, as you profess. Now, I pray that at the end of this year-long project that matters will not be worse as a result of your efforts. To accuse a majority of the people in the state which represents one-eighth of the nation's population of promoting racial segregation is not my idea of improving race relations. To describe this nation as a racist nation is neither productive nor true. To the contrary, it is a sure-fire formula for heightening resentment, bitterness and polarization.

From the beginning, many have said that your panel is not balanced enough to reflect the different American perspectives on this issue. If you are truly interested in having this panel's work taken seriously, I strongly suggest that you expand the panel to include an equal number of those with views different from those presently represented. People like Shelby Steele, Linda Chavez, William Bennett, Anita Blair of the Independent Women's Forum, Sally Pipes of Pacific Research Institute, Abigail Thernstrom, and Ed Koch, a former Mayor of New York come to mind.

Further, if you want to advance the dialogue about race relations, and if you want to know what prompted the people of California to approve Prop. 209, I invite you to come to California to an audience of my choosing and make your NAACP/NABJ speech, and I will go to one of your choosing and make the case for Prop. 209. It is no act of courage for any of us to appear before crowds that are selected for their affection toward our respective positions and tell them what they want to hear.

Above all, for the good of the nation, I plead with you and your advisors to discontinue using inflammatory rhetoric suggesting that the proponents of 209 want to "resegregate" America. This most assuredly will divide us into separate camps that will be more polarized at the end of this dialogue than we were at the beginning.

Sincerely,

Ward Connerly
Chairman

Racial and Ethnic Preferences in Admissions to the Law School of the University of California, Berkeley (Boalt Hall) in 1996 and 1997

Martin Trow
Graduate School of Public Policy
U.C. Berkeley, 94720

Affirmative Action and Discrimination at Boalt

In all the talk about affirmative action we hear a good deal more rhetoric than facts. There were very few facts during the President's speech in San Diego on June 8, but he, along with many others, have made reference to Berkeley's Law School (as well as to the Law School at the University of Texas) as evidence of the bad effects of the abolition there of what is called "affirmative action." What almost no one has talked about are the effects of the old ethnic and racial preferences in admissions on those excluded as well as on those admitted. But it might be useful to actually look at the patterns of racial and ethnic preference based on information about the applications and admissions to Boalt Hall in 1996 provided by the School itself, that is, the patterns in place before the new policies passed by UC's Regents in July 1995 were put into effect there.[1] What we see in these figures is a pattern of discrimination based on racial and ethnic preferences that far exceeds almost everyone's notions about the nature and effects of affirmative action, which most of its supporters have imagined to refer to a marginal advantage given to members of some groups over others of roughly equal ability and qualification. What we see in these data are not marginal advantages to disadvantaged social groups, but gross preferences that can only reflect a pattern of racial and ethnic bias.

Admissions to Boalt has been organized around placing applicants into one of four ability Ranges, A through D, from the highest scores to the lowest, defined by a combination of the student's grade point average and scores on the LSAT.[2] In 1996 only 855 students were admitted to Boalt out of 4684 who applied.[3] But the proportions admitted were very different among the different ethnic and racial groups and in the different ranges.

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[1] These data were obtained by Mr. Dan Guhr, a graduate student at Oxford University doing his dissertation on comparative patterns of access to higher education in several advanced societies. We want to thank the Office of Admissions at Boalt Hall for making these data available to us.

[2] For example, the chart for California residents defines Range A as including stepped combinations of GPAs from 4.00 to 3.80 and LSATs from 167 to 178. So a GPA of 4.00 and LSATs of 167 to 171 are included, as are a GPA of 3.80 and a LSAT score of 178.

[3] In both 1996 and 1997 fewer than 1 applicant out of every 5 were admitted by Boalt, (18.2% in 1996 and 19.9% in 1997).

Let us first look at those students whom we can call "Asian," made up of those who identified themselves as of Chinese, Japanese, Korean, Vietnamese, East Indian and Pacific Island origins; then at students in four groups -- Blacks, Chicanos, Puerto Ricans and Native Americans -- whom we can refer to as "Affirmative Action," or A.A., groups, who were the objects and beneficiaries of racial and ethnic preferences before the Regents' action of July 1995; and then at the group of applicants who are "Caucasians."[4] Each cell in Table 1 shows the numbers in a specific ethnic and ability Range group who were admitted to Boalt as a fraction of the number from that group who applied, with the ratio of those numbers in percent below.

Table 1
Ratio of Applications to Admissions, UC Berkeley Law School, by Ethnic or Racial Group and Ranges, 1996

	Ability Range			
	A (high)	B	C	D (Low)
ethnic group	admit/app ratio	admit/app ratio	admit/app ratio	admit/app ratio
Asian	36/37 = 97%	59/85= 69%	24/127 = 19%	2/492 = .4%
A.A. group	2/2 = 100%	15/16 = 94%	27/35 = 77%	100/696 = 14%
White	157/166 = 95%	182/295 = 62%	101/607 = 17%	19/1223 = 1.5%

[4] Five applicant groups reported by Boalt are omitted from these tables and discussion. Students classified as "Foreign," "Other," and "Declined to Answer" were clearly treated in 1996 as not eligible for affirmative action preferences -- with admission/applications ratios much like Caucasians and Asians. We also omit the small groups of "Pilipino and "Latino" applicants, who were admitted at slightly higher rates than Caucasians and Asians, but were not accorded the same affirmative action preferences as were the four groups that we include in that category. The key is in the proportions admitted from Range D applicants: in 1996 only 4 out of 111 Latinos and 2 out of 64 Pilipinos who were Range D applicants were admitted.

A glance at this table shows dramatically the workings of affirmative action as it was exercised at Boalt Hall before the application of the new Regents' policies, a pattern of very large differences between these groups in the ratios of admissions to applicants within the three of the four ability ranges. Only 18 applicants from the AA groups fell into the top two ability Ranges, and all but 1 of them were accepted. And that is true for the other two groups: almost all applicants from Range A were admitted. But substantial differences in admission rates begin to appear among applicants from Range B (69% and 62% for Asians and Whites respectively, versus 94% for AA groups), and are very large in the lower two ability Ranges C and D. Of the 124 Asian applicants in Range C, only 24, or 19%, were admitted; and of the 607 whites in that range, 101, or 17%, were admitted. But of the 35 members of Affirmative Action groups in that Range, 27 or fully 77% were admitted. And in the lowest ability Range D, only 2 out of 492 Asian applicants were admitted (.4%), as compared with 100 out of 696 (14%) Affirmative Action applicants. The proportion of Whites admitted from that ability Range, 19 out of 1223, or 1.5%, was almost as low as among the Asians.

When we look at specific ethnic groups, not shown in this table, the differences are even more striking. In ability Range C, 10 students of Japanese origins applied; an equal number of Blacks applied for admission in that same Range. All 10 Black applicants in that Range were accepted, not one of those of Japanese origins. Of the 384 Black applicants in Range D, 62 were admitted. By contrast, of the 174 applicants of Chinese origins in that same ability Range, not one was admitted to Boalt Hall.

Changing Patterns in 1997

The application of the new Regental rules had a noticeable effect on these discriminatory patterns of admissions. In 1997, the corresponding numbers and ratios for these groups look as follows (Ranges A and B are combined for simplicity) in Table 2:

Table 2
Ratio of Applications to Admissions, UC Berkeley Law School,
by Ethnic or Racial Group and Ability Ranges, 1997

	Ability Range		
	A + B(high)	C	D(low)
ethnic group	admit/app ratio	admit/app ratio	admit/app ratio
Asian	75 /79= 95%	35 /81= 43%	4/282= 1.4%
A.A. group	15 /14= 100%[5]	9 /20= 45%	26 /461= 5.6%
White	326 /380= 86%	134 /515= 26%	23 /978= 2.3%

While in 1997 traces of racial/ethnic preference are still to be seen in the admissions patterns – the distinctly lower proportions of Whites admitted in Ranges A through C than of the other two groups, and the higher proportions of A.A. groups admitted in Range D – still the contrast with the patterns of 1996 is clear: the inequities in admissions ratios among the several groups are greatly reduced. The impact of the Regents' policies abolishing race and ethnic preferences is visible in the figures, and take on added significance when we see what inequities they were addressing in Table 1.

On the decline in minority admissions between 1996 and 1997

Various observers of the changes in the pattern of admissions to Boalt Hall between 1996 and 1997, including the President of the United States, have noted that when the new rules were put into effect in UC, Black and Chicano enrollments in Boalt fell dramatically. And that is in fact the case. We might ask how that decline came about, and in what portion of the applicant pool it was most pronounced?

Between 1996 and 1997 the applications to Boalt by Blacks fell from 401 to 254, a drop of over a third (37%). The number of Blacks admitted to Boalt in those years fell from 77 to 18, an even bigger decline of over three-quarters

[5] This anomaly exists in the original data; we have just treated the ratio as 100%

(77%). Similarly the number of Chicano applicants to Boalt fell from 283 to 195, a drop of nearly a third (31%), and of admits from 53 to 27, a drop of nearly half (49%).

Where did these declines come from – among the ablest or least highly qualified applicants?

First, let us look at the changes in applications and admissions of Blacks in the three higher ability Ranges between 1996 and 1997. In 1996 15 Black students in those Ranges applied, and 15 were admitted. In 1997 11 applied and 7 were admitted. So there were only 4 fewer Black applicants between those years, and 8 fewer admits in those higher Ranges. However, in Range D, where almost no Asian or Whites are admitted (see Tables 1 and 2), the sharpest declines in both Black and Chicano applications and admissions occurred. Between 1996 and 1997 there was a decline in Range D Black applications from 384 to 239, and of admissions from that Range of from 62 to 11. Thus, of the total decline of 59 in the number of Blacks admitted to Boalt between 1996 and 1997, 51, or 86% were from the ability Range D, where few non-AA students were admitted in either year. One can at least raise the question of whether so many of those students should have been admitted on affirmative action preferences in 1996.

Among Chicanos in Range D, the decline in applications between 1996 and 1997 was from 250 to 175, a drop of nearly a third (31%), and of admits from 53 to 27, a fall of nearly half. But again, the decline came largely though not entirely from Range D candidates. Of the whole decline of 26 Chicano admits between those years, 12 were in Ranges A through C, and 14 in Range D. So a little over half (54%) of the decline in Chicano admits came from applicants in Range D.

If we were to add in the smaller AA categories, Native Americans and Puerto Ricans, the figures do not change much. In 1996 18 applicants from these two group were admitted as compared with only 4 in 1997. Of the difference of 14 applicants, 5 came from the higher three Ranges, and 9 from Range D, nearly two-thirds (64%) of the total decline in admits from those groups between those years.

If we combine these AA groups, as we did in the Tables 1 and 2, we see that there was a decline of 99 persons from these four AA groups admitted to Boalt between 1996 and 1997. Of these, 74 represented a decline in admissions of applicants from ability Range D, or almost exactly three-quarters (74.7%). These were applicants who probably would not have been admitted in 1996 if they had been Caucasian or Asian, or had "Declined to Answer" the question about their ethnicity, or in fact in any other than the four AA categories.

Conclusion

After all the talk about diversity and excellence, we see in the 1996 figures the true face of "affirmative action," a pattern of gross racial and ethnic discrimination that reminds us of past patterns of academic discrimination against Blacks and Asians, Jews and Irish, and others. No rhetoric can justify these patterns; and the Regents were right to abolish those practices, as also were the California voters who passed Proposition 209 in November 1996. Much of the justification for racial and ethnic preferences has pointed to its supposed advantages for the preferenced groups – "advantages" which may include the stigmatizing of all the members of those groups, including those who gain admissions to universities on their own merits. But almost nothing is said about the costs to the non-preferenced groups, many of whom also suffered discrimination in the past and who now suffer the new forms of discrimination that "affirmative action" has institutionalized.

The Sacramento Bee

OPINION

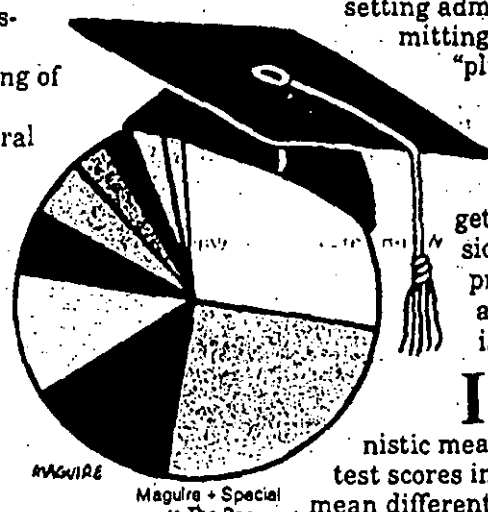
Tuesday, July 29, 1997

Racial cynicism

Clinton probe of UC admissions ignores the law

Judith Winston, general counsel of the U.S. Department of Education, apparently believes that federal civil rights law requires the University of California to do what the U.S. Supreme Court and the law barely permit: Grant racial preferences in admissions. Alarmed that black and Hispanic enrollment at University of California law schools is falling in the wake of the university's decision to end racial preferences in admission, her department's Office of Civil Rights is now investigating UC on the theory that using academic standards in admissions is a form of racial discrimination.

That is an Orwellian misreading of the law. Equally important, the investigation is an abuse of federal power, designed to punish California and its citizens for making a decision on affirmative action that, however overbroad it may have been as a matter of policy, is plainly within the scope of the Constitution.



Maguire • Special to The Bee

In comments to the Los Angeles Times, Winston said that, in dropping racial preferences and relying on individual grades and test scores, California may have broken the law. She implied that if UC's use of academic standards in admissions worked to exclude minorities, the burden would fall to the university to prove "those are the best measures" for selecting students and "no other nondiscriminatory alternatives" are available.

What next? Will the Clinton administration also decide to investigate Cal and UCLA because their use of such criteria as scoring averages and rebounding prowess, which have worked to exclude whites, Asians and Hispanics from their basketball teams, are also racial discrimination?

In cases involving employment, the Supreme Court has indeed held that employment standards that have a disparate impact on minorities and women must be justified. That has properly allowed job-seekers to challenge job requirements, such as minimum height requirements for firefighters, that aren't relevant to the job and were used to exclude women.

But in the 1978 Bakke case, which upheld affirmative action at UC, the U.S. Supreme Court gave broad deference to universities in setting admission policies, even permitting the use of race as a "plus" factor. The theory behind the Clinton administration investigation turns Bakke on its head: Universities get no deference in admissions, an always subjective process, and racial criteria are mandatory. And peace is war and love is hate.

It would be wrong for UC to rely entirely on mechanistic measures such as grades and test scores in admissions. Grades mean different things at different schools and tests cannot measure personal qualities such as initiative, empathy, leadership and creativity. And in fact, the UC law schools correctly used other criteria, including giving preferences to students from disadvantaged backgrounds, in picking their next class.

But the Clinton administration ignores that fact as blithely as it ignores the law. With its investigation, it courts minority voters by holding out the false hope of restoring affirmative action at UC. How does that kind of cynical politics lead to the racial healing the president says he seeks?

Race-affirmative actio

July 23, 1997

MEMORANDUM FOR DISTRIBUTION

FROM: **DAWN CHIRWA**

SUBJECT: **Active Affirmative Action Cases**

As I promised at our meeting last week, following is brief background on and status of the four main active court challenges to affirmative action.

I. Adarand Constructors, Inc. v. Pena -- Remand

After being reviewed and decided upon by the Supreme Court, Adarand was remanded back to the district court in Colorado to review the Department of Transportation's affirmative action program at issue (the subcontracting compensation (SCC) program) under a "strict scrutiny" standard. After reviewing the case under this heightened standard, the district court found that the SCC program is unconstitutional and enjoined the Department of Transportation from further use of the program. Although the SCC program is distinct from Transportation's Disadvantaged Business Enterprise (DBE) program -- SCC is a relatively small, direct federal procurement program while DBE is a much larger procurement program funded by the federal government but administered through the states -- the court provided the plaintiff with declaratory relief against the DBE program by ruling that it is also unconstitutional. The court did not, however, specifically enjoin Transportation's use of the DBE program.

More specifically, the court found that statutory provisions underlying both the SCC and the DBE programs which presume that members of certain racial groups are socially and economically disadvantaged did not pass constitutional muster under a strict scrutiny analysis. The court determined that although there was a compelling government interest for such affirmative action programs, the social and economic presumptions failed the narrow-tailoring prong of strict scrutiny.

Since the district court did not specifically enjoin the use of the DBE program, Transportation has made clear that it will continue to implement the program in Colorado unless and until the program is enjoined. In response, Adarand filed a preliminary injunction motion asking the court to enjoin the DBE program as well as the SCC program. A hearing on this motion will be held July 25th.

The July 25th preliminary injunction hearing has become further complicated by that fact that the Court denied Justice's request to participate as a party. This request was necessary since Adarand's preliminary injunction motion was filed only against the State of Colorado -- which actually awards contracts and expends federal funds through the DBE program -- and did not include Transportation (which represents the United States' interests) as a party. Justice expects to appeal the denial, but it is not likely that this appeal will be decided in time for Justice to participate in the hearing on the 25th. Justice is hopeful, however, that it will eventually be allowed to intervene in the case and join with the State in appealing the district court's decision.

II. Dynalantic v. The Department of Defense

This case is a constitutional challenge brought by Dynalantic, a small business, against SBA's 8(a) program. Dynalantic challenged the Department of Defense's placement of a certain procurement contract within the 8(a) program, effectively excluding Dynalantic from bidding on the contract since Dynalantic is not eligible to participate in 8(a). Among other things, Dynalantic claimed that 8(a) is unconstitutional because of the underlying presumption that members of certain racial minorities are socially disadvantaged and therefore presumed eligible for the program while non-minorities do not have the benefit of this presumption.

When the case was first brought in the District Court of the District of Columbia, Justice defended the case by arguing that Dynalantic lacked standing to bring the case -- in effect saying that Dynalantic should not be allowed to sue since, by that time, Defense had withdrawn the procurement contract at issue from the 8(a) program and submitted it to an open bidding process. Although the district court agreed with us, the D.C. Circuit Court ruled recently that Dynalantic does have standing to bring this case and can challenge the constitutionality of the 8(a) program.

The case has been sent back to the district court where Justice anticipates defending 8(a) against a substantive attack. The case will be heard by Judge Sullivan who ruled in our favor on the standing argument. As part of its litigation strategy, Justice may point to our ongoing procurement reform as proof that federal procurement programs, including 8(a), can be brought into compliance with Adarand.

III. Piscataway v. Taxman

This case arose after the Piscataway district's school board decided to eliminate a position within the business department of the district's high school. Faced with two teachers -- one white and one black -- who were equally qualified

and similarly situated with respect to seniority, the board decided to retain the black teacher in favor of the white teacher on affirmative action grounds. Although this was the first time since its inception that the school board had invoked its affirmative action policy as the basis for a hiring decision, the board stated that affirmative action was warranted in this case in order to preserve a racially diverse business department within the high school.

Taxman filed suit and won at the district level and the school board appealed to the Third Circuit. In 1992, while the case was still at the district court level, the Justice Department joined the case on Taxman's behalf. On appeal, however, Justice sided with the school board and submitted a brief defending a school's ability to use affirmative action -- both in hiring and lay-off situations -- for purposes of promoting racial diversity. The Third Circuit treated Justice's change in position as a request to be dismissed from the case, dismissed the United States and ruled in favor of Taxman on the merits. In doing so, the Third Circuit held that non-remedial affirmative action is impermissible under Title VII.

The school board then asked the Supreme Court to hear the case and the Court, in turn, requested the views of the United States before deciding whether to hear the case. In response, Justice argued that the Court should not hear this case because it was not an appropriate vehicle for the Supreme Court to decide the important question of whether Title VII permits non-remedial affirmative action in a hiring context. First, the school had not adequately built a record that demonstrated a need for racial diversity within this one department in the high school. Second, this case arose in a lay-off situation and the vast majority, indeed virtually all, affirmative action programs are used when making hiring and promotion decisions. Justice argued that for these reasons the case was not suitable for the Court to decide a broad issue of national significance. Most civil rights organizations agreed with our position and none filed a brief on behalf of the school board at that stage.

As you are all aware, the Supreme Court decided recently that, despite our urging the Court not to hear the case, it will review the Third Circuit's decision in Piscataway in its next term. We are working with Justice to determine what action on our part is appropriate in light of this event.

IV. Proposition 209 Challenge

A group of civil rights organizations and individuals filed a constitutional challenge to Proposition 209 the day after the referendum passed. These plaintiffs were successful at the district court level with their argument that Prop. 209, in amending the constitution to prohibit the State from using "preferences" based on race or gender, establishes a higher political-process hurdle for women and racial minorities to overcome when they seek programs which benefit them than

non-minorities face when they seek similar programs. The United States joined the plaintiffs' challenge as amicus curiae on similar constitutional grounds.

A three-judge panel of the Ninth Circuit has rejected the plaintiffs' and our constitutional arguments and denied our request to enjoin the implementation of Prop. 209. However, the plaintiffs and we have requested a re-hearing of the case before the entire Ninth Circuit and are awaiting a decision on this request.

To:

Sylvia Mathews
Maria Echaveste
Elena Kagan
Judy Winston
Minyon Moore
Ben Johnson
Gene Sperling
Cheryl Mills
Rob Weiner
Thurgood Marshall, Jr.
Ann Lewis
Ann Walker
Mickey Ibarra
Jose Cerda
Doris Matsui
Richard Hayes
Beverly Barnes
Richard Socarides
Andrew Mayock
Tracey Thornton
Alphonse Maldon
Susan Liss
Janet Murguia
Andy Blocker
Peter Jacoby

Civil Rights - affirmative action

July 14, 1997

AGENDA

1. Legal Issues / Strategy
   * Piscataway ✓ - challenge to SBA 8a program
   * Adarand Remand / Dynalantic - DOT gen successful in defending agt such challenges on standing. But DC Cir just said there was standing. So now goes back to dist ct. DOT will defend
   * Other legal issues (Prop 209, Hopwood, ~~other~~)

2. Implementation Issues / Timeline
   * Benchmarks / GSA data system changes
   * SBA pricing Proposal
   * New certification system

3. Legislative Issues
   * HR 1909/S 950 - Canady bill. Pres threatened veto.
   * S 936
   * NEXTEA DBE program
   * Small business goal increase
   * Contract bundling
   * S 208 } FAP - SBA Approp bill.
   * Comp demo extension }

4. Regulatory Issues / Status / Timeline
   * FAR Regs
   * SBA Regs
   * DOT DBE Regs

5. Communication / Outreach
   * Overall Message: Administration support of affirmative action
   * Things we have done to mend affirmative action programs
   * Wynn Press Conference

DPC / Counsel -

Civil rights – affirmation actio

Agenda for 7/15 Affirmative Action Legislative Subgroup Meeting

Legislative Issues

- H.R. 1909 by Canady/Campbell and S. 950 by McConnell/Hatch
  - House Judiciary Committee markup
  - Senate status
- Issues to resolve for Small Business Reauthorization Act SAP (or prior to Senate floor)
  - Contract bundling in federal procurement
  - S. 208 by Bond (HUB Zones)
  - Small Business Competitiveness Demonstration Program extension
  - Small Business Contracting Goal Increase
- Section 824 of S. 936, National Defense authorization bill
- NEXTEA Disadvantaged Business Enterprise program

Additional Issues with a Legislative Impact

- Administration efforts to develop and implement benchmarks
- Pending court cases (Piscataway)

Civil Rights – Affirmative Action

Post-it™ Fax Note 7671	Date 7/8/97	# of pages ▶ 2
To Ingrid Schroeder	From	
Co./Dept. OMB	Co.	
Phone # 395 3583	Phone #	
Fax #	Fax #	

The Honorable Charles T. Canady
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Draft

Dear Chairman Canady:

I am writing to express my strong opposition to the passage of H.R. 1909, the "Civil Rights Act of 1997." I believe the legislation that you have introduced, like its Senate counterpart, would be detrimental to the goal of ensuring equal opportunity. As Secretary of Labor, I am responsible for the Office of Federal Contract Compliance Programs (OFCCP), the agency that enforces equal opportunity laws covering federal contractors, I am concerned that the legislation would compromise contractors' ability to recruit qualified women and minorities and curtail the Government's ability to obtain full relief in proven cases of racial and other unlawful discrimination. I would recommend a veto should the legislation pass in its current form.

The bill's stated purpose seems reasonable on its face: to "prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex with respect to Federal . . . contracts." Indeed, this is the function of the long-standing Executive Order 11246, which prohibits discrimination based on race, color, religion, sex or national origin in the employment decisions of covered federal contractors. As with all federal civil rights laws, protection under the Executive Order extends to the employees or applicants regardless of race or gender, including white males. The bill would ban practices that are already unambiguously prohibited under the law -- such as "quotas" or fixed numerical targets. The Executive Order regulations are explicit that "goals" may not be rigid and inflexible quotas, but rather targets, reasonable attainable by means of applying good faith efforts to make the affirmative action program work.

This bill would eliminate some of OFCCP's most effective measures of federal contractor compliance, including flexible goals and timetables. The bill prohibits the granting of a preference and defines the term "preference" to mean "an advantage of any kind (including) a quota, set-aside, numerical goal, timetable, or

other numerical objective." This definition is so broad as to sweep away approaches that are lawful, standard corporate practice. Thus, not only does H.R. 1909 purport to "fix" what is not broken, it also breaks what is working well.

The legislative attempt to tar legitimate goals and timetables with the brush of illegitimate "quotas" belies the important legal and conceptual distinctions between the two. First, federal contractors are never penalized solely for failure to meet numerical goals -- only for failure to make good faith efforts toward ensuring equal opportunity. Furthermore, it is standard corporate practice for businesses to set goals and timetables to measure significant aspects of their operation. Private businesses can and do use numerical goals. Your legislation would strip businesses of an appropriate tool to measure their own progress in the EEO arena -- thereby constraining corporate freedom to ensure nondiscrimination and encourage equal opportunity in the workplace.

I respectfully urge you to reconsider this legislation and thank you for your consideration of these remarks.

Sincerely,

~~Alexis M. Herman~~
Barnard E. Anderson

Civil Rights –
Affirmative Action

DRAFT

The Honorable Charles Canady
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter provides the Department's initial comments on H.R. 1909, the "Civil Rights Act of 1997," the subject of a Subcommittee hearing on June 26, 1997. Because H.R. 1909 is substantially similar to H.R. 2128, a bill that was considered by the Subcommittee during the 104th Congress, and with which the Administration strongly opposed, our position remains unchanged. The reasons for this opposition were the subject of testimony presented before the subcommittee on December 7, 1995 by then Assistant Attorney General Deval Patrick. That testimony is attached to this letter. As Mr. Patrick stated, if H.R. 2128 had been presented to the President, the Attorney General would have recommended a veto. That recommendation would apply with equal force to H.R. 1909, and the President has indicated that he would accept my recommendation and veto the bill.

The Department opposes the bill for several reasons. First, there is compelling evidence of both historic and current discrimination against minorities and women. Second, the President's conviction that affirmative action is still necessary and that affirmative action programs should be "mended, not ended" remains unchanged. And third, the Administration has made significant progress in its efforts to implement the President's "mend, don't end" mandate and to bring affirmative action programs into compliance with the Supreme Court's decision in Adarand v. Pena.

There is an overwhelming body of evidence to support the assertion that discrimination against minorities and women still exists and that there is a compelling governmental interest in addressing this problem. This evidence was set forth in the Department's 1995 testimony before this Subcommittee, in the statements of other witnesses, and in our May 1996 proposal to reform government contracting programs (see attached).

Briefly, evidence convincingly demonstrates that minority business entrepreneurs still face competitive disadvantages because of their race. Additionally, minorities still face discrimination in seeking to secure capital for business formation and expansion, and with

bonding requirements, which often exacerbate the hindrances small, minority-owned businesses face in securing necessary capital for business expansion, and make it impossible or extremely difficult for minority-owned firms to satisfy bidding specifications. Moreover, discrimination in employment by employers and trade unions has hindered minorities from obtaining the technical and professional experience necessary for business formation and success. Discrimination by business suppliers also makes it difficult for minority-owned firms to proffer competitive bids, even when processes are open to them.

what does this mean?

The inability of minority firms over the years to achieve competitive success in government contracting is prolonged when governments continue the same contracting policies that have served to discourage the use of small businesses that are not already well known to contracting officers. Indeed, the evidence shows that when states or localities have eliminated affirmative action requirements in their contracting rules, the use of minority firms has plummeted. This uncontradicted evidence demonstrates convincingly that affirmative action requirements are an essential mechanism to insure that small, minority-owned firms have a reasonable way to enter into the arena of government contracting, and to establish a record of government contracting that will permit them to compete on a level playing field.

Statistics on business revenues further establish the continuing need for affirmative action in contracting. A recent study by the Urban Institute found that minority-owned firms receive only 59 percent of state and local expenditures that their availability suggests they should be receiving. While minorities are 20 percent of the population, they own only 9 percent of all U.S. businesses, and receive less than 4 percent of all business receipts. Minority firms receive, on average, only 34 percent of the gross receipts of non-minority firms. The continued use of affirmative action is essential if minority-owned firms are ever to overcome the continuing effects of racial discrimination on economic competition.

Since the Subcommittee's hearing in 1995, significant progress has been made on fulfilling the President's pledge to "mend, not end" affirmative action. To begin with, the Department has coordinated an ongoing effort with Federal agencies to examine their programs to ensure that they meet the requirements of Adarand. For example, the Department of Defense suspended the so called "Rule of Two," a contracting set-aside program for socially and economically disadvantaged businesses (SDBs), almost all of which are minority owned businesses. We also worked with a number of agencies to ensure that subcontracting efforts were being carried out in ways that satisfied constitutional strict scrutiny. In addition, we worked with both the Department of Transportation and the Environmental Protection Agency to ensure that federal aid programs would be implemented by both federal and state officials in ways that satisfied the standards of Adarand. Indeed, the Transportation Department recently published proposed regulations that reflect that effort. The Department of Justice has provided the Subcommittee with the letters sent to departments that reflect the results of these reviews.

The Department also issued written guidance to executive branch agencies on affirmative action in employment that sets forth limits on the ability of agencies to use race as a factor in employment decisions. This guidance has resulted in many agencies reviewing their use of affirmative action in employment to ensure that their efforts will satisfy strict scrutiny, and we are confident that changes in these areas have been made. The Office of Personnel Management and the Equal Employment Opportunity Commission are also in the process of revising guidance for federal agencies in this area.

Most significantly, the Federal Acquisition Regulation (FAR) Council published in the Federal Register on May 9, 1997, a proposed rule that will modify the way in which the government can use race-based affirmative action measures in procuring goods and services from contractors. This proposed rule is based on a May 1996 Justice Department proposal that concluded that affirmative action in federal procurement is still needed in order to help eliminate discriminatory barriers that impede opportunities for minority-owned businesses. This proposal documents historical and continuing discrimination in the area of government contracts and sets forth the compelling governmental interest for continuing the use of race conscious remedies.

The Department proposed a carefully tailored affirmative action measure that is essential to overcome the effects of past and continuing discrimination, and also necessary to build a more inclusive and fully productive society. This proposal, when implemented, will ensure that affirmative action is used in federal contracting only to the extent permitted by law.

Under the proposal, race will never be the exclusive factor when a contract is awarded. The use of price credits authorized under the Federal Acquisition and Streamlining Act (FASA) means that affirmative action is considered only in the process of assessing bids from all firms eligible to bid, minority and nonminority alike. While affirmative action may be a factor in some contracts, the bidding process is open to all. To the extent that contracts are awarded by taking account of considerations other than price, those considerations will be unaffected by the use of racial factors, ensuring that race is never elevated above qualifications for federal contracts.

In addition, the use of benchmarks ensures that where affirmative action measures are used, they are used in a manner that satisfies strict scrutiny. The use of benchmarks ensures that affirmative action is used only where there is firm statistical proof establishing that, without the use of affirmative action, minority-owned firms would not secure contracts at a level commensurate with their availability and capacity. This is not a quota; minority firms are not limited to contracts at the benchmark level, nor are they guaranteed to obtain contracts up to the benchmark level. The use of benchmarks ensures that when the government allows affirmative action to be a factor in a contract award, it is used only where we have proof that, without such consideration, minority firms will fail to receive federal

contracts at a level one would expect in a system free of discrimination. That, of course, is the aim of all of affirmative action; to achieve a system free of discrimination. Affirmative action is a means to insure that end ultimately is reached.

The proposed rule issued by the FAR Council on May 9 of this year reflects the Justice Department proposal and the numerous comments received on the proposal. This is a comprehensive proposed rule that would affect the contracting practices of every executive branch agency. It will affect a broad range of affirmative action programs that target assistance to small firms that are owned by socially and economically disadvantaged individuals. It is a major effort by this Administration to mend affirmative action.

As Acting Assistant Attorney General Isabelle Katz Pinzler testified before the Subcommittee in May of this year, discrimination remains a serious problem in this country, despite our best efforts to combat it. The ability to use the full range of judicially sanctioned remedies, including race- and gender-conscious affirmative action where appropriate, is necessary for the federal government to fully enforce civil rights laws. But H.R. 1909 takes away an important and proven legal remedy. This bill does not propose any substitute remedy that would provide effective relief for victims of discrimination, which relief the Speaker of the House has expressed his desire to provide.

How do these 2 sentences connect?

Thank you for the opportunity to provide the Department's initial comment on this bill. I ask that this letter be made part of the hearing record.

Sincerely,

Andrew Fois
Assistant Attorney General

Enclosure

cc: The Honorable Robert Scott
Ranking Minority Member
Subcommittee on the Constitution

'97 JUN 4 PM8:23

Civil Rights - Affirmative Action

THE WHITE HOUSE

WASHINGTON

June 4, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: **CHARLES F.C. RUFF** Chuff/Done
DAWN CHIRWA Done
BILL MARSHALL Bill/Done

CC: **ERSKINE BOWLES**
SYLVIA MATHEWS

SUBJECT: **1. Board of Education of the Township of Piscataway v. Taxman**
2. Adarand v. Pena

I. Piscataway v. Taxman

We wanted to inform you of the Justice Department's intention to file **tomorrow, Thursday, June 5, 1997**, a brief as amicus curiae in the case of Piscataway v. Taxman. The current brief is being filed pursuant to a Supreme Court order, entered on January 21, 1997, requesting the views of the United States in the case.

Briefly, the case arose after the Piscataway school board decided to eliminate a position within the business department of the district's high school. Faced with two teachers who were equally qualified and similarly situated with respect to seniority -- one white and one black -- the board decided to retain the black teacher in favor of the white teacher on affirmative action grounds. The board stated that affirmative action was warranted in this case in order to preserve a racially diverse business department within the high school.

Taxman filed suit and won at the district level and the school board appealed to the Third Circuit. In 1992, at the district court level, the Justice Department joined the case on Taxman's behalf. On appeal, however, Justice sided with the school board and submitted a brief defending a school's ability to use affirmative action -- both in hiring and lay-off situations -- for purposes of promoting racial diversity. The Third Circuit dismissed Justice from the case and ruled in favor of Taxman on the merits. The court held that non-remedial affirmative action is impermissible under Title VII. The school board has petitioned for certiorari.

In the brief to be filed tomorrow, Justice argues that certiorari should not be granted because this case is not an appropriate vehicle for the Supreme Court to decide the important question of whether Title VII permits non-remedial affirmative action. Justice's rationale is that because of its inadequate record and its unique factual circumstances, the case is not suitable to

further the principles announced in our post-Adarand memorandum which sets forth Administration policy on the appropriate use of affirmative action. (Justice's brief was filed after the Office of Legal Counsel post-Adarand memorandum was finalized). Therefore, Justice's brief does not need to address the same issue it addressed before the Third Circuit; i.e. whether affirmative action is permissible in this particular case.

We believe that this brief achieves two necessary goals: (1) answering the Court's request; and (2) forestalling potential criticism that Justice has distanced itself from its position before the circuit court. It also represents a sound legal position. Because of its unique and troublesome facts, Piscataway does not invite a favorable decision on affirmative action. For this reason, it is notable that no civil rights organizations are filing briefs in support of the school board in the case.

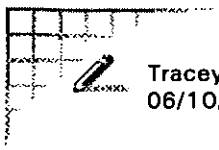
II. Adarand Constructors, Inc. v. Pena

On Monday, the district court for the District of Colorado ruled on Adarand v. Pena which had been remanded back to the district court by the U.S. Supreme Court in order to review the Department of Transportation affirmative action program at issue under a "strict scrutiny" standard. The district court found that while there was a compelling governmental interest in this program, it was unconstitutional under the strict scrutiny standard because it was not narrowly tailored. Among other aspects of the affirmative action program which the court found troubling, the court ruled that the statutory presumption which provides that members of specified racial minorities are presumed to be socially and economically disadvantaged was not narrowly tailored.

Thus, although the court's finding that there is a compelling governmental interest in affirmative action programs is encouraging, the finding that the statutory presumption undergirding the federal government's SDB programs fails the narrow tailoring prong of strict scrutiny is extremely troubling. In addition, the court entered an injunction against the particular Transportation program at issue. However, the court left unclear how broadly the injunction applies -- i.e. whether it applies to all federal programs which contain the racially based presumption, including 8(a) and other federal SDB programs.

The Department of Justice intends to file a Motion to clarify the extent of the court's injunction. Once the motion is decided, Justice will review what further litigation steps are appropriate. We also believe that Justice's procurement reform proposal will address most, although possibly not all, of the constitutional problems found by the court.

Civil Rights –
affirmative actic



Tracey E. Thornton
06/10/97 10:33:59 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Elisa Millsap/WHO/EOP, June G. Turner/WHO/EOP, Laura Emmett/WHO/EOP
Subject: Affirmative Action

Hatch has scheduled a hearing for monday on "State Sanctioned Discrimination" Dems are asking us for a witness....

Message Sent To:

Sylvia M. Mathews/WHO/EOP
Richard L. Hayes/WHO/EOP
Dawn M. Chirwa/WHO/EOP
John L. Hilley/WHO/EOP
Elena Kagan/OPD/EOP

PPi
PROGRESSIVE POLICY INSTITUTE

Policy Report
August 3, 1995

From Preferences to Empowerment:
A New Bargain on Affirmative Action

Will Marshall

Affirmative action faces triple jeopardy: a skeptical Supreme Court, a hostile Republican Congress, and the possibility of a first-ever popular vote next year in California, where opinion is running heavily against preferences based on race and gender. With many whites losing patience with preferences and many blacks afraid of losing hard-won ground, there's a growing risk of a convulsive "either or" debate that rends society along racial lines. What's needed is a third way that honors our moral commitment to equal opportunity without further depleting our civic reserves of interracial trust and goodwill.

Although affirmative action also affects women and other ethnic groups, it divides Americans most dramatically along racial lines. In *The Scar of Race*, Paul Sniderman and Thomas Piazza write that: "The new race-conscious agenda has provoked broad outrage and resentment. Affirmative action is so intensely disliked that it has led some whites to dislike blacks—an ironic example of a policy meant to put the divide of race behind us in fact further widening it."[1]

The Supreme Court touched these raw racial nerves in a series of decisions in June that tightened rules for federal set-asides, school desegregation, and racial gerrymandering. As conservatives gleefully forecast the beginning of the end for the "racial spoils system," defenders of affirmative action were apoplectic. Jesse Jackson even likened the high court to the Ku Klux Klan: "While we react to those wearing white sheets, those wearing black robes are killing our dreams and our justice."[2]

Left-right hyperbole aside, for many black Americans affirmative action remains a potent symbol of the nation's enduring commitment to racial equality. Opposition to race-conscious policies, many suspect, is really a form of racial denial—of wishing away a deep and persistent racism woven into the fabric of American life. Having been shortchanged for centuries, many black Americans are reluctant to give up set-asides or hiring preferences without getting something tangible in return. And they are understandably outraged by conservative attempts to make "reverse discrimination" the overriding civil rights issue of the day.

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[1]Sniderman, Paul and Thomas Piazza. 1993. *The Scar of Race*. Cambridge, MA: Belknap Press, p. 109.

[2]National Rainbow Coalition News Release, June 12, 1995, p. 1.

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Unfortunately, the symbolism is equally powerful in a negative way for most white Americans, women as well as men. Wary of race-conscious policies from the start, their skepticism has hardened as remedies originally justified as limited and temporary have congealed into a permanent, creeping regime of group classifications and favoritism. Cast as the villains in the affirmative action morality play, white working men naturally enough resent the prospect of being denied a job, a promotion, or a slot in college simply because they're white. (Many Asian-Americans likewise fear that affirmative action imposes an artificial ceiling on their ambitions.)

But their more fundamental objection has to do with the essential fairness of the American system of competitive enterprise. Put simply, they think that success or failure should reflect individual merit, not group membership or attempts by governing elites to dispense privileges on the basis of ethnic politics.

Are we, then, careening toward an irreconcilable conflict between racially distinct conceptions of justice? Not necessarily. Opinion surveys suggest that many Americans seem uncomfortable with the all-or-nothing choice being foisted upon them by liberals who believe that pulling on any loose thread will unravel the entire fabric of civil rights and by conservatives who imagine that their belated embrace of the principle of color-blindness can somehow wipe the historical slate clean of hundreds of years of racial oppression.

While racial and ethnic demagogues on all sides insist there is no middle ground on affirmative action, that's where most Americans instinctively repair. A July 1995 *CNN/USA Today* poll gave respondents three options: "basically fine the way it is"; "good in principle but needs to be reformed"; and "fundamentally flawed and needs to be eliminated." Sixty-one percent said they would reform affirmative action policies; 22 percent would scrap them; and only 8 percent favored leaving existing policies intact.

Key political leaders likewise are groping for a third way in the affirmative action debate. House Speaker Newt Gingrich, while adamantly opposed to race and gender preferences, has eschewed the purely negative stance adopted by many Republicans. "I'd rather talk about how do we replace group affirmative action with effective help for individuals, rather than just talk about wiping out affirmative action by itself," he said in April.[4]

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[3]See also Morin, Richard and Sharon Warden. "Americans Vent Anger at Affirmative Action." *The Washington Post*, March 24, 1995, p. A1. The poll also posed three choices: leave affirmative action policies as they are, change them, or do away with them entirely. Forty-seven percent said they would change affirmative action policies; 28 percent would scrap them; and only 23 percent favored leaving existing policies intact.

[4]Kahlenberg, Richard D. "Equal Opportunity Critics." *The New Republic*, July 17, 1995, p. 20.

In a major address on affirmative action in July, President Clinton largely reaffirmed the status quo, although he did concede that some changes are necessary, if only to bring federal policies into line with new Supreme Court guidelines.[5] The speech won unanimous praise from liberal elites but failed to address the public's doubts about the basic fairness of race-conscious policies. By failing to draw a distinction between the *morally unimpeachable* end of racial equality and the morally dubious means of race preferences, the President also missed an opportunity to challenge conservatives to join in the search for alternative ways to promote equal opportunity.

Conventional wisdom has it that the Republicans have everything to gain and nothing to lose by using affirmative action as a wedge to split Democrats' biracial coalition. Yet not all Republicans are ready to replace their portraits of Abraham Lincoln with pictures of Jesse Helms: Jack Kemp and Bill Bennett, for example, have warned GOP presidential hopefuls that they could gravely harm the party by whipping up racial passions to win elections. Many Republicans swear they support equal opportunity as fervently as they oppose quotas; now is the time to find out what they're willing to do to make that commitment tangible. By refusing to countenance necessary changes in affirmative action, however, liberals let conservatives off the hook and risk losing everything.

The affirmative action debate touches on two urgent public questions—one about our country's past, the other about its future. The first concerns the perennial American dilemma of race, or how to pay an historical debt to black Americans without generating fresh racial grievances in the process. The second question looks ahead to America's future as a multiethnic democracy, or how to accommodate the nation's growing diversity without validating an ethnocentric politics that threatens to fracture society.

As these questions suggest, what's missing from the debate is a civic perspective that rises above race or other group identity to consider the interests of society as a whole. Such a view grants neither side a moral monopoly; rather, it acknowledges the tensions inherent in affirmative action and rejects the all-or-nothing choice posed by absolutists in either camp. The search for a third way, however, doesn't entail split-the-difference compromises. It starts by reaffirming the basic tenets of U.S. liberalism: that civil rights inhere in individuals, not in classes or groups; that all citizens are entitled to no more or less than the equal protection of the laws; and that government has a responsibility to promote equality as Americans have traditionally understood it—as equality of opportunity rather than equality of result.[6]

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[5]"Remarks by the President on Affirmative Action." The White House, Office of the Press Secretary, July 19, 1995, p. 9.

[6]Lipset, Seymour Martin. "Equality and the American Creed: Understanding the Affirmative Action Debate." Progressive Policy Institute, June, 1991, p. 1.

Seen through the lens of shared principles rather than group rivalry, affirmative action appears to go too far in some directions and not far enough in others. The emphasis on numerically driven preferences, for example, ineluctably contradicts the principle of equal protection. On the other hand, few dispute that affirmative action as *we know it* fails to lift the minority poor, whose moral claim on society is strongest.

These twin defects suggest an opportunity to strike a new bargain on racial equality and opportunity. It requires that each side make a key stipulation: Critics of affirmative action should acknowledge that the legacy and lingering presence of racial bias remain significant obstacles to black progress, especially the poorest African-Americans stranded in inner cities. Defenders of affirmative action should concede that preferences cannot be the answer because their reach is too limited and because they make it more rather than less difficult to transcend racial difference.

Reducing the significance of race, looking beyond the color of our skin to our common humanity—this, after all, was the essence of Dr. Martin Luther King's celebrated dream. He invoked the liberal spirit of the Declaration of Independence and demanded that Americans live up to their beliefs in individual liberty and equality before the law. Dr. King's moral vision, not the current push for race-conscious preferences and group entitlements, remains the surest lodestar for a society still struggling to overcome the traumatic legacy of racial subjugation.

In that spirit, this essay proposes a new bargain on equal opportunity that trades group preferences for individual empowerment. Such a bargain entails three steps:

- First, phase out mandatory preferences in government and reinforce voluntary affirmative action by private employers.

However benign the intention behind them, today's race-conscious preferences or "positive discrimination" contradict the principle of equal protection and therefore can be justified only as temporary, narrowly tailored remedies to past discrimination. Moreover, they put government in the business of institutionalizing racial distinctions, hardly a good idea for a democracy held together only by common civic ideals that transcend group identity. Congress and the President should restore affirmative action's transitional and remedial character by setting termination dates for all federal contract set-asides and other numerically driven goals in procurement and government employment. It's also time to repeal Lyndon Johnson's 1965 executive order requiring federal contractors to adopt minority hiring "goals and timetables." In practice, guidelines encourage employers to hire women and minorities on a rigidly proportional basis.

Alternatively, we should bolster voluntary affirmative action in the private sector, where most jobs and opportunities lie and where the battle for equal opportunity must ultimately be won. A new bargain must include the resources necessary to ferret out discrimination in employment and housing and enforce anti-bias laws. Fortunately, most

major U.S. employers actively recruit minorities and women because they see diversity as a competitive advantage in an increasingly multiethnic society. "Diversity management" is well-entrenched in corporate culture. Such voluntary action, backed by strong anti-discrimination laws, avoids the inflexibility of bureaucratic mandates that lead to *de facto* quotas.

- Second, replace government preferences with new policies intended to empower poor individuals and communities.

The legacy of racial discrimination today is most starkly reflected in the fact that black Americans are disproportionately poor, more likely to be jobless, dependent on welfare, trapped in decaying and dangerous public housing, and condemned to lousy public schools. Unequal resources and opportunities for the minority poor rather than preferences that mainly benefit middle-class minorities and women should top the civil rights agenda in the 1990s. Indeed, affirmative action is a relatively cheap and ineffective substitute for a broad-scale agenda of economic empowerment aimed especially at the urban poor. Such an agenda should begin by radically lifting the quality of inner-city schools and creating a more effective occupational learning system that links schools to private employers.

New public investments are also required to help low-income families save and build personal assets, start businesses, and become homeowners. At a time of fiscal retrenchment, will the public be willing to redirect resources for these purposes? No one knows, but a majority of people polled consistently say government has an obligation to help compensate the minority poor. This much is certain: The debate over affirmative action stands in the way of building a new public consensus behind a course of economic empowerment.

- Third, base affirmative action in college admissions on need as well as race, and lift students rather than lower standards.

Notwithstanding the University of California's recent decision to end all ethnic and gender preferences, the case for continuing affirmative action is strongest in college admissions. One reason is that too many minority kids come from broken families and are handicapped by the abysmal quality of inner-city schools. Another is continuing racial and ethnic disparities in standardized test scores and grades, which only partially predict performance but wield decisive influence in determining who gets to go where. But the most important reason is education's democratizing mission. It is the incubator of civic equality, exposing people from different backgrounds to one another and giving them a chance to compete on a roughly equal footing. This is especially true now, as a college degree has become a minimal credential for competing in a new, knowledge-intensive economy.

Graduating from Yale probably opens more doors than graduating from State U. In general, however, colleges prepare people to compete; they don't predetermine the outcome of market competition. Nor has entrance traditionally been based on ruthlessly meritocratic standards; on the contrary, colleges have traditionally given preferences to the children of alumni or faculty, to applicants from other parts of the country or world, to athletes, musicians, and others. Under such circumstances, it's difficult to argue with the Supreme Court's Bakke ruling in 1978 that race can be a factor but not the main factor in deciding who is admitted to college.

Still, two reforms are necessary here as well. First, affirmative action in admissions should be based on need as well as race; that is, targeted to people from low-income families or to students who are the first in their family to attend college. There's no reason for blacks or women from middle-class families to get a preference over a poor white or Asian student. Second, instead of simply lowering standards to meet diversity goals, colleges should take extra steps to lift affirmative action students to the standards they must meet to succeed. Otherwise, affirmative action merely sets up minority students for failure and may also compromise academic standards.

The Changing Politics of Race

Nowhere is affirmative action more embattled than in California, where the University of California's Board of Regents voted in July to end all ethnic and gender preferences in admissions. The proposed California Civil Rights Initiative (CCRI), whose backers are trying to place it on a statewide ballot in November, would go farther, banning preferences in state contracts and hiring as well as college admissions. Polls show solid majorities (including among women) in favor of CCRI.[7] Such findings are consistent with national surveys, which since the late 1970s have consistently reflected public ambivalence on affirmative action: majority support for efforts to compensate *individuals* for the effects of discrimination, but deep misgivings about *group* preferences, and outright hostility to quotas.

Differing perceptions about how much racial progress we have made in the last three decades also exert a powerful influence on attitudes toward affirmative action. Here, whites tend to be optimistic and blacks pessimistic. In a sense, they are both right: While overt, legally sanctioned racism has virtually disappeared, covert or unconscious discrimination continues in many settings, like a surreptitious thumb tipping the scales of opportunity against blacks.

Experiments by the Urban Institute using equally qualified pairs of black and white applicants for jobs and housing demonstrate that the former still face unequal

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[7]Knight-Ridder Service. "60% in California Would Repeal Affirmative Action, Poll Finds." *The Boston Globe*, March 8, 1995, p. 73.

treatment. In one such employment "audit" in 1990, for example, the Urban Institute found that white seekers of entry-level jobs advanced farther in the hiring process 20 percent of the time, while black applicants went farther only seven percent of the time. Researchers concluded that old-fashioned bias against blacks was three times more likely than "reverse discrimination" against whites.[8]

Such evidence suggests we are still far from the color-blind society frequently invoked by critics of affirmative action. On the other hand, some defenders of race-conscious policies undermine their own credibility by refusing to acknowledge that a sea-change has occurred over the past 30 years in America's racial mores. The politics of race, note authors Sniderman and Piazza, has changed dramatically since the 1940s and 1950s. Then, the overriding issue was race itself: whether blacks should enjoy the same rights as white citizens. That issue was settled in the 1960s, and there are now a number of distinct racial issues on which the public lines up in different ways. "Prejudice has not disappeared, and in particular circumstances and segments of the society it still has a major impact," they write. "But race prejudice no longer organizes and dominates the reactions of whites; it no longer leads large numbers of them to oppose public policies to assist blacks across-the-board. It is . . . simply wrong to suppose that the primary factor driving the contemporary arguments over the politics of race is white racism."[9]

It's also difficult to square images of racial oppression with the tremendous economic and social strides black Americans have made since the mid-1960s. Regrettably, such progress has often been obscured by unbalanced media portrayals that dwell on the pathologies of the urban underclass rather than the achievements of an expanding black professional and middle class. The economic gap between whites and blacks is closing: In 1992, the median income of black married couples with children was one percent below the average for all American families. Family structure, rather than race, is the key determinant of family income.[10]

Such gains, of course, inevitably chip away at the historical rationale for affirmative action: It's hard to see an entire class of people as victims when many of them are better off financially than you are. It's also true that affirmative action increasingly resembles traditional special-interest politics, replete with organized constituencies (such as minority contractor associations) that work closely with congressional allies to ward off threats to programs that directly benefit them. And while

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[8]Turner, Margery Austin et al. 1991. *Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring*. Washington, DC: The Urban Institute, p. 2.

[9]Sniderman et al., p. 5.

[10]Thernstrom, Abigail, and Stephan Thernstrom. "The Promise of Racial Equality" in *The New Promise of American Life*, Lamar Alexander and Chester E. Finn Jr., eds. (The Hudson Institute, 1995) p. 91.

the evidence suggests that these programs have made at best a modest contribution to blacks' progress, their political and moral costs are indisputably high.

The quest for racial preferences has dissipated the moral authority of the civil *rights movement.* For much of the public, the once-broad crusade for racial justice seems to have degenerated into narrow demands for racial entitlement. Civil rights groups which in the 1960s had a biracial, ecumenical cast now act more like ethnic lobbies. The conflating of civil rights and race preferences, meanwhile, has allowed conservatives to posture as the champions of color-blind justice.

Finally, there is growing unease about affirmative action's steady drift towards proportionalism, the notion that the number of women and minorities in virtually every setting must reflect their percentage of the nearby population. In addition to erasing any real distinction between quotas and affirmative action, this trend reinforces what has been variously described as the "new racialism" or "identity politics" that views public questions mainly through the prism of race, gender, and ethnicity.

Second Thoughts on Diversity

From a civic perspective, the push to extend group preferences in the name of diversity is troubling.

As a social aspiration—as an expression of American tolerance and openness—diversity is unquestionably a worthy goal. The jostling and mixing of peoples from different places and cultures gives our society a unique vibrancy. U.S. businesses, competing in an increasingly multiethnic environment, have learned that a diversified workforce is a competitive asset if not a necessity.

As a government mandate, however, diversity assumes a less benign character. It weakens the civic ethic of self-reliance by encouraging citizens to recast themselves as victims to secure government favors. In the hands of bureaucrats, the quest for diversity quickly turns into a numbers game. Since no one knows how much diversity is the right amount, the safest course is to strive for the proportional representation of each protected group. The bean-counting logic of bureaucracy and the ideology of group rights thus combine to push us toward quotas.

Defenders of preferences frequently note that white males still predominate in the upper reaches of society. This is true, but it more accurately reflects discrimination 20 to 30 years ago, when today's top executives began their climb up the corporate ladder, than present conditions. In any event, the affirmative action debate can't be reduced to a pure struggle for power among different races, sexes, or ethnic groups. For most Americans, vital principles also are at stake. As sociologist Seymour Martin Lipset has pointed out, group preferences and entitlements run against the grain of an "American creed" that emphasizes individual rights and achievement, meritocratic values, and

equality defined as a chance to compete on fair terms, not a guarantee of equality of result.

The civil rights movement triumphed not by challenging but invoking these underlying beliefs—by forcing white Americans to confront the contradiction between their ideals and the ugly realities of segregation. Race-conscious policies now have a tenuous hold precisely because they seem to contradict the ideal of equal, color-blind citizenship. Americans, ever pragmatic, may tolerate temporary deviations from their liberal, individualistic creed to pay an historical debt. But they are unlikely to accept its overthrow by a new ideology of group rights, that, in its most extreme form, indicts the creed itself as the cause of racism rather than its cure.

From the treatment of Native Americans to slavery, from Jim Crow to the internment of Japanese-Americans during World War II, U.S. history abounds with cautionary tales of people lumped into groups and deprived of their civil rights. Having at last recognized and tried to rectify these injustices, it seems odd and dangerous to put government back into the business of classifying citizens according to race, gender, and ethnicity. This was originally justified as a temporary measure to remedy the effects of discrimination. Now, however, the goal of some affirmative action supporters seems to be the non-remedial purpose of promoting diversity for its own sake.

The new assumption is that government should not merely set fair rules of competition but apportion equal outcomes by group in the struggles of life. Even if this were within government's grasp, government could do so only by restricting some citizens' freedom and opportunity. Why should a poor white kid in Kentucky struggle to get ahead if his government decrees that whites as a group already hold too many of the best jobs? Government cannot ordain perfect justice but it can, through an unthinking embrace of group-think, give official sanction to a crude determinism that sees character and values as shaped chiefly by skin color or gender.

The Clinton Administration unfortunately has endorsed diversity as a pretext for racial preferences. In a case before the U.S. Court of Appeals, the Justice Department reversed a previous decision to back a white school teacher laid off by the Piscataway, NJ, school board to promote faculty diversity. In arguing that the board acted legally, the Clinton Justice Department has crossed a line carefully drawn by the Supreme Court to prevent layoffs or firings purely on the basis of race.

The facts of the Piscataway case are these: The school board hired one black and one white business education teacher on the same day in 1980. Eight years later, budgetary pressures forced the board to lay off one of the equally qualified teachers. Instead of flipping a coin—the method previously used for resolving similar dilemmas—the board chose to keep the black teacher on grounds that she was the only black in the 10-member business department. District-wide, however, blacks made up 10 percent of teachers, compared to six percent in the county's available labor pool.

The Supreme Court has previously rejected (in *Wygant v. Jackson Board of Education*) a similar plan to protect minorities against layoffs either to remedy "societal discrimination" or to provide minority "role models." If the Courts uphold the Piscataway layoff policy, however, the effect will be to dramatically lower the bar for *justifying* discrimination against white workers. Such a ruling would sever the increasingly tenuous link between race-conscious remedies and specific acts of discrimination and wipe out the distinction between preferences and quotas.

Beyond Black and White

The rise of ethnic pluralism in America is another reason for reassessing group preferences.

In the 1960s, civil rights was largely a matter of black and white. Since then, Asian-Americans have grown from roughly one million to 8.5 million; Latinos from 3.5 million to 23 million.[11] Groups classified as minorities now make up one-third of the population; add women and about two-thirds of the U.S. population is eligible for preferences.

There is something inherently absurd in classifying a majority of the country as victims and lumping them in such hopelessly broad categories as "Hispanic" or "Asian." A majority of Hispanics describe themselves as white, while immigrants from Korea or Japan have little in common with those from the Philippines or the Indian Subcontinent. Yet more groups are rushing to get into the victimization act: Some Arab-Americans want the government to designate a new minority—people of Middle Eastern background.

The more claimants for protected status, the more the zero-sum logic of preferential treatment multiplies opportunities for group conflict. In Los Angeles, for example, Latino advocacy groups have challenged what they regard as the overrepresentation of blacks in local government. Asians have long complained of *de facto* quotas that limit their numbers in California's most prestigious universities, despite their high grades and test scores. In fact, polls show majorities of Latinos and Asians, as well as women, favoring CCRI. The successful legal challenge to the University of Maryland's minority scholarship program came not from an "angry white male" but from an Hispanic student excluded from the blacks-only program.

As America becomes more diverse, it's more important than ever that government be as neutral as possible with respect to race, gender, and ethnicity. The alternative is stepped-up competition among ethnic groups for political power and government favors—a formula for an American version of the communal strife that has wracked

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[11]Lauter, David. "Where to Draw the Lines?" *The Los Angeles Times*, March 28, 1995, p. A1.

India and other countries that recognize group rights. Already, identity politics is roiling U.S. campuses, where oppression studies have mushroomed, where minority students resegregate themselves in ethnic dorms, and where an excruciating sensitivity to race and gender protocol has sparked a backlash against "political correctness."

Like any other set of public policies, affirmative action must be adjusted periodically to evolving realities. The starting point is to reject the stark up-or-down choice posed by left and right—either reflexive defense of the status quo or a rush to dismantle all group-conscious policies. Next, we should take three steps toward a new bargain on equal justice and opportunity.

Step 1: Phase Out Mandatory Preferences

The President and Congress should start refocusing affirmative action by phasing out mandatory preferences in contract set-asides, public jobs, and hiring by private firms that do business with the government.

According to the Congressional Research Service, the federal government operates 160 race and gender preference programs.[12] The largest category is set-asides, in which agencies typically allot 10 percent or more of federal contracts to businesses owned by minorities or women. The Supreme Court's recent *Adarand* decision dramatically raised the hurdle for justifying all racial and ethnic classifications and policies. Henceforth, set-asides and other numerically targeted preferences must be narrow in scope, limited in duration, pegged to specific findings of past discrimination, and diffuse in the burden they place on non-protected groups. It is doubtful that many federal preferences can survive the Court's new standard of "strict scrutiny." President Clinton also has called for tightening up on abuses in set-asides, such as white contractors who suddenly discover they have Native American ancestors or give their wives title to the business in order to qualify as a minority-owned enterprise.

Like welfare or other government transfer programs, set-asides are essentially redistributive. They steer public resources to minority businesses but do little to develop the skills that would allow those concerns to prosper independent of government. A study by the General Accounting Office shows that the longer companies stay in Small Business Administration's Section 8 (a) set-aside program, which is the model for most federal set-asides, the less likely they are to develop outside business that would sustain them when they no longer get non-competitive government contracts.[13]

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[12]"Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preference Based on Race, Gender, or Ethnicity." Congressional Research Service, Feb. 17, 1995.

[13]England-Joseph, Judy. "Status of SBA's 8(a) Minority Business Development Program." General Accounting Office, March 6, 1995, p. 2.

Instead of rigging the competition for public contracts, affirmative action should help minority businesses compete on even terms. In the wake of the Supreme Court's 1989 decision striking down a Richmond, VA set-aside program, Birmingham, AL has jettisoned its contract set-asides and is working instead with the business community to nurture minority-owned enterprises. This voluntary model builds the capacities that allow minority businesses to stand on their own in market competition rather than using public resources to shield them from that competition.[14]

It's also time for Congress to end the bidding discounts, tax credits, and set-asides the Federal Communications Commission uses to encourage minority- and female-owned businesses in telecommunications. There's little evidence that such preferences have achieved their stated purpose of promoting "minority views" in broadcasting; the content of broadcasting is determined by what people want to see or hear, not by the complexion or sex of company owners. And as Jeff Rosen points out in *The New Republic*, even large and successful minority businesses are eligible for set-asides for cellular licenses.[15] Why do they need a boost from government?

Census figures show that minority- and female-owned enterprises are growing rapidly.[16] In keeping with the principle that group preferences should be limited and transitional, we should begin phasing out set-asides over, say, a five- to 10-year period. During that period, we should begin phasing in new empowerment initiatives of the kind discussed below.

In addition, President Clinton should repeal Lyndon Johnson's 1965 Executive Order 11,246, which requires federal contractors to file written plans with the government specifying hiring goals and timetables. This is the federal government's largest affirmative action program. Studies by Jonathan Leonard of the University of California and others show that the executive order has only modestly increased black employment and income, while having little effect on women. Even where gains are posted, they often stem from a shift in employment from firms with no government business to federal contractors. Although the law bans formal quotas, government guidelines push employers to hire by the numbers to avoid the inference of discrimination.

Steady progress by minorities and women in public employment also suggest that we can safely dispense with hiring preferences in government. Blacks are actually

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[14]Barrett, Paul M. "Birmingham's Plan to Help Black-Owned Firms May Be Alternative to Racial Set-Aside Programs." *The Wall Street Journal*, Feb. 27, 1995, p. A14.

[15]Rosen, Jeffrey. "Affirmative Action: A Solution." *The New Republic*, May 8, 1995, p. 23.

[16]Mehta, Stephanie N. "Affirmative Action Supporters Face Divisive Problem." *The Wall Street Journal*, June 2, 1995, p. B2.

overrepresented in federal government (17 percent of the workforce compared to 10 percent of the private workforce) and many big-city governments as well; women are at 40 percent of the federal workforce and growing.[17]

At a time when governments everywhere are in the throes of reinvention and *downsizing*, it makes little sense to steer women and minorities toward public employment or contracting. Writing in *The New Democrat*, Joel Kotkin notes that in California, affirmative action tends to channel minorities and women to relatively stagnant sectors of the economy—to government and large corporate bureaucracies instead of to dynamic small- and mid-sized firms that are generating most innovation and job growth in the state.

Voluntary Affirmative Action

Since most jobs and lucrative opportunities are found in the private economy, voluntary affirmative action by employers clearly will do more to equalize opportunities for minorities and women than government set-asides and preferences. Most large companies actively seek to diversify their workforce and small employers are under social and legal pressure to do the same. In addition to barring outright discrimination, the Civil Rights Act of 1964 (in Title VII) permits companies to be sued when they *unintentionally* discriminate—when their hiring and layoff policies result in a "disparate impact" on women and minorities. (The Civil Rights Act of 1991 restored the burden of proof on employers to justify such practices on the basis of business necessity.) This "rebuttable presumption" acts as a safeguard against unconscious discrimination but, unlike government's numerical goals and timetables, does not induce employers to hire or fire by the numbers.

As part of any effort to reform affirmative action, President Clinton should challenge Congress to give the Equal Employment Opportunity Commission (EEOC) the resources it needs to sift frivolous from serious bias claims and to detect patterns of job discrimination. At the same time, however, Congress should direct the EEOC to avoid actions—such as using computer models to fix the supposedly "exact" percentages of qualified women and minorities available to employers in a given location—that compel companies to adopt race or gender proportionalism to avoid official harassment.[18]

Since anti-discrimination litigation is time-consuming and costly, it makes sense to explore alternatives for reinforcing voluntary affirmative action. A useful tool is the "employment and housing audit" pioneered by the Urban Institute, as described earlier. Increasing their frequency—say, by giving government grants to community groups—would aid in detecting discrimination, but the increased prospect of being

[17]"Central Personnel Data File." United States Office of Personnel Management. September 1993.

[18]Bovard, James. "The Latest EEOC Quota Mandate." *The Wall Street Journal*, April 27, 1993, A14.

audited would also act as a deterrent to employers and landlords. Consumer boycotts and other forms of public suasion have also proved effective at encouraging laggard firms to hire minorities.

Step one in reforming affirmative action, then, is to shift from mandatory preferences to voluntary action by employers, with anti-discrimination laws and public scrutiny as an insurance policy against backsliding. By itself, this step won't quell the controversy over race and gender preferences; it won't console whites who believe they've lost a job or promotion or a slot in medical school because of affirmative action. But it will get the government out of the business of group classification and preferences, halting a trend that promises heightened ethnic conflict.

Dubbing this approach "the separation of race and state," the weekly *Economist* recently pinned the key point:

> "It is true, of course, that race distinctions will not disappear from society simply because governments decline to recognize them. But it is equally true, and even more important, that race distinctions cannot disappear so long as governments not merely recognize but enforce them."[19]

Step 2: Replace Preferences With Empowerment

If race and gender preferences commit government to a divisive and ultimately futile quest for equal results, the answer is not simply to jettison them but to get serious about making equal opportunity a reality for America's minority poor. Step two in the new bargain is therefore to replace government preferences for groups with new public policies that empower individuals to get ahead regardless of race, gender, or ethnicity.

Most studies confirm that the impact of preferences on minority or female employment and income is exceedingly modest. For example, a report on black economic gains prepared for the U.S. Labor Department reached this conclusion:

> "The general pattern is that the racial wage gap narrowed as rapidly in the 20 years prior to 1960 (and before affirmative action) as during the 20 years afterward. This suggests that the slowly evolving historical forces we have emphasized in this report—education and migration—were the primary determinants of the long-term black economic improvement. At best, affirmative action has marginally altered black wage gains about this long-term trend."[20]

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[19]"A Question of Colour." *The Economist*, April 15, 1995, p. 13.

[20]Smith, James P. and Finis R. Welch. "Closing the Gap: Forty Years of Economic Progress for Blacks." The RAND Corp., February 1986, p. 99.

Moreover, as sociologist William J. Wilson has pointed out, affirmative action policies exhibit a class bias that favors middle-class professionals and entrepreneurs while offering little to people stuck in poverty.

In a seminal article titled "The Competitive Advantage of the Inner City," Michael Porter of the Harvard Business School argues for shifting public resources from transfer payments, subsidies, and race and ethnic preferences to efforts to create businesses in the inner city. Preferences, he notes, rarely benefit companies located in low-income neighborhoods:

> "In addition to directing resources away from the inner city, such race-based or gender-based distinctions reinforce inappropriate stereotypes and attitudes, breed resentment, and increase the risk that programs will be manipulated to serve unintended populations."[21]

What's tragic about the current impasse on affirmative action is that it blocks attempts to build a new biracial consensus behind a comprehensive attack on inner-city poverty. For blacks trapped at the bottom of the economic pyramid, the main obstacle is not vestigial discrimination but the breakdown of critical social and public institutions, chiefly the family and schools. Can anyone doubt that dramatically lifting their academic and occupational skills would have a greater impact on their life prospects than maintaining preferences that mostly benefit middle-class blacks, Hispanics, and women?

Empowerment is a broad agenda that encompasses everything from welfare reform to national service, youth apprenticeship, and other ideas for expanding access to education and job training. But it would be especially fitting to focus immediately on the *economic* legacy of discrimination—on the profound and lasting impact on minority citizens of their systematic exclusion from full participation in the free enterprise system. This legacy includes lower rates of business formation, of asset accumulation, and inheritance, and especially of home ownership.

- ***Asset-building strategies.*** According to the Census Bureau, the distribution of personal assets (property, savings, and investments) by race is even more skewed than the distribution of income: Whites possess 92 percent of Americans' total net worth while blacks have only 3.1 percent.

When it comes to building personal assets, middle-class Americans already benefit from "affirmative action" in the form of the mortgage interest deduction and tax breaks for private pensions and savings accounts. Yet our social policies, especially welfare, promote consumption rather than asset accumulation. An empowerment strategy should

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[21]Porter, Michael. "The Competitive Advantage of the Inner City." *Harvard Business Review*, May 1995, p. 55.

offer poor families similar incentives to save and build personal assets. Michael Sherraden of St. Louis University has proposed an asset accumulation system open to all Americans, but with special incentives for the poor. It would create Individual Development Accounts (IDAs), tax-free savings vehicles for low-income families whose deposits could be matched by government, businesses, churches, and charities. The Corporation for Enterprise Development has designed a National IDA Demonstration that would create 100,000 IDAs for low-income families at a cost to the federal government of $100 million.

- *Home ownership.* Our homes are the most important asset most of us will ever own. Stable communities, moreover, are rooted in high rates of home ownership. While 67 percent of whites own their own homes, only 45 percent of blacks do.[22] Instead of dismantling the U.S. Department of Housing and Urban Development (HUD), as some Republicans propose, why not reorganize it around the goal of lifting home-ownership rates among the poor generally—a shift that would disproportionately benefit the minority poor? HUD can promote home ownership by shifting dollars now spent on rental subsidies (the total exceeds $10 billion) toward grants to local governments to clear sites for construction of low-cost housing and cut mortgage interest rates for owner-occupant buyers in poor neighborhoods.[23] Localities should also revise building and housing codes to make it easier to build low-cost housing.

- *Public education.* Finally, no public task is more urgent than dramatically lifting the quality of inner-city schools. More money may be necessary but it will be insufficient: Big city school districts typically spend well above the national average. More important is to change the bureaucratic organization and culture of our standardized public school system.

The first step is for the states: They should withdraw the local school districts' monopoly on owning and operating public schools, freeing teachers and other civic entrepreneurs to create innovative public schools. Now operating in 12 states, such "charter" schools expand choices for parents and children while exerting real competitive pressure on traditional schools, who risk losing students (and public funding for them) if they fail to improve. Unlike conservative proposals to privatize public schools through vouchers, charter schools operate under license to public authorities without the stifling rules and procedures of central school districts and unions. The federal government can help boost these efforts by letting the states use federal education dollars to experiment with models and help capitalize new schools.

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[22] *Statistical Abstract of the United States.* 1994. Washington, DC: GPO, Table 1216, p. 735.

[23] Husock, Howard. "Up From Public Housing." *The New Democrat,* January/February 1995, p. 50.

These initiatives are modest in cost if not in scope. But they are only the beginning. Ultimately, the only way out of the quagmire of group-conscious policies is to redouble the nation's commitment to equal opportunity for all. This requires not only vigilance in combatting residual discrimination, but also positive steps to lift the prospects of poor people packed into decaying urban neighborhoods. Conservative critics of preferences have ignored both these moral imperatives and the public costs they imply. No wonder their calls for a color-blind Constitution and society ring hollow to Americans for whom discrimination is not an abstraction but a painful reality.

In pursuing a third way on affirmative action, we must be clear on this point: redeeming America's historical obligation to the victims of slavery and segregation is not a cost-free proposition. A serious agenda for equal opportunity and individual empowerment will require financial sacrifice from society as a whole.

Step 3: Reform Affirmative Action in College Admissions

The third step involves college admissions, where the abysmal quality of many inner-city schools, continuing racial and ethnic disparities in standardized test scores, and the special role Americans have traditionally assigned to education in equalizing opportunities combine to justify some form of affirmative action. Nonetheless, two reforms are essential: 1) we must lift students rather than lowering standards; and, 2) we must target students by need as well as race.

U.S. colleges compete for promising minority students almost as furiously as for star athletes. The dearth of candidates with high test scores creates pressure to lower official standards to meet affirmative action goals. On scholastic aptitude tests (SATS), for example, blacks score on average (combined math and verbal) nearly 200 points below whites. This has prompted protests and lawsuits from white and Asian students denied entry despite higher grade point averages and SAT scores.

Such measures, while useful, are not comprehensive or infallible predictors of future performance. Moreover, few colleges base admissions solely on meritocratic standards. Many take non-academic activities into account: participation in sports, clubs, student government, or civic work. Others give preferences to the children of alumni or faculty, limit local enrollment to leave space for students from other parts of the country, and offer special scholarships for students from low-income families. Under such circumstances, it is difficult to argue that colleges may consider any factor *except* race, ethnicity, and gender. The right standard is still set by the Supreme Court in its 1978 Bakke decision: Race should be a factor but not the decisive factor in college admissions.

Too often, however, accepting ill-prepared students under affirmative action plans sets them up for failure and reinforces stereotypes of intellectual deficiency not only held by whites but also internalized by minorities. Studies show that only one-third of black students who enter college graduate within six years, compared with 57 percent for

whites.[24] It's not just students who suffer: Institutions that allow the quest for diversity to compromise academic excellence risk repeating the descent of New York City's College, once the "Harvard of the proletariat" and now a venue for ethnic politics.

Given the disparity in test scores, how can colleges lift students rather than lower standards? One way is to adopt the military model of affirmative action that sociologist Charles Moskos says has made the army the most successfully integrated institution in America. This model combines goals (but not timetables) for minority promotion with rigorous training to ensure a sufficient pool of qualified candidates for promotion. Some colleges already are trying similar approaches: Boston College enrolls affirmative action students in a six-week summer training course and requires that they sign a contract pledging to make every effort to graduate. The results are impressive: 95 percent of these students graduate in four years, compared to 88 percent for the entire student body.[25] An alternative is to guarantee all high school students a slot in community colleges to prepare them for entry into more demanding four-year schools.

Colleges should also work more closely with high schools to create preparatory programs for minority students. In California, for example, officials estimate that only five percent of black and four percent of Latino public high school students complete the course and grade requirements necessary for admission to the University of California. But eligibility for both groups swells to over 40 percent when students are enrolled in preparatory courses.[26]

University officials worry, however, that the proposed CCRI would prohibit such programs because they do not meet its standard of pure color-blind neutrality. Nor, of course, would race-conscious recruiting of promising minority students—and indeed the architects of the initiative admit that it would lead to a dramatic drop in minority enrollment in top-ranked schools.

The second problem posed by affirmative action in college admissions is that it ignores wide income variations among members of a group. It's hard to defend giving an advantage to Bill Cosby's kids, to an engineer who recently emigrated from Peru or India, or to an affluent white woman over the son of a proverbial white coal-miner or a recent Russian immigrant. Some argue that the purpose of affirmative action is not just to widen opportunities but to indemnify people for historic wrongs. Since college slots are not unlimited, however, it makes sense to target preferences to people who really

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[24]McGrory, Brian. "Pathways to College - Affirmative Action: an American Dilemma." *The Boston Globe*, May 23, 1995, p. 12.

[25]Ibid., p. 12.

[26]Rogers, Kenneth. "Don't Lower the Bar - Elevate the Students." *The Los Angeles Times*, March 10, 1995, p. B7.

need them—to kids who are the first in their family to go on to higher education, for example, or to those from poor or working poor families.

Simply substituting class for race as the basis for affirmative action runs afoul of the test-score gap; the likely result would be to make poor whites and Asians the main beneficiaries. The better solution is to combine the two as a means of targeting affirmative action to truly needy members of minority groups. Since colleges already collect lots of financial information from students seeking loans, grants, or scholarships, tempering affirmative action with a means test shouldn't be hard.

All this raises an obvious question: If preferences are wrong in public contracting, why are they permissible in college admissions? One answer is that colleges have a broader public mission than career preparation and meritocratic sorting. Americans have always believed that education is the key not only to opportunity but to an enlightened citizenry capable of self-government. Since World War II, we've invested heavily in college opportunity because we see it as integral to both economic growth and equality. This is even more true today, as the global information economy puts a premium on knowledge and mental agility.

Affirmative action in college is not a guaranteed outcome but an opportunity to develop civic capacities and compete successfully in the economic arena. Like other race-conscious preferences, it should be viewed as a temporary expedient until representation of minorities in colleges is roughly equivalent to that of whites. In the meantime, it should be done in ways that don't compromise academic standards or confer benefits on people who are not needy.

Conclusion

At the heart of the affirmative action debate are conflicting interests and visions of justice that divide largely on racial lines. There is, however, a third option—a civic perspective that works to synthesize these visions into a new bargain on racial justice and equal opportunity. The moral underpinning of such a bargain is Dr. King's vision of a society that judges individuals by "the content of their character" rather than the color of their skin.

A recent series of articles in *The New Democrat* provides thematic building blocks for the third way: Start phasing out mandatory group preferences; wherever practical, target affirmative action by need, not by race alone; shift efforts to combat inequality from the courts and federal bureaucracies to the economic arena; don't lower standards but lift people up to common standards instead; don't bestow group entitlements, but instead use public resources to build individual capacity.

Finally, as author Jim Sleeper argues, our political leaders should have more faith in civil society.[27] Rather than base affirmative action on the insulting premise that government must perpetually compel citizens to do the right thing, it's time to acknowledge incomplete yet incontrovertible progress and move on to the next phase of the struggle for racial justice. And instead of waving the bloody shirt of racism to suppress dissent, it's time now to air public doubts and trust in the power of democratic deliberation to move us closer to common ground.

Will Marshall is president of the Progressive Policy Institute.

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[27]Sleeper, Jim. "Leap of Faith." *The New Democrat*, May/June, 1995, p. 23.

Civil rights - affirmative action

Draft letter for Erskine's response to CBC -- May 9, 1997, 3:49PM (and)

May 9, 1997

Crime - youth violence strategy

The Honorable Maxine Waters
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Dear Ms. Waters:

I appreciate the opportunity to meet with you and the entire Congressional Black Caucus (CBC) earlier this week. I believe that it is extremely important for this Administration to maintain strong lines of communication with the CBC. The President and I are committed to working with you to advance policies which are beneficial to the African-American community.

As you recall, a number of questions were raised on a wide range of topics at our meeting. As I promised, I have attached answers to the questions which were left outstanding at the end of our meeting. In addition, I have attached a budget agreement fact sheet on areas of the budget of particular interest to you and your CBC colleagues. I hope that this information is helpful. I look forward to your upcoming meeting with the President and working closely with you in the future.

Sincerely,

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Attachments

1. What is the Administration doing in response to Prop 209, e.g., will the Administration still award states with federal contract dollars even if the state is not implementing affirmative action programs, etc.?

The President has stated his opposition to state referenda which abolish affirmative action at the state level, and, in keeping with this position, the Justice Department has joined in the challenge to Prop 209 in California. The U.S. is a party to the case as amicus curiae and had argued forcefully at the Preliminary Injunction stage that Prop. 209 was unconstitutional. Unfortunately, a three-judge panel of the Ninth Circuit Court of Appeals recently overturned a district court injunction which had stayed implementation of Proposition 209, ruling that the initiative was constitutional. Obviously, we are disappointed with the panel's decision.

The plaintiffs in the Prop. 209 litigation have petitioned for a rehearing of the panel's decision before the Fifth Circuit as a whole. The Justice Department has continued as amicus in this petition and fully expects to continue as a party in the case through any further appeals.

Notwithstanding the outcome of the Prop. 209 litigation, the Administration will require institutions in California to comply with all Federal laws, including those which require affirmative action, and we have made this clear to these institutions. Further, Prop. 209 itself contains a provision exempting from its reach those institutions which are complying with Federal affirmative action programs as a condition of receiving a Federal grant.

2. Why is SBA's 8(a) program included in the federal procurement regulations?

Our proposed system for reforming federal procurement sets out a framework under which an annual comparison of the availability and use of small disadvantaged businesses will determine whether race conscious means, such as price or evaluation credits, will be permitted to help increase opportunities for these firms.

Many commentators to our proposal have asserted that we should not include contracts awarded under the 8(a) program in the reform framework. First, we believe that it is critical that the availability of SDB's in an industry not be undercounted so that we can make an accurate determination of the level of federal utilization of such firms that would be appropriate. As such, minority firms in the 8(a) program must be counted in the capacity or "benchmark" numbers. Only by determining how much minority participation in contracting exists, through all means, can we figure out the extent to which race-conscious means continue to be

needed in a particular industry.

Second, as proposed, the SBA Administrator will have the authority to decide what steps are needed, if any, to limit the use of the 8(a) program in a particular industry where SDB participation exceeds an industry benchmark. However, the Administrator will not be required to take such steps -- the benchmark numbers will serve as a guide to the Administrator, not a mandate. Nevertheless, we believe strongly that some limited reform of 8(a) is needed to ensure the continued vitality of the program. The 8(a) program does consider race as a factor in determining eligibility -- small minority firms are allowed the presumption of being socially disadvantaged under the program. As such, although the Justice Department continues to vigorously defend 8(a) in court as constitutional, we believe that the substantial risk of future court rulings unfavorable to the program greatly outweighs the costs of this limited reform.

SBA will be explaining how it intends to implement this limited reform in proposed regulations they will issue in a few weeks. Their proposed rule will also be published for comment in the Federal Register and is expected to be finalized later this year.

3. Please clarify the Administration's position on set-asides, e.g., is there still a moratorium on set-asides?

The primary SDB set-aside program authorized by existing contracting regulations, the Department of Defense's "Rule of Two," was suspended in light of Adarand in October 1995, and remains so. Under the Justice Department's May 1996 proposal, the suspension on the use of set-asides such as the Rule of Two would have remained in place for at least two years after the implementation of the reformed system. The proposal contemplated that after two years we would evaluate the system to consider whether set-asides might be appropriate if the new system clearly was unable to remedy persistent and substantial underutilization of minority firms in particular industries resulting from past or present discrimination.

Many comments to the Justice Department's May 1996 proposal suggested that the two-year moratorium was too inflexible. We agreed that whether to permit set-aside contracts in any industry should not turn on the lapse of any particular period of time, but on the amount and strength of the evidence regarding the effectiveness of the new system in that industry. In cases where this rigorous standard is met, the use of set-asides can be considered.

4. DOT programs are not included in these federal procurement regs. What will DOT be issuing on its own?

The Department of Transportation will soon be issuing a Supplemental Notice of Proposed Rulemaking concerning its disadvantaged business enterprise (DBE) program. This program operates through state and local governments that receive DOT financial assistance for highway, transit, and airport projects.

DOT will give the public 60 days to comment on the proposed regulations and we expect that they will be finalized later this year. DOT's DBE program, which Congress established in 1982, sets a nationwide goal that, unless the Secretary determines otherwise, at least 10% of the amounts appropriated for Federally-assisted highway transit and airport projects be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The department retained the current legislative language in its NEXTEA bill, which the President recently submitted to Congress.

DOT has developed its proposed regulations in response to the Supreme Court's June 20, 1995, decision in Adarand Constructors v. Pena and President Clinton's July 15 directive to mend affirmative action programs. In addressing these issues, the proposed regulations will: (1) propose several alternative methods by which recipients establish DBE goals; (2) advise recipients to give priority to race-neutral measures, like outreach and technical assistance, in meeting these goals; and (3) provide recipients more flexibility in determining what mechanisms to use in addressing discrimination in contracting. The proposal also provides clearer program eligibility standards and reduces burdens on small businesses and state and local governments.

5. Under the guise of efficiency this Administration has created an environment where consolidation or bundling of contracts is viewed as more cost efficient. As a result, small businesses, especially minority small businesses have been unable to compete against larger businesses that have more resources, bonding and personnel. What is the Administration's position on contract bundling and does it plan to continue this practice?

There are many situations where the government is able to achieve dramatic price reductions by leveraging its buying power as a large purchaser. For example, in consolidating a number of contracts for pharmaceuticals, the Veterans Administration has achieved price savings of as much as 75% compared with prices they were previously paying. The government is able to obtain Federal Express delivery for a three-pound package that retails at $27 for $3.62 by aggregating our buying power. Especially in a tight budget environment where excessively high contract costs come at the expense of needed money for public programs, it would be unconscionable to forego the ability to obtain these price discounts from quantity buying.

However, there are also legitimate concerns about situations where combining smaller service contracts into larger contract vehicles not only hurts the ability of small businesses to compete for government business, but also deprives agencies of the services of businesses that would otherwise be able to provide high-quality services at advantageous prices. The Administration is therefore aggressively formulating a whole series of countermeasures to preserve the ability of competitive small and minority-owned businesses to serve government customers. Examples of these countermeasures include: (I) increased use of small-business and 8(a) prime contract set asides incorporated into multiple-award aggregated contracts, a technique that has already been used by the Department of Transportation and the Air Force; (2) streamlining of the 8(a) contract award process, so award of 8(a) contracts can be as streamlined as the award of task orders under large aggregated contracts; (3) a new ability for the government to award service contracts up to $100,000 to small businesses using far more streamlined procedures; (4) expansion of the GSA services schedule to more small and minority-owned businesses, so these businesses have a contract vehicle available that allows them streamlined access to government customers outside large aggregated contracts; and (5) aggressive efforts in regulation to provide various ways to increase the participation of small and minority-owned businesses in service subcontracting. We believe that this aggressive approach is the best way to deal with legitimate concerns without depriving the taxpayer and the consumers of government programs of the benefits of consolidated contracting when it provides advantageous pricing and service.

6. Why is the Administration supporting the incarceration of juveniles with adults?

Under the Administration's proposed legislation, the "Anti-Gang and Youth Violence Act of 1997", juveniles prosecuted as juveniles could not be housed with adults until they reach age 18, regardless of the offense. Moreover, no juvenile under age 16 who has been charged or convicted as an adult, can be housed with an adult under the proposed bill. Juveniles prosecuted as adults can be housed with adults after they reach the age of 16, at the discretion of the Bureau of Prisons.

As juveniles have become increasingly violent, however, housing such dangerous juveniles with other juveniles can endanger younger, and sometimes more vulnerable, delinquents. The Administration believes it is more appropriate to give federal prison authorities the ability to be flexible depending upon the needs of the individual defendant.

7. Why is the Administration supporting the prosecution of more juveniles as adults?

The current process for determining whether a juvenile will be prosecuted as an adult or as a juvenile is often highly unpredictable. The Administration's bill does not add any new offenses for which a juvenile can be charged in federal court.

However, the Administration bill does expand the circumstances where a juvenile can be charged as an adult by giving federal prosecutors the discretion to transfer juvenile offenders to adult criminal court. It should be noted that except for the most serious juvenile offenders, age 16 and older, juveniles charged as adults may petition the court to be tried as juveniles rather than adults.

8. Why is the Administration supporting more mandatory minimum sentences for juveniles?

The Administration's legislation increases mandatory minimum sentences from one year to three years for three narrowly targeted crimes: selling drugs to minors; using minors to distribute drugs; and trafficking drugs in or near a school or other protected location. The Administration believes that the proposed increases are necessary to punish persons who endanger children by selling illegal drugs to them, or employ or otherwise use them in their drug trade, and to deter others from engaging in such reprehensible and dangerous conduct.

The mandatory minimum sentences could apply to juveniles who are prosecuted as adults. However, it should be noted that "safety valves" on mandatory sentences may be applied to 13-15 year olds in certain circumstances.

9. Why is the Administration supporting making public the records of individuals prosecuted as juveniles?

President Clinton has had a longstanding commitment to fight for the rights of victims of crime. The Administration's bill contains important protections for the rights of victims, including the victims of crimes committed by juvenile offenders. The bill clarifies current law by extending to victims of juvenile offenders the right to information about the juvenile proceeding that they might need or be entitled to under state or federal law. For example, victims would be able find out about the status of the proceedings, or the release status of the offender. Fingerprints and photographs of adjudicated delinquents found to have committed the equivalent of an adult felony offense or a federal gun offense would be sent to the FBI and made available in the same manner applicable to adult defendants.

The Administration believes these changes represent a fair balance between maintaining important protections for juveniles and expanding the information available to their victims.

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SBA will be explaining how it intends to implement this limited reform in proposed regulations they will issue in a few weeks. Their proposed rule will also be published for comment in the Federal Register and is expected to be finalized later this year.

3. Please clarify the Administration's position on set-asides, e.g., is there still a moratorium on set-asides?

The primary SDB set-aside program authorized by existing contracting regulations, the Department of Defense's "Rule of Two," was suspended in light of Adarand in October 1995, and remains so. Under the Justice Department's May 1996 proposal, the suspension on the use of set-asides such as the Rule of Two would have remained in place for at least two years after the implementation of the reformed system. The proposal contemplated that after two years we would evaluate the system to consider whether set-asides might be appropriate if the new system clearly was unable to remedy persistent and substantial underutilization of minority firms in particular industries resulting from past or present discrimination.

Many comments to the Justice Department's May 1996 proposal suggested that the two-year moratorium was too inflexible. We agreed that whether to permit set-aside contracts in any industry should not turn on the lapse of any particular period of time, but on the amount and strength of the evidence regarding the effectiveness of the new system in that industry. In cases where this rigorous standard is met, the use of set-asides can be considered.

4. DOT programs are not included in these federal procurement regs. What will DOT be issuing on its own?

The Department of Transportation will soon be issuing a Supplemental Notice of Proposed Rulemaking concerning its disadvantaged business enterprise (DBE) program. This program operates through state and local governments that receive DOT financial assistance for highway, transit, and airport projects.

DOT will give the public 60 days to comment on the proposed regulations and we expect that they will be finalized later this year. DOT's DBE program, which Congress established in 1982, sets a nationwide goal that, unless the Secretary determines otherwise, at least 10% of the amounts appropriated for Federally-assisted highway transit and airport projects be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The department retained the current legislative language in its NEXTEA bill, which the President recently submitted to Congress.

DOT has developed its proposed regulations in response to the Supreme Court's June 20, 1995, decision in Adarand Constructors v. Pena and President Clinton's July 15 directive to mend affirmative action programs. In addressing these issues, the proposed regulations will: (1) propose several alternative methods by which recipients establish DBE goals; (2) advise recipients to give priority to race-neutral measures, like outreach and technical assistance, in meeting these goals; and (3) provide recipients more flexibility in determining what mechanisms to use in addressing discrimination in contracting. The proposal also provides clearer program eligibility standards and reduces burdens on small businesses and state and local governments.

5. Under the guise of efficiency this Administration has created an environment where consolidation or bundling of contracts is viewed as more cost efficient. As a result, small businesses, especially minority small businesses have been unable to compete against larger businesses that have more resources, bonding and personnel. What is the Administration's position on contract bundling and does it plan to continue this practice?

There are many situations where the government is able to achieve dramatic price reductions by leveraging its buying power as a large purchaser. For example, in consolidating a number of contracts for pharmaceuticals, the Veterans Administration has achieved price savings of as much as 75% compared with prices they were previously paying. The government is able to obtain Federal Express delivery for a three-pound package that retails at $27 for $3.62 by aggregating our buying power. Especially in a tight budget environment where excessively high contract costs come at the expense of needed money for public programs, it would be unconscionable to forego the ability to obtain these price discounts from quantity buying.

However, there are also legitimate concerns about situations where combining smaller service contracts into larger contract vehicles not only hurts the ability of small businesses to compete for government business, but also deprives agencies of the services of businesses that would otherwise be able to provide high-quality services at advantageous prices. The Administration is therefore aggressively formulating a whole series of countermeasures to preserve the ability of competitive small and minority-owned businesses to serve government customers. Examples of these countermeasures include: (l) increased use of small-business and 8(a) prime contract set asides incorporated into multiple-award aggregated contracts, a technique that has already been used by the Department of Transportation and the Air Force; (2) streamlining of the 8(a) contract award process, so award of 8(a) contracts can be as streamlined as the award of task orders under large aggregated contracts; (3) a new ability for the government to award service contracts up to $100,000 to small businesses using far more streamlined procedures; (4) expansion of the GSA services schedule to more small and minority-owned businesses, so these businesses have a contract vehicle available that allows them streamlined access to government customers outside large aggregated contracts; and (5) aggressive efforts in regulation to provide various ways to increase the participation of small and minority-owned businesses in service subcontracting. We believe that this aggressive approach is the best way to deal with legitimate concerns without depriving the taxpayer and the consumers of government programs of the benefits of consolidated contracting when it provides advantageous pricing and service.

6. Why is the Administration supporting the incarceration of juveniles with adults?

Under the Administration's proposed legislation, the "Anti-Gang and Youth Violence Act of 1997", juveniles prosecuted as juveniles could not be housed with adults until they reach age 18, regardless of the offense. Moreover, no juvenile under age 16 who has been charged or convicted as an adult, can be housed with an adult under the proposed bill. Juveniles prosecuted as adults can be housed with adults after they reach the age of 16, at the discretion of the Bureau of Prisons.

As juveniles have become increasingly violent, however, housing such dangerous juveniles with other juveniles can endanger younger, and sometimes more vulnerable, delinquents. The Administration believes it is more appropriate to give federal prison authorities the ability to be flexible depending upon the needs of the individual defendant.

7. Why is the Administration supporting the prosecution of more juveniles as adults?

The current process for determining whether a juvenile will be prosecuted as an adult or as a juvenile is often highly unpredictable. The Administration's bill does not add any new offenses for which a juvenile can be charged in federal court.

However, the Administration bill does expand the circumstances where a juvenile can be charged as an adult by giving federal prosecutors the discretion to transfer juvenile offenders to adult criminal court. It should be noted that except for the most serious juvenile offenders, age 16 and older, juveniles charged as adults may petition the court to be tried as juveniles rather than adults.

8. Why is the Administration supporting more mandatory minimum sentences for juveniles?

The Administration's legislation increases mandatory minimum sentences from one year to three years for three narrowly targeted crimes: selling drugs to minors; using minors to distribute drugs; and trafficking drugs in or near a school or other protected location. The Administration believes that the proposed increases are necessary to punish persons who endanger children by selling illegal drugs to them, or employ or otherwise use them in their drug trade, and to deter others from engaging in such reprehensible and dangerous conduct.

The mandatory minimum sentences could apply to juveniles who are prosecuted as adults. However, it should be noted that "safety valves" on mandatory sentences may be applied to 13-15 year olds in certain circumstances.

9. Why is the Administration supporting making public the records of individuals prosecuted as juveniles?

President Clinton has had a longstanding commitment to fight for the rights of victims of crime. The Administration's bill contains important protections for the rights of victims, including the victims of crimes committed by juvenile offenders. The bill clarifies current law by extending to victims of juvenile offenders the right to information about the juvenile proceeding that they might need or be entitled to under state or federal law. For example, victims would be able find out about the status of the proceedings, or the release status of the offender. Fingerprints and photographs of adjudicated delinquents found to have committed the equivalent of an adult felony offense or a federal gun offense would be sent to the FBI and made available in the same manner applicable to adult defendants.

The Administration believes these changes represent a fair balance between maintaining important protections for juveniles and expanding the information available to their victims.

Civil rights - affirmative action

'97 MAY 2 PM6:42

THE WHITE HOUSE

WASHINGTON

May 1, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: **ERSKINE BOWLES**
CHARLES F. C. RUFF
SYLVIA MATHEWS

SUBJECT: **PROPOSED REGULATION IMPLEMENTING REFORM OF AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT**

We write to seek your approval to proceed with publishing proposed regulations implementing reforms of affirmative action in federal procurement in the Federal Register for public review and comment and to provide an update of our roll-out of the proposed regulation. The proposed regulation implements the Justice Department's procurement reform proposal which you reviewed and approved in May of 1996 and which was published in the Federal Register May 23, 1996.

Background

As you are aware, in the wake of the Supreme Court's Adarand decision, you directed the Department of Justice to: (i) review affirmative action programs at all levels of the federal government, (ii) determine which programs require reform, and (iii) develop a proposal to reform those programs. In completing its assignment, Justice's primary -- and most difficult -- task was to develop a proposal, consistent with Adarand, to "mend, not end, affirmative action programs" as you promised.

Justice conducted an extensive review of government-wide affirmative action. It also engaged in a wide-ranging consultation process with Federal officials and third parties likely to be affected by any reforms, including minority and small business contractors and civil rights groups. After these consultations, Justice developed guidelines to limit, where appropriate, the use of race-conscious measures in specific areas of Federal procurement.

Under Justice's proposal, the Department of Commerce (in consultation with the General Services Administration and the Small Business Administration ("SBA")) would establish appropriate limits -- or "benchmarks" -- for industries doing business with the Federal government. (Each industry benchmark will represent the level of minority contracting that one would reasonably expect to find in that industry absent discrimination or its effects.) These benchmarks would then guide the determination of whether, when and to what extent race-conscious tools, such as evaluation credits are appropriate.

Justice also proposed that the Federal government should, for two years, suspend certain set-aside programs (most notably, the Department of Defense's Rule-of-Two program). During this two-year period, the Federal government would use other measures to assist small and disadvantaged businesses. After this period, we were to evaluate whether our new program had achieved an appropriate level of minority contracting with the Federal government in each industry in order to determine whether the use of set-asides is justified. The suspension of the Rule-of-Two caused concern among minority groups, however, Justice felt strongly, and we agreed, that a suspension of this program was necessary in light of Adarand until the effectiveness of more narrowly-tailored measures could be reviewed.

Further, under Justice's proposal the benchmark numbers would inform, but not strictly govern, the use of SBA's 8(a) program -- a program Justice continues to defend as constitutional. Justice proposed that the Administrator of SBA, in his or her discretion, could then use the benchmarks as a guide in administering 8(a). Justice advised that this limited application of benchmarks to 8(a) makes the program more narrowly tailored, as Adarand counsels.

On May 13, 1996, Deval Patrick and John Schmidt presented Justice's proposal to you and the Vice President. After a full discussion, you approved Justice's proposal. You also agreed that the proposal should be submitted for public comment, which Justice did on May 23, 1996.

The Proposed Regulation

When Justice's proposal was published, we contemplated that, at the end of the public comment period, the proposal would form the basis for the new government-wide affirmative action provisions of the Federal Acquisition Streamlining Act ("FASA") Regulation Supplement, which took effect on October 1, 1996. Now, Justice has finished collecting and reviewing all of the comments it received during the comment period, and the FAR Council -- the entity responsible, by law, for drafting procurement regulations -- has drafted a proposed FASA regulation and is prepared to publish it. (Commerce, on a parallel track, is in the process of developing appropriate benchmark numbers.)

Over the past month, we have held several briefings with all relevant constituencies on the proposed FASA regulation. With the assistance of Justice, we have briefed House and Senate staff, representatives from the civil rights and minority contracting communities and the Congressional Black Caucus. Also, the Commerce Department has briefed civil rights and minority contracting groups on Commerce's benchmarking project.

The briefings for general Hill staff raised few issues or concerns. However, the CBC and the civil rights/minority contracting communities identified two specific issues which they felt needed some modification -- the proposed two-year moratorium on set-asides and inclusion of SBA's 8(a) program within the reform framework.

The civil rights/minority contracting communities commented that a fixed two-year moratorium on set-asides -- in particular on the Rule-of-Two -- was too inflexible. They felt that a decision on the use of set-asides should be based on available evidence only. We agreed that a slight modification in the language of the proposed rule would more fully comport with the intent of Justice's proposal. White House and OVP Counsel crafted amendatory language so that consideration of set-asides would turn not on the lapse of a particular time, but rather on the existence and strength of evidence of continuing and persistent discrimination in a particular industry and the demonstrated incapacity of race-neutral or more narrowly-tailored measures to remedy the problem. This modification alleviated the concerns on this issue raised by the groups.

We recognize that there is some danger that those groups which are hostile to set-asides may view this language as a move to reinstate set-aside programs as opposed to replacing them with a more narrowly tailored system. However, we believe that the language we have adopted is a reasonable compromise which is consistent with Adarand and provides the Administration with the flexibility it needs to review the new system and revise it when warranted by the evidence.

However, both the CBC and the civil rights/minority contracting groups remain opposed to the application of benchmarks to the 8(a) program -- a reform included in the proposed regulation. (You should know that some members of these groups maintain that you indicated a belief that 8(a) should not be included in the reform framework). But, Justice has advised, and we agree, that this limited reform of 8(a) is crucial and must remain part of the proposed regulation. Justice continues to defend 8(a) in court as constitutional and has succeeded to this point, primarily by fending off attacks on the program on its merits through challenges to the standing of plaintiffs. Nevertheless, Justice and we believe strongly that a limited form of narrow-tailoring of 8(a) is necessary in continuing to successfully litigate the constitutionality of 8(a) and ensuring the preservation of the program.

SBA will promulgate new regulations implementing changes to 8(a) -- involving both the limited use of benchmarks and stronger certification requirements. We have assured the parties we briefed that they will have an appropriate opportunity for input into these regulations.

Roll-Out Steps

At this time, the proposed regulation has cleared the OMB approval process and is ready to be sent to the Federal Register for publication. We propose sending the proposed rule to the Federal Register next **Tuesday, May 6**. This will give us the opportunity to inform key agency people as well as relevant constituencies, including the CBC, the Hispanic Caucus, other key Hill staff, civil rights and minority contracting groups and the press at appropriate times on **Monday, May 5** that the rule will be sent for publication on Tuesday. If we send the proposed rule to the Federal Register on Tuesday, they will publish it by **Friday, May 9** at the earliest, but in any event, no later than **Monday, May 12**. Once the proposed rule is published, we also intend to hold several briefings for an expanded list of minority businesspeople, civil rights groups and women business owners, for agency Chief of Staffs and for agency procurement officials.

Recommendation

We recommend that you approve the publication of the proposed regulation implementing reforms of affirmative action in federal procurement in the Federal Register for public review and comment and the roll-out schedule that we have proposed.

DECISION:

APPROVE _____

DISAPPROVE _____

LET'S DISCUSS _____

Civil rts - affirm action

Dawn M. Chirwa 04/11/97 11:29:12 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: FYI: Talking points on Hopwood.

Education and Justice finally have agreement on language. These talking points went to the Press Office this morning. Education is sending a clarifying letter to Texas State Sen. Ellis today and is meeting with Sen. Kay Bailey Hutchinson today as well.

- As was stated by the Justice Department in its amicus brief before the Supreme Court urging review of Hopwood, the Fifth Circuit panel held that educational institutions in the Fifth Circuit may not consider the race of applicants as a relevant factor in making its admission decisions.

- The Administration believes that case was wrongly decided and in direct conflict with the Supreme Court's decision in Bakke. However, it is the position of the United States that, absent further judicial developments, Hopwood is binding law in the Fifth Circuit. [In an appropriate case, DoJ would urge the Fifth Circuit as a whole or the Supreme Court to overturn the panel's decision].

- Outside the Fifth Circuit, we continue to believe that it is permissible for an educational institution to consider race in an appropriate manner in its admissions process, consistent with the Bakke decision.

Q: A letter sent by the Department of Education to a Texas legislator seems to indicate that Fifth Circuit schools are at risk of losing federal funds from the Department of Education for complying with Hopwood. Is this the case?

No. There has been some confusion on this issue based on mischaracterizations of Education's letter. To clarify: Educational institutions in the Fifth Circuit are not at risk of losing federal funds for complying with Hopwood. Nor has the federal government encouraged or required any institution in the Fifth Circuit receiving federal funds to engage in race-conscious affirmative action that is inconsistent with the prohibitions in Hopwood. Education has repeatedly made these points in the past few days to clarify any confusion.

Message Sent To:

Sylvia M. Mathews/WHO/EOP
Andrew J. Mayock/WHO/EOP
Richard L. Hayes/WHO/EOP
Elena Kagan/OPD/EOP
William R. Kincaid/OPD/EOP
Tracey E. Thornton/WHO/EOP
Janet Murguia/WHO/EOP

Civil Rts - Aff Action

2/1 Aff. Action

1. Structure/process
2. Proposed regs on procurement (rmkg not started)

Pres signed off on gen'l proposal (prior to comments)

Mtg - early next wk.

Subst vt point??

2 contractor parts — ~~SBA~~

Sa prog included in benchmarks?? Why? (we've argued this prog is const)

KB — Pres did sign off - knew this was a hot button

DOT - said all along - were defending, but we're also thg 2nd look at Sa. living on borrowed time.

Also need to protect self on Hill re Sa.

2-yr moratorium

Civil Rights –
Affirmative Action

THE WHITE HOUSE

WASHINGTON

January 31, 1997

MEMORANDUM FOR ERSKINE BOWLES

CC: SYLVIA MATTHEWS

FROM: JACK QUINN
DAWN CHRIWA

SUBJECT: Proposed Regulations Regarding the Reform of Affirmative Action Programs in Federal Procurement

This memorandum seeks your approval to proceed with publication of the proposed regulations reforming affirmative action in federal procurement. As you know, the President has determined that these reforms are necessary and appropriate. For your review, we have attached a memorandum from Justice setting forth their strongly held view that the regulations should be published.

There no doubt remain concerns within the minority contracting community about certain aspects of the proposed regulations -- most notably, the continued suspension of the Defense Department's "Rule-of-Two" set-aside program and the application of the regulations to SBA's 8(a) program. However, as DOJ's memo makes clear, those issues have been extensively reviewed by the Department and it has concluded that it cannot accommodate those concerns in light of the applicable constitutional requirements.

For all of the reasons set forth in the attached memorandum, we recommend that the FAR Council be authorized to proceed expeditiously with publication of the proposed regulations. Before publication takes place, appropriate White House staff should conduct extensive outreach to the minority contracting community to inform it of our decision.

Please indicate how you would like to proceed:

_____ AGREE: PROCEED WITH PUBLICATION AFTER APPROPRIATE OUTREACH EFFORTS

_____ LET'S DISCUSS

Attachment

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

January 28, 1997

MEMORANDUM

TO: Jack Quinn
Counsel to the President

FROM: John C. Dwyer
Acting Associate Attorney General

SUBJECT: Affirmative Action -- Procurement Reform Regulations

The Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995), requires strict scrutiny of the justifications for, and provisions of, a broad range of existing race- and ethnicity-based affirmative action programs. On July 19, 1995, following his "mend it, don't end it" speech on affirmative action at the National Archives, the President instructed every Federal agency, pursuant to the overall direction of the Attorney General, to evaluate whether their programs that use race or ethnicity in decision making are narrowly tailored to serve a compelling interest, as required under Adarand's strict scrutiny standard. The President has ordered that any programs that do not meet the constitutional standard must be reformed or eliminated.

On May 23, 1996, the Department of Justice published in the Federal Register, for comment, a proposal to reform affirmative action in federal procurement in compliance with the constitutional standards established by Adarand. *See* 61 Fed. Reg. 26042. It is my understanding that the President personally approved the publication of this proposal. The proposal was developed by an inter-agency working group and would amend, *inter alia*, the affirmative action provisions of the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFAR). Under the proposal, race would be relied on as a factor in contracting only when, and only to the extent that, an annual analysis of actual experience in procurement indicated that minority contracting in an industry fell below levels that would be anticipated absent discrimination. This reform would modify virtually all federal affirmative action procurement programs, including federal prime and subcontracting programs, among them the 8(a) program at the SBA. Under the reforms, while the 8(a) program would continue,

there would be a government-wide moratorium for at least two years on the use of programs that set contracts aside for bidding exclusively by small disadvantaged businesses (SDBs). At the end of two years, the need for such set-asides would be reevaluated.

Following publication of the proposal, we worked closely with the Department of Defense, the General Services Administration and other affected federal agencies in developing proposed regulations that embody the proposed reforms. In drafting the proposed regulations, these agencies considered over 1,100 comments that were received from the public regarding the May 23rd proposal. The agencies have completed a final draft of the necessary FAR and DFAR provisions, as well as an accompanying preamble. We should now move forward with publication of the proposed regulations.

I urge you to authorize the publication of the proposed regulations for these reasons:

First, it is my understanding that the President has already determined that the subject reforms are necessary to address constitutional concerns regarding federal procurement programs and to effectuate his "mend it, don't end it" policy. In May of last year, the President weighed the reasons for and against the reforms (including vigorous objections raised by several minority contracting groups) and, it is my understanding, personally authorized the publication of the proposal in the Federal Register. At the time the proposal was published, it was anticipated that we would issue proposed regulations in the fall. For a variety of practical and policy reasons, the process has taken longer. It has now been more than eight months since the publication of the proposal and I believe that we must soon publish the proposed regulations, lest the Administration be portrayed and perceived by the public as having reversed course and lessened its commitment to mend affirmative action programs.

Second, the reforms are essential if we are to avert having existing federal affirmative action procurement programs declared unconstitutional by the courts. The Justice Department believes that the proposed reforms are legally necessary to bring Federal affirmative action programs in line with the Adarand decision. Recently, we dodged a bullet when, in late November, Judge Sporkin of the D.C. District Court preliminarily enjoined the award of an 8(a) contract in Cortez III Service Corp. v. NASA. Fortunately, the scope of the Cortez decision was limited -- Judge Sporkin enjoined the award of an individual contract, rather than halting the entire 8(a) program. Notably, the judge also commented favorably, in his opinion, on the May 23rd reforms, suggesting that if they were in place he might not have enjoined the award of the contract. I share the concerns of John Schmidt, Deval Patrick and others that we are on borrowed time

and that, if we do not act soon to implement the reforms, a judge will enjoin an entire major procurement program. Even with the proposed changes, we face an uphill battle in defending federal affirmative action procurement programs in the courts. Moreover, we should not falsely assume that if we lose a major case, we will then be able to address the constitutional infirmities identified by the court by issuing the proposed regulation -- a court could rule on legal grounds that are simply nonremediable.

Third, further delay in issuing the proposed regulation could spark efforts in the Congress to pass legislation that would eliminate federal affirmative action in procurement. As you know, Congressman Canady and others have proposed legislation that would essentially ban federal affirmative action. Legislation has also been proposed to end the 8(a) program as we know it. Up until now, the Administration's steady progress in implementing the President's "mend it, don't end it" policy has thwarted passage of this legislation. But, we are at a critical juncture. Delaying the issuance of the proposed regulations could provide just the spark that opponents of affirmative action need to move their bill out of committee and onto the floor.

And finally, the reform proposal has been extensively vetted with members of Congress, various caucuses and representatives of civil rights and minority contracting groups, the wide majority of whom have reacted positively to the substance of the proposal. Before the reform proposal was published in May, White House staff and the Justice Department conducted a lengthy and intense effort to explain the legal rationale for, and details of, the reform proposal to key members of Congress, constituency groups and other interested individuals. In particular, White House and Justice officials met repeatedly with representatives of minority contracting groups. While significant changes were made in the proposal to address concerns raised at these meetings, two concerns raised by a few minority contracting groups were deemed so fundamentally flawed that they could not be accommodated -- exempting the SBA's 8(a) program from the scope of the proposal and allowing the immediate use of set asides (such as the "Rule of Two" program at the Department of Defense, which was suspended in October, 1995). We felt strongly then -- and continue to feel now -- that these modifications go to the heart of the proposed reforms and that the proposed reforms would be declared unconstitutional if these modifications were made. It is my understanding that ultimately the President was called upon to resolve these issues, and he concluded that the proposal should go forward without the modifications requested by the contracting groups. I believe it is important that we not reopen these matters. This is not to say that we should not have a dialogue. We have, in fact, repeatedly explained to the relevant groups why we need to proceed, have done so again within the last month, and should continue that dialogue as we proceed forward.

Please let me know if I can provide any additional information.