

THE WHITE HOUSE
WASHINGTON

Sent
cc
7/12/95

OFFICE OF THE STAFF SECRETARY

Fax Transmittal Sheet

TO: The Honorable Robert Reich

Fax Number: 219-7971

Phone Number: 219-6666

FROM: Todd D. Stern

SUBJECT: Presidential Note: "Worth reading. BC"

DATE: July 12, 1995

NUMBER OF PAGES (including cover sheet): 6

MESSAGE:

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Stanley K. Sheinbaum

THE PRESIDENT HAS SEEN
7/12/95

1. Ce: [unclear]
2. President

March 15, 1995

President Bill Clinton
The White House

via fax

TO VP
Laura
Bob Reich

Dear Bill:

The enclosed by Ed Luttwak is really worth your time. Luttwak is a very conservative guy who usually only writes about foreign affairs. However, lately he has been addressing himself to the dynamic changes in capitalism and what it is doing to the family and society in general. It will be in the upcoming issue of NPQ.

Warmly,

SKS/kc
enclosure

with reading
Re

cc: First Lady Hillary Rodham Clinton
George Stephanopoulos
Secretary Robert Reich

TURBO-CHARGED CAPITALISM VS. FAMILY "VALUES": THE ECONOMIC CONTRADICTIONS OF THE NEW CONSERVATIVES

EDWARD LUTTWAK A Senior Fellow at The Center for Strategic and International Studies in Washington, Edward Luttwak is author most recently of *The Endangered American Dream*, 1994. He also advises the Japanese Finance Ministry.

WASHINGTON — Long before "family values" became a political slogan, long before it became fashionable to celebrate stable communities, both were exactly what political conservatives everywhere strove to conserve above all else. At the same time, conservatives opposed state control of the economy, and therefore favored free-enterprise capitalism for the freedom it gave to individuals, quite aside from the proven prosperity it also assured. There was no sharp contradiction between the two because individuals, families and communities could absorb structural change — or at least most of them could, most of the time. The advent of turbo-charged capitalism now imposes a choice.

Those who value the stability of families and communities cannot at the same time advocate more deregulation and globalization which, conjointly, open the way for fast-paced technological change as well.

Those who value growing and dynamic innovation cannot at the same time demand stable families and communities. Not when jobs come and go, not when life-styles must abruptly change to keep up with the demands of the economy.

FAST WEALTH | That free-enterprise capitalism unobstructed by public regulations, cartels, monopolies, effective trade unions or cultural inhibitions as the ultimate engine of economic growth is an old truth now disputed by only a few, aged Stalinists.

That free-enterprise capitalism achieves growth so well because its relentless competition destroys inefficient firms and entire industries, thus allowing more efficient firms and industries to rise in their place, has long been understood.

And, finally, that the economic gains achieved by such "creative destruction" must have some social cost insofar as working lives and therefore families, firms and therefore communities, entire industries and therefore nations are disrupted is another old truth first recognized more than a century ago.

What is new about free-enterprise capitalism today is only a matter of degree — a mere acceleration in the speed of creative destruction at any given rate of economic growth. But that, as it turns out, is quite enough to make all the difference. We now live in a new era of "turbo-charged capitalism."

Structural change is now quite fast even when there is no growth, and it becomes much faster when the economy does grow. In the process, more disruption is being inflicted upon working lives, firms, and entire industries than many individuals can absorb, or the connective tissue of many families, communities or even complete nations can withstand.

The disintegration of American families, the breakdown of once meaningful communities into mere localities in many parts of the world, and the recent upheavals in places like Mexico are the products of the same disruptive force. Only the scale of the damage is different.

Unlike Italians or the Spanish for that matter, most Americans have had no cousins in working order for quite some time, that is, as real family members from whom they could export material as well as moral help when in need. That is how Spain can have a 23 percent unemployment rate without starvation or revolution. With the advent of turbo-capitalism, Americans are in the process of losing their siblings as well as parents losing their children and children their parents. As they say, life moves or is moved for them, too fast for people to keep up with each other, to maintain the connective tissue in working lives.

GLOBALIZATION | One obvious cause of accelerated structural change is the world-wide retreat of public ownership, central planning and commercial regulation, with all their rigidities that slowed innovation.

But of course the most widely noticed cause of accelerated and drastic structural change is "globalization" — the unification of the puddles,

2

ponds, lakes, and seas of village, provincial, regional and national economies into a single global economic ocean, and thus their exposure to oceanic waves of competition instead of mere ripples or gradual tides.

More important than the removal by treaty of formal trade barriers is the geographic spread of reliable, cheap and instant telecommunications that ease the formation of new commercial relationships both materially and psychologically. Companies are now willing to rely on foreign subcontractors for components, knowing that they can keep in touch with them in "Real Time."

There are other factors as well: Diminishing transport costs and the waning material content of commerce; the diffusion of up-to-date technologies for the production of export goods or components, even within otherwise backward local economies; and the hammering down of once diverse consumer preferences into uniformity by transnational mass media imagery and advertising.

The overall effect of "globalization" is that any production anywhere can expand enormously, far beyond the limits of the domestic market, insofar as it is competitive. By the same token any production anywhere and the related employment can be displaced at any time by cheaper production from someplace else in the whole world. Life in the global economy is full of exciting surprises — and catastrophic downfalls.

THE INDUSTRIAL OFFICE | Still another cause of disproportionately rapid structural change is the "industrialization" of office work, a rather belated product of the electronic computer and associated machines. Because of generational change, even senior managers now know how to work office electronics, allowing them to understand their uses, abuses and non-uses. Computer networks allow managers at the next level up to literally oversee, right on their own screens, the work that their underlings are doing or not doing. The result is that office work is increasingly as transparent as assembly-line work has been from the start, immediately revealing inefficient procedures and unproductive employees.

The long-awaited, long-delayed increase in the efficiency of office-work has finally arrived, brutally exposing until now secure white-collar employees to the work-place dislocations, mass firings employment insecurity and declining real wages that have long been the lot of blue-collar workers in mature industrial economies.

At the present time even though the United States economy is growing at a "torrid" rate (in Federal Reserve Chairman Alan Greenspan's word), white-collar job reductions by the thousands are still being announced by one famous corporation after another. They call it "restructuring" or more fancifully "re-engineering the corporation," and duly decorate the proceedings with the most recently fashionable management-consultant verbiage. But the real economies that Wall Street anticipates by bidding up the shares, thereby incidentally hugely rewarding mass-firing top executives who have stock options, come not from the background music of management-consultant talk but rather from the displacement of telephone-answering secretaries by voice-mail systems, the displacement of letter-writing secretaries by computer word-processing and faxboards, the consequent displacement of clerical supervisors, the displacement of junior administrators by automated paperflow processing, the consequent displacement of administrative supervisors, and finally — and most of all — from the displacement of middle managers no longer needed to supervise the fired clerical and administrative employees.

TOO FAST TO ADAPT | There are perhaps still other or better explanations for the advent of turbo-charged capitalism with its greatly accelerated structural change, but what is certain is the result: The creative destruction of old skills, firms and entire industries are now apt to span years rather than generations — often, only a very few years. That clearly favors global prosperity but brutally exceeds the adaptive limits of many individual families and communities.

When the sons and daughters of US steelworkers, British coalminers or German welders must become software-writers, teachers, lawyers or, for that matter, shop attendants

(3)

because the respective paternal industries offer less and less employment, few have reason to complain. But when the same mechanisms of change work so fast that steelworkers, coalminers or welders must themselves abandon lifetime proclivities to acquire demanding new skills on penalty of chronic unemployment or unskilled low-wage labor for life, failure and frustration are the likely results.

To be sure nothing could be more old-fashioned than to worry about the fate of hopelessly passé blue-collar workers. So the big news is the dislocation of white-collar employment as well. Job turn-over statistics are irrelevant, for no statistics can measure the felt job-insecurity of employees who are well aware of the rapid economic transformations of our times which they do not control, but which control them.

For now, the Republicans who contrive to celebrate, advocate and demand both economic change and social stability may be unaware of the huge contradiction between the two. For now they may know, but still count on the fact that their fellow Americans do not yet know that in the turbo-capitalist era, it is one or the other, not both. But they will find out soon enough.

Technologism is the religious belief that tech-change is both always good for all and unstoppable. Technology is not an independent force, it can be revised easily by even weak regulations. As for this writer, I believe that the economy should serve society — not the other way around.

Pullquote — Those who value growing and dynamic innovation cannot at the same time demand stable families and communities.

Pullquote — We now live in a new era of "turbo-charged capitalism."

Pullquote — The long-awaited, long-delayed increase in the efficiency of office-work has finally arrived, brutally exposing untill now secure white-collar employees.

Pullquote — The economy should serve society — not the other way around.

[BOX]

THE CASE OF THE AIRLINES

The exemplary American case is the deregulation of the airline industry. When still highly regulated, with their assigned routes and fixed air fares, US airlines were moderately inefficient, moderately over-staffed, consistently profitable and very stable, commonly offering life-time jobs for their employees, and a stable customer base for the aircraft industry. Relatively high air fares paid for that, hence Americans with more time and less money habitually traveled by rail or bus, even over long distances.

Since deregulation, Braniff, Eastern, Pan-Am and many lesser airlines have disappeared in bankruptcies, surviving airlines have become much more efficient, wages and salaries have been sharply reduced (except for top executives who earn much more than before), and fares are now so low that even Americans with ample free time and little money habitually travel by air.

Themselves financially unstable because of waves of competitive fare-cutting, US airlines are no longer reliable customers for the aircraft industry. Sudden mass cancellations of options or even "firm" orders have become very common, destabilizing an industry that has long lead times. Lockheed no longer makes airliners; McDonnell-Douglas can no longer develop new airliners on its own (and seeks foreign partners at the price of sharing its key technologies) and Boeing's future is only secure because of sales to foreign airlines — whose orders are reliable because most are still highly regulated.

From a strictly economic point of view, the greater efficiency brought about by unregulated competition justifies all. But from a social point of view there is no such compensation. With its stable, well-paid jobs, the regulated airline industry of the past enhanced the stability of employee's families and their communities as

well as those of the aircraft industry that supplied the airlines.

Today's chaotically unstable airlines are by contrast very disruptive, as they rapidly expand or drastically shrink over a matter of months or even weeks, as they abruptly shift "hubs" and maintenance bases from one place to another, each time hiring and firing employees in their constant maneuvering. It would be a nice bit of sociological research to calculate the number of divorces (and therefore problem children) caused by deregulation-induced economic stresses on the families of airlines employees.

THE PRESIDENT HAS SEEN

7-14-95

CR/cc Leon

need reply

Be

Jim Dorskind

Please coordinate
the reply.

Sent Jim D
original



Center on Addiction
and Substance Abuse
at Columbia University

THE PRESIDENT HAS SEEN
7-14-95

July 13, 1995

152 West 57th Street
New York, NY 10019 3310

phone 212 841 5200
fax 212 956 8020

President Bill Clinton
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

Newspaper reports this morning indicate that you are considering what action to take based on the conclusion of Food and Drug Administration Commissioner David Kessler that cigarettes are a drug and should be regulated.

I urge you to take every possible action to keep tobacco out of the hands of our nation's children. The battle against smoking in America is, above all, a battle for America's children. Virtually every individual who is addicted to cigarettes is hooked before the age of 21.

Our children are crying out for help. The Center on Addiction and Substance Abuse at Columbia University (CASA) has commissioned the most comprehensive survey of American attitudes toward all substance abuse ever undertaken, which we will release on Monday morning. This survey of 2,000 adults and 400 adolescents, conducted by the Luntz Research Companies, reveals that 84 percent of 12 to 17 year-olds consider cigarettes a serious problem for kids their age. That's more than the number who consider alcohol (68 percent), marijuana (61 percent), LSD, cocaine or heroin (37 percent) a serious problem.

The CASA survey demonstrates that children know the dangers of cigarettes: 82 percent consider them dangerous to their health, while 81 percent consider marijuana dangerous and 80 percent consider beer and wine dangerous. Despite this awareness, year after year, thousands of 12 to 17 year-olds get hooked on cigarettes.

Unquestionably, the easy access our children have to tobacco and the glamorization of smoking must be ended. Eighty-seven percent of 12 to 17 year-olds say that cigarettes are easy to get. In focus groups, children repeatedly cite movie characters as making smoking look "cool."

I hope you will do everything you can to encourage enforcement of laws prohibiting sales to minors, outlaw vending machines, curb advertising designed to appeal to children and prohibit tobacco

1. C. C. Rosco
D. J. M.
R. J. M.
2. Pres.

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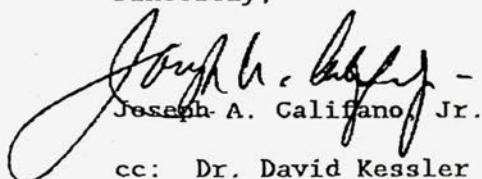
President Bill Clinton
July 13, 1995
Page 2

companies from paying producers to have characters smoke and display tobacco brands in movies and television shows.

I applaud your efforts to encourage the entertainment industry to be more responsible about violence and drugs, and I hope you will use your bully pulpit to press the industry to refuse payments from tobacco companies who want to put cigarettes in the hands of our children's entertainers.

What is at stake is the health of our children. That's what makes the recommendations of the FDA so important to our nation.

Sincerely,


Joseph A. Califano, Jr.

cc: Dr. David Kessler

FACSIMILE

CENTER ON ADDICTION AND SUBSTANCE ABUSE
AT COLUMBIA UNIVERSITY
152 WEST 57TH STREET
NEW YORK, NEW YORK 10019
(212) 841-5200

FAX NO.#: (212) 956-8020

TO: President Bill Clinton

FROM: Joseph A. Califano, Jr.

DATE: July 13, 1995

FAX NO.#: (202) 456-6703

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Number of Pages: 3
CASA Account Code: 500

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711 FIFTH AVENUE, SUITE 900

NEW YORK, NY 10022

212/339-2579

FAX: 212/832-8023

To: The Honorable William J. Clinton **Date:** July 14, 1995
Fax #: 202/456-1121 **Pages:** 3, including this cover sheet.
From: William J. vanden Heuvel
Subject: Bosnia

COMMENTS:

Tony / Stanley
This is worth considering
CC VP / L. Fuent
Poc

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July 14, 1995

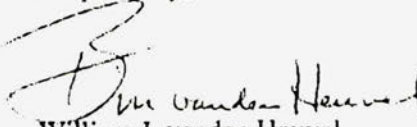
The Honorable William J. Clinton
President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

As we discussed on July 7th, the Bosnian situation is at a crisis point in terms of the United Nations and our relationship to Europe. It has been my judgment for some time that our best option was to withdraw from the indefensible safe havens and regroup in Sarajevo, committing all necessary allied strength to resist any assaults on Sarajevo. The United Nations would make it clear through a Security Council resolution that this was basically a humanitarian effort to protect the innocent victims of the war, but that this humanitarian effort would have the military capacity to resist any and all efforts to undermine it, including the use of NATO air power. While assuring the defense of Sarajevo we would continue intensive, diplomatic, political and economic efforts to bring peace. By withdrawing the vulnerable United Nations peacekeepers from the present safe haven areas, we would make it possible to use air power in a productive manner.

Richard Haass had a column in *The Washington Post* yesterday (July 13th) which states my position. The United Nations has been humiliated and left vulnerable to its enemies. Unless we are prepared to support Sarajevo as a protected safe haven, we should encourage the departure of the U.N. without delay and prepare ourselves for the barbaric consequences.

Respectfully,


William J. vanden Heuvel

Bill vanden Heuvel

*Encourage
departure from
Bosnia*

THE WASHINGTON POST

JULY 13, 1995

Richard N. Haass

Bosnia Can Still Be Saved

The loss of Srebrenica is a political and human tragedy. But it will be even worse if the idea of safe havens is discredited, for they still have the potential to help keep people alive in Bosnia and other places torn by ethnic conflict.

Safe havens are zones carved out within a country by outside powers in which people are protected from either the central government or a rival ethnic group. The idea is not to assert sovereignty but to deny it to those who abuse its powers or fail to live up to its obligations.

To be effective, safe havens require significant air and a modest number of ground forces inside and around their perimeter. Safe havens also require the establishment (and enforcement) of a weapons-exclusion zone around the area and a no-fly zone over it. Air forces must be prepared to carry out disproportionately large punitive attacks on those who violate the area in any way.

This is akin to what the French did for a time in Rwanda—and what the United States is doing in Northern Iraq. The no-fly zone over Bosnia and the exclusion zone around Sarajevo and five other designated cities might have been additional examples, but for the delay in introducing it and the absence of will to carry out meaningful punitive action.

Safe havens have drawbacks. They are open-ended, offering no guaranteed exit date. Some pilots and ground troops will be lost in defending them. Except in situations where an endangered population already is concentrated in one area, establishing zones can either fail to protect some people or force them to migrate to safety, thereby rewarding the aggressor.

Safe havens are limited in what they can accomplish. Humanitarian interventions should not be confused with more ambitious interventions, especially peace-making and nation-building. They are designed to provide a respite from the problem at an affordable cost, not a solution. They are needed until the politics of the situation evolve, to buy time for other approaches—sanctions, covert action, providing arms, diplomacy—to work.

Safe havens can still work in Bosnia. The United States and selected allies could establish a large safe haven around Sarajevo (that would include Tuzla) and at least one more in the northwest to protect the bulk of the Bosnians. Srebrenica is lost; it is probably too late to save Zepa and Gorade. Safe havens could provide protection to most Bosnians once the current U.N. force was withdrawn and the arms embargo was ended and if the Serbs determined to press the attack before the

new weapons could shift the balance. It would be up to Bosnian soldiers to liberate their territory; our role (in addition to providing arms and maintaining sanctions) would be to keep children, women and the elderly alive in the meantime.

Building true safe havens in Bosnia would be a feasible mission with modest costs and risks—something neither more nor less than our interests there dictate.

Less than vital interests do not justify the cost in blood or treasure of becoming a full protagonist. Who would favor or even tolerate the Haiti intervention if Americans were dying in droves? Eighteen deaths were enough to drive us from Somalia. The notion of America's sending in several divisions to fight alongside the Bosnians is a non-starter.

But standing aside amid such crises is no better. For good reason we would not be comfortable with ourselves. Moreover, our inaction runs the risk of setting the stage for larger conflicts where important or even vital strategic interests are placed at risk.

The writer, who directs the national security programs for the Council on Foreign Relations, worked in the National Security Council in the Bush administration.

THE WHITE HOUSE
WASHINGTON

✓ Sent
95 JUL 14 P 9:58

OFFICE OF THE STAFF SECRETARY

Fax Transmittal Sheet

TO: Eli Segal

Fax Number: 565-2784

Phone Number:

FROM: Todd Stearn

SUBJECT: CC

DATE: 7-14-95

NUMBER OF PAGES (including cover sheet): 5

MESSAGE:

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THE WHITE HOUSE
WASHINGTON

07/14/95

JIM DORSKIND:

Please coordinate reply with
Eli Segal.

Thanks.

Todd Stern

cc: Eli Segal

STATE OF LOUISIANA
OFFICE OF THE LIEUTENANT GOVERNOR

95 JUL 14 P3:02

MELINDA SCHWEGMANN
LIEUTENANT GOVERNOR
AND
COMMISSIONER
DEPARTMENT OF CULTURE,
RECREATION AND TOURISM

P. O. BOX 44243
BATON ROUGE, LOUISIANA 70804
(504) 342-7009
FAX (504) 342-1849

July 13, 1995

President William J. Clinton
The White House
Washington, D.C.

Dear Mr. President:

I am writing today to request your help in supporting the Delta Service Corps, an organization about which you are quite familiar! The Delta Service Corps' renewal application for continued funding as an "AmeriCorps National Direct Grantee" is currently being considered by the Corporation for National Service.

The Delta Service Corps has made its mark on communities in which it operates and is making tremendous progress in addressing the challenges laid out by the Lower Mississippi Delta Commission's report. It has also proven to be a leader among AmeriCorps programs. Yet because of proposed Congressional budget cuts in the AmeriCorps program, which I know helped lead to your veto of the original budget rescissions bill, and the Corporation's desire to spread its resources as widely as possible, the Delta Service Corps is facing significant challenges in maintaining its position as the recipient of one of the largest AmeriCorps grants. The Delta Service Corps' grant request of \$3.2 million will permit 300 residents of Arkansas, Louisiana, and Mississippi to serve as AmeriCorps members during the 1995-96 program year.

Mr. President, I have witnessed first hand the tireless efforts of Delta Service Corps members and the difference they have made in the lives of thousands of Louisianians. They tutor children in rural and under-resourced schools, teach literacy classes to adult non-readers, distribute food and medicines to homebound seniors, build houses for low-income families, and provide living assistance to persons with AIDS. When floods hit South Louisiana in May, Delta Service Corps members joined other AmeriCorps members in providing immediate help to those families most in need. In Louisiana, over 200 corps members have served with nearly 150 non-profit or government agencies in addressing community needs in 30 parishes. They have earned over \$600,000 in education awards that will enable them to return to college or vocational school or repay student loans.

Here are just a few examples of our corps members' accomplishments:

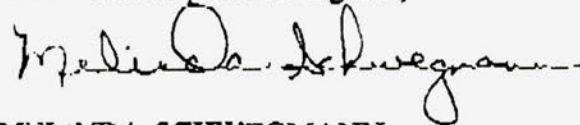
- In Baton Rouge, Esclamonda Fisher has proven to the teachers of a local elementary school that the low-achieving students she tutors can become high achievers with one-on-one attention in her "positive thinkers" program.

- In Grand Coteau, Daniel Guilbeau has brought an abandoned city park back to life through a clean-up, new landscaping and athletic facilities. He has established volunteer-run basketball and soccer leagues that provide 80 young people a week with safe, adult-supervised after school activities.
- Working with the Alexandria Museum of Art, Mark Byrd has delivered interactive, hands-on arts education to 3000 Central Louisiana fourth and fifth graders through his mobile art van.

I would greatly appreciate your letting Eli Segal at the Corporation for National Service know of your interest in seeing the Delta Service Corps be fully-funded. It is of great importance to the people of the Lower Mississippi Delta, a region where federal and state support has always been too thin.

Thank you for your strong leadership of our great nation and for the priority you have placed on the AmeriCorps program. If I may ever be of assistance to you, please do not hesitate to let me know.

With warmest personal regards,



MELINDA SCHWEGMANN
Lieutenant Governor

cc: Eli J. Segal
Corporation for National Service

Welfare Reform Daily Talking Points
Friday, July 14, 1995

LET'S GET THE JOB DONE

Yesterday, President Clinton, Secretary Shalala, and Democratic members of Congress called on Senate Republicans to stop practicing "just say no politics" and move forward in creating a strong, bipartisan welfare reform bill that the President can sign. "While Senate Republicans have fumbled with welfare reform," the *Washington Times* reports today, "Senate Democrats ... have unveiled a welfare reform proposal that has been endorsed by Mr. Clinton." And Reuters adds that "Democrats are united behind their own bill." We're ready to proceed. As the President said yesterday, "it's time to move away from the extreme position toward the common ground of sensible welfare reform."

- o **What's the holdup?** The *Washington Times* reports today, "Welfare reform has been stalled in the Senate since the Finance Committee passed its bill in May with tepid support." As President Clinton said yesterday "some people on the far right are blocking any action on welfare reform that doesn't cut off children and parents if the parents are poor, young, and unmarried. I think that's a terrible mistake. We shouldn't punish babies for their parents' mistakes. We ought to be building strong families and independent workers."
- o **Falling short of reform.** As Senator Breaux said yesterday, the Senate Finance bill would fail to provide states with enough money to move people into jobs. "Because the GOP bill doesn't provide new resources for child care and work programs, states would have to raise taxes to pay for the new costs," Breaux noted. "In short, their welfare bill is an enormous unfunded mandate on state and local governments -- a \$35 billion unfunded mandate over the next seven years." Over seven years, California and New York would have to raise an additional \$5.3 billion and \$3.4 billion respectively in order to comply with the Senate Finance bill's work requirements.
- o **We know what works.** "Now, there is an alternative," the President said yesterday. "We basically all agree on what ought to be in a welfare reform proposal." Our "Work First" bill would get the job done. This plan includes all of the elements necessary to move young parents into the work force. It also promotes parental responsibility, protects children, strengthens child support enforcement, and give states the flexibility and the tools they need to succeed.
- o **It's time to get the job done.** As the Associated Press reports, President Clinton believes that "lawmakers should be able to build on a developing consensus to overhaul the nation's welfare system." Senator Breaux said yesterday that "it's time Democrats and Republicans pass welfare reform legislation based on the mainstream principles we can all agree on: work and responsibility." As President Clinton noted, "every day without welfare reform drains our economic strength, saps our community spirit, and prevents all Americans from living up to their full potential. We need to work together and get this job done."

STATE OF LOUISIANA
OFFICE OF THE LIEUTENANT GOVERNOR

95 JUL 14 P3:02

MELINDA SCHWEGMANN
LIEUTENANT GOVERNOR
AND
COMMISSIONER
DEPARTMENT OF CULTURE,
RECREATION AND TOURISM

P. O. BOX 44243
BATON ROUGE, LOUISIANA 70804
(504) 342-7009
FAX (504) 342-1949

July 13, 1995

President William J. Clinton
The White House
Washington, D.C.

Dear Mr. President:

I am writing today to request your help in supporting the Delta Service Corps, an organization about which you are quite familiar! The Delta Service Corps' renewal application for continued funding as an "AmeriCorps National Direct Grantee" is currently being considered by the Corporation for National Service.

The Delta Service Corps has made its mark on communities in which it operates and is making tremendous progress in addressing the challenges laid out by the Lower Mississippi Delta Commission's report. It has also proven to be a leader among AmeriCorps programs. Yet because of proposed Congressional budget cuts in the AmeriCorps program, which I know helped lead to your veto of the original budget rescissions bill, and the Corporation's desire to spread its resources as widely as possible, the Delta Service Corps is facing significant challenges in maintaining its position as the recipient of one of the largest AmeriCorps grants. The Delta Service Corps' grant request of \$3.2 million will permit 300 residents of Arkansas, Louisiana, and Mississippi to serve as AmeriCorps members during the 1995-96 program year.

Mr. President, I have witnessed first hand the tireless efforts of Delta Service Corps members and the difference they have made in the lives of thousands of Louisianians. They tutor children in rural and under-resourced schools, teach literacy classes to adult non-readers, distribute food and medicines to homebound seniors, build houses for low-income families, and provide living assistance to persons with AIDS. When floods hit South Louisiana in May, Delta Service Corps members joined other AmeriCorps members in providing immediate help to those families most in need. In Louisiana, over 200 corps members have served with nearly 150 non-profit or government agencies in addressing community needs in 30 parishes. They have earned over \$600,000 in education awards that will enable them to return to college or vocational school or repay student loans.

Here are just a few examples of our corps members' accomplishments:

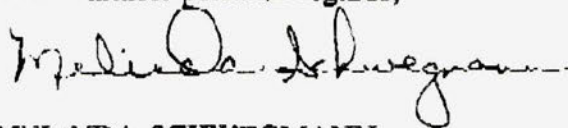
- In Baton Rouge, Esclamonda Fisher has proven to the teachers of a local elementary school that the low-achieving students she tutors can become high achievers with one-on-one attention in her "positive thinkers" program.

- In Grand Coteau, Daniel Guilbeau has brought an abandoned city park back to life through a clean-up, new landscaping and athletic facilities. He has established volunteer-run basketball and soccer leagues that provide 80 young people a week with safe, adult-supervised after school activities.
- Working with the Alexandria Museum of Art, Mark Byrd has delivered interactive, hands-on arts education to 3000 Central Louisiana fourth and fifth graders through his mobile art van.

I would greatly appreciate your letting Eli Segal at the Corporation for National Service know of your interest in seeing the Delta Service Corps be fully-funded. It is of great importance to the people of the Lower Mississippi Delta, a region where federal and state support has always been too thin.

Thank you for your strong leadership of our great nation and for the priority you have placed on the AmeriCorps program. If I may ever be of assistance to you, please do not hesitate to let me know.

With warmest personal regards,



MELINDA SCHWEGMANN
Lieutenant Governor

cc: Eli J. Segal
Corporation for National Service

**Welfare Reform Daily Talking Points
Friday, July 14, 1995**

LET'S GET THE JOB DONE

Yesterday, President Clinton, Secretary Shalala, and Democratic members of Congress called on Senate Republicans to stop practicing "just say no politics" and move forward in creating a strong, bipartisan welfare reform bill that the President can sign. "While Senate Republicans have fumbled with welfare reform," the *Washington Times* reports today, "Senate Democrats ... have unveiled a welfare reform proposal that has been endorsed by Mr. Clinton." And Reuters adds that "Democrats are united behind their own bill." We're ready to proceed. As the President said yesterday, "it's time to move away from the extreme position toward the common ground of sensible welfare reform."

- o **What's the holdup?** The *Washington Times* reports today, "Welfare reform has been stalled in the Senate since the Finance Committee passed its bill in May with tepid support." As President Clinton said yesterday "some people on the far right are blocking any action on welfare reform that doesn't cut off children and parents if the parents are poor, young, and unmarried. I think that's a terrible mistake. We shouldn't punish babies for their parents' mistakes. We ought to be building strong families and independent workers."
- o **Falling short of reform.** As Senator Breaux said yesterday, the Senate Finance bill would fail to provide states with enough money to move people into jobs. "Because the GOP bill doesn't provide new resources for child care and work programs, states would have to raise taxes to pay for the new costs," Breaux noted. "In short, their welfare bill is an enormous unfunded mandate on state and local governments -- a \$35 billion unfunded mandate over the next seven years." Over seven years, California and New York would have to raise an additional \$5.3 billion and \$3.4 billion respectively in order to comply with the Senate Finance bill's work requirements.
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THE WHITE HOUSE
WASHINGTON

07/14/95

JIM DORSKIND:

Please coordinate reply with
Eli Segal.

Thanks.

Todd Stern

cc: Eli Segal

7/14

OK to send to

Dorskind

OK:

to coordinate
reply w/
Eli Segal
+ cc Eli

John Dalton's this book?

7/14/95

Red

July 17, 1995

Dear Representative Dellums:

In letters of September 1994 and February 9, 1995, you and a number of your colleagues asked me to review the 1944 Port Chicago incident with a view toward either having the convictions of the sailors in question expunged or finding "other means of recognizing their contribution to our country."

As you know, Secretary Perry and Secretary of the Navy Dalton, after extensive review of this case last year, determined that the circumstances of the sailors' cases did not provide a basis for expunging their convictions. In response to your letters, I asked Secretary Perry and Secretary Dalton to consider whether any appropriate action might be taken.

I am now pleased to forward to you a statement of Secretary Dalton recognizing the brave and honorable service these men rendered their country during trying times in which they were exposed not only to the dangers of handling war materiel, but also to the indignities of racial prejudice.

I thank you for bringing this matter to my attention and hope that Secretary Dalton's statement will help set the historical record straight.

Sincerely,

Red dot to
John
Angell

Todd:

Is this okay?

Nancy was ^{95 JUL 14 PM 2:02} ~~there~~ with her

Pls. Let Hancock know ASAP.

Thanks. OK w/
edctb,

1 -

Given to Doug Seavick's
office 7/14/95

BILL CLINTON

DRAFT

July 14, 1995

FIELD(1)

Dear FIELD(2):

Thank you for serving on the Steering Committee of the Arkansas Presidential Luncheon and for making the event such a tremendous success. It was nice to see so many old friends who have supported Hillary and me for so many years.

It is hard to believe ^{are helping to} that the reelection campaign has begun. Your leadership and tireless efforts have given us the resources we need to communicate our message of accomplishment to all Americans. Your support of my Administration and of the Clinton-Gore '96 Primary Committee has proved critical to our efforts and will be increasingly important in the coming months.

Thanks again for always being there when you're asked to help out. I look forward to continuing to work with you.

Hillary and I send our warmest regards and hope to see you again soon.

Sincerely,

P.O. BOX 19300 WASHINGTON, D.C. 20036-9300

Paid for by the Clinton/Gore '96 Primary Committee, Inc. Contributions to Clinton/Gore '96 are not Tax Deductible

DRAFT

BILL CLINTON

July 14, 1995

FIELD(1)

Dear FIELD(2):

are helping to

Thank you for serving as a Co-Chair of the New Jersey Presidential Dinner and for making the event such a tremendous success. Your leadership and tireless efforts ~~have~~ *are* giving us the resources we need to communicate our message of accomplishment to all Americans.

Your support of my Administration and of the Clinton-Gore '96 Primary Committee has proved critical to our efforts and will be increasingly important in the coming months.

Thanks again for always being there when you're asked to help out. I look forward to continuing to work with you.

Hillary and I send our warmest regards and hope to see you again soon.

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P.O. BOX 19300 WASHINGTON, D.C. 20036-9300

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BILL CLINTON

DRAFT

July 14, 1995

FIELD(1)

Dear FIELD(2):

are helping to join

Thank you for serving as a Co-Chair of the Illinois Presidential Dinner and for making the event such a tremendous success. Your leadership and tireless efforts ~~have given~~ us the resources we need to communicate our message of accomplishment to all Americans.

Your support of my Administration and of the Clinton-Gore '96 Primary Committee has proved critical to our efforts and will be increasingly important in the coming months.

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P.O. BOX 19300 WASHINGTON, D.C. 20036-9300

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THE WHITE HOUSE
WASHINGTON

07/13/95

THE VICE PRESIDENT
LEON PANETTA
HAROLD ICKES
ERSKINE BOWLES
MIKE MCCURRY
MAGGIE WILLIAMS
KITTY HIGGINS

The attached has been forwarded
to the President.

Todd Stern

Draft July 13, 1995

AFFIRMATIVE ACTION REVIEW 95 JUL 13 P10:53
OUTLINE OF THE REPORT

1. INTRODUCTION

- 1.1 Purposes of the Review
- 1.2 Analytical framework
- 1.3 The *Adarand* Review

2. AFFIRMATIVE ACTION: HISTORY AND RATIONALE

- 2.1 Background
- 2.2 Fair Employment -- The Executive Order
- 2.3 Fair Employment -- The Enforcement of Title VII
- 2.4 Education
- 2.5 A Note on Affirmative Action for Other Minorities

3. HAS AFFIRMATIVE ACTION WORKED?

- 3.1 Review of the empirical literature, in summary
- 3.2 Effect on earnings
- 3.2 Effect on employment

4. THE FIRST RATIONALE FOR AFFIRMATIVE ACTION: THE CONTINUING PROBLEM OF DISCRIMINATION

- 3.1. Evidence of continuing discrimination
- 3.2. Results from random testing
- 3.3 Continuing disparities in economic status

5. REVIEW OF THE PROGRAMS

6. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

- 6.1 Concepts & Principles
- 6.2 Policies & Practices
- 6.3 Performance & Effects
- 6.4 A Note on OFCCP Anti-Discrimination Enforcement Functions
- 6.5 Conclusions and recommendations

7. AFFIRMATIVE ACTION IN THE MILITARY

- 7.1 Concepts & Principles
- 7.2 Policies & Practices
- 7.3 Performance & Effects
- 7.4 Implications
- 7.5 Conclusions and recommendations

8. FEDERAL CIVILIAN EMPLOYMENT AFFIRMATIVE ACTION

- 8.1 History and Results
- 8.2 Summary Profiles for Selected Agencies
- 8.3 Affirmative Action for a Shrinking Federal Workforce
- 8.4 Conclusions and recommendations

9. FEDERAL PROCUREMENT POLICIES & PRACTICES

- 9.1 Overview
- 9.2 Policies & Practices
- 9.3 Performance & Effects
- 9.4 Evaluations & Proposed Reforms
- 9.5 Conclusions and recommendations

10. EDUCATION AND HHS POLICIES & PRACTICES

- 10.1 Overview
- 10.2 Policies & Practices
- 10.3 Performance & Effects
- 10.4 Concerns & Complaints
- 10.5 A Note on Minority-Targeted Scholarships
- 10.6 Conclusions and recommendations

11. SELECTED OTHER FEDERAL POLICIES: THE FCC AND THE DEPARTMENTS OF TREASURY, AGRICULTURE AND HUD

- 11.1 FCC Preferences and Targeting
- 11.2 The Treasury: Minority Bank Deposits
- 11.3 Agriculture Programs
- 11.4 Housing and Urban Development
- 11.5 Conclusions and Recommendations

[draft 2]

[White House Stationary]

TO THE PRESIDENT:

We are pleased to submit the report on the Review of Federal Affirmative Action Programs. When you requested this analysis four months ago, you stated your belief that a candid and balanced description of these programs, including a discussion of what is known about their strengths and weaknesses, would provide a valuable starting point for a national conversation on the challenges of creating truly equal opportunity. In that spirit, dozens of Administration officials have analyzed the details of programs together with analyses from many sources. This Report summarizes that evidence and, where appropriate, offers preliminary conclusions of fact based on that evidence. In addition, we have taken the policy principles you provided at the beginning of our effort and applied those in a preliminary fashion to the key programs. The result is a set of policy recommendations for your consideration.

Several of our conclusions and recommendations, however, must be considered tentative and provisional, because the intervening Supreme Court decision in *Adarand Constructors, Inc. v. Peña* now requires that many such judgments be based on the much more detailed empirical analysis entailed by the constitutional standard of "strict scrutiny." Nevertheless, we believe our preliminary views are responsive to your request, and will be a useful starting point for the Attorney General and the agencies as they work to ensure full compliance with *Adarand*.

We want to note the special contributions of Peter Yu and Michael Waldman in preparing this Report, together with the diligent and thoughtful participation of the Steering Committee of subcabinet and senior officials who worked with us in conducting the review itself. We and the Steering Committee were supported by an outstanding team of policy analysts and attorneys drawn from several agencies.

Finally, we want to express our appreciation to you for this opportunity and challenge. We hope this Report will serve well in the ongoing debate over affirmative action.

George Stephanopoulos
Senior Adviser to the President

Christopher Edley, Jr.
Special Counsel to the President

1. INTRODUCTION

1.1 Purposes of the Review

On March 7, 1995, President Clinton directed that a review be conducted of the Federal government's affirmative action¹ programs. The President asked the following questions:

- **Descriptions.** What kinds of Federal programs and initiatives are now in place, and how are they designed?
- **Performance.** What is known about their effects -- benefits and costs, direct and indirect, intended and unintended -- both to the direct beneficiaries and to others? In short, how are they run? Do they work? Are they fair?

In preparing this report, we analyzed federal programs that might be categorized as affirmative action. These programs range from outreach efforts that encourage grantmakers to seek out members of disadvantaged groups, to procurement regulations that set aside particular contracts for competitive bidding limited largely to minority-owned, economically disadvantaged small businesses.

The report first sets forth the framework we used to analyze these programs. It then describes the evolution of affirmative action, as policymakers sought to make real the promise of the civil rights legal breakthroughs. It then summarizes the evidence of discrimination and exclusion today, followed by a brief review of the overall effectiveness of affirmative action in remedying discrimination. All of this provides the context for considering current affirmative action programs in more detail. Several sections describe the government's major affirmative action programs, and applies to those programs the policy test set forth by the President.

¹"Affirmative action" enjoys no clear and widely shared definition. As a result, it has been the subject of great miscommunication. We begin therefore with a definition:

For purposes of this review, "affirmative action" is any effort, beyond enforcement of the antidiscrimination laws, taken to expand opportunity for racial and ethnic minorities and women by using membership in those traditionally disadvantaged groups as a consideration in decisionmaking of some kind.

For economy of language, in this document the use of the word "race" (e.g., "race-targeted scholarship") also refers to membership in a disadvantaged ethnic group.

The discussion of these programs is necessarily a preliminary analysis. The Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*² changed the standard of legal analysis required to determine the constitutionality of affirmative action programs. The first and most fundamental question in any policy test must concern the constitutionality of the program. Accordingly, on June 28, 1995 the Department of Justice issued guidance to federal agencies for use in reviewing existing programs under the new, stricter *Adarand* standards. This document is not intended to bear on the legal determination whether any particular program satisfies the constitutional standard advanced in *Adarand*.

1.2. Analytical framework

Affirmative action produces deep feelings on all sides. A clearheaded analysis of this subject, then, must begin with the question: What is the purpose of affirmative action? Is it the same in all circumstances? How does that purpose intersect with other goals of our governmental and legal system? This section outlines the framework for analyzing affirmative action that was followed in the course of this review. It provides a basis for analyzing the success and fairness of the government's existing programs -- and for concluding whether a particular program should be retained, reformed or replaced.

1.2.1. Basic premise: equal opportunity

The tests that we apply are based on a fundamental premise: the goal of any affirmative action program must be to promote equal opportunity. Offering every American a fair chance to achieve success is a central tenet of our constitutional and political system, and is a bedrock value in our culture. It is the fundamental goal of the civil rights statutes -- and of affirmative action as well. More particularly, however, affirmative action is one of several tools used in the public and private sectors to move us away from a world of lingering biases and the poisons of prejudice, toward one in which opportunity is equal. Affirmative action measures recognize that existing patterns of discrimination, disadvantage and exclusion may require race- or gender-conscious measures to achieve that equality of opportunity.

Because our ultimate goal is to perfect and realize this American ideal of opportunity, affirmative action cannot supersede the concept of merit -- because to do so would unfairly deprive others of opportunity that is their due. In other words, we believe it is wrong if an unqualified person is chosen for a job, a scholarship, or a federal contract over a qualified person in the name of affirmative action. However, the review of federal programs and broader practices demonstrates that affirmative action, when used properly, is consistent with merit. It also demonstrates that "merit" must be properly defined in terms of the needs of each organization, and not in arbitrary

² 115 S. Ct. 2097 (1995).

ways that are, in their effect, exclusionary. A demonstrated ability to get the job done is a merit test; "old-boy" connections and cronyism are not.

1.2.2 The First Test: Does It Work?

More specifically, the President's first charge was to determine whether the federal government's affirmative action programs work.

Whether a program "works" depends on what goal it seeks to achieve. Above all else, the overriding goal of affirmative action must be to provide equal opportunity for all citizens. In pursuit of that goal, affirmative action has two general justifications -- remediation of discrimination, and promoting inclusion -- both of which are consistent with the traditional American values of opportunity, merit and fairness.

Expanding opportunity by fighting and preventing discrimination. The primary justification for the use of race- and gender-conscious measures is to eradicate discrimination, root and branch. Affirmative action, therefore, is used first and foremost to remedy specific past discrimination or the lingering effects of past discrimination -- used sometimes by court order or settlement, but more often used *voluntarily* by private parties or by governments. Affirmative action is also used to *prevent* future discrimination or exclusion from occurring. It does so by ensuring that organizations and decisionmakers end and avoid hiring or other practices that effectively erect barriers. In undertaking such efforts, however, two wrongs don't make a right. Illegal discrimination includes reverse discrimination; reverse discrimination is discrimination, and it is wrong. Affirmative action when done right is not reverse discrimination.

Expanding opportunity through inclusion. But vigorous prosecution of proven instances of discrimination will not by itself close the opportunity gap; bias and prejudice have proven too varied and subtle for that. Therefore, to genuinely extend opportunity to all, we must take affirmative steps to bring underrepresented minorities and women into the economic mainstream. The consequences of years of officially sanctioned exclusion and deprivation are powerfully evident in the social and economic ills we observe today. In some circumstances, therefore, race- and gender-conscious measures can also be justified by the compelling importance of inclusion. Affirmative action is used simply to open institutions and opportunities because doing so will move minorities and women into the economic mainstream, with benefits to them, to those institutions, and to our society as a whole. For example:

- Virtually all educators acknowledge that a college is a better academic enterprise if the student body and faculty are diverse.
- A police department will be more effective in protecting and serving its community if its officers are somewhat reflective of that community

- The military recognized years ago that sharp imbalances in the representation of minorities and women in the leadership grades of enlisted and commissioned personnel undermined the cohesion and effectiveness of military units, and effectively deprived the armed forces of full use of a portion of our nation's pool of talent. Most major corporations recognize this same challenge.
- Judges and government policymakers must be able to reflect the concerns, aspirations and experiences of the public they serve in order to do their jobs well and enjoy legitimacy.

Ultimately, therefore, the test of whether an affirmative action program works is whether it hastens the eradication of discrimination, and promotes inclusion of everyone in the opportunities America promises us all. As a general matter, increases in the numbers of employees, or students or entrepreneurs from historically underrepresented groups are a measure of increased opportunity. It is very difficult, however, to separate the contribution of affirmative action from the contribution of antidiscrimination enforcement, decreasing prejudice, rising incomes and other forces. At the same time, the fact that we observe so much continuing socioeconomic division and inequality of opportunity does not imply that affirmative action is a failure, because it is merely one tool among many that must play a part in creating opportunity.

1.2.3. The Second Test: Is the Program Fair?

For each federal program, at the President's direction, the Review team asked the agency head to apply the following test of essential fairness:

- (1) **Not quotas.** Quotas are intrinsically rigid, and intrinsically relegate qualifications and other factors to secondary status. Does the program effectively avoid quotas for inclusion of minorities or women?
- (2) **Race-Neutral Options.** In a program's design or reconsideration, have options for using various *race-neutral decision factors* been analyzed? Were the options reasonably rejected, given the available information and experience, because those alternatives are unlikely to be acceptably effective in advancing the program objectives?
- (3) **Flexible.** If race-neutral measures will not work, is the measure applied in a flexible manner, and were *less extensive or intrusive uses of race* analyzed and rejected based on a determination that they would not have been acceptably effective?
- (4) **Transitional.** Is the measure *limited in duration*, and does the administering agency periodically review the continuing need for the measure?
- (5) **Balanced.** Is the *effect on nonbeneficiaries* sufficiently small and diffuse so as not to unduly burden their opportunities? In other words, are other jobs or other similar benefits available, or is the result of the program to close off an irreplaceable benefit?

1.2.4. Affirmative Action: The Right Way and The Wrong Way

In short, we believe that there is a right way to do affirmative action, and a wrong way. This review conducts a preliminary policy analysis of many of these existing programs to assess whether they are being done the "right way." This means two things: they must actually work to effectuate the goals of fighting discrimination and encouraging inclusion; and they must be fair -- i.e., no unqualified person can be preferred over another qualified person in the name of affirmative action, decisions will not be made on the basis of race or gender except when there is a special justification for doing so, and these measures will be transitional. Only by applying these principles can we *aggressively and simultaneously* pursue remedies to discrimination, the inclusion we need in order to strengthen our institutions and our economy, *and* essential fairness to all.

1.3 The *Adarand* review

On June 12, 1995, in the case of *Adarand Constructors, Inc. v. Peña*, the United States Supreme Court issued a major ruling affecting federal affirmative action programs. Most significantly, the Court held that federal affirmative action programs, under the equal protection component of the Fifth Amendment's Due Process Clause, must be reviewed by the courts using "strict scrutiny." To surmount this hurdle, the program must be shown to meet a "compelling governmental interest," and must be "narrowly tailored to meet that interest." This is a more demanding legal test than had previously been applied to federal affirmative action programs, and as a practical matter it will require the Administration, Congress and the courts to engage in a searching analysis of many federal programs.

The Court's decision, naturally, concerned what is permissible under the Constitution, and the way in which courts must examine that question. The review directed by the President, however, was concerned with policy. In other words, the President asked the review to analyze whether a particular program was wise social policy, rather than whether it was constitutional. However, the questions asked by the President are not dissimilar to the questions that will have to be asked by any post-*Adarand* analysis of programs.

[*DESCRIPTION OF THE PRESIDENTIAL DIRECTIVE.*] The text of the Presidential Directive, and the memorandum from Assistant Attorney General Walter Dellinger to the agency general counsels, are attached as Appendix [A].^a This represents the Administration's legal analysis of the new standard set forth by *Adarand*.

2. AFFIRMATIVE ACTION: HISTORY AND RATIONALE

Neither this review nor the current debate over affirmative action occur in a historical vacuum. This section and the following two provide the context for this review, and, indeed, for federal affirmative action programs. First, we examine the history of the creation of modern affirmative action programs, which was a result of efforts to overturn and undo two centuries of discrimination. Then, in section 3, we review the general evidence on the effectiveness of affirmative action. Finally, section 4 examines the extent to which discrimination and exclusion persist today, requiring a continuation of affirmative action.

2.1 Background

Current affirmative action programs are best understood as an outgrowth and continuation of our national effort to remedy racial subjugation -- subjugation that was the law of the land within the lifetime of "baby-boomers." Some affirmative action efforts began before the great burst of civil rights statutes in the 1950s and 1960s. But affirmative efforts did not truly take hold until it became clear that anti-discrimination statutes alone were not enough to break longstanding patterns of discrimination.

For much of this century, African Americans were segregated into low wage jobs, usually agricultural. The first significant wave of progress in enhancing employment opportunities for African Americans was made during the labor shortages of World War II and afterwards, before the use of affirmative action. However, racial separation and division were the norm, and African Americans were still segregated for the most part into low wage jobs into the 1960's. Whole industries and categories of employment were, in effect, all-white, all-male. In thousands of towns and cities, police departments and fire departments remained all white male, and women and African Americans were even forbidden to apply. In grocery and department stores, clerks were white and janitors and elevator operators were black. Generations of African Americans swept the floors in factories while denied the opportunity to become higher paid operatives on the machines.

College-educated African Americans worked as bellboys, porters and domestics, if they could not get a scarce teaching position in the all-black school -- which was usually the only alternative to preaching, or perhaps working in the post office. In higher education most African Americans attended predominantly black colleges, many established by states as segregated institutions. Most concentrated on teacher training to the exclusion of professional education. Students who were interested in business had to take business education instead of administration. A few went to predominantly white institutions, in which by 1954, about one percent of entering freshman were black.

The civil rights movement and its dramatic victories -- *Brown vs. Board of Education* and the other cases striking down segregation, the Civil Rights Act of 1964, the Voting Rights Act of 1965 -- granted the rights of full citizenship to African-Americans. However, these legal victories were not enough to overcome long-entrenched discrimination, for several reasons. In part, these measures frequently focused only on issues of formal rights (such as the right to vote) that were particularly susceptible to judicial or statutory resolution. In part, the difficulty was that formal litigation-related strategies are inevitably resource-intensive and often dependent upon clear "smoking gun" evidence of overt bias or bigotry, whereas prejudice can take on myriad subtle, yet effective, forms. Thus, private and public institutions alike too often seemed impervious to the winds of change, remaining all-white or all-male long after court decisions or statutes formally ended discrimination.

As a result, both the courts and Republican and Democratic administrations turned to race-conscious remedies as a way to end entrenched discrimination. These remedies were developed after periods of experimentation showed that other means had failed to correct the problems. For example:

- In July 1970, a federal district court enjoined the State of Alabama from continuing to discriminate against blacks in the hiring of state troopers. The court found that "in the thirty-seven year history of the patrol there has never been a black trooper." The order included detailed, non-numerical provisions for assuring an end to discrimination, such as stringent controls on the civil service certification procedure and an extensive program of recruitment of minority job applicants. Eighteen months later, not a single black had been hired as a state trooper or into a civilian position connected with the troopers. The district court then entered a further order requiring the hiring of one *qualified* black trooper or support person applicant for each white hired until 25% of the force was comprised of blacks. By the time the case reached the Court of Appeals in 1974, 25 black troopers and 80 black support personnel had been hired.³ The U.S. Supreme Court ultimately affirmed the orders.
- In 1979, women represented only 4 percent of the entry-level officers in the San Francisco police department. By 1985, under an affirmative action plan ordered in a case in which the DOJ sued the City for discrimination, the number of women in the entry class had risen to 175, or 14.5 percent.
- In 1975, a federal district court found that Local 28 of the Sheet Metal Workers' International Association had discriminated against non-white workers in recruitment, training and admission to the union. The court found that the union had (1) adopted discriminatory admission criteria, (2) restricted the size of its membership to deny access to minorities, (3) selectively organized shops with few minority workers and (4) discriminated in favor of white applicants seeking to transfer from sister locals. The court found that the record was replete

³ NAACP v. Allen, 493 F.2d 614, 621 (1974).

with instances of bad faith efforts to prevent or delay the admission of minorities. The court established a 29% membership goal, reflecting the percentage of minorities in the relevant labor pool. The Supreme Court affirmed the relief.

- Prior to 1974, Kaiser Aluminum hired only persons with prior craft experience as craft workers at its Gramercy, Louisiana plant. Because blacks traditionally had been excluded from the craft unions, only 5 of 273 skilled craft workers at the plant were black. In response, Kaiser together with the union established its own training program to fill craft jobs with the proviso that 50% of new trainees were to be black until the percentage of black craft workers in the plant matched the percentage of blacks in the local labor pool. The Supreme Court held this program to be lawful.
- On March 23, 1973, the Nixon administration's Department of Justice, Department of Labor, Equal Employment Opportunity Commission and the now defunct Civil Service Commission issued a joint memorandum titled "State and Local Employment Practices Guide." The guide points out that the Nixon Administration... since September of 1969, recognized that goals and timetables... are a proper means for helping to implement the nation's commitment to equal employment opportunity." The memorandum stressed that strict quotas are unacceptable but that 'goals and timetables' are entirely different and reasonable tools. In July of 1986, Justice Sandra D. O'Connor referred to this document, and the merits of fair and effective affirmative action goals, in her concurring portion of her opinion in *Local 28, Sheet Metal Workers v. EEOC*. In doing so, she joined a majority of the courts' support for numerical guidelines in affirmative action programs.

2.2 Fair Employment -- The Executive Order

The longest-standing federal affirmative action program has its roots in World War II. The Executive Order barring discrimination in the federal government and by war industries was issued by President Franklin Roosevelt. The action was taken to forestall a planned march on Washington organized by A. Philip Randolph, the President of the Brotherhood of Sleeping Car Porters. Roosevelt's order barred discrimination against blacks by defense contractors, and established the first Fair Employment Practices Committee. However, federal compliance programs were routinely understaffed, underfunded and lacked enforcement authority.

After World War II, gains that had been made by women and blacks receded as returning GIs reclaimed their jobs. By 1960, the 10 million workers on the payrolls of the 100 largest defense contractors included few blacks. The \$7.5 billion in federal grants-in-aid to the states and cities for highway, school, airport, school and public housing construction went almost exclusively to whites. The U.S. Employment Service, which provided funds for state-operated employment bureaus, encouraged skilled blacks to register for unskilled jobs, accepted requests from white employers and made no efforts to get employers to accept African American workers. The President's Committee on Government Contracts, chaired by Vice-President Nixon in 1959, called

blamed "the indifference of employers to establishing a positive policy of nondiscrimination" more prevalent than over discrimination, and called for remedial steps.

In response to the civil rights movement, President John F. Kennedy created a Committee on Equal Employment Opportunity in 1961 and issued Executive Order 10925, which used the term "affirmative action" to refer to measures designed to achieve non-discrimination. In 1965, President Johnson issued Executive Order 11246 requiring federal contractors to take affirmative action to ensure equality of employment opportunity without regard to race, religion and national origin. In 1967, sex was added to the protected categories.

In the Johnson administration, the Labor Department Office of Federal Contract Compliance (OFCCP) started pre-award compliance for federal contracts over \$1 million. The Office began with construction contractors, who were required to set goals and timetables under a regulation issued to implement the Order in 1968. However, under pressure from unions and the General Accounting Office, which found the process too vague, OFCCP discontinued the effort.

But in the most far-reaching federal expansion of affirmative action, the "goals and timetables" plan was revived by President Nixon and Labor Secretary George Shultz in 1969. In issuing the so-called "Philadelphia Order," Assistant Secretary Arthur Fletcher said:

Equal employment opportunity in these [construction] trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6% minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these seven trades.⁴

President Nixon later remembered, "A good job is as basic and important a civil right as a good education . . . I felt that the plan Shultz devised, which would require such [affirmative] action by law, was both necessary and right. We would not fix quotas, but would require federal contractors to show 'affirmative action' to meet the goals of increasing minority employment."⁵

Order No. 4 in 1970 extended the plan to non-construction federal contractors.

⁴ DOL memo from Arthur Fletcher to All Agency Heads discussing the revised Philadelphia Plan, 6/27/69

⁵ Richard Nixon, *RN: The Memoirs of Richard Nixon* 437 (Grosset and Dunlap: 1978).

2.3 Fair Employment -- Enforcement of Title VII

In July, 1963, in the midst of the civil rights campaign in Birmingham, Alabama, President John F. Kennedy appeared on national television to propose a civil rights bill. The measure proposed outlawing discrimination in public accommodations, permitting a cut-off of federal funds from discriminating institutions, and expanding the equal employment opportunity committee he had established. After President Kennedy's assassination, Title VII was enacted as part of the Civil Rights Act of 1964, seeking to end discrimination by large private employers whether or not they had government contracts. The Equal Employment Opportunity Commission, established by the Act, is charged with enforcing the anti-discrimination law. The Act is designed to make employees whole for illegal discrimination and to encourage employers to end discrimination. Title VII was substantially strengthened in 1972 amendments, signed by President Nixon. The legislative history to the 1972 amendments made clear that Congress approved of race- and gender-conscious remedies that had been developed by the courts in enforcing the 1964 Act.

Court-ordered affirmative action to remedy violations of Title VII developed on a parallel track with the Executive Order program, as another remedial effort to stop existing discrimination and prevent its recurrence. The Supreme Court's most comprehensive review of affirmative action has occurred in the employment area.

2.4 Education

Discrimination in education was the target of the original breakthrough civil rights cases. Indeed, because education is the gateway to opportunity, education has consistently been a central focus of civil rights efforts. But for nearly two decades following the original court decisions, educational institutions -- particularly colleges and graduate schools -- remained predominantly white and male. In 1955, only 4.9% of college students ages 18-24 were black. This figure rose to 6.5% during the next five years, but by 1965 had slumped back to 4.9%. Only in the wake of affirmative action measures in the late 1960s and early 1970s did the percentage of black college students began to climb steadily (in 1970, 7.8% of college students were black; in 1980, 9.1%; and in 1990, 11.3%).

The 1978 *Bakke* case set the parameters of educational affirmative action. The University of California at Davis medical school had reserved for qualified minorities 16 available places. In a splintered decision, with Justice Powell casting the deciding vote, the Supreme Court essentially decided that setting aside a specific number of places in the absence of proof of past discrimination was illegal, but that minority status could be used in admissions as a factor. The desire to obtain a "diverse" student body was found to be a compelling goal in the educational context.

Increased educational opportunity has, in fact, revolutionized education. The enrollment of women in higher education has risen steadily. Women are now over fifty percent of undergraduate

students and 50 percent or more of the students in law and medicine and other graduate and professional schools. Through the availability of student aid programs and aggressive recruitment and retention programs, the college-going rate for blacks and whites who graduated from high school was about equal by 1977.⁶ Since 1977, the proportion of black 18-24 year old high school graduates enrolled in college has not kept pace with that of white students. While the percentage of black students who have graduated from high school has increased over 20% in the past 25 years, the portion of black high school student graduates attending college is now 25% less thanb that of white students.⁶

2.5 A Note on Affirmative Action for Other Minorities

In general, affirmative action grew as a response to national patterns of racial and sexual discrimination. However, just as African-Americans suffered discrimination across the country, particularly in the South, in particular regions or areas specific minority groups suffered similarly intense discrimination. Hispanics have been subject to discrimination in education, employment, and housing -- discrimination encountered not only on the basis of skin color, but also language and surname. Asian Americans, who doubled in number between 1980 and 1990, have at various times faced restrictions on their citizenship, and discrimination in education, employment and housing. Asian Americans have also been the victims of violent hate crimes, including those targeted at residences, Asian-owned businesses, and places of worship. Over time, such other minority groups have been included in some federal affirmative action programs. Such inclusion will now have to meet the strict scrutiny test of Adarand.

⁶Chronicle of Higher Education: April 28, 1995.

3. HAS AFFIRMATIVE ACTION WORKED?

Modern affirmative action, then, was established as policymakers groped for a way to address continuing problems of discrimination. Has it worked to help eradicate or prevent such discrimination? In a fundamental sense the question must be posed for the broader society-wide effort of which federal programs are only an element and, ideally, model.

3.1 Review of the Empirical Literature, in Summary

Over the past three decades, minorities and women have made real, undisputable economic progress. Before the Civil Rights Act of 1964, the median black male worker earned only about 60% as much as the median white male worker;⁷ by 1993, the median black male earned 74% as much as the median white male.⁸ The male-female wage gap has also narrowed since the 1960s: median female earnings relative to median male earnings rose from about 60% during the 1960s to 72% in 1993.⁹

This section of the Report addresses three issues: (1) Why has there been an earnings gap between black and white workers, and what role did anti-discrimination legislation and affirmative action play in the reduction of that gap? (2) Why has there also been an earnings gap between men and women, and what role did government policies play in the reduction of that gap? (3) Is there any evidence that affirmative action boosted minority or female employment?

3.2 Effect on Earnings

3.2.1 *Anti-Discrimination Policy, the Black-White Earnings Gap*

- The ratio of the average black workers' earnings to the average white workers' earnings increased significantly in the 1940s, increased slightly if at all in the 1950s, increased significantly between 1960 and the mid 1970s, and declined somewhat since the late 1970s.¹⁰

⁷ Bureau of Labor Statistics, Current Population Survey.

⁸ Bureau of Labor Statistics, Current Population Survey.

⁹ Bureau of Labor Statistics, Current Population Survey.

¹⁰ Bureau of Labor Statistics, Current Population Survey. For a time-series discussion of black/white earnings ratios, see Donohue, John and James Heckman, 1991. "Continuous versus Episodic Change: The Impact of Federal Civil Rights Policy on the Economic Status of

- There has not been an improvement in the employment-population rate of black workers relative to whites since the 1960s. If anything, there has been a deterioration in the relative employment-population rate.¹¹
- Education and work experience are the two most reliable predictors of a worker's earnings. Black workers historically have had much lower education than white workers. Adjusting for racial differences in education and work experience can account for about half of the wage gap between black men and white men, and about one-third of the gap between black women and white women. Additionally, holding constant differences in individuals' test scores leads to a further reduction in the black-white earnings gap. For example, in one study, in 1991, black males earned 29 percent less than white males without any adjustments, 15 percent less after adjusting for education and experience, and 9 percent less after additionally adjusting for test scores. For women, the gap declines from 14 percent to almost zero after making these adjustments.¹² There is some controversy as to how to interpret the black-white wage gap after holding constant differences in education, test scores, and other variables. In particular, differences in education or test scores may themselves represent the discrimination. Thus, the reduction in the racial gap after controlling for these factors may not mean that discrimination is any less, but it may mean that attention should also focus on discrimination prior to entry into the labor market.
- Historically there have been great differences in the quality of education between black and white students. In South Carolina in 1920, for example, black students attended schools with class sizes twice those of white schools. Partly as a result of the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965, and the *Green* decision, schools became increasingly integrated in the late 1960s. The improvement in the quality and quantity of education of black workers since the 1960s accounts for about 20% of the gain in black workers' relative earnings.¹³
- There is near-unanimous consensus among economists that the government anti-discrimination programs beginning in 1964 contributed to the improved income of African Americans.

Blacks," *Journal of Economic Literature* 29:1603-43. See also, Bound, John and Richard Freeman, 1989, "Black Economic Progress: Erosion of Black Americans" in *The Question of Discrimination*.

¹¹ Bureau of Labor Statistics, Current Population Survey.

¹² Rogers, Bill, 1994, "What Does the AFQT Really Measure: Race, Wages, Schooling and the AFQT Score," mimeo., William and Mary. The figures cited here adjust for racial geographic differences.

¹³ See Card, David and Alan Krueger, 1992, "School Quality and Black-White Relative Earnings: A Direct Assessment." *The Quarterly Journal of Economics* p.151-200.

Nevertheless, it is difficult to draw conclusions about which specific anti-discrimination programs were most effective. And it may well be that the programs collectively helped even though no single program was overwhelmingly effective.¹⁴

3.2.2 *Anti-Discrimination Policy and the Male-Female Earnings Gap*

- The female-to-male ratio of earnings of full-time, year-round workers was roughly stable at around 60% from the early 1900s until the mid 1970s. In 1993, earnings of women who worked full-time, year-round had risen to 72% as much as men. After adjusting for differences in education, experience, and other factors, the wage gap is reduced by about half (i.e., the adjusted ratio is approximately 85%).¹⁵
- An increase women's work experience and a shift into higher-wage occupations are the major causes of their improved economic position relative to men. The decline in higher-paying manufacturing jobs, which is partly responsible for the decline in the earnings of less-skilled men, has also contributed to the narrowing of the male-female wage gap. Nevertheless, a substantial part of the improved earnings of women cannot be explained by these factors, and probably reflects a decline in discrimination.¹⁶
- The relative roles in this story of anti-discrimination laws and affirmative action, in education and the workplace, are unclear. The major equal opportunity laws covering women were passed in the mid-1960s, and the most rapid growth in women's earnings and occupational status did not begin for another decade. The lag between the change in law and the increase in earnings may be due to time it took for women to acquire education and training for traditionally male-dominated occupations. The rapid growth in the number of female graduates from professional schools coincided with increased anti-discrimination efforts.¹⁷

¹⁴ An important study that points out the near unanimous opinion among economists of the positive impact of government anti-discrimination programs on improved income of African-Americans is Donohue, John and James Heckman, 1991, "Continuous versus Episodic Change: The Impact of Federal Civil Rights Policy on the Economic Status of Blacks," *Journal of Economic Literature* 29:1603-43. Freeman, Richard, 1973, "Changes in the Labor Market for Black Americans, 1948-72," *Brookings Papers on Economic Activity*, vol. 1 was among the first to identify government anti-discrimination programs as a source of progress.

¹⁵ See Blau, Francine and Marianne Ferber, 1992. *The Economics of Women, Men and Work* Englewood Cliffs: Prentice Hall, p.129.

¹⁶ See Blau, Francine, and Lawrence Kahn, 1994, "Rising Wage Inequality and the U.S. Gender Gap." *AEA Papers and Proceedings* 84:23-28, for a discussion of the large decline in male-female wage differentials that occurred from the mid 1970s to the late 1980s.

¹⁷ Department of Education, National Center of Education Statistics.

3.3 Effect on Employment_a

- The Labor Department's Office of Federal Contract Compliance Programs (OFCCP) administers Executive Order 11246, which imposes nondiscrimination and affirmative action obligations on most firms that contract to do business with the Federal government. According to five academic studies, active enforcement by OFCCP during the 1970s caused government contractors to moderately increase their hiring of minority workers.¹⁸ According to one study, for example, the employment share of black males in contractor firms increased from 5.8% in 1974 to 6.7% in 1980. In non-contractor firms, the black male share increased more modestly, from 5.3% to 5.9%. For white males, the employment share fell from 58.3% to 53.3% in contractor firms, and from 44.8% to 41.3% in non-contractor firms.¹⁹
- The literature also finds that contractor establishments that underwent an OFCCP review in the 1970s subsequently had faster rates of white female and of black employment growth than contracting firms that did not have a review.²⁰
- Other than studies comparing employment records of government contractors with non-government contractors, it is hard to separate out the effects of affirmative action from broader civil rights enforcement. Non-government contractors often took active steps to ensure diversity and compliance with equal opportunity laws, even though they were not covered by the OFCCP. Some, or perhaps much, of this behavior may be attributable to government anti-discrimination efforts. Also, the recruitment efforts of both contractors and non-contractors may have bid up the wages of minorities and women, reducing wage disparities regardless of the effect on occupational disparities.

¹⁸ The five studies are: (1) Leonard, Jonathan, 1984, "The Impact of Affirmative Action on Employment," *Journal of Labor Economics* 2:439-463; (2) Leonard, Jonathan, 1984, "Employment and Occupational Advance Under Affirmative Action," *The Review of Economics and Statistics* (3) Ashenfelter, Orley and James Heckman, 1976, "Measuring the Effect of an Anti-discrimination Program, in *Estimating the Labor Market Effects of Social Programs*, Eds: Orley Ashenfelter and James Blum Princeton NJ: pp.46-89; (4) Heckman, James and Kenneth Wolpin, 1976, "Does the Contract Compliance Program Work? An Analysis of Chicago Data," *Industrial and Labor Relations Review* 29:544-64; (5) Goldstein, Morris and Robert Smith, 1976, "The Estimated Impact of Anti-discrimination Laws Aimed at Federal Contractors," *Industrial and Labor Relations Review*.

¹⁹ Leonard, Jonathan, 1984, "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment," *Journal of Economic Perspectives* 4:47-64.

²⁰ See above studies plus Donohue and Heckman, *Continuous versus Episodic*, 29, *Journal of Economic Literature*, p.1631.

- OFCCP enforcement was greatly scaled back during the 1980s. For example, the real budget and staffing for affirmative action programs was reduced after 1980. Over the same period, fewer administrative complaints were filed and back-pay awards were phased out. Perhaps not surprisingly, available evidence suggests that OFCCP did not have a noticeable impact on the hiring of minority workers by contractor firms in the early and mid 1980s.²¹
- Although the literature clearly shows that, when actively enforced, affirmative action can lead to an increase in minority employment in contractor firms, it is less clear whether this employment represents a net gain or merely a shift of minority employees from non-contractors to contractors.²²
- The extent to which affirmative action has expanded minority employment in skilled positions is unclear. The academic literature suggests that before 1974, minority employment growth in contractor firms was predominately in unskilled positions. Since 1974, there is evidence of modest occupational advance in contractor firms. But some researchers think this may be the result of biased reporting.²³
- There is no systematic qualitative evidence that productivity is lower in contracting firms as a result of OFCCP. The one systematic study found that contractors do not appear to have lower productivity, suggesting that OFCCP has not caused firms to hire or promote less qualified workers.²⁴

²¹ For a full discussion of the impact of weakened affirmative action enforcement during the 1980s, see Leonard, Jonathan, 1990, "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment," *Journal of Economic Perspectives* 4:47-64.

²² For a discussion that affirmative action merely redistributes black workers from small and medium size firms to large employers and federal contractors, see Bloch, Farrell, 1994, *Anti-discrimination Law and Minority Employment: Recruitment Practices and Regulatory Constraints*, Chicago: University of Chicago Press.

²³ For a discussion of the impact of affirmative action on minority employment in skilled positions, see Leonard 1990, *The Impact of Affirmative . . .*, "4 J. of Econ. Perspectives 47.

²⁴ See Leonard, Jonathan, 1984, "Anti-discrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII and Affirmative Action on Productivity," *Journal of Human Resources* vol. 19, No.2, pp.145-74.

4. THE JUSTIFICATIONS FOR AFFIRMATIVE ACTION: THE CONTINUING PROBLEMS OF DISCRIMINATION AND EXCLUSION

Affirmative action was established as part of society's efforts to address continuing problems of discrimination; the empirical evidence presented in the preceding chapter indicates that it has had some positive impact on remedying the effects of discrimination. Whether such discrimination lingers today is a central element of an analysis of affirmative action. The conclusion is clear: discrimination and exclusion remain all too common.

4.1. Evidence of Continuing Discrimination

The evidence is overwhelming that the problems affirmative action seeks to address -- widespread discrimination and exclusion and their ripple effects -- continue to exist.

- Minorities and women remain economically disadvantaged: the black unemployment rate remains over twice the white unemployment rate; 97% of senior managers in Fortune 1000 corporations are white males;²⁵ in 1992, 33.3% of blacks and 29.3% of Hispanics lived in poverty, compared to 11.6% of whites.²⁶ In 1993, Hispanic men were half as likely as white men to be managers or professionals;²⁷ only 0.4% of senior management positions in Fortune 1000 industrial and Fortune 500 service industries are Hispanic.²⁸
- Blatant discrimination is a continuing problem in the labor market. Perhaps the most convincing evidence comes from "audit" studies, in which white and minority (or male and female) job seekers are given similar resumes and sent to the same set of firms to apply for a job. These studies often find that employers are less likely to interview or offer a job to minority applicants and to female applicants.²⁹

²⁵ "Good for Business: Making Full Use of the Nation's Human Capital", A Fact-Finding Report of the Federal Glass Ceiling Commission, March 1995.

²⁶ Bureau of the Census, Current Population Survey, "Income, Poverty and Valuation of Noncash Benefits 1993."

²⁷ Bureau of Labor Statistics, *1994 Fact Sheet*.

²⁸ Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* (March 1995).

²⁹ See, e.g., Neumark, David and Roy Blank and Kyle Van Nort, 1995, "Sex Discrimination in Restaurant Hiring: An Audit Study," *NBER Working Paper No. 5024*

- Less direct evidence on discrimination comes from comparisons of earnings of blacks and whites, or males and females.³⁰ Even after adjusting for characteristics that affect earnings (such as years of education and work experience), these studies typically find that blacks and women are paid less than their white male counterparts. The average income for Hispanic women with college degrees is less than the average for white men with high school degrees.³¹
- Last year alone, the Federal government received over 90,000 complaints of employment discrimination. Moreover 64,423 complaints were filed with state and local Fair Employment Practices Commissions, bringing the total last year to over 154,000. Thousands of other individuals filed complaints alleging racially motivated violence and discrimination in housing, voting, and public accommodations, to name just a few.

4.2 Results from Random Testing

The marked differences in economic status between blacks and whites, and between men and women, clearly have multiple causes in addition to discrimination. One respected method to isolate the prevalence of discrimination is to use random testing, in which individuals compete for the same job, apartment, or other goal. For example, the Fair Employment Council of Greater Washington, Inc., conducted a series of tests between 1990 and 1992. The tests revealed that blacks were treated significantly worse than equally qualified whites 24 percent of the time and Latinos were treated worse than whites 22 percent of the time. Some examples document the disparities:

- Two pairs of male testers visited the offices of a nationally-franchised employment agency on two different days. The black tester in each pair received no job referrals. In contrast, the white testers who appeared minutes later were interviewed by the agency, coached on interviewing techniques, and referred to and offered jobs as switchboard operators.
- A black female tester applied for employment at a major hotel chain in Virginia where she was told that she would be called if they wished to pursue her application. Although she never received a call, her equally qualified white counterpart appeared a few minutes later, was told about a vacancy for a front desk clerk, later interviewed, and offered the job.
- A black male tester asked about an ad for a sales position at a Maryland car dealership. He was told that the way to enter the business would be to start by washing cars. However, his white counterpart, with identical credentials, was immediately interviewed for the sales job.

³⁰ Bureau of Labor Statistics, Current Population Survey.

³¹ EEOC, Office of Communications, *The Status of Equal Opportunity in the American Workforce* (1995).

- A suburban Maryland company advertised for a typist/receptionist. When a black tester applied for the position, she was interviewed but heard nothing further. When an identically qualified white tester was interviewed, the employer offered her a better position that paid more than the receptionist job and that provided tuition assistance. Follow up calls by the black tester elicited no response even though the white tester refused the offer.

The Urban Institute's Employment and Housing Discrimination Studies (1991) matched *equally qualified* white and black testers who applied for the same jobs or visited the same real estate agents. Twenty percent of the time, white applicants advanced further in the hiring process than equally qualified blacks. In one in eight tests, the white received a job offer when the black did not. *In housing, both black and Hispanic testers faced discrimination in about half their dealings with rental agents.*

Similarly, researchers with the National Bureau of Economic Research sent comparably matched resumes of men and women to restaurants in Philadelphia. In high priced eateries, men were more than twice as likely to receive an interview and five times as likely to receive a job offer than the women testers.³²

Finally, the Justice Department has conducted similar testing to uncover housing discrimination. Those test also have revealed that whites are more likely than blacks to be shown apartment units, while blacks with equal credentials are told nothing is available. Since the testing began, the Justice Department has brought over 20 federal suits resulting in settlements totaling more than \$1.5 million. A particularly graphic case of discrimination occurred during a fair housing test performed by the Civil Rights Division in Wisconsin, which sought to establish whether discrimination existed against the relatively large East-Asian population there. When the Asian tester approached the apartment building, the rental agent stood between the tester and the door to the rental office and refused to allow the tester to enter the building. The tester was told that there were no apartments available and there would not be any available for two months. When the white tester approached two hours later, the individual was immediately shown an apartment and was told he could move in that same day.

4.3 Exclusion from Mainstream Opportunities: Continuing Disparities in Economic Status

Apart from the remediation of and bullwark against discrimination, a second justification that has been offered for continuing affirmative action in education, employment and contracting is the need to repair the mechanisms for including all Americans in the economic mainstream. There

³² David Neumark, et. al. *Sex Discrimination in Restaurant Hiring: An Audit Study*. Working Paper No. 5024, National Bureau of Economic Research, Inc. (February 1995).

is ample evidence to conclude that the problems to which affirmative action was initially addressed remain serious, both for members of disadvantaged groups and for America as a whole.

- A recent study by the Glass Ceiling Commission, a body established under President Bush and legislatively sponsored by Senator Dole, recently reported that:³³
 - White males continue to hold 97% of senior management positions in Fortune 1000 industrial and Fortune 500 service industries. Only 0.6% of senior management are African American, 0.3 percent are Asian and 0.4 % are Hispanic.
 - African Americans hold only 2.5% of top jobs in the private sector and African American men with professional degrees earn only 79% of the amount earned by their white counterparts. Comparably situated African American women earn only 60% of the amount earned by white males.
 - Women hold 3 to 5 percent of senior level management positions -- there are only two women CEOs in Fortune 1000 companies.
 - The fears and prejudices of lower-rung white male executives were listed as a principal barrier to the advancement of women and minorities. The report also found that, across the board, men advance more rapidly than women.
- The unemployment rate for African Americans was more than twice that of whites in 1994. The median income for black males working full-time, full year in 1992 was 30 percent less than white males. Hispanics fared only modestly better in each category. In 1993, black and Hispanic men were half as likely as white men to be managers or professionals.³⁴
- In 1992, over 50% of African American children under 6 and 44% of Hispanic children lived under the poverty level, while only 14.4% of white children did so. The overall poverty rates were 33.3% for African Americans, 29.3% for Hispanics and 11.6% for whites.
- Black employment remains fragile -- in an economic downturn, black unemployment leads the downward spiral. For example, in the 1981-82 recession, black employment dropped by 9.1 percent while white employment fell by 1.6 percent. Hispanic family income remains much lower, and increases at a slower rate, than white family income.³⁵

³³ Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* (March 1995).

³⁴ Bureau of Labor Statistics, *1994 Fact Sheet*

³⁵ *A Report of the Study Group on Affirmative Action to the House Committee on Education and Labor* (1987).

- Unequal access to education plays an important role in creating and perpetuating economic disparities. In 1993, less than 3% of college graduates were unemployed; but whereas 22.6% of whites had college degrees, only 12.2% of African Americans and 9.0% of Hispanics did.
- The 1990 census reflected that 2.4 percent of the nation's businesses are owned by blacks. Almost 85 percent of those black owned businesses have no employees.³⁶
- Even within educational categories, the economic status of minorities and women fall short. The average woman with masters degrees earns the same amount as the average man with an associate degree.³⁷ While college educated black women have reached earnings parity with college educated white women, college educated black men earn 76 percent of the earnings of their white male counterparts.³⁸ Hispanic women earn less than 65 percent of the income earned by white men with the same educational level. Hispanic men earn 81 percent of the wages earned by white men at the same educational level. The average income for Hispanic women with college degrees is less than the average for white men with high school degrees.³⁹

A study of the graduating classes of the University of Michigan Law School from 1972-1975 revealed significant wage differentials between men and women lawyers after 15 years of practice. While women earned 93.5 percent of male salaries during the first year after school, that number dropped to 61 percent after 15 years of practice. *Controlling for grades, hours of work, family responsibilities, labor market experience, and choice of careers (large firms versus small firms, academia, public interest, etc.), men are left with an unexplained 13 percent earnings advantage over women.*⁴⁰

³⁶ Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* Ballantine Books(1992).

³⁷ 1990 Census data as compiled by the Office of Federal Contract Compliance Programs (1995).

³⁸ U.S. Bureau of the Census, *The Black Population in the United States: March 1994 and 1993*(1995); U.S. Bureau of the Census, *Characteristics of the Black Population*(1995).

³⁹ EEOC, Office of Communications, *The Status of Equal Opportunity in the American Workforce*(1995) (Data supplied by the National Committee on Pay Equity).

⁴⁰ Robert Wood, Mary Corcoran and Paul Courant, *Pay Differentials Among the Highly Paid: The Male-Female Earnings Gap in Lawyer's Salaries* Journal of Labor Economics (July, 1993).

5. THE VARIETIES OF FEDERAL PROGRAMS

This report examines most of the federal programs that would be considered to be affirmative action. It may be useful, therefore, to consider one or more taxonomies of those efforts. Figures 1 and 2 offer two possible matrices. In Figure 1, the horizontal dimension arrays various policy devices from the most flexible to the least flexible, while the vertical dimension arrays different spheres of activity--from those most closely to those less closely related to the Federal government.⁴¹ In this array, examples of the eight categories of policies include:

Outreach & Hortatory Efforts:

- Various statutes *encourage* recipients of Federal funds to use minority-owned and women-owned banks.
- DOL's Office of Federal Contract Compliance Programs (OFCCP), for example, offers a periodic award for contractors manifesting superior affirmative-action practices.

Disclosure of Data:

- The Small Business Act (§502) requires SBA to monitor and report on agency contracting with small disadvantaged businesses (SDBs). This reporting can serve hortatory purposes and create a competitive dynamic among agencies.
- Last year, the Administration announced plans to publish the rates at which financial institutions made federally guaranteed loans to women- and minority-owned firms. This reporting can leverage public and intra-industry pressures to expand such lending.

Affirmative Action Plan Requirements:

- E.O. 11246 requires Federal contractors to maintain affirmative action plans; since the Nixon Administration, such plans must in certain circumstances contain flexible goals and timetables.
- The Community Reinvestment Act (CRA) requires certain chartered financial institutions to conduct and record efforts to reach out to underserved communities.

Targeted Training & Investment Efforts:

- The Foreign Service maintains a minority internship program designed to increase minority participation in the Foreign Service.
- EPA maintains a Mentor/Protégé program to encourage prime contractors to develop relationships with small and disadvantaged businesses (SDBs).

⁴¹ This taxonomy is not intended to suggest which programs may warrant strict scrutiny pursuant to *Adarand*

Goals:

- The Small Business Act requires each agency to set goals for contracting with small businesses and SDBs; the SBA coordinates the effort. Additionally, Congress has in several instances legislated specific goals for certain agencies. (As described in section 9 of this Report, these goals are all flexible -- they are not quotas or numerical straight jackets.)
- In response to dramatic imbalances in the numbers of women and minority entrepreneurs participating in its programs, SBA now sets management goals to increase diverse participation in its core §7(a) loan guarantee program.

Market Advantages:

- In upcoming FCC auctions of certain licenses for personal communication services and interactive video, the Commission had planned to offer a 25% discount for women- and minority-owned businesses; this effort was temporarily suspended by the Commission in light of *Adarand*, but may be reinstituted.
- Under its "§1207" authority, the Defense Department is permitted to provide a 10% bid price preference, and to employ reduced-competition systems as a means of meeting their SDB contracting goals. Last year's procurement reform legislation extended this authority to non-DOD agencies as well.
- Surface Transportation Assistance Act, and now the Intermodal Surface Transportation Efficiency Act (ISTEA), authorizes use of "subcontractor compensation" bonuses to prime contractors who use SDBs.

"Soft" Set-Asides:

- ISTEA requires that 10% of contracts be allocated to disadvantaged business enterprises (DBEs), *except to extent that the Secretary determines otherwise*.
- The Airport & Airway Improvement Act requires the same.

"Hard" Set-Asides:

- The Omnibus Diplomatic Security & Antiterrorism Act requires that a minimum of 10% of funds appropriated for diplomatic security projects be allocated to minority business enterprises.
- Certain small education grant programs target minorities in graduate education(20 U.S.C 1134 A⁴²)._f

Obviously, there is no single best way to think about these efforts. For example, in Figure 2, one could categorize efforts based on their programmatic objectives, perhaps distinguishing programs focused on education and training (as more "investment-oriented"), from programs focused on employment and contracting (as more "income-oriented"), from programs focused on the

⁴²such "hard" set-asides have included the Patricia Roberts Fellowship(20 U.S.C. 1134D-G and the women in minorities in graduate education.

assignment of scarce assets (as more "result" or reward-oriented), such as bank charters and spectrum licenses. There are obviously elements of opportunity and result present across the board, but the scale has some intuitive appeal.

Affirmative Action: Opportunity v. Results Framework

Opportunity ----- Results

Results ----- Opportunity

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

Federal Affirmative Action Efforts:

Methods, Spheres of Activity, and Illustrative Programs

	Outreach & Hortatory Efforts	Affirmative Action Plans	Disclosure of Data	Targeted Training & Investment	Goals & Timetables	Preferences	Set-asides
Federal employment	Military recruitment	Encouraged by EEOC when appropriate	EEOC reporting requirements	Foreign Service Minority Internships	Used by agencies when appropriate		
Federally-administered benefits	Regulations encouraging federal use of minority banks	Conditions on certain federal grants (e.g., DOD, DOI)	CRA; SBA 7(a) disclosure of lending data	Selected HHS and Education scholarship and related programs	SBA 7(a) district-level goals set by Administrator	FCC distress sale and tax incentives; PCS bid preference	
Federal procurement practices	OSDBU offices; 8(a) program outreach		SBA reporting on procurement goals	Special Small Business Investment Cos. (SSBICs); SBA's 7(j) program	Government-wide procurement goals	10% bid preference for minority firms	"Rule of two" sheltered competition for minority firms; 8(a) sole-source contracting
Federal contractor practices	Exemplary Voluntary Efforts (EVE) awards	Required by EO 11246 when appropriate		Mentor-protege programs	Required by EO 11246 when appropriate	Incentives for use of minority subcontractors	

6. THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (DOL)

This Part offers a summary based on materials prepared by the Department of Labor and subsequent discussions.

6.1 Concepts & Principles

OFCCP's primary responsibility is to implement and enforce an Executive Order and several statutes banning discrimination and establishing affirmative action requirements for federal contractors and subcontractors. While these policies have roots in the 1940s, the seminal requirements are contained in E.O. 11246, signed by President Johnson, and in regulations promulgated pursuant to that order in 1970 under President Nixon, which introduced the concept of goals and timetables. Specifically, OFCCP may require goals for hiring and promoting women and minorities as part of the affirmative action program (AAP) which contractors are required to develop and/or implement; however, race- or gender-based hiring and promotion are not required, and quotas are prohibited.

6.2 Policies & Practices

- *Coverage:* With certain exceptions, E.O. 11246 applies to Federal contractors and subcontractors with contracts of more than \$10,000 per year. In FY 1993, some 92,500 nonconstruction establishments and 100,000 construction establishments were covered. These establishments employed approximately 26 million people and received contracts of more than \$160 billion.
- *Affirmative Action Requirements:* OFCCP regulations impose different requirements on construction and nonconstruction firms.
 - Nonconstruction firms with 50 or more employees or contracts of more than \$50,000 must develop and maintain a **written affirmative action program (AAP)**. The contractor keeps the AAP on file and carries it out; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review. As part of its AAP, the contractor must conduct a workforce analysis of each job title, determine workforce availability of women and minorities for each job group, and conduct a utilization analysis to determine whether women or minority group persons are "underutilized" in any job

group. Based on these analyses, the contractor establishes goals to overcome the underutilization, and makes a good faith effort to achieve those goals.

- Construction firms are not required to maintain written AAPs, but must make **good faith efforts to meet demographic goals** informed by place-specific census data for minorities and a nation-wide goal for women.
- *OFCCP regulations expressly prohibit discrimination and the use of goals as quotas.*
- **Goals & Timetables:** 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. Numerical benchmarks are established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force. The regulations specifically prohibit quotas and preferential hiring and promotions under the guise of affirmative action numerical goals. *Numerical goals do not create quotas* for specific groups, nor are they designed to achieve proportional representation or equal results.
- **Enforcement Procedures:** A contractor's failure to attain its goals is not, in and of itself, a violation of the Executive Order; failure to make good faith efforts is. OFCCP undertakes **compliance reviews** for certain contractors flagged by a computer program as having below average participation rates for minorities or women. OFCCP also conducts reviews of contractors selected randomly and identified through complaints.⁴³ In FY 1994, OFCCP conducted more than 4,000 reviews, roughly 3.26% of its supply-and-service contractor universe, and 1.55% of its construction contractors. If a firm is found to violate affirmative action requirements (or antidiscrimination requirements) OFCCP attempts to conciliate with the contractor; in a very small percentage of cases, no agreement is reached and the case is referred for formal administrative enforcement.
- **Incentives:** OFCCP gives Exemplary Voluntary Efforts (EVE) and Opportunity 2000 awards to those companies who demonstrate significant achievement in equal opportunity and affirmative action.
- **Sanctions:** A contractor in violation of E.O. 11246 may have its contracts terminated or suspended, or be debarred. Such administrative actions are rare, and there is ample due process accorded the contractor before hand.

⁴³Roughly 80% of reviews are "triggered by" computer-based selection system.

6.3 Performance & Effects

■ *Performance Generally:*

As noted in Part 3 of this document, OFCCP programs have been studied in some detail. During the 1970s, when enforcement was quite strong, the programs were found to increase modestly the employment of minorities. (During the 1980s, enforcement -- and the effectiveness of the policies -- declined.) Most studies have found that OFCCP has had a less significant impact on hiring of minorities in skilled crafts and trades. However, some limitations on the validity of the OFCCP evaluation studies have been raised. The available evidence indicates that productivity at contracting firms is unaffected by OFCCP. This suggests that OFCCP has not caused contracting firms to hire less qualified workers. Further, a recent study finds that exemplary affirmative action programs help a company's stock market values.

The OFCCP national office conducted a random survey of 247 conciliation agreements obtained by the field in FY 1993 and FY 1994, and did not find any situations where the agency sought and obtained remedies outside the scope of OFCCP's authority. Moreover, during the review of the conciliation agreements OFCCP found an example of an OFCCP regional office requiring corrective action by a contractor who had engaged in an employment practice that discriminated against males, both whites and minorities. OFCCP cited the contractor with a violation of Executive Order 11246 and required it to enter into an agreement providing relief to both white and minority victims.

Several studies were critical of the administrative aspects of the programs, such as the mechanisms for selection of contractors for review and the paperwork burdens on smaller contractors. Some groups have been critical of the length and detail of the AAPs. In part in response to this latter criticism, OFCCP plans to (i) significantly reduce the AAP paperwork requirements and (ii) initiate a summary AAP format that will help target reviews.

Finally, some have raised a concern that although AAPs as a formal matter are framed in terms of flexible goals, and although rigid quotas violate both OFCCP regulations and Title VII, in some cases employers implement the goal with a rigidity making it tantamount to a quota. OFCCP has little data directly addressing this concern, but notes that reverse discrimination complaints, including objections to *de facto* quotas, are very rare in their administrative mechanism or at the EEOC. The absence of litigation is not, of course, a complete answer, in as much as subtle discrimination -- reverse or otherwise -- can be difficult to detect and even more difficult to challenge. Therefore, the DOL conducted further analysis for this Review:

- analysis of a recent report by an association of 300 Federal contractors, and interviews with attorneys who represent contractors on OFCCP matters;
- analysis of OFCCP's 1994 customer satisfaction sample survey of contractors; and

- detailed interviews with OFCCP regional directors.

The conclusion of this further analysis is that, while there are some issues of regulatory burden and enforcement consistency, and while there are a small number of firms who feel that the effect of goals is to make them "hire by the numbers," the weight of the evidence refutes the claim that the Executive Order program leads to widespread abuses.

The following subsections review this material in more detail.

■ *Views of the Contractors' Trade Association and Attorneys*

On March 17, 1995, the Equal Employment Advisory Council (EEAC), an association of 300 federal contractors (including companies such as Marriott, Martin-Marietta, and Bausch & Lomb), issued a report "to clarify the nature of affirmative action planning" as well as "to explain the point that Executive Order 11246 does not require contractors to grant preferential treatment to any employee or applicant on the basis of race, gender, or ethnic background." DOL played no role in soliciting the EEAC to prepare and issue its report, but believes it is entitled to considerable weight because EEAC exists to promote the interests of federal contractors.

Emphasizing that OFCCP's regulations explicitly prohibit the use of goals as "inflexible quotas,"⁴⁴ the Report notes that "rancorous debate" often ensues between employers and OFCCP over how many women and minorities are "available" in the work force because solid empirical data do not exist.

The Report also noted that goals and timetables in the past (*i.e.*, during the 1970s and 1980s) worked as quotas. Under OFCCP regulations, numerical affirmative action steps are not required unless "underutilization" exists. OFCCP's previous approach required three types of goals for each underutilized group: an *annual placement rate goal* (expressed as a percentage, and generally set at a rate above "availability"); an *annual numerical goal* (determined by multiplying the annual placement rate goal by the number of anticipated placements); and an *ultimate goal* (expressed as a percentage and equal to availability, coupled with a timetable for reaching that goal). Contractors complained that by setting the placement rate above availability, they were pressured "into extending preferences to fulfill goals." Also during prior periods, failure to implement an acceptable affirmative action goal could be remedied by "catch-up goals." This would have the effect of having goals function like quotas and bore "no relationship to true current availability." In the early 1980s OFCCP abandoned these "preferential tactics." In 1987, a majority staff report of the Committee on Education and Labor, U.S. House of Representatives, specifically recommended reinstating (1) ultimate goals; (2) multi-year timetables; (3) goals set above availability; and (4) numerical goals (to add to percentage placement rate goals). The

⁴⁴ 41 C.F.R. § 60-2.12(e).

EEAC concludes that OFCCP did **not** adopt these recommendations and "*the goal-setting process today clearly does not impose preferences or quota-like requirements.*"

DOL also contacted several lawyers who work with contractors on OFCCP matters. These attorneys consistently stated that employers' major concerns about the administration of Executive Order 11246 have very little to do with goals operating as quotas. Major complaints include inconsistent enforcement among regions, irrelevance of some factors OFCCP requires to be considered in the workforce availability analysis, length and paperwork burden associated with preparing the affirmative action plan, and compliance officers emphasis on minor or technical requirements. They attribute some of these problems to lack of training of compliance officers and poor quality control.

■ *Customer Satisfaction Survey*

In its 1994 customer satisfaction surveys of nonconstruction and construction contractors, OFCCP selected randomly from contractors that had been reviewed during the past year. The response rate for each group was approximately 80% -- responses from 278 construction and 363 service and supply contractors were tabulated.

One question, designed to elicit respondents' overall opinion of the compliance review, asked respondents to indicate their agreement with five statements using a ten point scale. Overall, the survey results were relatively positive. Regarding perceptions of enforcement consistency, 15.2 percent of the construction and 29.3 percent of the service and supply contractors responded that OFCCP had not been very consistent among reviews by the same compliance officer or by staff members from the same office. More than 70 percent agreed that the compliance review was a thorough assessment of compliance with OFCCP's regulations, that OFCCP provided responsive technical assistance, and that the company's position was considered during the conciliation process. Most respondents (more than 80 percent) agreed that the compliance officer was professional during the review and that oral and written communications from OFCCP were professional and courteous.

More broadly, two survey questions ("If you could change or improve any part of the review process, what would it be" and "Are there any additional comments that you would care to include") invited respondents to add narrative comments. Of the 278 construction and 363 nonconstruction responses, one-quarter and one-third of the firms, respectively, commented. *Only 10 construction firms and four nonconstruction firms chose to address quotas or reverse discrimination.* The following are examples of these comments:

Allow businesses to conduct their business for the betterment of customers and employees and not to satisfy some minority quota requirement. [nonconstruction contractor]

Believe program has gone overboard. It is not flexible considering the different factors that effect the hiring process. It has become a numbers game, even though it will not be admitted to. [nonconstruction]

I can see no way to improve the review due to its basis in the code which stresses quotas and quality with little or no emphasis on productivity, work ethic or quantity and quality of work which ultimately makes us competitive nationally and internationally. [construction]

Greater consideration for employer showing good faith. If skills necessary are not available in area in minority and female applicants, they cannot be hired. Do not want to hire unqualified applicants just because they are minorities or females; want to hire best qualified applicant regardless of race or sex. [nonconstruction]

There were also isolated comments about unrealistic goals:

Our women goals, we can't even come close to obtaining. Add to this, the fact that there is currently high levels of unemployment at the local [union]s. What's the reality of these goals? How can we comply when there isn't enough work, and there aren't enough women and minorities in the trade? When will someone take an honest look at this situation and develop realistic goals and procedures to follow? [construction]

The fact that so very few contractors addressed the quota issue is consistent with OFCCP's random survey of conciliation agreements obtained by the field in FY 1993 and FY 1994. OFCCP did not find any instances of contractors being cited for not meeting their goals, use of the word "quota," or obtaining remedies outside the scope of OFCCP's authority.

Other comments from contractors addressed the length of time that it took to prepare for and conduct the compliance review; inconvenient scheduling of the review; inconsistency among compliance officers; and compliance officers' lack of familiarity with the particular industry. Approximately 11 percent of the construction contractors comments and approximately 14 percent of the service and supply contractor comments addressed paperwork burdens. Many of the comments indicated that OFCCP devoted too much time to the on-site review and took an inordinately long time to complete the entire review. Contractors also commented that they sometimes were given the impression during the on-site review that the review had gone well, but the formal closing correspondence was much more negative.

■ *Interviews with OFCCP Regional Directors*

The complaints of contractors conveyed by the regional directors were similar to those revealed in the customer satisfaction survey, such as inconsistency and frustration over technical infractions. Also:

- The Region III Director believes that some contractors today allow goals and timetables to limit unnecessarily opportunities for women and minorities in that the contractors consider the goal to be a ceiling. For example, they hire only 20% women because that is the affirmative action program, but there are 60% women in the applicant pool for a particular job. (Such a situation could lead OFCCP to investigate whether the contractor is engaging in unlawful discrimination, and a quota would be unlawful.)
- According to the Director from Region II, some contractors often set their own hiring and promotion goals and treat those as quotas because "it is smart for their company" and to "keep the government off their backs." When they "hire by the numbers," the word spreads that numbers are driving hiring and promotion decisions -- leaving it unclear as to whose "numbers" are driving the process. Where a contractor engages in such action, the OFCCP is charged with conducting an investigation. Such conduct would violate the executive order.
- Neither Director from Region VIII or IX believes their federal contractors have treated their goals as quotas. The Directors from Regions III, IV, VIII, and IX cannot recall reverse discrimination complaints. The Region V Director remembers only one reverse discrimination complaint.
- The Region I Director noted that contractors can perpetuate the false notion that contractors are being driven by "quotas." Contractors will sometimes tell disappointed male applicants that the individual who got the job or promotion got it because he or she was a woman or minority, even though that was not the reason.

■ *OFCCP Response and Reforms*

As part of the ongoing National Performance Review process led by the Vice President, OFCCP is eliminating unnecessary paperwork requirements associated with the written affirmative action plan and has designed a summary format for the affirmative action plan that will greatly assist OFCCP in targeting its limited resources, while saving contractors approximately 4.5 million (out of 15 million) hours in the annual preparation of their plans and recordkeeping. Several other streamlining and burden-reduction measures are also underway.

OFCCP currently attempts to address the problem of inconsistencies with policy guidance by reemphasizing relevant portions of the Federal Contract Compliance Manual, the agency's operating manual, and with its continuing program of training for its compliance officers. Other mechanisms are more ad hoc. According to the Director from Region III, for example, the region has moved forward with suggestions from Scott Paper Company that (1) the Regional Office communicate/negotiate with the contractor before sending a formal letter of noncompliance, and (2) the compliance officer focus on substantive issues in the review (e.g. good faith) and not technical issues (e.g. formatting of the plan documents).

6.4 A Note on OFCCP Anti-Discrimination Enforcement Functions

In addition to enforcing the government's affirmative action requirements, the OFCCP performs a related but distinct function: enforcement of the antidiscrimination provisions of Executive Order 11246 (based on the principles of Title VII of the Civil Rights Act). The courts and Congress have permitted the use of statistical evidence showing a disparate impact, or manifest imbalance, to establish a *prima facie* case of unlawful discrimination.

Understandably, these two independent concerns are sometimes confusing to contractors in when they are target of corrective actions. For example, contractors occasionally claim they are being "forced" to hire a woman or minority when OFCCP requires them to remedy discrimination by providing job offers, back pay and other relief to identified victims. By contrast, OFCCP polices the affirmative action requirement of E.O. 11246 by "auditing" for "good faith efforts," not for whether any specific goal has been met.

6.5 Conclusions and Recommendations

Do the federal government's affirmative action programs relating to fair employment meet the President's tests: do they work, and are they fair?

6.5.1 Conclusions

Do they work?

With respect to antidiscrimination enforcement, the OFCCP process is designed to provide dispute resolution, adjudication and remediation for identified acts of unlawful discrimination. The key issue in this Review, however, concerns the use of affirmative action programs. Under the Executive Order program, affirmative action in employment is intended to:

- promote inclusion of underrepresented minorities and women, in recognition that the lingering effects of past discrimination and exclusionary practices have denied opportunity to qualified people;
- prevent future discrimination by encouraging employers to be inclusive in their hiring and promotion practices;
- provide a practical means, through use of flexible goals and timetables, for employers to gauge their progress; this mirrors the universal conclusion that successful organizations pursue their objectives by adopting measurable goals, and plans to achieve them.

The empirical literature indicates that affirmative action generally, and specifically the OFCCP Executive Order program, does create opportunity. According to five academic studies, active

enforcement by OFCCP during the 1970s caused government contractors to moderately increase their hiring of minority workers.⁴⁵ According to one study, for example, the employment share of black males in contractor firms increased from 5.8% in 1974 to 6.7% in 1980. In non-contractor firms, the black male share increased more modestly, from 5.3% to 5.9%. For white males, the employment share fell from 58.3% to 53.3% in contractor firms, and from 44.8% to 41.3% in non-contractor firms.⁴⁶ The literature also finds that contractor establishments that underwent an OFCCP review in the 1970s subsequently had faster rates of white female and of black employment growth than contracting firms that did not have a review.⁴⁷ OFCCP enforcement was scaled back during the 1980s. Nonetheless, there is reason to believe that it continues to have a positive and significant impact on remedying discrimination in the workplace.

Is it fair?

(1) Not Quotas

The available evidence, from court and administrative litigation, refutes the charge, based on anecdote, that equal employment opportunity goals have led to widespread quotas through sloppy implementation or otherwise. Quotas are illegal under current law, and can be used only as remedies in extremely limited court-supervised settings involving recalcitrant defendants found to have engaged in illegal discrimination. EEOC and court records simply do not bear out the claim that white males or any other group have suffered widespread "reverse discrimination."

Undeniably, however, there is anecdotal evidence of managers taking impermissible short-cuts -- hiring and promoting "by the numbers" rather than by using affirmative action in a flexible way to broaden the pool and then ensure that the effort to be inclusive does not compromise legitimate merit principles. (See recommendation below.) These anecdotes, if true, may in fact be stories

⁴⁵ The five studies are: (1) Leonard, Jonathan, 1984, "The Impact of Affirmative Action on Employment," *Journal of Labor Economics* 2:439-463; (2) Leonard, Jonathan, 1984, "Employment and Occupational Advance Under Affirmative Action," *The Review of Economics and Statistics*; (3) Ashenfelter, Orley and James Heckman, 1976, "Measuring the Effect of an Anti-discrimination Program, in *Estimating the Labor Market Effects of Social Programs*, Eds: Orley Ashenfelter and James Blum Princeton NJ: pp.46-89; (4) Heckman, James and Kenneth Wolpin, 1976, "Does the Contract Compliance Program Work? An Analysis of Chicago Data," *Industrial and Labor Relations Review* 29:544-64; (5) Goldstein, Morris and Robert Smith, 1976, "The Estimated Impact of Anti-discrimination Laws Aimed at Federal Contractors," *Industrial and Labor Relations Review*.

⁴⁶ Leonard, Jonathan, 1984, "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment," *Journal of Economic Perspectives* 4:47-64.

⁴⁷ See above studies plus Donohue and Heckman, *Continuous versus Episodic*, 29, *Journal of Economic Literature*, p.1631.

about illegal discrimination, and are grounds for more attention to enforcement and education. Nevertheless, the balance of the *evidence*, based on complaints and litigation, indicates the problem is not widespread.

(2) Race-Neutral Alternatives

Nothing in the Executive Order requires race-based hiring or promotion, although equal opportunity *results* are measured. Thus, employers are free to adopt outreach, recruiting and hiring strategies as they choose, consistent with antidiscrimination law. While employers must analyze workforce and labor market data to identify manifest imbalances, the Executive Order only requires good faith efforts, and "good faith effort" is the basis upon which OFCCP reviews contractor performance. In that sense, therefore, as both a logical and practical matter employers are perfectly free to adopt race-neutral strategies to achieve their EEO goals, provided they make a good faith calculation that such strategies will be effective.

(3) Flexible and Minimally Intrusive

There has been criticism of the Executive Order program as inflexible and intrusive, but the actual structure and working of the program demonstrate otherwise. First, there is the fact that the affirmative action programs emphasize goals and good faith, while leaving employers wide latitude to select means. Second, employers develop goals following analyses of their workforce and of the relevant labor pool, and there is no requirement of strict proportionality in the setting of a goal. Third, OFCCP is preparing a very significant reformulation of the guidelines for labor market analysis in order to simplify greatly the paperwork and research burden on firms preparing affirmative action programs. Finally, OFCCP is also streamlining the compliance review process so that its audits are less burdensome and disruptive. In these respects, some legitimate concerns about administration of the Executive Order are being addressed by the agency.

There continue to be concerns about the flat nationwide goal that women occupy 6.9% of construction jobs. That goal was established on April 8, 1978 as part of DoL regulations (41 C.F.R.60-4.6), and has not been revisited. The Secretary of Labor should consider whether such a review is called for. Experience may suggest adjusting the goal.

(4) Transitional

The transitional nature of affirmative action is implicit in the structure of the Executive Order, in as much as action is triggered by manifest underrepresentation of minorities and women, and when a workforce is fully inclusive, no further action is called for.

There is a broader issue, however. To the extent that a contractor is doing a good job of inclusion -- as demonstrated quantitatively by the numbers or qualitatively by the good faith efforts, then the compliance burdens of the Executive Order should be reduced and no regulations

should require the continuation of elements of an affirmative action plan that are unneeded. OFCCP is considering taking steps in this direction.

(5) Balanced

Finally, affirmative action done the *right* way is balanced in that, even where it is necessary to have goals and timetables to correct manifest underrepresentation, those goals must be designed with reference to the relevant pool of applicants, and actual employment decisions cannot in the name of affirmative action give benefits to unqualified over qualified individuals. Moreover, caselaw makes clear that the interests of third parties -- of bystanders -- must be weighed in the balance. All of this is reflected in OFCCP's administration of the Executive Order program.

6.5.2. Recommendations:

Our conclusion is that the pragmatic use of affirmative action to promote equal opportunity in employment by government contractors has been and continues to be valuable, effective, and fair. Moreover, the leadership provided by the Federal government and its contractors has been a critical factor in causing private and public organizations to challenge and change their own personnel practices, using affirmative action tool as one tool to open up opportunity to qualified minorities and women who might otherwise have been left outside.

- To underscore and reinforce current law and policy regarding nondiscrimination, the illegality of quotas, the enforcement focus on "good faith efforts," and the relationship of equal opportunity to legitimate qualifications, direct the Secretary of Labor to institute appropriate changes in the administrative guidelines for the Executive Order program and in the technical assistance provided to employers by the Office of Federal Contract Compliance Programs.
- Finalize and implement plans to reduce the employer paperwork burden associated with the Executive Order Program, and reward successful companies by targeting enforcement on problem firms. Currently, OFCCP is working to achieve a 30% reduction in private sector paperwork burdens. These steps include a streamlining of the written plan required to be prepared by contractors, targeting audits to firms where there is evidence of a problem, and limiting audits to areas of specific concern. In addition, OFCCP will eliminate duplicative or unnecessary forms that are required to be filed by contractors.
- Direct the Secretary of Labor to explore means of collaborating with private sector leaders in more vigorous private sector-led efforts to promote best practices in providing equal employment opportunity.

7. AFFIRMATIVE ACTION IN THE MILITARY

7.1 Concepts & Principles

Today's military leadership is fully committed to equal opportunity.⁴⁸ This commitment has produced considerable progress, but not unqualified success. Historically, the Army has been the most successful -- a record, one official explained, built on "necessity, control and commitment." More specifically:

First, the current leadership views complete racial integration as a military necessity -- that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenges of diversity is critical to national security. Experience during the 1960s and 1970s with racial conflict in the ranks was a seemingly effective lesson in the importance of inclusion and equal opportunity. As a senior Pentagon official told us, "Doing affirmative action the right way is deadly serious for us -- people's lives depend on it."

Second, doing it "the right way" means ensuring that people are qualified for their jobs; promotion is based on well-established performance criteria which are not abandoned in pursuit of affirmative action goals.

Third, the equal opportunity mission is aggressively integrated into the management systems - - from intensive efforts at training, to formal incorporation of EO performance into the appraisals used by promotion boards.

Fourth, the military has made very substantial efforts and investments in outreach, retention and training. These tools help build diverse pools of qualified individuals for assignment and promotion.

Fifth, despite the formality of the military system, the details vary somewhat across services. Different officials expressed slightly different perceptions about subtle aspects of how the system operates.

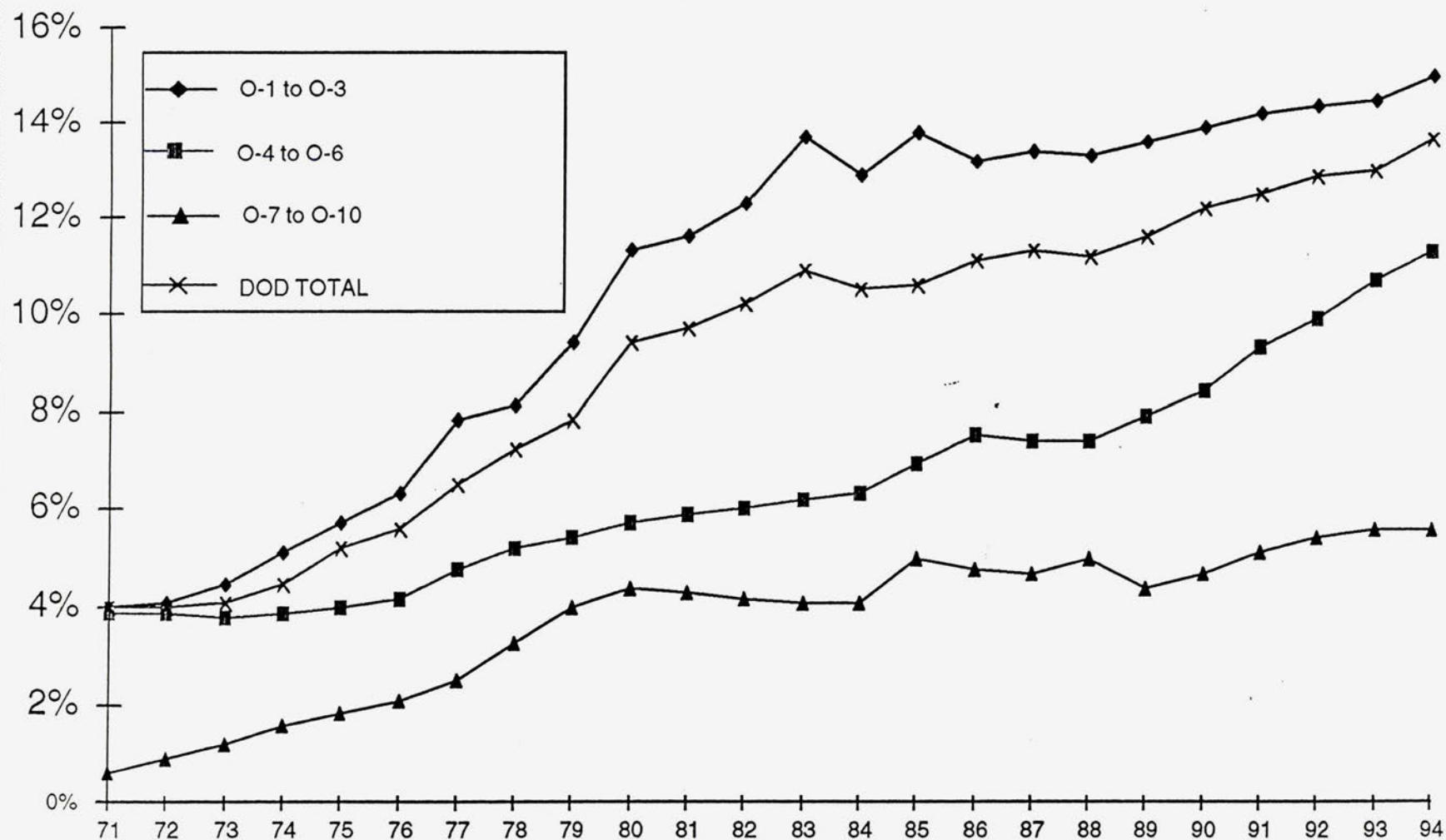
⁴⁸ The Pentagon tends not to use "diversity" and rarely uses "affirmative action." The preferred term is "equal opportunity."

7.2 Policies & Practices

Because minorities are overrepresented in the enlisted ranks and underrepresented in the officer corps (compare Exhibits 3 & 4), the armed forces have focused recently on the officer "pipeline." The services employ a number of tools:

- **Goals & Timetables:** The Navy and the Marine Corps, historically less successful than the other services in this arena, have responded in recent months by setting *explicit goals* to increase minority representation in the officer corps. Both services seek to ensure that, in terms of race and ethnicity, the group of officers commissioned in the year 2000 roughly reflects the overall population: 12% African American, 12% Hispanic, and 5% Asian. Department of the Navy officials point out that this represents a significantly more aggressive goal than had been the case, when the focus for comparison had been on college graduates; the more aggressive goal implies vigorous outreach and other efforts (see below). Moreover, the Navy and the Marine Corps have set specific year-by-year targets for meeting the 12/12/5 goal.
- **Outreach, Recruiting, & Training:** All of the services target outreach and recruiting activities through ROTC, the service academies, and other channels. Also, the services have made *special, race-conscious (though not racially exclusive) efforts to recruit officer candidates*. For example, the Army operates a very successful "preparatory school" for students nominated to West Point whose academic readiness is thought to be marginal; the enrollees are disproportionately but non exclusively minority.
- **Selection Procedures:** All of the services emphasize racial and gender diversity in their promotion procedures. The Army, for example:
 - instructs officer promotion boards to "be alert to the possibility of past personal or institutional discrimination -- either intentional or inadvertent";
 - sets as a goal *that promotion rates for each minority and gender group at least equal promotion rates for the overall eligible population*; if, for example, a selection board has a general guideline that 44% of eligible lieutenant colonels be promoted to colonel, the flexible goal is that promotions of minorities and women be at that same rate;
 - establishes a *"second look" process* under which the files for candidates from underrepresented groups who are not selected upon initial consideration are reconsidered with an eye toward identifying any past discrimination; and
 - instructs members of a promotion board carefully so that the process does not force promotion boards to use quotas. Indeed, as Exhibits 5-7 illustrate, *the minority and women promotion rates often diverge considerably from the goal*.

DoD Minority Officer Representation (by Grade)



NOTE: Graphs depict active duty, commissioned male and female officers.

DoD Female Officer Representation (by Grade)

<u>GRADE</u>	<u>1973</u>	<u>1983</u>	<u>1993</u>	<u>1994</u>
O-7 to O-10	0.3%	0.7%	0.9%	1.2%
O-4 to O-6	2.6%	4.4%	10.3%	10.8%
O-1 to O-3	5.2%	12.4%	14.8%	15.1%
DoD Total	4.2%	9.5%	13.0%	13.4%



NOTE: Data pertain to active, commissioned officers only.

Source: DMDC 3035EO Reports

- **Management Tools:** These include performance standards, reporting requirements, and training and analytic capacity.
 - Personnel evaluations include matters related to effectiveness in EO matters.
 - DoD maintains the Defense Equal Opportunity Management Institute, which trains EO personnel, advises DoD on EO policy, and conducts related research.
 - DoD conducts various surveys and studies to monitor equal opportunity initiatives and the views of personnel.
 - Most important, DoD requires each service to maintain and review affirmative action plans and to complete an annual "Military Equal Opportunity Assessment" (MEOA). The MEOA reports whether various equal opportunity objectives were met and identifies problems such as harassment and discrimination.

The MEOA includes both data and narrative assessments of progress in 10 areas. One of these is recruitment and accessions (i.e., commissioning of officers). Other areas include officer and enlisted promotion results, completion of officer and enlisted professional military education (e.g., the war colleges and noncommissioned officer academies), augmentation of officers into the Regular component, assignment to billets that are Service defined as career-enhancing and to commanding officer and deputy commanding officer billets, and over- and under-representation of minorities or women in any military occupational category. In addition to these formal efforts, the Services support the efforts of non-profit service organizations, such as the Air Force Cadet Officer Mentor Action Program, that strengthen professional and leadership development through mentorship, assist in the transition to military life, and support the establishing of networks.

7.3 Performance & Effects

In quantitative terms, the military has significantly increased opportunities for minorities. As Exhibit 9 illustrates, in 1949 0.9% of all officers were African American; today, that proportion is 7.5%; in 1975, only five percent of active duty officers across all services were minorities, and today that proportion is 13 percent. At senior levels, over the past two decades there has been a fairly steady increase in, for example, the numbers of African Americans at the colonel/Navy captain rank; General and flag officer representation increased until roughly 1982, and has been essentially steady since then.

It is important to note, however, that equal opportunity has not meant total racial harmony or universal respect for the system. A congressional task force that interviewed 2,000 military personnel reported continued perceptions of discrimination, some perceptions of reverse discrimination, and a need to strengthen equal opportunity training. For example, the task force reported that *at one installation*, on a scale of 1 to 5 (with 1 = poor, 5 = excellent), minority

enlisted personnel rated the equal opportunity climate at 1.9, while majority enlisted personnel rated the climate at 4.1. Notwithstanding progress, this and other data suggest continuing sharp differences in perceptions. The Services conduct regular Military Equal Opportunity Climate Surveys. Generally, the races and sexes diverge when asked whether the unit's command structure is committed to equal opportunity. The greater divergence tends to occur between minority women officers and majority male officers, who respectively rate that commitment as "below average" and "good."

Finally, as noted earlier, there are significant variations in diversity across the services, and across specialties and missions within each service. For example, the Navy and Marines have lagged generally, and all the services report comparatively less success in integrating the ranks of technical specialties and of certain "technical" career tracks.⁴⁹

The Department of Defense reports that minorities constitute less than 2% of the Air Force enlisted missile maintenance personnel, and 17% of the enlisted Electronic Warfare/Intercept Maintenance personnel in the Army, while more than 24% and 41% of the enlisted personnel in the Air Force and the Army, respectively, are minorities. In the case of officers, only 6% of the Navy physical scientists, and 7% of the officers of the Marine Corps Electronic Maintenance officers are minorities.⁴⁹

7.4 Implications

Several tentative inferences can be drawn from DoD's experience.

- **Goals and related policies play a critical role in military promotions.** DoD and Service officials are unanimous in stating that merit is not sacrificed in the effort to meet goals for equal opportunity and diversity. The Services reconcile this emphasis on merit with their commitment to correcting underrepresentation of minorities and women by using the tools of goal-setting, outreach and training. The key appears to be management vigilance, motivated by a clear sense of the relationship of diversity issues to the military mission.
- **The military is unique.** In significant respects, the policies and practices of the military may not be portable to other realms. The military is unlike other public and private entities in several relevant dimensions:
 - *A closed system:* There are virtually no lateral hires in the military, thus competition for promotions are among a closed group. Moreover, under the general "up-or-out" policy, underperforming personnel tend to leave the service.
 - *A controlled system:* The military has tremendous discretion to assign, train, and promote its personnel. This provides a degree of control not available elsewhere.

⁴⁹Distribution of Active Duty Forces Report, DMDC 3035, March 1995.

- *A disciplined system:* Individuals who are unhappy with the management priorities, including the attention to diversity, are likely to keep their objections to themselves or exit the service. While EO measures are subject to continual evaluation, internal protest against such a high priority initiative would be frowned upon.
- **But some lessons may be transferrable.** Nevertheless, certain elements in the military success may be applicable more broadly, including in the corporate sector:
 - *Top-down priority:* There is no confusion in the ranks about the importance of the equal opportunity agenda. Private sector experts on affirmative action stress the importance of similar commitment flowing from the Board Room to the line supervisors.
 - *Thorough implementation:* Relatedly, the goals are pursued with a range of tools, from management information systems, to equal opportunity training, to performance appraisals of managers based on their EO efforts.
 - *Emphasize merit and have patience, but measure results:* The long-term support for the program has depended upon the firm belief that merit principles are indispensable. The payoff has required both patience and investments. Patience, however, can degenerate into flagging commitment unless progress is carefully measured, tracked and related to goals.
 - *Investments for a quality pool:* The organization works to recruit, retain and upgrade the skills of women and minorities to ensure that they, like their white male colleagues, can compete effectively in the promotion pool.
- **Overall, the military has made significant progress.** In part because of the closed and controlled nature of the system, the military has made significant progress. Interestingly, to the extent that side-effects of aggressive equal opportunity policy may exist -- such as resentment by white males -- they are probably subdued by the high level of discipline in the services.

It is worth noting, however, that President Truman's actions in 1948 to provide equality of treatment and opportunity in the armed forces took *several decades* to bear fruit, as measured by the increasing representation of minorities in the flag and general officer ranks.

7.5 Conclusions and Recommendations

Do the military's affirmative action programs meet the President's tests: do they work, and are they fair?

7.5.1 Conclusions

Does it work?

For years, segregation in the military was a widely-debated national issue. Even after the military was desegregated, however, the effects of discrimination were deeply ingrained. Racial conflict within the military during the Vietnam era was a blaring wakeup call to the fact that equal opportunity is absolutely indispensable to unit cohesion, and therefore critical to military effectiveness and our national security. Then, with the move to an All Volunteer Force, the military's need to include all Americans in the pool of potential recruits took on added urgency. Today, discussions with both uniformed and civilian leaders at the Pentagon make clear that the justification for aggressive, affirmative efforts to create equal opportunity is understood by commanders and translated into a broad program of outreach, recruitment, training, retention, and management strategies.

The uneven pattern of progress across the services reflects both different choices of strategy and differences in top-level commitment over the years. Many observers, for example, credit the Army's leading effort to the unswerving drive of a few general officers and certain subcabinet officers during the 1970s. Of special importance were the efforts of Carter-era Army Secretary Clifford Alexander, the first African-American service secretary. While much remains to be done, and the pipeline has not yet led to senior ranks diverse enough to declare victory, the trend and the commitment are positive.

Is it fair?

The military has always had a different role and different requirements. For example, actions taken by the Department of Defense since April 1993 have resulted in the eligibility of women for assignment to some 260,000 additional military positions, many of which involve combat. However, women may not be assigned to units that engage in direct ground combat. The military is exempt from the statutes prohibiting discrimination in employment. Nevertheless, its affirmative action efforts prohibit quotas. The core of their strategy is to *build the pool* so that there are minorities and women fully qualified to enlist, succeed, and rise.

7.5.2 Recommendations:

- The President should meet with senior military and civilian leadership of the Armed Services to underscore personally the importance of continued progress in ensuring equal opportunity to women and minorities. Of special concern are the "pipeline" difficulties at the flag and general officer ranks, the importance of successful implementation of recent initiatives to correct the lagging performance of the Navy and Marine Corps, and certain career tracks in all of the Forces, including "technical" specialties, which are still underrepresented.

- The President should ask the Secretary of Defense to convene a high-level group to examine the degree to which the military's equal opportunity philosophy and management tools (such as performance evaluations, job-specific training, sexual harassment training, and alternative dispute resolution) can be adapted to non-military organizations, including DOD's civilian workforce. Of particular interest is whether the driving force behind the military's commitment to equal opportunity -- military necessity -- has analogies in other settings. That group, whose members should include retired senior military officers and corporate executives, should report back to the President.
- The Defense Department should share with other agencies the materials that it has developed for its equal opportunity training for senior officers and DOD civilians.

8. FEDERAL CIVILIAN EMPLOYMENT AFFIRMATIVE ACTION

8.1 History and Results

In 1969, President Nixon issued an executive order that required the Federal agencies to establish Federal Affirmative Employment Programs to foster equal employment opportunity for minorities and women. These programs have had a statutory basis since 1972. In 1994 alone, there were 68 agency plans filed.

Since 1978, the Equal Employment Opportunity Commission (EEOC) has had advisory authority for these affirmative employment functions, including the responsibility to review and approve annual equal opportunity plans submitted by each agency. (EEOC collects information and evaluates the work of the agencies, and has a role in adjudication of individual discrimination complaints. It has no broad enforcement authority, and cannot require agencies to change their mode of operation.) EEOC has implemented the various federal affirmative employment program requirements through a series of Management Directives ("MDs"). The first, MD-707, issued in 1981, instructed Federal agencies to submit equal employment plans for a five-year period. It required each agency to determine whether minorities and women were underrepresented in various employment categories and to set annual goals for underrepresented groups in categories where vacancies were expected.

In 1987, EEOC issued MD-714, which **eliminated** the requirement that agencies set goals. MD-714 placed greater emphasis on the identification and removal of barriers to the advancement of women and minorities. It instructed agencies to devise flexible approaches to improving the representation of women and minorities in their workforces.

In 1993 and 1994, EEOC staff drafted MD-715 to succeed MD-714 and circulated it to agencies for comment. Among other things, the draft Directive proposes: (i) consolidating all Directives into one; (ii) reducing reporting requirements; (iii) requiring agency heads to hold senior and program managers accountable for the accomplishment of agency objectives through their actions and performance appraisals; (iv) eliminating any requirement for the use of goals; and (v) requiring the reporting of discharge or separation rates for minorities, women, and people with disabilities, to allow greater emphasis of retention trends.

EEOC has found no single answer to the challenge of overcoming barriers to minorities, women, and people with disabilities in the Federal government. Agencies have unique workforces, and barriers to equal employment opportunity vary from one organization to another. Successes are gradual in nature and depend considerably on the good will engendered in the Federal executives who manage these programs.

In the Federal agencies, women and minorities comprise a relatively large proportion of the workforce -- XX%, compared to xx% of the nation's overall workforce. Moreover, between 1982 and 1993 overall (white collar and blue collar) and white collar employment of women and every minority group has steadily increased. White women and Hispanics are the only groups whose employment in the overall Federal workforce and in white collar ranks remains below their availability in the overall and white collar civilian labor force. Minorities and women continue to be disproportionately employed in clerical jobs and in the lower grade levels of other occupational series. In FY 1993, for example, 85.98% of clerical jobs were held by women and 39.48% by minorities, while their employment in the Professional workforce was 34.57% and 18.08%, respectively.

While employment of women and minorities in the Federal workforce has increased, their representation falls as grade level rises. In FY 1993, women comprised 72.90% and minorities 38.15% of employees in grades 1-8, while 16.16% of GS/GM-15 employees were women and 12.04% were minorities. In the same year, 13.40% of Senior Executive Service (SES) employees were women and 8.5% were minorities.

For purposes of this review, EEOC selected and reviewed a cross-section of six agencies that had demonstrated creative ways of addressing equal employment opportunity (ranging in size and variety of job categories): Department of the Navy, Smithsonian Institution, Defense Intelligence Agency, NASA, Pension Benefit Guaranty Corporation, and Health and Human Services. The key observations were:

- Each agency described an aggressive affirmative employment program -- including targeting sources, requiring recruiters to consider and report, management awareness/accountability, external and internal communications strategies -- which had achieved modest success rates.
- Available data are limited to the numbers and percentages of minorities and women employed by grade level by year; no systematic data exist about effects on bystanders, the nature or resolution of complaints, or the actual operation of minority preferences in hiring and promotion.
- Several agencies expressed the belief that agency educational efforts are effective in ameliorating white-male concerns (which are palpable in each agency), but this belief was purely anecdotal. The officials we interviewed admitted that truly disgruntled employees might not attend such voluntary town-hall meetings or workshops.
- Agencies subject to downsizing face special pressures which have reduced gains.
- Those agencies with high percentages of professional or technical jobs attribute their limited progress in minority hiring and promotion in higher grades to competition with the private sector for a limited labor pool.

- Several agencies measure carefully the number of women and minority participants in their SES Candidate Development Programs.

8.2 Summary Profiles for Selected Agencies

8.2.1 Department of the Navy (DON)

The Secretary of the Navy has directed action on eight initiatives to improve the civilian Equal Employment Opportunity program. These include centrally coordinated recruitment programs at selected Historically Black Colleges and Universities and minority institutions; expanded intern and cooperative education programs; new approaches to the development of employees in the pipeline with particular focus on minorities and women in grades 9 through 15; special recruitment plans for Senior Executive Service positions; and alternative complaint resolution efforts.

Continuous downsizing and restructuring of the DON have significantly reduced intake and promotion opportunities. DON had made some gains in moving women and minorities into the higher grade levels of GS 13-15 and SES in the last two years but downsizing eliminated many of these gains. The major portion of senior-level white collar positions are in science and engineering. Until the labor market increases significantly, DON expects to continue to compete unsuccessfully with the private sector within a limited market.

8.2.2 Pension Benefit Guaranty Corporation (PBGC)

To improve minority and women recruitment, PBGC has (i) contacted viable recruitment sources and required the recruiting staff to discuss with each selecting official the use of those sources each time a vacancy occurs; (ii) issued quarterly EEO statistics to each office as a reminder of its status versus that of the entire PBGC; and (iii) established a Workforce Diversity Board.

According to EEOC, PBGC has a good record for employing blacks at all grade levels and in Professional and Administrative categories, an average but improving record for employing women at all grade levels and a good record for employing women in the Professional occupations. According to PBGC, during the last year women and minorities were promoted during at a slower rate than men and nonminorities, particularly above grade GS-9, but that the rate was within 20% of the rate for men and nonminorities.

8.2.3 Defense Intelligence Agency (DIA)

DIA implemented a comprehensive program that includes affirmative employment activities within a larger diversity management program. The program includes diversity management, training, affirmative employment plans and programs, adjudication of complaints, deaf and disabled programs, special recruitment, selection reviews, and communications.

According to EEOC, between 1988 and 1993 the representation of women in the Professional, Administrative, Technical, Others and Blue Collar work force increased. The representation of women in the Clerical category decreased. Blacks are fully represented in all of the above categories, while Hispanics, Asian Americans/Pacific Islanders and American Indians/Alaskan Natives either remained far below Blacks and women or have shown no progress. DIA's representation of minorities and women is concentrated in the lower grade levels. Overall, DIA's objectives to increase the number of women and minorities in the upper grade levels, SES and major occupations have not been accomplished during the duration of the multi-year plan, but there has been some improvement.

8.2.4 The Smithsonian

The Smithsonian's Affirmative Employment Program consists of five key components: the diversity planning process, the monitoring and assessment system, education and outreach initiatives, recognition/awards and accomplishment reports. Women and minorities are still underrepresented in all job categories.

A ten year trend analysis reveals that the Smithsonian has experienced a decrease in the total work force representation for Hispanics, Asian Americans/Pacific Islanders, and American Indians/Alaskan Natives. Women made the greatest gains, going from 32.63% to 40.38%. The 1993 SES representation places women at 26.8% and Blacks at 8.7%.

8.2.5 Health and Human Services (HHS)

At HHS, developmental programs have been a main focus of affirmative employment efforts. For example, HHS did outreach to ensure that women and minorities were well-represented in the pool for its most recent Senior Executive Service Candidate Development Program. Using race-neutral selection criteria, the results were dramatic. More than half of the candidates in the class were women and 29% of the candidates were minorities.

HHS uses a "top-down approach" to affirmative action, believing that a diverse top-echelon will drive these practices down through all levels of the organization. In support of the top-down approach, HHS gives responsibility for furthering affirmative employment to Executive Resources Boards. These Boards, composed of senior management officials, provide advice to the head of the operating division on all SES personnel actions. Also, SES and non-SES managers are held accountable for affirmative employment through their performance plans.

8.2.6 National Aeronautics and Space Administration (NASA)

The centerpiece and newest initiative in NASA's Equal Opportunity Program is the Equal Opportunity and Diversity Management Plan which was endorsed by the Administrator and all senior officials of NASA in September 1994. The Plan, to increase the diversity of the workforce while reducing its size, completely redesigns and strengthens the affirmative employment program

by establishing voluntary goals and timetables based on in-depth analysis of underrepresentation compared to the relevant civilian labor force statistics.

NASA's EEO profile is worse than that of most Federal agencies; however, it has improved considerably in almost all areas over the last decade. Women and minorities tend to be concentrated in the lower grade levels. NASA states that they cannot compete with the private sector when recruiting for the highly skilled Professional jobs that comprise the majority of their work force (scientist and engineer positions comprise 76% of the workforce). In NASA, 82% of SES positions are held by white males. White males comprise 37% of the population but hold 82% of senior management and leadership positions.

8.3 Affirmative Action for a Shrinking Federal Workforce

Civilian employee affirmative action has been relatively non-controversial at a time of a growing or stable federal workforce. However, as the federal government shrinks, tensions will likely increase.

As a result of policies implemented by President Clinton, the federal workforce will soon be the smallest since John F. Kennedy was President. In all, Executive Branch civilian employment has shrunk 8% from a total of 2,155,200 in 1993 to an anticipated total of 1,981,900 in 1996, according to the Office of Management and Budget. The budget proposed by the President envisions accelerated reductions, and the budget resolution passed by the Congress envisions even more dramatic personnel reductions. [more stats not easily available], While most reductions have been made through attrition, in the future layoffs and terminations may be required more prominently.

The issues of layoffs and restructuring are salient throughout the economy, not just in the public sector. They are especially painful because it is generally recognized that the decision whether to lay someone off is different from, and more difficult than, a decision to hire someone. The adverse impact on the "nonbeneficiary" is more severe, and less reparable, than in the case of a new job not obtained. Already, several Clinton appointees have indicated that their aggressive efforts to improve affirmative action performance have met with heightened resentment due to sharply declining FTE ceilings. (Even so, the EEOC, does not report a significant increase in formal reverse discrimination actions against federal agencies.)

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

In the federal government, personnel policy generally follows the merit system, and personnel reductions are governed by a strict regime of civil service statutes and regulations. In addition, many personnel policy issues are resolved through consultation with public employee unions.

Accordingly, the issue of race in the context of layoffs will generally arise when a choice must be made among employees of the same seniority. In the *Piscataway* case, the Justice Department argued that Title VII does not prohibit a School Board from using race as a tie-breaking consideration in pursuit of a legitimate interest in diversity. In the context of the Federal civil service, OPM regulations are silent on the use of race and gender in connection with layoffs. The Justice Department believes that Federal statutes and caselaw would, as in *Piscataway*, permit narrowly tailored consideration of race and gender.

8.4 Conclusions and Recommendations

8.4.1 Conclusions

Do the affirmative action programs affecting the federal government's civilian workforce meet President's tests: do they work, and are they fair?

Does it work?

Again, the first question to ask is: what is the goal of civilian workforce affirmative action?

The principal goal of federal civilian employment affirmative action is to remedy past discrimination and deter future discrimination -- just as would be the case with a large private employer. For decades, the Federal Civil Service was viewed by African Americans as a principal avenue to economic security, and it was. But few of the jobs were professional, because, tragically, America's government reflected the discrimination of society at large. And some agencies were dominated by a discriminatory mindset, while others were more receptive to minority advancement. Today, the Federal Government strives to be a model employer. As such, all agencies make affirmative efforts to be inclusive in their hiring and promotion practices, and many include goals and timetables in their annual affirmative action plans.

In addition, because of the unique nature of the government, there are particular benefits to be gained from diversity in the federal workforce. First, in some areas (such as law enforcement), diversity is particularly important to the government's effectiveness at dealing with the broader community. Second, diversity of decisionmakers leads to better decisions, when the goal is a government that truly represents the interests of all the people.

Significant progress has been made toward meeting these goals. Federal agencies, in the aggregate, seek to be model employers, and offer real opportunity for minorities and women that are often not available in the private sector. However, real problems remain. Minorities and women remain seriously underrepresented in the higher ranks and at some agencies. There are many explanatory factors, including the lag required for hirees to reach the senior ranks, but the inescapable conclusion is that a glass ceiling impedes progress in the public sector as well -- not as seemingly impenetrable as that in corporate world, but a barrier nonetheless.

As discussed above, it will be still more difficult to retain the appropriate balance in a period of reduction in the size of the Federal workforce. Promotion opportunities are decreasing, jeopardizing efforts to create a more diverse senior workforce and creating pressures and tensions which, if not properly addressed, trigger resentment and demoralization. Agency managers recognize this challenge. Those with whom we consulted express confidence that they are taking appropriate steps, but these expressions were not fully persuasive. Seminars and town hall meetings to discuss "diversity" and "opportunity" are undoubtedly important and necessary elements of a strategy. It seems unlikely, however, that these will be fully effective. As the Federal workforce shrinks, the risk of tensions will increase.

Is it fair?

(1) Not quotas.

Policy and law prohibit quotas and numerical straightjackets, and we found no hint of evidence that these prohibited practices take place. Throughout the government, civil service statutes and regulations ensure adherence to merit principles. During the Reagan Administration, EEOC "deregulated" the agencies to provide discretion in whether to use goals and timetables. This flexibility allows managers great latitude in structuring their hiring and promotion policies. The cost may be, however, slower progress in building a workforce that draws upon the full range of talents and capacities of all citizens.

(2) Race-neutral options.

Although managers are encouraged to keep diversity and equal opportunity objectives in mind when conducting outreach and recruiting, these efforts are designed to ensure that hiring and promotion decisions are made from an inclusive pool of qualified candidates. Beyond that, actual decisions are made in accordance with the race- and gender-neutral civil service "merit selection" procedures established by law and regulation, so that race and gender are not given *formal* weight. For those positions in which interviews and subjective factors play an inevitable role, such as policymaking positions in the Senior Executive Service, anecdotal reports are that some managers may give flexible weight to diversity considerations. This is appropriate to redress a manifest imbalance, or when diversity is somehow relevant to the effective performance of the organization -- but with the important caveats regarding avoidance of reverse discrimination as established in the caselaw. (The antidiscrimination enforcement mechanisms of the EEOC and the agencies are designed to prevent and remedy any abuses.)

(3) Flexible.

Since 1987, there has been no requirement that agencies use goals and timetables; instead, they are directed to focus on removing barriers to advancement. Accordingly, the programs vary among agencies and departments.

(4) Transitional.

Because agencies undertake affirmative employment efforts in accordance with their affirmative action plans, and because agencies review and modify those plans every year, the current efforts are appropriately transitional. It is reasonable to make these judgments narrowly, focusing on specific job categories and organizational units within each agency, rather than making an aggregate decision for the entire Federal workforce.

(5) Balanced.

The data suggest that reverse discrimination charges have been a relatively small and constant proportion of all discrimination complaints filed by Federal workers with the Equal Employment Opportunity Commission. (Nevertheless, the long delays all complaints face at the EEOC is a matter of serious concern because delay is a form of unfairness to all concerned -- both complainants and respondents. An ineffective enforcement mechanism makes the promise of a discrimination-free workplace too fragile for comfort.)

The shrinking federal workforce puts into sharp relief the issue of affirmative action's effect on nonbeneficiaries, this time in the context of layoffs. These issues will be increasingly thorny in the future, and will require extra attention to ensure fairness to nonbeneficiaries.

8.4.2 Recommendations

We recommend:

- Recognizing that the EEOC is chronically underfunded, the OMB should work with the agency to develop a budget proposal that ensures it can effectively carry out its mission. Proposals should specifically address implementation of major new initiatives regarding charge processing, alternative dispute resolution and other efforts to tame the agency's large backlog of complaints.
- The President should direct agency heads to ensure that performance appraisals for managers include evaluation of their performance with respect to equal opportunity objectives, as defined by each agency in light of its circumstances and needs; periodic consideration by agencies of whether appropriate management systems of accountability are in place to pursue the agency's equal opportunity objectives.
- The President should direct the President's Management Council to work with the EEOC to study and report on the appropriate use of flexible goals and timetables for hiring and promotion, in the context of an overall Federal workforce reduction. The overall goal is to ensure that the Federal government is a model equal opportunity employer.

- The President should also direct the President's Management Council to coordinate with the EEOC to identify and report on best agency practices in managing diversity and promoting equal opportunity, and implement a mechanism to foster dissemination and adoption of those practices throughout the government. The Council should also look to successful examples in the private sector.

9. FEDERAL PROCUREMENT POLICIES & PRACTICES

This Part summarizes the Review Team's examination of affirmative procurement efforts administered by the Department of Defense, the Department of Transportation, and the Small Business Administration, including implementation at those agencies of government-wide efforts to contract with Small Disadvantaged Businesses. These agencies were surveyed because they administer programs accounting for a large percentage of government contracting.

9.1 Overview and background

9.1.1 General

Throughout the federal government, several programs seek to increase procurement and contracting with minority- and women-owned businesses. The largest of these efforts are government-wide programs overseen by the SBA; this overall effort is supplemented in some cases by agency-specific initiatives. Under these programs taken as a whole, some procurement contracts are set aside for sole-source or sheltered competition contracting, eligibility for which is limited almost entirely to minority-owned businesses. (There is also a broad, race-neutral, sheltered competition or setaside for small businesses generally. This operates separately and has a lower priority than the more targeted efforts.) The implementation of these programs has caused considerable controversy, despite the fact that over 93 percent of procurements are with non-minority firms.

We conclude that *flexible goals* for procurement from minority- and women-owned businesses make sense, remain important, and are not in themselves unfair. They have successfully fostered minority and women entrepreneurship, and can be a necessary counterweight to continuing discrimination faced by those businesses. However, we conclude that many current programs are prone to unintended consequences and abuses, and the should be substantially reformed.

9.1.2 History and background

MBE programs were enacted as a response to specific executive and congressional findings that widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority owned businesses to have an equal chance at developing in our economy.⁵⁰

⁵⁰ See, for example: "Historically there has been an acute shortage of equity capital and long-term debt for small concerns owned by socially and economically disadvantaged individuals." S. Rep. No. 95-1070, 95th Cong., at 3 (1978) (Amendments to the Small

This congressional cognizance was recognized by the Court in *Fullilove v. Klutznick*, when it upheld the set-aside program.⁵¹

Such discrimination -- and the impact of prior discrimination -- continues today. The U.S. Commission on Minority Business development reported in 1992:

(S)tereotypical images of minority owned firms limit their access to the factors of production . . . Our nation's history has created a 'cycle of negativity' that reinforces prejudice through its very practice; restraints on capital availability lead to failures, in turn, reinforce a prejudicial perception of minority firms as inherently high-risks, thereby reducing access to even more capital and further increasing the risk of failure."⁵²

In 1990, African Americans accounted for 12.1 percent of the population but they owned only 3.1 percent of the total business and 1.0 percent of receipts of all U.S. firms. That same year, Hispanic Americans accounted for 9 percent of the population, but only 3.1 percent of U.S. businesses and 1.2 percent of all receipts. And Asian and Pacific Islanders accounted for 2.9 percent of the population, 2.6 percent of U.S. firms and 1.7 percent of total receipts. The typical minority firm has annual receipts that are less than half that of white-owned firms. And while in 1987 the average payroll among white-owned firms with employees was \$85,786, for minority-owned firms the average payroll was \$38,318.⁵³

These disparities have been linked to past and present discriminatory practices, especially in the provision of capital:

- Traditional sources of financial capital, such as commercial banks, have frequently been unavailable to minority business owners.

Business Investment Act of 1958, P.L. 95-507 (1978)

⁵¹"Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1979).

⁵² United States Commission on Minority Business Development, Final Report, at 6 (1992)

⁵³ United States Commission on Minority Business Development, Final Report (1992), developed from data provided by U.S. Department of Commerce, Bureau of the Census.

- The effects of current and past discrimination in the labor market creates a glass ceiling on minority earning potential and limits inherited income resulting in compounded difficulties for minorities in generating the initial equity investments.
- Scarcity of financial capital has forced the overwhelming majority of minority owned businesses to concentrate in fields that do not require large amounts of capital (very small service businesses with few employees).⁵⁴

9.2 Policies & Practices

9.2.1 Government-Wide Efforts

- **Goals:** Federal law establishes several overall, national goals to encourage broader participation in federal procurement: 20% for small businesses; 5% for small disadvantaged businesses (SDBs); and 5% for women-owned businesses.⁵⁵ The SBA consults with each agency to set annual agency-level goals to ensure progress toward the overall goal. (For contracts and firms above certain thresholds, the law requires subcontracting plans in furtherance of these goals.) The goals are themselves flexible, and hence relatively non-controversial. The government-wide SDB goal was met for the first time in 1993.^q
- **Sole-source contracting:** Under the §8(a) program, which is statutorily mandated, small SDBs can secure smaller contracts (usually less than \$3 million) without open competition. This "sole sourcing" is accomplished when an agency contracts with SBA, which in turn subcontracts with the SDB.

For a company to participate in the §8(a) program, SBA must certify that the firm is controlled and operated by **socially and economically disadvantaged persons**.⁵⁶ By statute, persons from certain racial and ethnic groups -- but not women -- are presumed to be socially

⁵⁴ For further discussion, See, e.g. Timothy Bates., "The Potential of Black Capitalism." Public Policy 21 (Winter 1973); and, generally, Timothy Bates, Major Studies of Minority Business, A Bibliographic Review, Joint Center for Political and Economic Studies (1995).

⁵⁵ The goal for women was added in the 1994 procurement reform legislation, the Federal Acquisition and Simplification Act. Racial minorities are presumed to be "socially disadvantaged" for purposes of the government-wide SDB program, mirroring the statutory presumption in the SBA's §8(a) program described below.

⁵⁶ Congress first codified the §8(a) program in 1978. The earlier regulation-based program keyed eligibility to either group status *or* economic disadvantage. Congress and the Carter Administration chose to require that *both* conditions be satisfied in order to focus the program on victims of group-based discrimination. 15 U.S.C. § 637(a)(1), (4).

disadvantaged; persons are considered economically disadvantaged if they face "diminished capital and credit opportunities" -- measured by asset and net-worth standards.

In FY 1994, the §8(a) program accounted for about 2.7% of all government procurement -- about \$4.9 billion. The number of certified §8(a) firms grew from 3,673 in 1990 to 5,833 in 1994, of which 47% received contract actions.

Once a firm is certified and brought into the §8(a) program, the 1987 amendments to the statute establish both a "graduation" period of nine years and a requirement that, over time, firms achieve an increasing mix of business from outside the §8(a) program and outside federal contracting.⁵⁷ Under the prior Administration, the SBA did not aggressively implement these 1987 statutory changes, but it has now done so. Moreover, in recent years there has been increasing emphasis on using competition among §8(a) and SDB firms rather than sole-source procurements.

- **Bid price preferences:** Procurement reforms enacted by Congress last year authorize government-wide use of the 10% bid preference for SDBs which previously was a tool available primarily at DOD (the so-called "§1207 program" -- see below). Implementing regulations are scheduled to be finalized this summer. These regulations could have a significant effect on procurement by SDBs in those agencies that do not use an effective set-aside scheme such as DOD's "rule of two," described below.

9.2.2. Agency-Specific Efforts

- **Department of Defense:** In addition to participating in the goal-setting and §8(a) efforts, DOD has two additional efforts, which are significant because DOD executes roughly two-thirds by amount of all federal prime contracts. These additional programs are part of DOD's effort to meet its share of the government-wide goals mentioned above.
 - *SDB shelters or set-asides:* Contracting officers are authorized to **limit bidding** on a particular contract to small disadvantaged businesses (SDBs) if two or more such firms are potential bidders and the officer determines the prevailing bid will likely be within 10% of the fair market price.
 - *SDB 10% bid preferences:* Whenever there is full and open competition and procurement is based on price factors alone, contracting officers (notionally) add 10% to the price of *non-SDB* bidders, and then award the contract on the basis of the revised bids. (This is the "§1207" program. Although the applicable statute merely makes this tool *available* to DOD as a means of achieving its contracting goals, the Department's procurement regulations mandate its use.)

⁵⁷ 15 U.S.C. § 636(j)(15).

- *Comparative usefulness of preferences:* Over 60% of DOD's contracting with SDBs occurs through either this "rule of two" set-aside or through the §8(a) program; the 10% bid price preference has been little-used in recent years because regulations require that the "rule-of-two" be used whenever possible, and it generally is. See the accompanying chart.

Targeted Procurement Programs: A Side-by-Side Comparison

	GOVERNMENT-WIDE			DEFENSE *			TRANSPORTATION	
	MBE goals**	8(a)	WOB goals	8(a)	SDB set-asides	SDB bid preferences	8(a)	STAA (grants to states and locals)
ADMINISTERING AGENCY	SBA	SBA	SBA	SBA/DOD	DOD	DOD	SBA/DOT	DOT
ELIGIBILITY CRITERIA	race/ethnicity	social and economic disadvantage	gender	social and economic disadvantage	social and economic disadvantage	social and economic disadvantage	social and economic disadvantage	race/ethnicity gender, or social and economic disadvantage
CERTIFICATION BY	N/A	SBA	self	SBA	self	self	SBA	state transportation departments
MECHANISMS	goals & outreach	technical assistance; sole-source and set-asides	goals & outreach	technical assistance; sole-source and set-asides	sheltered competition	price advantages	technical assistance; sole-source and set-asides	reward primes for subcontracts with SDBs
VOLUME (prime contract \$ in FY94)	9.7 billion (4.9%)	5.3 billion (2.7%)	3.1 billion (1.6%)	2.75 billion (2.0%)	1.09 billion (0.97%)	0.36 billion (0.32%)	0.39 billion (15.9%)	\$2.7 billion (incl. sub Ks)

Abbreviations:

MBE = Minority Business Enterprise

WOB = Woman-Owned Businesses

SDB = Small Disadvantaged Business

STAA = Surface Transportation Assistance Act

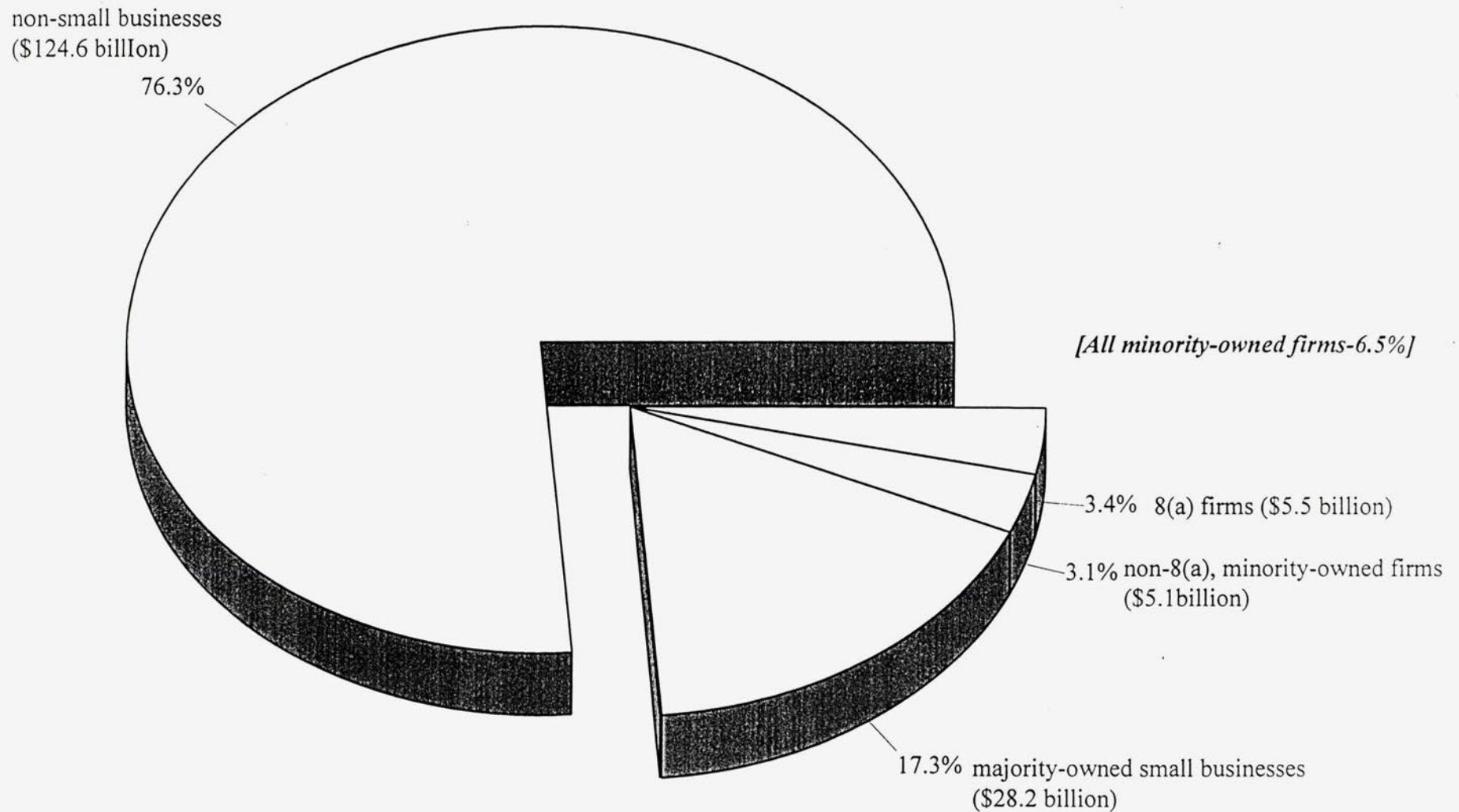
Notes:

*Defense data do not include \$1.6 billion in prime contracts awarded to SDBs in open competition.

**"MBE goals" are 5% in the aggregate, but vary across agencies. Volume data include the 8(a) program.

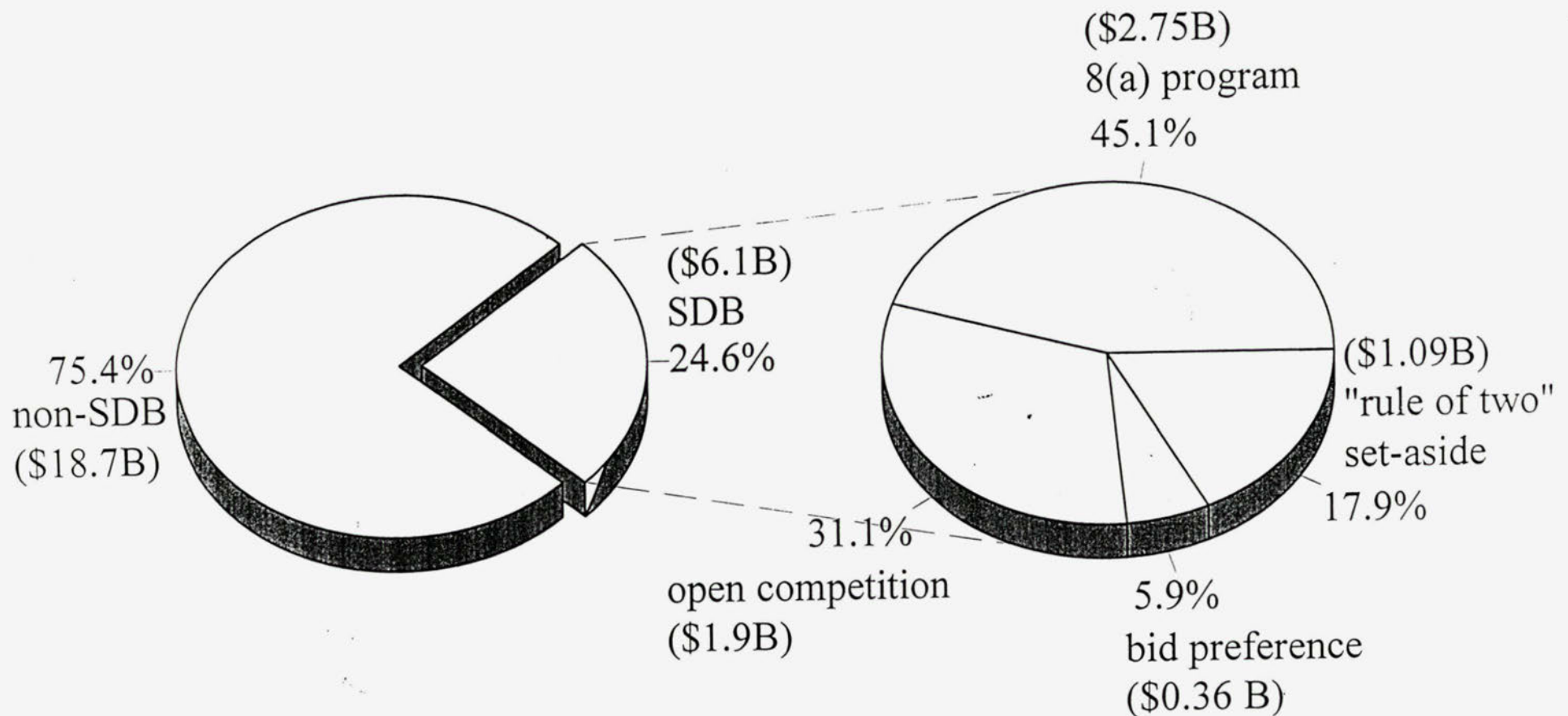
Distribution of Federal Prime Contracts by Minority Status

(for major federal agencies, FY1994)



DoD Small Business Procurement

SDB/non-SDB & by preference (FY94)



Note: Approximately 90% (\$2.5B) of 8(a) contracts are sole-sourced; the remaining 10% are competed among 8(a) firms.

Abbreviations:

SDB = small disadvantaged business

- **Department of Transportation:** In addition to participating in the goal-setting and §8(a) efforts, DOT manages an effort to encourage business with minority- and women-owned firms through its grants to state and local entities.⁵⁸
 - **Subcontracting preferences:** In addition to setting goals for subcontracting with women- and minority-owned firms, DOT requires that grant recipients (usually state or local authorities) provide an additional payment to contractors who attain certain levels of contracting with women- or minority-owned subcontractors and who provide certain technical assistance to those subcontractors. The payment is designed to compensate the prime contractor for additional costs for assisting the subcontractors. The bonus is up to 1.5 to 2.0% of the total contract.⁵⁹ (This is the provision at issue before the Federal courts in *Adarand*.⁶⁰)
- **Graduation from sheltered competition:** Unlike the §8(a) program, the DOD and DOT programs do not require that firms graduate from preferences, or that firms have a mix of federal procurement and other business. There is, of course, the "natural" graduation which occurs if a firm becomes bigger than the "small" business size standard established by the Small Business Act, or the owner's wealth rises above the applicable threshold.⁶¹
- **Certification of eligibility** in these programs differs from SBA's certification for participation in the government-wide §8(a) program. In the DOD programs, the firms self-certify that they are qualified; in the DOT program, the state/local grant recipient is responsible for certifying the subcontractor's status.⁶²_{aa}

9.2.3 Complementary Programs: Technical & Other Assistance

⁵⁸ See, *Surface Transportation Assistance Act of 1982*, Pub. L. 97-424, 96 Stat. 2100 (Jan. 6, 1983) [STAA]; superseded by *Surface Transportation and Uniform Relocation Assistance Act of 1987*, Pub. L. 100-17, 101 Stat. 132 [STURAA]; *Intermodal Surface Transportation Efficiency Act of 1991*.

⁵⁹ 15 U.S.C. § 644(g); *Federal Acquisition Regulation*, 8 C.F.R. § 52.219-8.

⁶⁰ 115 S. Ct. 2097 (1995).

⁶¹ "Small" varies with the industry, but the maximum number of employees varies between 500 and 1500. See *Federal Acquisition Regulations (FAR) Part 19.102*. The DOD wealth test is personal assets not more than \$750,000, excluding business assets and personal residence.

⁶² 49 C.F.R. part 23; 48 C.F.R. § 52.219-8.

A number of agencies have other programs to assist women- and minority-owned firms seeking procurement opportunities. These include:

- SBA maintains several programs that serve small businesses generally, by providing technical assistance, loan guarantees, and equity capital through Small Business Investment Companies (SBICs).
- The *Minority Business Development Administration* (MBDA) at Commerce provides technical assistance and support for women- and minority-owned firms.
- Several agencies maintain "*Mentor-Protegé*" programs which encourage majority firms to advise and nurture new and growing minority-owned firms by providing managerial and technical assistance.
- *SBA's Surety Bond Program* provides up to a 90% guarantee for bonds required of contractors and subcontractors on many public and private construction contracts, thereby lowering the small firm's cost of doing business. In FY 1994, SBA approved more than 22,000 bid bond guarantees, resulting in 6,591 final bonds, for a total bond guarantee amount of \$1.08 billion. Although this program is not specifically targeted, 24% of bonds went to minority firms; nearly half of these were African-American, and one-quarter were Hispanic.^{bb}

9.3 Performance & Effects

In the face of continuing barriers to full minority participation in economic life, most of these efforts have been **very successful in expanding federal procurement from women- and minority-owned firms.**⁶³ Agencies first achieved the 5% SDB goal in 1993 and, government-wide, prime contracts for minority-owned businesses were 6.4% of the total dollar volume. This approaches the proportion of minority-owned businesses among all U.S. firms, but is considerably below the 10.4% minority representation among adults with college degrees. See the illustration.^{cc}

⁶³ The full effect of federal procurement affirmative action is found in the "ripple effect" – diminished discrimination at the state and local level, and in the private sector. Such measurement is inherently difficult.

- In 1994, 32 of the largest 100 African-American owned firms and 17 of the top 100 Hispanic-owned firms were or had been in the §8(a) program.
- Between 1982 and 1991, the dollar volume of all federal procurement contracts over \$25,000 increased by 24%. At the same time, contracts awarded to women-owned firms increased by more than 200%; contracts awarded to minority-owned firms increased by more than 125%.
- Agency-level data show similar trends: for example, between 1985 and 1994, contracting with small, disadvantaged businesses grew from 2.1% of DOD procurement to 5.5%--an increase of more than \$3 billion.
- Discussions with GSA contracting experts revealed that subcontracting with minority- and women-owned firms on large federal construction projects would likely not occur but for federal pressure in order to meet overall goals. This is also the strongly held view of SBA officials and of leadership in the SDB community.

Given the shrinking size of the procurement pie, such increases have necessarily been accompanied by real decreases for other small firms. For example, while DOD's contracting with SDB's more than doubled, its **contracting with non-disadvantaged small firms fell by almost 20%** in dollar terms, while remaining a fairly constant share of DOD's decreasing acquisition budget.⁶⁴ Perhaps relatedly, the SDB programs have been the source of some controversy. As noted above, DOT's bonus program is currently the subject of constitutional challenge in the *Adarand* case, on remand to the lower Federal courts from the U.S. Supreme Court.

- While the overall goals and levels of these programs are relatively small nationwide (less than 10%) it is important to examine their effects in particular *geographic regions* and within *certain industries and subsectors*.⁶⁵ For example, there appears to be a tendency for agencies to concentrate their minority contracting in certain fields -- such as construction -- where there are a significant number of existing minority firms. While this makes operational sense, it also means that, in practice, effective goals, set-asides, and preferences in some fields can be several times the overall goal. Indeed, reports indicate that in a few regions

⁶⁴ This comparison is for the period 1985-94, over which the non-SDB small business share of DOD business fluctuated, but began and ended the period at 16.6%.

⁶⁵ See, e.g., GAO/RCED 94-168 (August, 1994), at pp. 24-25.

CHART

and fields, **set-asides account for more than half of all procurements.** Our research indicates that these types of unintended effects cause considerable resentment among a significant sector of the government contractor community. (See below.)

- Some proponents of these procurement initiatives argue that they are valuable not only because they combat discrimination and the lingering effects of discrimination facing minority and women entrepreneurs, but also because they indirectly promote **employment** of socially disadvantaged workers and development of economically **distressed areas**. The very limited evidence on these hypotheses suggests that there is, indeed, a meaningful correlation between minority ownership and minority workforce,⁶⁶ but the anecdotal evidence is that the relationship varies considerably across sectors. There has not been adequate study of the broader economic development hypothesis; indeed, a measurable effect seems unlikely given the comparatively small amount of contract dollars involved and the observed concentration of §8(a) firms in the Washington D.C. area.
- The data regarding the effect on business formation and subsequent success of these programs are limited, but somewhat encouraging: SBA statistics for FY 1993 indicate that of the 710 firms that were graduates in that or previous years, 56% were still fully operational, 6% had curtailed operations, 3% had been acquired by other companies, and 35% had ceased operations. Comparisons with census data suggest that the failure rates of graduated §8(a) firms are no worse than, and in fact may be better than, those seen in small businesses generally.⁶⁷_{gg}

9.4 Evaluations & Proposed Reforms

These programs have been the object of a number of studies, including a Congressionally mandated study during the prior Administration which recommended maintaining and strengthening the federal effort to ensure minority- and women-owned business participation in federal procurement.⁶⁸ SBA, this past August, proposed a comprehensive reform of the §8(a) program in testimony before Congress. That proposal, summarized in Appendix B, is responsive to the great majority of common criticisms.^{hh}

⁶⁶ See, T. Bates, "Do Black-Owned Businesses Employ Minority Workers? New Evidence," Review of Black Political Economy 51 (Spring 1988) (research by Professor Timothy Bates, Wayne State University, Detroit, MI., based on 1987 census data).

⁶⁷ Census data indicate that of all small businesses formed in 1976-78, less than 30% survived 6 to 8 years; data for 1982-87 indicate that only 42% of black-owned firms survive five years. See *The State of Small Business: A Report to the President* 214-15 (1993).

⁶⁸ See Final Report of the U.S. Commission on Minority Business Development (Dec. 1992).

Generally, critics and commentators reviewing these programs have made the following points:

- **Reorganization:** Some observers emphasize the need to rationalize and coordinate the web of federal programs serving minority- and women-owned firms. For example, in 1992 the U.S. Commission on Minority Business recommended the creation within the Commerce Department of an Administration for the Development of Historically Underutilized Businesses which would assume SBA's §8(a) responsibilities.⁶⁹ A preliminary Commerce Department proposal is reviewed in Appendix Volume B to this Review.
- **Graduation:** The §8(a) program now requires "graduation" after nine years, and has phased requirements of non-8(a) and non-federal business mix designed to wean firms from sheltered competition and dependency on federal contracting. In February 1995, of the 1,038 firms in the fifth through ninth year of §8(a) participation, nearly two-thirds met or exceeded the minimum non-8(a) business levels.⁷⁰ Some observers have emphasized the need for analogous graduation and business-mix requirements in the DOD and DOT programs.
- **Excessive Regional/Sectoral Concentration:** Our analysis found SDB contracts and limited competition concentrated in certain industries and regions. For example, while DOD's overall goal for SDBs was only 5%, *more than 35% of all DOD construction awards went to SDBs*, and more than *two-thirds* of these were awarded under sheltered competition. Moreover, in ten States, more than 40% of all construction contracts awarded to small business were awarded to SDBs; in New Mexico, 85% of DOD's construction contracts went to SDBs. This concentration occurs at particular sites as well: we uncovered a few facilities where *all* of the contracts were set-aside for SDBs. These include: Lowry AFB (Colorado), Norton AFB (California), Fort Monroe (Virginia). This practice has resulted in substantial resentment and criticism. On the other hand, some degree of sectoral concentration in SDB procurements is inevitable to "balance" the huge procurements for weapons systems and the like, for which no SDBs are available as prime contractors, and still too few as major subcontractors.
- **Self-Certification:** Because DOD's program is based on self-certification by SDBs, it may be prone to abuse, particularly through "front companies." While we were not able to uncover comprehensive data on this issue, our research found instructive anecdotes, including two criminal convictions:
 - DOD's IG investigated Tyco Manufacturing and referred the case to the US Attorney. The company's pled guilty to charges that he falsely represented his firm as Hispanic-owned and controlled.

⁶⁹ See, *Final Report of the U.S. Commission on Minority Business Development 51* (Dec. 1992).

- Top officials of Automated Data Management, Inc. were convicted of conspiracy to defraud the government for concealing the firm's ownership structure to participate in the §8(a) program.

Self-certification has obvious advantages in terms of reduced administrative expense and regulatory intrusion. Nevertheless, this must be balanced with the importance of ensuring that affirmative action measures are fair, which means as free of abuses as can reasonably be achieved. Some burden to bureaucracies and beneficiaries is to be expected.

- **Subcontracting:** In FY 1993, the most recent data available, small businesses received about \$63 billion of federal contract dollars, out of roughly \$180 billion in total. About one-third of that amount was from subcontracting. SDBs, on the other hand, received a little over \$13 billion in federal contract dollars, but only *one-sixth* of that was through subcontracting. These figures are consistent with the widely held view that SDBs face greater obstacles to subcontracting participation than do other small firms. The SBA and other agencies believe that expanding the use of SDBs in subcontracting is both feasible and desirable as a strategy for creating more SDB opportunities.
- **Other Program Changes:** Several earlier analyses by the GAO, the SBA Inspector General and commentators have raised criticisms of the §8(a) program, several of which SBA is moving to address by aggressively implementing recent statutory amendments which had languished under the prior Administration. More specifically:

■ ■ *"Too much money is awarded without competition."*

This criticism has largely been addressed by recent and pending reforms. The 1988 law reforming the §8(a) program requires that companies in the program compete among themselves for contracts valued at \$3 million or more. (There is a higher competition threshold of \$5 million for manufactured goods.) Currently, however, many of the larger §8(a) contracts are open-ended agreements that started out as small contracts and grew well beyond the competition threshold when a contracting officer renewed the order. To increase the number of contracts available for competition, SBA has proposed regulations to change this procedure so that an estimated value will be set on these open-ended contracts, which probably will be higher than the initial value. This means more §8(a) contracts will be subject to competitive bidding among participating firms.

■ ■ *"§8(a) firms concentrate too much on federal business."*

Again, this criticism is stale. The 1988 statute, which will be in full effect at the beginning of 1996, requires §8(a) companies to maintain a specified percentage of private sector business while participating in the program so that these firms are not totally dependent on government contracts. As a result, §8(a) companies will have to compete in both the

private and public sectors. This should improve the survival rate of firms graduating out of the sheltered environment of the §8(a) program.

■ ■ *"Too many 'wealthy' people are labeled 'economically disadvantaged'."*

In applying the test of economic disadvantage, the Small Business Act requires exclusion of the §8(a) participant's equity in his/her primary residence, business, and, except in community property states,⁷⁰ the spouse's share of the family's wealth.⁷⁰ Recent audits of the §8(a) program revealed problematic practices by some firms. These include underreporting of net worth, high salaries and bonuses (more than \$1 million per year) for several business owners, and efforts to "shelter" resources in spousal assets and residences.^{mm} Defenders of the programs correctly point out that the number of such abuses is small and declining. SBA staff has been receiving training in order to better determine an applicant's net worth. Nevertheless, several of these problems are traceable not to staff expertise, but to provisions in the statute. SBA has already proposed certain amendments in this regard.⁷¹ⁿⁿ

■ ■ *"Too much business is concentrated among too few companies."*

Pending SBA regulatory changes will help solve this problem. When the requirement that §8(a) companies maintain a specified mix of government and private sector business is fully implemented, there will be a limit on the dollar value of the §8(a) business one company can control. In addition, the proposed regulation limiting open-ended contracts will mean some of the larger §8(a) contracts will be open to competition and will change hands more regularly. Another proposed change will eliminate the distinction between a "local buy" and a "national buy" system, thereby allowing firms to market to the government without geographical restrictions (except for construction contracts).

⁷⁰ SBA measures economic disadvantage in a three-part test: the individual's net worth, the financial condition of the company, and the company's access to credit. For entry into the program, personal adjusted net worth cannot exceed \$250,000; during the developmental stage of the program (the first four years), it cannot exceed \$500,000; and during the transition stage (the last five years), it cannot exceed \$750,000. In a September 1994 audit of 50 larger §8(a) firms, the SBA Inspector General found that 35 of the 50 owners had a net worth in excess of \$1 million; 13 of the owners, for example, had business equity ranging from \$1 to \$9 million; five owners had personal residences valued at between \$800,000 and \$1.4 million. See *Audit Report on §8(a) Program Continuing Eligibility Reviews* Report No. 4-3-H-006-021 ("1994 Audit Report") at 7-9 (Sept. 30, 1994).

⁷¹ Testimony by Cassandra Pulley, Deputy Administrator, unveiling the Administration's proposed §8(a) reforms, 1995, S721-1:1:August 9, 1994.

SBA's Office of Government Contracting also has negotiated a Memorandum of Understanding with DOD to use §8(a) participants who have never received a contract. SBA is negotiating similar agreements with other federal agencies.⁷²

■ ■ *"Minority workers do not always benefit."*

Research has shown that minority-owned businesses have a tendency to hire more minority employees than other firms.⁷² SBA believes that in industries such as military base maintenance and construction, a significant number of the employees of §8(a) firms are minorities. In high-technology industries such as computer systems integration and radar development, however, the number of minority employees of §8(a) firms reflects the representation of minorities within the relevant scientific disciplines. Currently the primary goal of the §8(a) program is business development. SBA thinks that the inclusion of a minority hiring requirement would be an uneconomic burden for some companies, and in tension with the program's long-standing focus on entrepreneurship opportunities. Some observers argue, nonetheless, that this burden could be justified if it is considered the price a participant must pay for access to set-aside contracts.

9.5. Conclusions and Recommendations

9.5.1 Conclusions

Do the federal affirmative action programs relating to contracting meet the President's tests: do they work, and are they fair?

Does it work?

The several programs discussed in this section have clearly been effective at increasing the amount of Federal contracting with minority- and women-owned businesses. This comes against a backdrop of continuing underrepresentation of minorities and women in the ranks of entrepreneurs. Agency officials believe that a substantial portion of this underrepresentation is the consequence of current and past practices of exclusion and illegal discrimination; *Adarand* now requires careful documentation of this factual predicate of discrimination and its effects.

Moreover, experience suggests that contracting opportunities for underrepresented groups would decline sharply in the absence of *some form* of targeted procurement. After the Supreme Court's 1989 *Croson* decision involving the minority contracting program in Richmond, Virginia, the

⁷² See, T. Bates, "Do Black-Owned Businesses Employ Minority Workers? New Evidence," *Review of Black Political Economy* 51 (Spring 1988) (research by Professor Timothy Bates, Wayne State University, Detroit, MI., based on 1987 census data).

share of city contracting dollars won by minority firms plummeted from over 38.5% to only 2.2%. (Entrepreneurs also reported a sharp drop in private sector work, which they attributed to the "signaling" effect of the public sector retrenchment.) After a new program was designed and implemented, meeting the constitutional test of strict scrutiny, the figures recovered to slightly above the goal of 16%.⁷³ *qq*

In summary, then, the continuing justifications for these programs include:

- *Remedying discrimination.* The Federal programs are a remedial counterweight to the exclusion and discrimination that minority and women entrepreneurs continue to face -- a counterweight that not only opens up opportunity to do business in the federal contracting sector, but ideally helps small disadvantaged businesses develop the resources to penetrate private markets.
- *Mainstream inclusion.* Apart from securing individual fairness, these programs reflect a need to build a stronger economy by tapping the entrepreneurial talents and drive of all segments of the population. That means affirmative efforts to open mainstream opportunities to underrepresented groups.
- *Economic development.* These programs are often supported because they are presumed to contribute to job creation and economic development in distressed communities. The evidence is positive, at least regarding employment, though not fully conclusive.
- *Practicality.* If for the above reasons it is appropriate for government to use procurement activity to promote minority and women entrepreneurship, then the final key concern is that the measures adopted be *effective*, not empty aspirations. We must be mindful of the practical realities of the marketplace, and of agency administrative routines.

These preliminary findings and conclusions must be reconsidered in greater detail as part of the the post-*Adarand* review being conducted by the Attorney General and the various agencies That review must ascertain whether these programs are narrowly tailored to achieve a compelling governmental interest, so as to satisfy the strict scrutiny standard of constitutional review.

Is it fair?

The above quite legitimate objectives do not imply that every detail of any conceivable procurement preference would be justified. There are important constraints of fairness, most of which are given substantial effect in the operation of the current contracting programs.

⁷³ The actual 12 month participation rate for MBE's following the 1993 implementation was 17.7%.

(1) Not quotas.

The contracting programs are not quotas because the statutes and regulations establish flexible goals rather than numerical straightjackets:⁷⁴ they reflect an aspiration that 5% of contracting be with minority firms, not a guarantee that it will happen. Indeed, for many years it did not happen. On the other hand, it is also clear that the governing statutes and regulations enable contracting officers to use the entrepreneur's race and economic disadvantage, in combination, as a condition of eligibility for participation in various forms of preferential sheltered competition. Individual contracts are set aside for §8(a) firms or SDBs only. As a practical matter, white males find it difficult to establish "social disadvantage" under the terms of the law, so the programs in effect are targeted on members of traditionally discriminated-against groups. But, this "targeting" is, from another perspective, racial exclusion that to some is nearly as unfair as a quota, no matter what the facts concerning discrimination and exclusion faced by minorities and women in business. In sum:

- In the aggregate, over 18 of every 20 contracting opportunities go to non-minority, male-owned firms. This suggests that there are ample opportunities in the aggregate for white male entrepreneurs.
- However, specific, individual contracting opportunities are set aside for sheltered competition that is, in practical effect, open only to members of groups socially disadvantaged by reason of group-based discrimination. In a limited sense, that is unfair to excluded majority-owned firms.

(2) Race-Neutral Options

The review team examined insofar as was possible the consideration given by agencies and the Congress to various race- and gender-neutral approaches to expanding entrepreneurial opportunities for minorities and women. Unfortunately, it is difficult at present to evaluate the effectiveness of such alternatives. There are no readily available data, for example, on the extent to which non-minority entrepreneurs who benefit from the long-standing preference for all small businesses would benefit from a new preference targeted only on *economic disadvantage*, i.e., on entrepreneurs below a certain threshold of personal assets. We believe, however, that moving from social *and* economic disadvantage to focus on *economic disadvantage only* would likely dilute the effectiveness of the preference in creating entrepreneurship opportunities for minorities

⁷⁴ Even where one statute seems to speak commandingly of a rigid numerical set aside, it elsewhere gives the agency head authority to waive or modify the numerical target as appropriate. See, [Cite DOT STAA statute.] Read together, these provisions amount to the usual kind of flexible goal, though with a pointed Congressional emphasis suggesting that the Secretary of Transportation would be expected to defend carefully a decision to set lesser ambitions.

and women. Predicting the amount of the dilution would require further careful study, and the results would vary widely across different business sectors.

Another approach would be to provide preferences to firms that will perform contracts in economically distressed areas, thereby stimulating employment and economic development. These are worthy goals, paralleling those of the Administration's Empowerment Zones initiative. They are, however, only indirectly related to the specific goal of combatting business-related discrimination and opening entrepreneurship to underrepresented groups:

- Current SDB preferences directly promote entrepreneurship, and secondarily and modestly stimulate employment and development for economically disadvantaged workers and distressed communities.
- A contracting preference scheme based on distressed regions would directly promote employment and community development, but only secondarily and perhaps modestly create new opportunities for minority entrepreneurs to enter the economic mainstream.

These two approaches are not good substitutes for one another; each has valuable objectives; geographical targeting does not create new problems of racial exclusion, but may do little to address the *old* problems of gender- and race-based entrepreneurial exclusion.

(3) Flexible and minimally intrusive.

Most Administration officials have concluded that, as a practical matter, some degree of explicit targeting is the only effective way to ensure that entrepreneurial opportunities are increasingly open to minorities and women. The question remains whether such targeting can be done in a less racially exclusionary manner than at present.

As a threshold matter, it is important to bear in mind that, largely because of race-neutral preferences for all small businesses, *non-minority* small businesses win roughly *three times* as much in procurement dollars as minority firms. In that sense, *the preference structure as a whole benefits non-minorities far more than minorities, and is not as intrusive or exclusionary as would be a procurement system in which the only significant preferences were exclusively for minorities.*

Nevertheless, because of the special scrutiny focused on distinctions based on race, we have examined some alternatives.

- *Tighten eligibility.* The racial exclusion would in some sense be lessened if the preference were more sharply limited in duration or to a subgroup of those now eligible - by, for example, using a much more restrictive asset test. While a certain measure of this is warranted to address perceived abuses of SDB programs, a very short graduation period would result in a very high business failure rate, essentially slamming shot the door to opportunity. Similarly, too tight an asset test would be unrealistic; owners of

businesses capable of providing needed services and goods to the government will very rarely be economically struggling in an absolute sense, since potential to take advantage of entrepreneurial opportunity depends significantly on such factors as education, experience and personal financial security.

- *Expand eligibility to women.* The current race-based preferences could be made less racially exclusionary by making all women eligible. This is currently the case only in SDB programs at Transportation and a few other agencies.
- *Expand eligibility to economic disadvantage generally.* The current eligibility test, requiring both social disadvantage *and* economic disadvantage, could be broadened to "social disadvantage *or* economic disadvantage." (Social disadvantage, as explained above, effectively means membership in a discriminated-against group.) Practically speaking, such a preference program would simply key to the assets or net worth of the entrepreneur.

Our conclusion is that the expansion of eligibility would marginally expand opportunities and improve the fairness of the current preferences from the perspective of white entrepreneurs, but that doing so would risk significant dilution of efforts to expand entrepreneurial opportunity to individuals who have traditionally been excluded by virtue of their membership in discriminated-against groups. This dilution could *perhaps* be offset if the current *flexible goals* for minority- and women-owned business contracting were retained, if the flexible outreach and management tools for supporting those goals were strengthened, and if eligibility were broadened not by opening the floodgates but in a careful way that balanced fairness. Any such new regime would have to be monitored carefully to ensure steady, acceptable progress towards equal opportunity.

(4) Transitional.

Programs should be transitional in two senses. First, an individual beneficiary should be provided with an *entryway* to entrepreneurial opportunity rather than a *guarantee* of business success. Second, the program as a whole should have an agreed measure of success, so that once equal opportunity has been achieved, and the field of competition is level, the program can *sunset* and we can rely exclusively on antidiscrimination and less intrusive measures, such as outreach.

With respect to *entryway*, only the §8(a) program has a specific graduation limit of nine years, while all SDB programs have implicit graduation based on firm size and assets of the entrepreneur. Still, some form of limit, measured in years or perhaps cumulative contract dollars, seems highly desirable because otherwise the notion of using sheltered competition to provide an *opportunity* to succeed at business would become instead an effort to *guarantee* such success. An analogy would be a preferential baseball rule allowing certain batters an unlimited number of swings in an effort to guarantee them a trip to first base or even beyond.

With respect to *sunset*, these procurement programs have been subject to a relatively intense level of continuing review by the agencies and by Congress. Annual procurement data are used to set and track goals, and several Members of Congress have long taken a strong interest in the details of how the programs are administered. Nevertheless, there has been no systematic effort by Congress or the agencies to answer the basic question: When will a given procurement initiative have accomplished enough to be declared "successful," so that it can fairly be terminated? In particular, data suggest that minority firm penetration into the various industrial sectors is far from uniform, and over time one would expect to see differences in progress towards equal opportunity.

Our conclusion, therefore, is that the contract set aside programs as currently structured are not sufficiently consistent with the President's principle that affirmative action measures be transitional, because graduation for individual beneficiaries is not always required, and because there have been no efforts to define conditions for sunsetting the preferences based on the achieving of equal entrepreneurial opportunity.

(5) Balanced.

Finally, we return to the observation that the exclusion experienced by some firms when they are ineligible to participate in sheltered competition is, in the larger picture of government procurement and overall commerce, a minor diminution in opportunity for nonminority firms. In that respect, current preferences are balanced and equitable in the large.

The Review identified some minor, localized difficulties, however. In a few situations, the operation of the set asides leads to very large concentrations of SDB contract awards at certain government sites, and/or in certain subindustries. This "crowding" or concentration is driven by the appropriate desire of contracting officials to achieve their goals by taking advantage of the fact that a critical mass of SDB firms happen to exist in that region or field. The result, however, is a reduction in contracting opportunities for those non-SDB firms who are excluded from the SDB's sheltered competition. Current rules give agency heads discretion to adjust set asides to prevent such concentrated impacts on non-SDB firms, but such adjustments are not always made. The problem of subindustry, or sectoral concentration of SDB firms is more complex, but also needs attention. Not only is there some risk of unbalanced impact on certain non-SDB entrepreneurs, there is also the danger of effectively isolating SDB's in particular lines of business. The goal of these programs is to open up opportunity broadly, creating and expanding beach heads in the mainstream economy, not erecting entrepreneurial ghettos. These difficulties can be addressed by proper exercise of agency discretion.

9.5.2 Recommendations:

The efforts of Congress and the Executive branch to provide equal opportunity for minority and women entrepreneurs has succeeded in fostering successful businesses, but that success is neither

complete nor unalloyed. In most respects, the use of race and gender by these programs is fair. Significant possibilities exist, however, to address the remaining concerns without risking the gains in opportunity for minorities and women. At a minimum, these possibilities deserve serious consideration by agency heads and by the Congress.

These programs providing sheltered competition for eligible firms should be structured with greater practical flexibility, *so that they promote opportunity as broadly as possible, consistent with effectiveness in accomplishing the important goal of opening doors to those who have been historically excluded from business opportunities as a result of group-based discrimination and exclusion.* Therefore, we recommend that the President instruct agencies, under the leadership of the National Economic Council as follows:

- **Reforms:** The Administrator of the Small Business Administration and the Deputy Director for Management of OMB will lead formulation of detailed government-wide proposals to address abuses in the current operation of the procurement programs focused on opportunity for minority and women entrepreneurs. Specifically, the proposals should:
 1. Tighten the economic disadvantage test. So that business owners cannot hide assets under a spouse's name so as to qualify for a set-aside, reform the asset test to count the value of the personal residence and to consider the spouse's assets (now excluded) in a manner analogous to treatment of a 49 percent owner of the enterprise.
 2. Tighten requirements for graduation. Apply §8(a)'s 9 year graduation limit to all SDB programs, but then direct the NEC and SBA to establish objective industry-specific criteria for determining when any individual firm "develops" beyond need for sheltered competition. Direct the NEC and SBA to establish caps on the dollar value of contracts, plus a cap on total dollars a single firm can win through sheltered competition. These measures will also reduce the concentration of §8(a) awards among a limited number of successful firms.
 3. Enforce stringent safeguards against fronts and pass-throughs. Create a uniform, privatized certification process for all SDBs. Require certification audits at time of first contract and periodically thereafter to verify continuing eligibility and to monitor for "fronts" and "pass-through" companies. Increase penalties.
 4. Establish sunsets and caps to reduce regional/industry concentrations. Direct the NEC to formulate industry and regional caps/controls or other appropriate oversight to prevent significant adverse burden on non-SDBs. Direct the NEC to determine industries/areas where sheltered competition programs may be phased out based upon successful inclusion.
- **Adarand compliance:** In accord with the Directive issued by the President, the Attorney General, in cooperation with the White House and other agencies, will examine the extent of continuing patterns of discrimination and exclusion in the industries and regions with which they do business. Agencies should use those findings to develop guidelines for measuring

when minority and women entrepreneurs have achieved a full measure of equal opportunity to participate in the economic mainstream, making race- and gender-conscious contracting programs unnecessary.

- *Empowerment contracting:* Looking beyond the issue of fair and effective responses to discrimination, we must recognize that there are communities and regions in our country where the free enterprise system is not working to provide jobs and opportunity. Although the Administration has taken several steps to help poor communities directly -- including, for example, Empowerment Zones, Community Development Banks, the reinvention of HUD, and more effective enforcement of the Community Reinvestment Act -- more is needed. Under the leadership of the Community Empowerment Board chaired by the Vice President, agencies should develop an "empowerment contracting" program to target procurement dollars on small firms located in communities suffering persistent, severe economic distress, or employing a substantial number of workers from those communities. This initiative would help bring jobs and economic development to areas in great need.

10. Education and HHS Policies & Practices

10.1 Overview

Several DoEd and HHS programs are targeted on the basis of race, gender or disability. Most of these are programs designed to increase the representation of minorities or women in certain professions or fields; others support institutions that have a high enrollment of racial and ethnic minorities. Federally funded minority- or gender-targeted scholarships are one strategy for accomplishing increased representation of minorities or women in certain professions. However, most such scholarships are funded by non-federal public and private sources (e.g., institutions, private foundations, and state and local governments) and are not, therefore, "federal programs." Federal policy is formally relevant only because such efforts must comply with federal civil rights laws when institutions are recipients of federal financial assistance. Finally, it bears mention that most of the these programs at DoEd and HHS are targeted by race or gender on the basis of express Congressional authorization to use such criteria, rather than based on some more general delegation of authority.

10.2 Policies & Practices.

10.2.1 Programs to Increase Representation in Certain Fields

DoEd, HHS and the NSF operate several dozen programs that have as their primary purpose increasing the representation of underrepresented groups in certain fields and occupations. The justifications for addressing this underrepresentation extend beyond distributive justice to concerns remedying the specific continuing effects of discrimination in some institutions and fields, and improving the quality of participating institutions by supporting the diversity critical to that quality, and securing for the nation the broad pool of human resources needed for competitiveness and progress in the decades ahead. Almost all of this support is provided as assistance to institutions, rather than direct assistance to individuals. Many of these programs are minority- and/or gender-targeted -- that is, they employ group membership (or an institution's attention to targeted groups) as a condition of eligibility. Illustrative examples include:

- **The Program To Encourage Minority Students to Become Teachers:** This DoEd program provides grants to institutions of higher education with schools of education, and is designed to: (1) improve recruitment and training opportunities in education for minority individuals, including minority language individuals; (2) increase the number of minority teachers in elementary and secondary education; and (3) identify and encourage minority students in the 7th through 12th grades to aspire to and prepare for careers in elementary and secondary

school teaching. The program prepares and places minority students as teachers elementary or secondary schools with at least 50 percent minority enrollment, including urban and rural public or private nonprofit schools.^{ss}

- **The Faculty Development Fellowship Program:** This DoEd program provides grants to institutions that have a "demonstrated record of enhancing the access to [graduate education for] individuals from underrepresented groups." The grants support fellowships for the continuing education of minority faculty members, defined by statute to include "African-Americans, Asian Americans, Hispanics, Native Americans, Pacific Islanders, and Native Hawaiians."
- **Institute for International Public Policy:** This DoEd program is designed to increase significantly the number of African Americans and other underrepresented minorities in international service, including private international voluntary organizations and the foreign service of the United States. It provides a single grant to a consortium of higher education institutions to establish and administer the Institute.
- **National Science Foundation Programs:** The NSF administers programs designed to address underrepresentation of women and minorities in the fields of science, engineering, and mathematics. For example, the NSF funds the Graduate Fellowships for Women in Engineering and Computer and Information Science Program, which is designed to increase the numbers of women entering these two fields.^{tt} This specific program provides funding to individuals; However, some NSF programs direct their support to institutions.
- **National Institutes of Health Programs:** Pursuant to statutory direction to "increase the number of women and individuals from disadvantaged backgrounds (including racial and ethnic minorities)," NIH (part of HHS) supports underrepresented minorities in research and education programs. "This phasing of the statute was approved by Congress in the 1993 NIH Revitalization Act (Title 42:288.H of the U.S. Code). Most of these programs are minority-targeted, although that is not expressly required in every statute.^{uu} Examples include:
 - **National Center for Research Resources (NCCR) Minority Initiative,**^{vv} provides grants to high schools to support underrepresented minorities interested in certain natural sciences. The program leaves to the school to determine which "ethnic or racial group[s] are] underrepresented in biomedical or behavioral research." The program description notes that nationally, Black Americans, Hispanic Americans, Native Americans and Pacific Islanders, are underrepresented in these fields.
 - **Minority Predoctoral Fellowship Program** supports individual Ph.D. and M.D./Ph.D. candidates who are members of groups underrepresented in the biomedical sciences. The applicant's institution defines which groups are eligible, but NIH gives "priority consideration" to "African Americans, Hispanics, Native Americans Alaskan Natives, and

Pacific Islanders."^{ww} This program provides funding to institutions. The institutions then administer the program to a large degree," tailoring" it to the needs.

HHS also administers programs that target the "disadvantaged." HHS defines "disadvantage" in race- and gender-neutral terms; however, from year to year, HHS sets funding priorities that may use, for example, race or ethnicity as one of several factors in funding, or that may rely instead on outreach.

- **Federal Health Professions Education Programs:** HHS currently administers over 40 programs concerning the education of health professionals. Most of these programs are designed to assist "disadvantaged populations" and are race- and gender-neutral. These programs serve large percentages of underrepresented minorities. For example:
 - **HHS' Scholarships for Disadvantaged Students:** This program provides grants to institutions that serve students from "disadvantaged backgrounds,"⁷⁵ defined by HHS regulations as students from low-income families or "from environment[s] that ha[ve] inhibited the individual from obtaining the knowledge, skill or abilities required to enroll in . . . a health professions school."⁷⁶ Under this program, special statutory consideration is directed to institutions with underrepresented minority enrollment in excess of the national average. Of the 7,500 students who participated in the Scholarships for Disadvantaged Students (SDS) program, more than half were underrepresented minorities.
 - Of the 108 participants in the **Disadvantaged Health Professions Faculty Loan Repayment Program**, 77% are African-American, 11% Hispanic, and 11% disadvantaged whites.^{xx} This program encourages graduate students from disadvantaged backgrounds, including Caucasians, to become teachers, helping them to pay-off loans, if they agree to become Professors.

[Note: The Administration recently proposed consolidating these programs into five "clusters"; Senators Kassebaum and Kennedy have co-sponsored a similar measure. One of the clusters addresses "minority and disadvantaged training;" another addresses diversity in nurse training programs.]

10.2.2 Support for Minority Institutions

A second set of programs provide targeted assistance to institutions that serve (or historically have served) a high proportion of minorities. These efforts include:

⁷⁵ 42 U.S.C. § 293a(b).

⁷⁶ 57 Fed. Reg. 8347 (1992).

- **Support for HBCUs:** Several DoEd and NSF programs provide assistance to the 103 historically black colleges and universities ("HBCUs"). Funds for these programs may be used for a variety of purposes -- including programs to establish development offices; strengthen physical, financial, and academic structures and resources; purchase telecommunications equipment; establish outreach programs; and help HBCUs gain access to private-sector financing. (Admissions policies of these institutions are, of course, nondiscriminatory.)
- **Support for Hispanic-Serving and Minority-Serving Institutions:** DoEd's Hispanic-Serving Institutions Program makes grants to institutions with an enrollment of at least 25% Hispanic students (of which 50% must be low-income, first generation college students and an additional 25% must be low-income or first generation college students). One component, the Strengthening Institutions Program, makes grants to institutions with at least 50 percent minority student enrollment to enable these institutions to expand and improve their capacities to serve minority and low-income students.

10.2.3 Programs to Serve Special Needs

DoEd also administers a number of major programs for individuals with special needs, including programs for individuals with disabilities and for individuals with limited proficiency in English. While these measures lie outside the focus of this Review, we mention them by way of comparison to note the variety of efforts designed to promote inclusion.

- **IDEA:** The Individuals with Disabilities Education Act ensures that all children with disabilities have available to them appropriate public education designed to meet their unique needs. This is accomplished through formula grants to states, 75% of which is passed through to local education agencies, and through competitive grants for research, training, demonstration, and technical assistance.
- **The Rehab Act:** The primary purposes of the Rehabilitation Act are to (1) provide vocational rehabilitation services to individuals with disabilities to prepare for gainful employment; (2) provide independent living services to individuals with severe disabilities to enhance their independence, productivity, and quality of life; (3) increase the number of qualified personnel who are trained to deliver rehabilitation services; and (4) conduct rehabilitation research.
- **Language-Related Programs:** The Department also supports a number of programs targeted to students with limited proficiency in English. These include the Bilingual Education Act (which is dedicated to expanding the capacity of school districts to educate these students) and the Migrant Education Program (which provides funds for States for supplementary education services for the children of migrant agricultural workers and fishermen.)

10.2.4 Efforts to Ensure Access

Finally, apart from programs directly or indirectly supporting training or outreach for individuals, DoEd and the NSF also undertake broader activities that further equal opportunity for traditionally underrepresented groups. These efforts include:

- **WEEA:** The Women's Educational Equity Act Program promotes gender equity in education by making grants and awarding contracts to educational agencies for research and development of strategies to support gender equity and for projects that implement effective gender equity policies and programs in schools. Relatedly, the NSF's **Women and Girls Program** also supports programs which develop and implement gender equity policies from the grade school level through the graduate school level.
- **Advisory Activities:** Many DoEd programs establish advisory or governing boards, councils, or panels and in many cases, the membership of these entities is specified (or diversity is encouraged) based on race, gender, or disability. For example, Goals 2000 requires that local improvement plans be developed by a panel that is "representative of the diversity of students and the community with regard to race, language, ethnicity, gender, disability, and socioeconomic characteristics."

10.3 Performance & Effects

Relatively few of these programs have been formally studied or reviewed. The more significant efforts include:

- **HBCUs:** Since their creation in 1965, the programs supporting HBCUs have never been thoroughly evaluated; however, in FY 1995, Congress appropriated \$1 million to evaluate support for HBCUs.
- The **IDEA program** has been closely examined, and the consensus view is that this program has significantly contributed to a steady decline in the dropout rate for children with disabilities and an increase in their graduation rate, over the past five years. The number of children served and the number of teachers serving these children have also increased.
- In 1994, the GAO issued a formal evaluation of the **WEEA**. Its primary finding was that the **WEEA** program supported direct services to a small number of girls and women; the GAO recommended that program resources be devoted to eliminating systematic inequitable policies and practices in schools.
- **Health Professions:** In 1994, the GAO also reviewed the various HHS programs intended to increase the representation of underrepresented groups in the health professions. Emphasizing that data in this area are inadequate, the study found, in relevant part, that:

- The representation of African-Americans, Hispanics, and Native Americans in health education and practice is increasing.
 - Evidence that this increase will improve access to care in underserved areas is "inconclusive."
 - "Evaluations ... have not conclusively linked these programs to changes in the supply, distribution, and minority representation of health professionals."
- However, as regards the importance of remedying the problems of under-representation in the health professions and various research fields, HHS credits several published studies and articles referenced only in passing by the GAO. These studies indicate that: minority health professionals are considerably more likely to work in underserved communities;⁷⁷ "bedside bias" toward minority patients is more likely to occur in institutions where there are few minority professionals;⁷⁸ minority researchers are more likely to bring special sensitivities to medical research problems relating to minority populations and communities;⁷⁹ and minority professionals are more likely to provide training and mentoring to members of minority groups.⁸⁰

⁷⁷ Institute of Medicine, *Balancing the Scales of Opportunity: Ensuring Racial and Ethnic Diversity in the Health Professions*, p. 16; Huckman, Beverly B. and Rattenbury, Bruce, "The Need to Bring More Minority Students into Medicine," *American Medical News*, 35 (29), p. 39-41 (1992); Nickens, H.W., "The Rationale for Minority-Targeted Programs in Medicine in the 1990s," *Journal of the American Medical Association*, 267 (17); p. 2390-95 (1992); Council on Graduate Medical Education, *Third Report: Improving Access to Health Care Through Physician Workforce Reform: Directions for the 21st Century*, p. 13, 19-21 (1992).

⁷⁸ Nazario, Sonia, "Treating Doctors for Prejudice; Medical Schools Are Trying to Sensitize Students to 'Bedside Bias,'" *Los Angeles Times*, Dec. 20, 1993; Blendon, Robert J., Aiken, Linda H., Freeman, Howard E., and Corey, Christopher R., Access to Medical Care for Black and White Americans," *Journal of the American Medical Association*, 261, p. 280 (1989).

⁷⁹ Lillie-Blanton, Marsha and Hoffman, Sandra C., "Conducting an Assessment of Health Needs and Resources in a Racial/Ethnic Minority Community," *Health Services Research*, 30 (1), p. 229 (1995). This article references the Tuskegee Institute study as leaving a legacy of mistrust, particularly in African American communities, of research.

⁸⁰ Institute of Medicine, Op. Cit., p. 19; COGME, Op. Cit., p. 29.

10.4 Concerns & Complaints

A number of individuals have complained about several of these programs:

- An East Indian student filed a Title VI complaint against Marquette University regarding its Minority Engineering Scholars Program, which was funded through NSF's Research Careers for Minority Students (RCMS) program. The student charged he was discriminated against on the basis of his national origin. NSF had earlier determined that Asians were not underrepresented in sciences and engineering (but that "American Indians, Blacks, Hispanics, and Native Pacific Islanders" were). Accordingly, the Department of Education's Office for Civil Rights (OCR) found insufficient evidence of a Title VI violation. OCR reasoned that the NSF was authorized by Congress to devise programs to increase minority participation in science and engineering, and thus that the RCMS program was not in violation of Title VI. From a broader perspective, OCR's findings reflect the understanding that tying benefits to group membership is not an end in itself, but must reflect the central policy purpose of opening opportunity to groups by virtue of their underrepresentation. Moreover, in as much as a race-conscious program must be narrowly tailored to serve the compelling national interest in removing barriers and broadening participation in critical research sectors, that tailoring must recognize when a specific minority group is no longer underrepresented.
- Similarly, in 1989, an applicant challenged the University of Colorado's Patricia Roberts Harris Fellowship program. Having found that white women were adequately represented in its relevant programs, the University limited the scholarship to minority men and minority women. The Department of Education reviewed and upheld the University's practices. (The Administration's FY 1996 budget requests no funds for this program.)
- The HHS Scholarships for Disadvantaged Students (SDS) program provides grants to institutions to support the recruitment and training of disadvantaged nursing students (and does so without a preference for race or gender). SDS regulations published in 1992 require that, in order to qualify for SDS assistance, an institution must have at least one minority faculty member. Wichita State University's application for an SDS grant was denied because it did not have any minority faculty. A faculty member from the University wrote to Senator Dole, who forwarded the letter to HHS.

The Department replied that the minority-faculty requirement is implicit in the authorizing legislation, which requires that a qualifying institution have a program "for recruiting and retaining minority faculty."⁸¹ It is HHS' view that an institution cannot "retain" minority faculty unless it *has* minority faculty; that in a competitive application program, it is reasonable to take past success at recruiting minority faculty as evidence of commitment to serving minority students effectively; and that 181 other institutions were able to satisfy this

⁸¹ 42 U.S.C. § 293a(b)(2).

eligibility condition. The faculty member argued that institutions that are interested in serving disadvantaged students sometimes lack the financial resources to compete for "qualified" minority faculty.

- During a subcommittee hearing, one Representative asked the Assistant Secretary for Postsecondary Education why the Department supports HBCUs, which the Representative characterized as segregated institutions. The witness responded that (i) these institutions are open to all students; (ii) Congress chose to strengthen these institutions because of their unique role in serving populations who were historically denied access to postsecondary education because of their race; and (iii) the statutory definition of HBCU does not require a school to have a predominantly African-American student body in order to qualify as an HBCU.

10.5 A Note on Minority-Targeted Scholarships

Minority-targeted scholarships have been controversial; a summary of existing federal policies and practices follows.

Minority-targeted scholarships include both (i) scholarships for which minority status is the *only* requirement for eligibility (i.e., where minority status is a necessary and sufficient condition) and (ii) scholarships for which minority status is one of several requirements for eligibility (i.e., where minority status is a necessary but not sufficient condition). When public resources or institutions are involved, such programs are subject to strict constitutional scrutiny under *Adarand* and previous caselaw.

10.5.1 Current Use of Minority-targeted Scholarships

The GAO, in a 1994 study found that at the undergraduate level, scholarships (from all funding sources), for which minority status is the *only* requirement for eligibility are rare, accounting for less than 0.25% of all scholarship monies; that scholarships for which minority status is one of several requirements for eligibility represent about 3% of scholarship monies; and that scholarships for which minority status is one factor among many considered are somewhat more common. On the other hand, DoEd officials note that there are countless scholarship programs which are limited to white students, at least *de facto*, because of some condition on family origins, membership in some social or fraternal organization, family affiliation with the particular school, etc.

A few GAO case studies illustrate the use of minority-exclusive and minority-designated scholarships:

- At a small public college, less than one percent of the student body is minority. The school initiated minority-targeted scholarships in 1972, paying the difference between in-state and

out-of-state tuition (about \$3900). The school believes these scholarships are useful, particularly for recruiting minorities from out-of-state (the State population is 95% white). Reacting to the Bush Administration's 1991 policy, questioning the permissibility of minority-targeted scholarships, the school suspended its program; as a result in 1992 only one minority student received assistance (compared to the usual 5 or so students).

- At a private law school, the student body is 8% minority. Nearly half of the minority students receive minority-targeted aid. The school initiated minority-targeted scholarships in 1984 as part of a broader minority-recruitment strategy; the effort has had significant effects: the minority representation has risen from 2% to 8%. School officials consider the scholarships "vital" because (i) they signal the school's seriousness about diversity, and (ii) they allow the school to compete with other schools in order to achieve diversity benefitting that institution.
- At an undergraduate school of a private university, the student body is 14% minority. Half of these students receive minority-targeted assistance. The school's program (established in 1970) serves students from "disadvantaged" backgrounds based on financial need. Each year the program serves a few needy white students -- officials offered the example of a student with two blind parents. The program has been successful at recruiting minority students: in 1969, minorities accounted for 2 percent of the student body; in 1989, they accounted for 16%. When financing for the scholarships declined briefly in 1972, the number of African-American students dropped by more than 50%. "

10.5.2 Federal Policy

In late 1990, organizers of college football's Fiesta Bowl pledged to set aside certain proceeds from the game to establish minority-targeted scholarships at the participating schools. The Bush Administration's Department of Education announced that such scholarships might be illegal under Title VI. However, after a lengthy review and public comment, the Department, in 1994, promulgated new policy guidelines regarding how Title VI would be applied to minority-targeted aid. Those rules permit the use of race as a condition of eligibility for financial aid in order (a) to remedy past discrimination or (b) to promote diversity, provided the measure is narrowly tailored. A measure is "narrowly tailored" if (1) race-neutral means would have been ineffective; (2) a less extensive or intrusive use of race would have been ineffective; (3) the measure is of limited extent and duration, and is applied in a flexible manner; (4) the institution periodically reviews the continuing need for the measure; and (5) the effect on nonbeneficiaries is sufficiently small and diffuse so as not to unduly burden their opportunity to receive financial aid. DoEd and DOJ believe these guidelines satisfy the constitutional tests established by the Supreme Court. By denying the University's request, the Supreme Court merely declined to hear the appeal requested by the University of Maryland in the Podberesky case. It neither ruled against race-targeted scholarships, nor affirmed the decision of the Fourth Circuit Court of Appeals that the University had not submitted sufficient evidence to justify the banneker scholarship program at issue. The Department of Education's policy on race-targeted student financial aid has not

changed as a result of the Supreme Court's recent action. Race-targeted student aid is legal in many circumstances as a remedy for past discrimination or as a tool to achieve a diverse student body.

10.5.3 Additional Observations

In general, the Department of Education believes that there is a virtual consensus within the higher-education community that minority-targeted scholarships are essential to meeting schools' diversity and remedial needs, and that race-neutral approaches will not always be reasonably effective.

To redress the lingering effects of past discrimination, the University of Maryland established a merit-based scholarship program (the Banneker scholarship program) for which only African-Americans are eligible. An Hispanic student challenged the constitutionality of this program and a district court rejected the challenge, emphasizing that the program was a narrowly-tailored remedy for past discrimination. However, in *Podberesky v. Kirwan*,⁸² the Fourth Circuit overturned that decision; the Supreme Court declined to review the case.^{aaa}

On the other hand, responding to the controversial nature of race-targeted scholarships, some institutions have modified their efforts. For example, ten years ago, Colorado State University started a "First Generation Scholarship" for students whose parents did not attend or complete college. While this program is needs-based and colorblind, 84 percent of the recipients are minorities. (Two more universities started similar programs last year.) At present, according to HHS and DoEd, there are insufficient data to conclude that such approaches would be acceptably effective in producing the desired remedial and diversity benefits. Despite the promising result in Colorado, without further experimentation and research the risk is too great that nationwide adoption of such measures will dilute targeted resources at a time of increasing fiscal pressures. Such research should be undertaken expeditiously to determine whether race-neutral alternatives will, in fact, work. ^{bbb}

Finally, some observers have expressed skepticism about whether minority-targeted scholarships actually expand opportunity by "growing the pool." These observers believe that universities are simply bidding for a finite number of qualified minorities and that real growth in the pool will require far more investment in secondary and primary education, rather than simply financial aid at the university level. Defenders of targeted programs agree that continued efforts are needed on the investment front, but argue that post-secondary education as a whole is far more inclusive than it would be without these affirmative efforts. The number of minority and women students prepared for and interested in further education may be influenced by the degree to which genuine opportunity is available and outreach is effective.

⁸² 38 F.3d 147 (1994), cert. denied, ___ U.S. ___ (1995).

10.6 Conclusions and Recommendations

Do the federal government's affirmative action programs relating to education meet the President's tests: do they work, and are they fair?

8.6.1 Conclusions

Does it work?

Because education is so fundamental to virtually all aspects of social and economic opportunity in America, the federal government's affirmative action programs in this area seek not only to deter and remedy discrimination, but also to promote inclusion of underrepresented groups. The fundamental problem addressed by these targeted programs in HHS and DoEd is the continuing underrepresentation of historically discriminated against groups in key professions and in institutions of higher education. Agency officials and experts generally agree that among the important factors explaining the underrepresentation are *current discrimination, past discrimination, and the lingering effects of that past discrimination* -- including direct and indirect effects on both individuals and on institutions.

This problem remains a critical challenge because:

- *Remediation:* A great many institutions and professions have never made an effective break with their history of discrimination and exclusion. Whether one looks at the statistics on continuing illegal discrimination, at the report of the *Glass Ceiling Commission*, or at the glacial pace with which patterns of historical exclusion are reversed in specific settings.
- *Opportunity:* Increasingly, educational institutions are the engines of opportunity in the economy, and education is often the first rung on the opportunity ladder. Ensuring the inclusion of underrepresented groups therefore remains an invaluable tool for making the promise of equal opportunity a reality.
- *Wasting no talent:* As the President has stated, the competitiveness of our companies and economy depends upon building an inclusive economy so that we create the opportunity and encouragement owed every American to develop their talents to the fullest of their potential, and use those talents productively. The inevitable result will be stronger families, businesses and communities. Indeed, in science, higher education and several other fields addressed by Federal programs, *studies project dangerous shortages of talent* if we continue to draw the ranks of those professions so overwhelming from among white males only.
- *Quality:* Finally, there is broad agreement that diversity is critical to the quality of certain institutions and professions. While higher education is the most familiar example of this,

the biomedical and life sciences are another. Officials at HHS and NIH point out that training and support for underrepresented groups is one means, albeit very imperfect, of providing a workforce of service providers likely to be concerned with underserved populations. There is an added purpose, however, in ensuring that research agendas over time reflect the full range of society's needs: experts state, for example, that participation of minorities and women in biomedical research helps ensure not only that key questions are being addressed, but that the questions are even asked in the first place.

The evidence as to whether these particular programs meet these goals is positive but incomplete. The participation of women and minorities at every level of education has dramatically increased in recent decades; these programs have played a positive role in that progress, but it is difficult to quantify how much of that improvement is due to affirmative action, and how much to other societal and policy factors. The studies referred to above indicate that program effects have been positive; however, they also suggest more work needs to be done.

Is it fair?

We conclude that these DoEd and HHS programs have few adverse effects on nonbeneficiaries, and that in general the criticisms raised can be answered. Concerning minority-targeted scholarships, for example, DoEd estimates that only 40 cents of every \$1000 in Federal educational assistance funding is devoted to such targeted programs; they should be understood as a very minor element of an overall, balanced, opportunity strategy addressing many needy populations and several national purposes. More broadly, these programs serve strong national interests related to the effective remedying of discrimination, root and branch, and the securing of a full measure of opportunity needed to create strong institutions and a strong economy for the future.

10.6.2 Recommendations

- Direct agencies to further analyze whether higher education programs targeted on the basis of first-generation high school graduation or other social background indicators, would be effective race-neutral tools for achieving greater inclusion of members of historically underrepresented groups.
- Instruct the Office of Management and Budget to work with agency heads to ensure that the each agency has appropriate plans over time to conduct continuing reviews on the effectiveness and fairness of any program using race or gender as a condition of eligibility or as a key factor earmarking funds.
- Instruct the Office of Management and Budget to work with agency heads to ensure that equal opportunity objectives and measures are included, where appropriate, in the implementation of the Government Performance and Results Act.

**11. OTHER FEDERAL POLICIES:
THE FEDERAL COMMUNICATIONS COMMISSION,
AND THE DEPARTMENTS OF TREASURY, AGRICULTURE AND HUD**

In addition to the various classes of programs discussed above, there are a number of other federal efforts that are noteworthy or have proven controversial. This Part discusses several such programs, and is based on materials prepared by the White House Counsel's office and discussions with senior officials.

11.1 FCC Programs

11.1.1 Policies & Practices

In 1978, after convening a conference on minority ownership policies, the FCC concluded that the perspectives of minorities and programming directed specifically to minorities were inadequately represented in the broadcast media, and that adequate representation of minority viewpoints was necessary for both the minority and non-minority communities. The agency determined that increased minority ownership of broadcast enterprises was needed to ensure this diversity of views and programming. (In *Metro Broadcasting*,⁸³ the Supreme Court later relied upon Congressional and Commission findings that minority ownership increased the diversity of broadcast programming.) The agency also determined that various other methods of encouraging more programming diversity that pre-dated 1978, e.g., consideration of minority status in comparative hearings, had not been fully effective.

Since that time, the FCC has undertaken a number of initiatives. Most prominently, since 1994, in response to Congressional directive, the Commission has fashioned measures to ensure that smaller businesses, including businesses owned by minorities and women have opportunities to participate in the auctions of personal communications services and other new spectrum-based technologies.

A summary of the principal FCC policies and practices regarding minorities follows:

- **Auctions for personal communications services:** In 1993, Congress authorized the FCC to conduct auctions to award licenses for communications technologies which uses the electromagnetic spectrum. Since implementing this authority, the FCC has raised over \$9

⁸³ *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

billion in auction revenue for the U.S. Treasury. In authorizing the use of auctions, Congress directed the FCC to "ensure that ... businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding credits, and other procedures."⁸⁴ The FCC created bidding credits, tax certificates, and installment payment plans for women and minority-owned businesses in these auctions in order to overcome the problem of general lack of capital access by these groups. In the fourth auction, scheduled to be held in mid-1995, the FCC created special measures for smaller entities, with enhanced measures for small businesses owned by minorities and women. However, these measures provided by the statute and FCC implementing rules were constitutionally challenged, and the auction was initially stayed by a federal court. That case was recently settled and the auction will take place later this summer.

Fearing additional constitutional challenges to the fourth auction in the wake of the *Adarand* decision, many minority- and women-owned businesses urged the FCC to modify its rules by eliminating race- and gender-conscious measures. The FCC has proposed to do so, but the proposal would apply only to the fourth auction. The FCC plans to continue to explore ways to preserve race- and gender-based rules for subsequent spectrum auctions.

- **Consideration of minority status in comparative broadcast hearings:** The FCC considers minority ownership in administrative proceedings to grant new broadcast licenses. Minority ownership is considered a plus in so-called comparative hearings, and weighed together with other relevant factors. These factors include diversification of ownership, proposed service, past broadcast record, and efficient use of frequency. This program was upheld by the U.S. Supreme Court in *Metro Broadcasting*. For several years, the Commission's appropriations statute has prohibited it from re-examining this policy.
- **Efforts targeted at women in comparative broadcast hearings:** In 1978, the FCC extended to women-owned businesses its policy of awarding comparative credit in hearings to award new broadcast licenses. However, in 1992, the D.C. Circuit -- in an opinion by then-Judge Thomas over a dissent by then-Chief Judge Mikva -- struck down the FCC preference favoring women applicants. In *Lamprecht v. FCC*,⁸⁵ the court found no correlation demonstrated by the FCC between women ownership and diversified programming. The FCC has not attempted to reinstate this gender-based preference.
- **Distress sale policy:** Under this policy, a broadcaster whose license has been designated for revocation or whose renewal has been denied can assign the license to an FCC-approved minority enterprise, and thereby avoid the otherwise applicable transfer restrictions. The

⁸⁴ 47 U.S.C. §309(j)(4)(C), (D).

⁸⁵ 958 F.2d 382 (D.C. Cir. 1992).

purchase price by the minority entity must not exceed 75% of the fair market value. This policy has had a minuscule impact because very few stations are subject to distress sales, and they tend to be smaller radio stations. For several years, the Commission's appropriations statute has prohibited it from re-examining this policy. This policy was also upheld by the U.S. Supreme Court in *Metro Broadcasting*.

- **Tax certificate policy (the "Viacom" issue):** Under FCC's tax certificate policy (carried out pursuant to § 1071 of the Internal Revenue Code⁸⁶) and the Commission's current appropriations statute, an owner of a radio or television station can sell to a minority-owned enterprise (the minority buyer must maintain both legal and actual control over business operations), and thereby defer capital gains and/or reduce the basis of certain depreciable property. This program often lowers the price of the station for a minority buyer, thus overcoming the general problem of lack of minority access to capital. This program was the one most frequently used in the transfer of licenses to minorities. In the fall of 1994, the FCC proposed reforms in the § 1071 program. Before the issues could be fully explored, Congress in April 1995 repealed the authorization for this program, attaching the repeal to an unrelated provision.

11.1.2 Performance & Effects

Until Congress authorized the use of auctions to award new personal communication services licenses, the FCC had given away licenses for free. The FCC believes that absent affirmative measures to foster participation by small minority- and women-owned businesses, the use of auctions to award licenses would have erected a formidable new barrier to their participation in the telecommunications revolution, affecting an industry which is owned almost exclusively by nonminority white males.

We now have some data concerning participation by minority and women owned businesses in auctions for licenses to provide communications services, three of which have already occurred. In the first auction, which attracted very high bids for a small number of nationwide licenses, no women- or minority-owned businesses won. However, in the next auction, which involved 594 local licenses for much smaller bids, minority businesses won 23.6% of the licenses and women-owned businesses won 38.2% of the licenses. In light of the results of the first auction, the FCC made some changes in its system of benefits for these groups, and in the third auction, which involved 30 licenses for large regions, approximately 35% of the licenses were won by women- and minority-owned businesses.⁸⁷

⁸⁶ 26 U.S.C. § 1071.

⁸⁷ FCC, "Representation of Minorities and Women Among FCC Auction Winners" (4/17/95).

Although the FCC has been barred by Congress in recent years from utilizing its funds to evaluate certain of its minority broadcast ownership programs, existing data and anecdotal evidence demonstrate that the FCC's efforts have encouraged a marked increase in the percentage of minority-owned broadcast and cable television systems. In 1978, 0.5 percent of all licenses were minority-owned; today, 2.9 percent are. The FCC has testified that most sales to minorities occurring after 1978 *would not have happened* without its § 1071 tax certificate policy.⁸⁸

The vast majority of existing minority broadcast owners have utilized tax certificates at some point during the past 15 years. In 42% of these cases, licenses were later transferred, with an average holding period of four years; the FCC says that this is not an unusually short time for this industry. The data show that the great majority of tax certificates have been used to acquire relatively small radio and television stations.⁸⁹ The FCC believes that the program has not been abused, either through the use of sham "minority-controlled" companies or through the rapid flipping of licenses by new minority owners.

11.1.3 Evaluations & Proposed Reforms

The licensing of new telecommunications technology raises policy considerations distinct from the § 1071 program, because there is no link between ownership and diversity of viewpoints expressed. However, the FCC believes that the licensing of new telecommunications technologies creates an unprecedented opportunity to provide small minority- and women-owned businesses meaningful opportunities to participate in this rapidly expanding sector. In addition, obtaining a license in these auctions merely gives the winner the ability to try to succeed in a highly competitive field. Finally, FCC officials believe that its program to enable women and minorities to bid more successfully in these auctions has resulted thus far in increased revenue to the United States Treasury through an increase in the number of bidders.

During recent Congressional consideration of tax legislation, the FCC proposed a number of reforms of the tax certificate program benefiting the sellers of broadcast licenses to minority-owned and controlled entities. The FCC proposals would have limited and targeted the tax benefits. The Administration indicated in testimony and in negotiations on Capitol Hill that it favored such reforms rather than total repeal of the provision. Nevertheless, Congress has repealed the provision, and done so retroactively in order to reach the multibillion dollar Viacom transaction.

⁸⁸ Statement of William Kennard, General Counsel of the Federal Communications Commission, before the Senate Committee on Finance, March 7, 1995, at 10; Statement of William Kennard, General Counsel of the Federal Communications Commission, before the House Committee on Ways & Means, Subcommittee on Oversight, Jan. 27, 1995 at 11.

⁸⁹ Federal Communications Commission, "Summary of FCC Tax Certificate Data," at 4 (Data as of 2/28/95).

This repeal is significant because the FCC believes that the § 1071 program was by far the best method to increase minority ownership of broadcast, cable, and satellite stations, and thereby achieve diversified programming. Because of a general lack of access to capital and limited publicity regarding sales of existing stations, minorities have failed to achieve increased station ownership without the tax certificate program.

The question of minority and women ownership of broadcast, cable, and satellite stations will be quite important in the near future because the technology in this industry is rapidly changing, transforming the meaning of "broadcast." Congress, the Administration, and the FCC will have to address the issue of whether the current station owners will simply be allowed to transfer their ownership and control to the new technology, and thereby largely retain the current ratios of ownership, or whether an entirely new system should be adopted that would open the market to a broadening of opportunity and participation. (Commission staff state that some proposals for allocation of the new digital HDTV spectrum threaten virtual elimination of low power television stations, which is one of the areas in which there has been a higher percentage of minority ownership.)

The Commission remains committed to diversifying ownership in the telecommunications industry in both the broadcast sector, where format diversity is critical, and in non-broadcast areas of emerging technologies, where the Commission believes that entrepreneurial opportunity in new industries is likely to be dominated by established firms, to the longer run detriment of the industry and the economy as a whole.

11.2 The Treasury: Minority Bank Deposits

11.2.1 Policies & Practices

Pursuant to Executive Order 11458, promulgated in 1969, the Treasury Department administers a "minority-owned bank deposit" program in which these banks receive special consideration to act as depository institutions holding cash for federal agencies, as long as no increased cost or risk for the government results. This is a totally voluntary program through which the Treasury Department encourages federal agencies and private entities to use minority-owned financial institutions. The most important element of the program is the deposits made by businesses for federal tax payments.

11.2.2 Program Effects and Future

From 1991 through 1994, the amount of such deposits made in minority-owned financial institutions ranged from a high of 2.8% of the total, to a low of 2.1% (which was \$21 billion in 1994). These deposits were made in 117 minority-owned financial institutions in 1994, approximately 1% of the total number of institutions receiving such deposits. (The Treasury

Department does not have data showing what percentage of federal agency deposits are placed in minority-owned banks under this program.)

This program had considerable potential for minority-owned institutions because the Treasury Department, federal agencies, and private entities have wide discretion in choosing which financial institution to use. This potential was never realized as the prior two Administrations largely ignored the program.

This program in the near future will have much less value because technology will soon sharply increase direct electronic deposits of taxes by businesses; this will eliminate the need for a financial institution in the middle, and will save considerable money for both businesses and the Government. Consequently, the massive tax deposits currently being made in both minority-owned and other banks will decline sharply. This technological advance will have a particularly adverse impact on minority-owned financial institutions because many of them had become partially dependent upon the federal tax deposits. The program also has limited utility for federal agency deposits because the Treasury Department, as a policy matter, prefers not to have agency money deposited outside the Treasury.

11.3 Agriculture Programs

Pursuant to a statutory requirement, the Department of Agriculture gives preferences to "socially disadvantaged" persons in the sale of farm properties, and sets aside loan funds for farmers in this group. These programs have not generated much controversy recently, although a prior version of the farm sale program was severely criticized by the U.S. Court of Appeals for the Fifth Circuit in 1993, because it prohibited a non-minority farmer from purchasing a particular farm.⁹⁰

In the Agricultural Credit Act of 1987, Congress required the Secretary of Agriculture to establish "annual target participation rates, on a county wide basis, that shall ensure that members of socially disadvantaged groups will receive loans made or insured [under the statutory scheme], and will have the opportunity to purchase or lease inventory farmland."⁹¹ Congress further provided in 1992, that "socially disadvantaged group" means "a group whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as a member of the group

See Moore v. U.S. Department of Agriculture, 993 F.2d 1222 (5th Cir. 1993) ("One wonders what substantial relation to an important interest is satisfied in operating, if that is what happened, a government program for the sale of agricultural land with a racial criterion this crude").

7 U.S.C. § 2003(a)(1).

without regard to their individual qualities."⁹² Thus, "socially disadvantaged" now includes minorities and women.

The Department of Agriculture obtains farm property when farmers default on government loans. Once former owner preservation rights are exhausted, the agency sells its farm property for a specific assessed value. When the statutory scheme was created, the agency set aside specific farms for sale only to socially disadvantaged farmers, depending upon the number of minority farmers in a state. This program did not work well in increasing or stabilizing minority farm ownership because properties that were set aside for minorities often were not in the right location for purchase by a willing minority buyer.

Given this failure, the agency abolished the set-asides in 1992, and substituted by regulation a preference system instead. Under the current program, a farm is put up for sale at an appraised value, and any of the preference groups described in the regulations can apply to purchase. The sale is made to whichever prospective buyer is in the highest preference group. These groups are, in order: socially disadvantaged "beginning" farmers, all other beginning farmers, socially disadvantaged family farmers, all other family farmers. (Congress has been trying to boost the number of new family farmers in recent years.) If there are no qualified buyers from these preference groups, the agency attempts to lease the farm to these same groups. If there are no interested parties, the farm is sold to a non-preference buyer, which is usually a large, corporate farm business.

There has been little criticism of the current preference program, likely because there have been relatively few farms sold to socially disadvantaged buyers. In 1992, only 2.7% (24 out of 889) of the farms sold went to socially disadvantaged individuals. For 1993, this figure was 2.6% (33 out of 1244); and for 1994, it was 4.7% (53 out of 1120). The agency expects the sale figures to increase in the future as women farmers are now considered socially disadvantaged. There is some cost to this program because it would likely be less expensive if the agency did not acquire property in the first place.

This program also contains a loan component under which a percentage of loan money for farms is set aside for women and minorities. Although the amounts vary considerably from state to state, the agency roughly estimates that about 10% percent of the funds available nationally during the last several years has been set aside for socially disadvantaged farmers. This aspect of the program has led to resentment recently as the agency has exhausted its generally-available farm loan funds, but had funds available for loans to socially disadvantaged farmers.

USDA officials report that the justifications offered for these programs over the years have been several. Many observers have argued that government policies and practices in the past operated in a discriminatory fashion and diminished the opportunities available to minority farmers. Some

7 U.S.C. § 2003(d).

observers stress broader problems of discrimination in the rural economy -- access to credit, for example. Still others simply observe the sharp declines in the numbers of minorities engaged in farming, and argue that true integration of rural and economic life will be improved if something can be done about this underrepresentation. All of these justifications must be examined carefully by the Department of Agriculture and the Attorney General in light of *Adarand*.

11.4 Housing and Urban Development

[TO BE DONE]

11.5 Conclusions and recommendations

11.5.1 Conclusions

Apart from the principal areas discussed in earlier chapters, Congress has created a number of affirmative action measures scattered across the government in order to respond to problems of unequal opportunity and exclusion. Some of those sampled in this chapter have recently ended, or are scheduled to end soon. The recommendations below address others.

11.5.2 Recommendations:

- *Farming:* Direct the Secretary of Agriculture to examine alternative policies to enhance the opportunities of minorities to remain or become farmers, without using inflexible preferences or set asides. In particular, the Department should consider whether a variety of outreach and affirmative action measures related to participation in land auctions and financial assistance for new operations, could replace the present system.
- *Housing and Urban Development:* Direct the Secretary of HUD to examine less restrictive means by which the Government National Mortgage Guarantee Association (GNMA) might effectively promote participation by minority and women-owned firms in the securitization transactions guaranteed through GNMA's Multiclass Securities Program.
- *Generally:* The President should direct all agency heads to establish a process to review the effectiveness and fairness of affirmative action programs on a continuing basis, using the principles described in this Report.
