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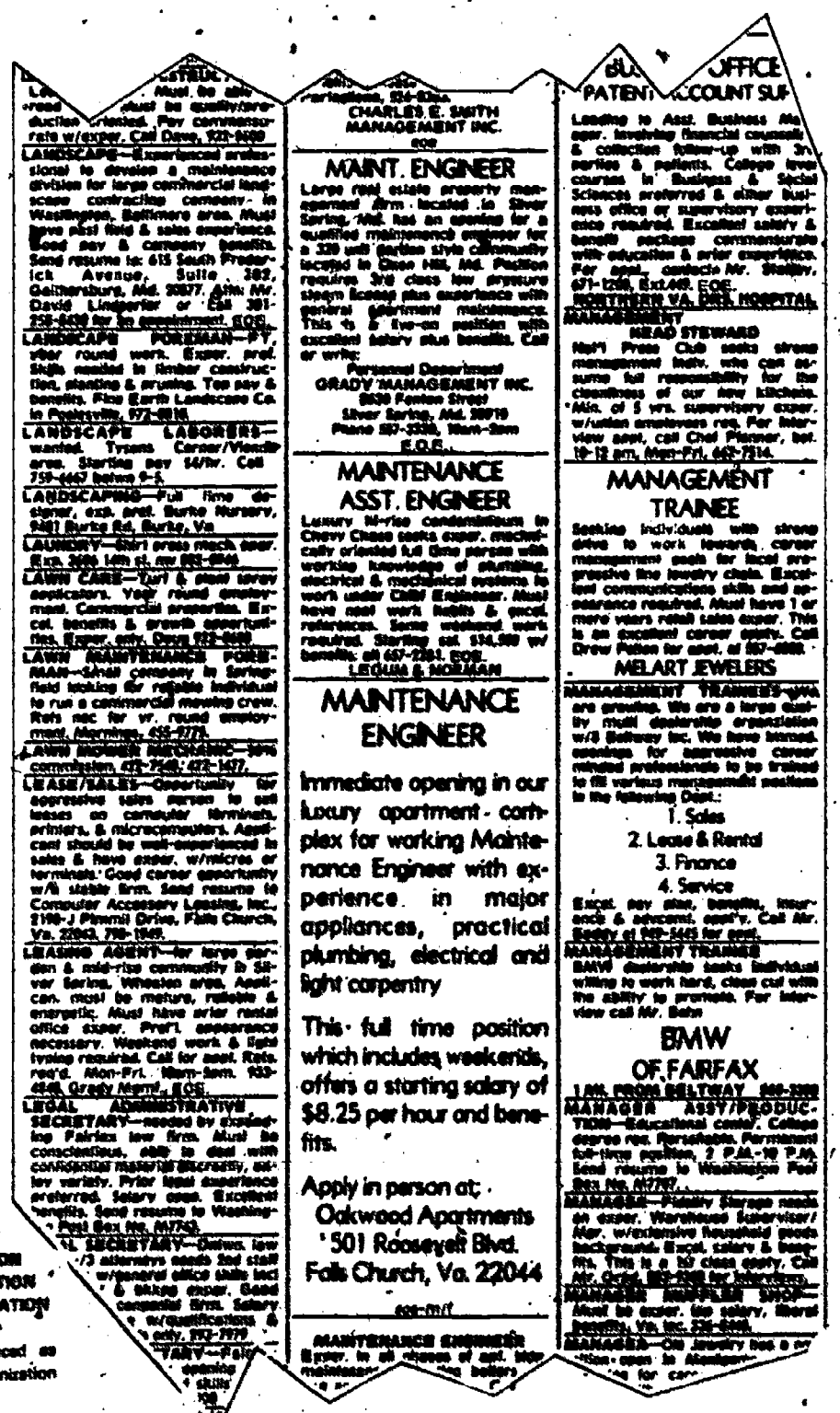
ABSTRACT

This is a history of the discriminatory practices that gave rise to affirmative action policies, of the way in which such policies evolved, and of the current law regarding affirmative action. It examines the application of Federal policy to institutions which provide employment and training opportunities, as well as implementation of affirmative action policy by the current administration. Statistical information and opinions of employers and others directly involved in the workings of the policy are included. In general, affirmative action is found to be "a policy marked by pragmatism and compassion," but criticisms are made against the Reagan Administration: the President is called upon to reexamine his position of opposition to affirmative action policies developed and implemented by his predecessors. His stance, it is argued, has had little influence on the courts, Congress, and most Federal agencies, but it has encouraged opposition and decreased the protections of law available to persons discriminated against. Chapters include: (1) History of Affirmative Action; (2) Goals, Ratios, and Quotas; (3) The Reagan Administration Record; (4) The Impact of Affirmative Action; and (5) The Debate over Affirmative Action. Final sections include findings, recommendations, footnotes, and an appendix (a questionnaire on affirmative action practices which was sent to private companies). (KH)

Affirmative Action to Open the Doors of Job Opportunity

A Policy of Fairness and Compassion That Has Worked



A Report of the
Citizens' Commission on Civil Rights
June 1984

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In the 1980s the focus of national debate on civil rights has moved from rights to remedies. Nondiscriminatory treatment of citizens is mandated by law and widely recognized at least in principle if not always in practice. But there is far less agreement on what measures are needed or are effective to correct the impact of mistreatment of people because of their group status.

The current controversy over remedies pits advocates of "neutrality", who believe that mere termination of discriminatory practices is sufficient, against proponents of "affirmative action", who urge the need for additional measures to redress discrimination and to prevent it from recurring in the future.

While this division of opinion has broad implications for civil rights policy in voting, housing, education or other areas, the Citizens' Commission decided to confine its attention to an in-depth examination of federal affirmative action policy as applied to institutions which provide employment and training opportunities. Our intent was to go beyond the rhetoric that has marked much of the public discussion to determine how affirmative action policies, including those that use numerically-based remedies, have worked in practice. Accordingly, we sought to develop a factual record of the discriminatory practices that gave rise to affirmative action policies, of the way in which such policies have evolved, and of the current law of affirmative action. We also investigated the implementation of affirmative action policy by the current

Administration. Most important, we sought evidence on the practical impact of affirmative action - both statistical information and the informed opinion of employers as well as others who have intimate knowledge of the workings of the policy.

What the Commission discovered was that in the main, federal affirmative action in employment has been a policy marked by pragmatism and compassion. Even the most rigorous remedies (goals and timetables and court ordered ratios) have been administered with a sensitive regard for their impact on all workers as well as on employers and in a manner which preserves other important values such as merit standards. It was also found that while affirmative action alone is not sufficient to provide access to opportunity for victims of deprivation and discrimination, in the past two decades the policy has contributed to the progress that many minorities and women have been able to attain in upgrading their educational and economic status.

Thus, we have concluded that affirmative action is a policy that works. But we are seriously concerned that the utility of affirmative action as a remedial tool is being undermined by attacks on the concept by the Reagan Administration and by the Administration's failure to enforce laws and policies developed by preceding Administrations and upheld by the courts.

Our strongest recommendation is that President Reagan reexamine his position of opposition to affirmative action policies developed and implemented by his five predecessors. Though his Administration has had little success in convincing the courts, Congress and most federal agencies of the correctness of its proposals to draw back on enforcement of affirmative action, its stance has encouraged opposition and decreased the protections of law available to persons who have been subjected to discrimination. This recommended change in position should also reflect itself in the nominations and appointments the President makes to the judiciary, independent agencies and Executive Branch positions that have equal opportunity responsibilities. He should designate for those positions only persons who have a demonstrated commitment to the enforcement of civil rights laws.

We believe Congress should seek to enlarge the numbers of persons who have access to the benefits of affirmative action by passing legislation designed to improve basic skills through education and job training and by creating more jobs to meet pressing national needs. Both the Executive Branch and Congress should cooperate in making sure that the necessary personnel and financial support are available for vigorous enforcement of nondiscrimination laws and affirmative action requirements by all responsible agencies.

Congress, of course, should extend affirmative action requirements to its own employment policies, thereby demonstrating its commitment to the nation.

Further, Congress should take immediate action to address the problem of layoffs. Neither white male workers who have accumulated seniority nor minority or female workers who have gained opportunities through affirmative action should be made to suffer the loss of their jobs. Constructive steps by Congress may include additional incentives to work sharing and certain anti-layoff requirements.

In addition, there is much that can be done by state and local governments and by citizens. Organizations that serve the needs of state and local governments should make available to those governments information on the operation of affirmative action policies, including model statutes and ordinances that may be used to implement such policies on the state and local level.

Organizations and associations that serve the needs of employers and employees should disseminate information on the techniques that have proved successful in implementing affirmative action policies and on the positive results that have been achieved through affirmative action programs.

Lawyers who advise on employment practices should also make available to their clients information on the positive results of affirmative action and on the broad scope the courts have accorded to such programs. In addition, the organized bar and individual law firms should undertake on a pro bono basis to monitor equal employment cases in which the government is a party to make sure that rights are adequately protected.

Public school systems, colleges and universities, employers, unions and government at all levels should seek means of closer cooperation to assure that programs designed to enhance opportunity - basic skills, job training and affirmative action - are coordinated to achieve the goal.

Chapter 1 - HISTORICAL PERSPECTIVES ON AFFIRMATIVE ACTION (pp. 29-65)

The concept of affirmative action to remedy racial injustice had its origins in the Civil War Reconstruction Period. Constitutional amendments and other federal initiatives were undertaken to establish equal opportunity for the former slaves. These initiatives brought about significant advances, among them participation by blacks in elections and elective office. When the federal government, toward the end of the 19th Century, withdrew support for equality the meager political and economic rights which blacks had attained were quickly lost.

Federal support for equal employment opportunity (EEO) was renewed in the early 1940s. President Roosevelt's 1941 Executive Order, prohibiting employment discrimination by federal defense contractors, marked the beginning of a new era in the federal commitment to ensure equality. Successive Presidents continued or expanded the Executive Order program. After two decades of experience in implementing federal EEO policy among federal contractors, it was recognized that a passive policy of non-discrimination was inadequate to achieve equal employment opportunity. Because of entrenched institutional barriers which had developed over many decades of discrimination, a positive program to

ensure non-discrimination was needed.

In 1961, President Kennedy added to the Executive Order program the requirement that contractors take "affirmative action" to ensure equal opportunity. During the twenty years following the Kennedy order, the meaning and methods of affirmative action were refined. Techniques to identify and eliminate discrimination were improved. When initial affirmative steps, such as recruitment or outreach, proved insufficient to alter exclusionary patterns in some industries, federal agencies developed numerical measures of equal employment opportunity.

Endorsement of affirmative action has not been limited to the executive branch of government. Congress has included authority for affirmative action remedies in several statutes, beginning with the enactment of Title VII of the Civil Rights Act of 1964. Congress also has rejected proposals to limit the scope of affirmative action remedies.

The federal judicial system has widely accepted the correctness and effectiveness of affirmative action to remedy prior discrimination. Federal courts have consistently ordered affirmative action, including such race or sex-conscious numerical measures as goals and timetables and ratio hiring when necessary, to remedy

past patterns of exclusion and discrimination.

Affirmative action has been supported consistently by Congress, the courts and each of the four previous Administrations, both Republican and Democratic, which have considered it. Despite this broad support for affirmative action, controversy persists, particularly over the use of numerical standards for determining performance.

Chapter 2 - GOALS, RATIOS AND QUOTAS (pp. 66-88)

The use of numerical bases for assessing equal opportunity performance evolved from the failure of lesser measures to bring about tangible change in the discriminatory patterns of some workforces. Standard techniques that rely on numbers include the "goals and timetables" required of government contractors and "ratio hiring" sometimes required by courts. "Quotas" is a third term often used in the debate over affirmative action.

Goals and timetables are targets set by government contractors for the employment of minorities and women along with time frames for achieving the targets. The hiring goal is a numerically expressed estimate of the percentage of new employees expected to be minorities or women and is based on several factors, including the proportion of such groups who possess the requisite skills in the relevant labor market. Goals and timetables policies require employers to make good faith efforts; failure to achieve a goal does not automatically subject employers to sanctions.

Hiring ratios are requirements imposed by courts after findings of systemic patterns of discrimination. A hiring ratio, for example, may call upon an employer to employ one female or minority applicant for each male or white applicant hired until a goal is reached. In practice, ratio remedies are more rigorous than goals and timetables because ratios focus on each hiring decision rather than on the overall results achieved over time by hiring practices. Both "goals" and "ratios" have been inartfully and inaccurately characterized as "quotas."

A "quota" is an absolute requirement that an employer hire a specific number or percentage of a particular group, without regard to the availability of qualified candidates or the existence of vacancies. Quota hiring is not a part of national policy and this Commission knows of no case in which Congress, a court or an agency has ever imposed on an employer such a requirement.

Race- or sex-conscious numerical remedies (goals, timetables and ratios) grew out of the persistent use of practices such as word-of-mouth recruiting, "old boy" networks, aptitude and other tests not related to job performance, which continued to prevent the employment of minorities and women even after overt practices of discrimination had ended. Such numerical measures have been deemed by the courts to be essential to meaningful equal employment opportunity for minorities and women.

The Supreme Court in three important cases has validated the main tenets of affirmative action policy. In Weber (1979), the Court upheld an agreement between an employer and a union to establish an employee training program in which slots were allocated equally to black and white employees regardless of seniority. In Fullilove (1980), the Court sustained the constitutionality of a congressional "set-aside" for minority businesses in federally-sponsored public works programs. And in Bakke (1978), while striking down a rigid system employed by the University of California to allocate places in medical schools to minorities, the Court ruled

that race could be used as a factor in the admissions process, to deal with past patterns of exclusion, to promote the goal of diversity or for other purposes. Federal courts of appeals also have been consistent in sustaining the use of numerically-based remedies including ratio hiring, where their need has been demonstrated.

At the same time courts and federal agencies have been careful to ensure that white males are not displaced from positions they hold or required to bear an unreasonable or unnecessary burden because of such remedies. Goals and ratios have been limited to circumstances in which other measures would be inadequate.

Notwithstanding the consistent, bipartisan support numerical remedies have received, and the considerable body of legal precedent and logic which has impelled the federal government to undertake such remedies, affirmative action has been under attack in the Reagan Administration.

Chapter 3 - THE REAGAN ADMINISTRATION RECORD (pp. 89-120)

The Reagan Administration, while endorsing affirmative action in general terms, has attempted to undermine its use. The focus of Administration efforts has been an attack in the courts and in public forums on the use of goals and ratios. In addition, the Administration has weakened affirmative action policy by decreasing budgets and enforcement activities and by failing to foster stability in leadership of the agencies which implement the policy.

Among the responsible agencies, affirmative action policy has varied. The Department of Labor has endorsed goals and timetables, but has sought to weaken materially its affirmative action regulations. The Department's enforcement activities have slowed down considerably in the Reagan Administration. The Equal Employment Opportunity Commission has maintained its support for numerical remedies, but its ability to implement such measures has been restricted. The U.S. Commission on Civil Rights, its independence eroded by President Reagan's dismissal of Commissioners, has backed away without any further study from past reports approving goal and ratio relief.

Acting in pursuit of what it states is the true Reagan Administration policy, the Department of Justice also has sought to bring an end to the use of numerical goals and ratio remedies. The Department of Justice has advanced its opposition to such remedies in public pronouncements, in efforts to

impose its will on other agencies and in cases to which it is a party. It also has attempted to intervene in other cases to request that a court reconsider use of goals and ratio relief. The Department's avowed objective is to find a legal vehicle to convince the Supreme Court that it "wrongly decided" the 1979 case of Weber v. Kaiser Aluminum Corp., in which the Court upheld private use of race-conscious ratio selection of employees for a training program. The Department argues that race or sex-conscious remedies, such as hiring goals or ratios, prefer minorities and women who are not victims of discrimination and disadvantage white males who are innocent of any wrongdoing.

The Department has had little success, thus far, in convincing the courts, Congress or most other federal agencies of the correctness of its views. Recently the Fifth Circuit Court of Appeals, in an en banc decision in Williams v. New Orleans, resoundingly rejected the Justice Department's arguments against race-conscious numerical remedies. Nevertheless, the Department's vigorous opposition to affirmative action remedies has fostered resistance to and relaxation of federal affirmative action policies.

Chapter 4 - THE IMPACT OF AFFIRMATIVE ACTION (pp. 121-146)

Much evidence shows that implementation of affirmative action policy has led to improved occupational and income status for minorities and women.

Gains have occurred across the spectrum of occupations: in the professions (such as law, medicine and psychology); in managerial positions; in the construction trades; in manufacturing and trucking; in service occupations; in police departments and other public service positions.

These gains are clearly linked to affirmative action. Two recent studies on the effect of federal affirmative action policy under the Executive Order contract compliance program - one done by the Department of Labor and the other performed under contract to it - concluded that the program has a measurable, positive impact in increasing minority and female employment among federal contractors. Such gains are also seen when one traces over time the changes in employment patterns of large companies that have entered into affirmative action consent decrees. This conclusion was also confirmed by representatives of business who participated in a consultation held by the Citizens' Commission. These business leaders described their affirmative action programs and endorsed goals and timetables as a useful and appropriate management tool.

The business consultation also elicited testimony about other benefits that have flowed from affirmative action.

One such benefit has been an expansion of markets and clientele. The representative of one company reported, for example, that minority insurance agents brought in minority customers who were not previously insured by that company.

Another important effect of affirmative action has been a streamlining of job requirements and personnel practices that has inured to the benefit of all employees. Business representatives reported that the elimination of non-job related requirements from job descriptions, the improvement of counseling services and grievance procedures, the establishment of uniform employee evaluation policies all promoted a greater sense of fairness among employees. These findings were supported by the responses to the Commission's survey questionnaire on affirmative action, sent to some 200 companies which varied by size, industry and geographical local.

More than one third of the respondents reported that implementation of affirmative action plans resulted in increased employee job satisfaction as reflected by such measures as fewer employee grievances, decreased absenteeism or decreased employee turnover. Most companies reported that affirmative action programs had enhanced their public image and overall goodwill.

Chapter 5 - THE DEBATE OVER AFFIRMATIVE ACTION (pp. 147-174)

Affirmative action, particularly the use of goals and timetables and court-ordered ratio hiring, remains subject to great controversy. Charges persist that such remedies constitute "preferential treatment," that they benefit some who do not need assistance while failing to help others who do, that they impose bureaucratic burdens on employers, and that they threaten standards of merit. These criticisms call for careful evaluation in light of what has been learned about the needs that gave rise to affirmative action, the ways in which the policy has been administered over two decades and the impact that it has had on employers, employees and upon society as a whole.

Some argue that affirmative action constitutes "reverse discrimination" in that it disadvantages white males who neither participated in nor benefitted from prior discrimination. This criticism ignores the fact that courts have taken pains to balance competing interests in shaping affirmative action remedies. They have held that expectations of white workers may be disappointed as a result of affirmative action remedies, but that such workers are not to be displaced from their jobs to make room for minorities (or women) deserving of a remedy, even where an identifiable white worker may actually have profited from the employer's discrimination. Courts have also made it clear that ratio

is a temporary measure which may be used only until the conditions of exclusion or segregation that gave rise to the remedy are eliminated. Layoff situations where discharge of employees according to seniority would wipe out affirmative action gains pose more difficult problems. But public policy initiatives, e.g., work sharing, are available to assure that burdens are allocated equitably. The courts have recognized, however, that burdens cannot be avoided entirely since affirmative action is needed to withdraw the unfair economic advantage that past practices of discrimination conferred on white males.

Affirmative action has also been criticized on the grounds that it establishes racial/ethnic categories that are arbitrary and either over- or under-inclusive, that it has benefitted people who do not need assistance and has failed to benefit people who do. With respect to criticisms of under-inclusiveness, public policy determinations of which groups are eligible for the benefits of affirmative action are based on a principle: that members of groups that have been subjected to official, governmentally-sanctioned discrimination are entitled to the remedial measures provided by affirmative action. Admittedly, the categories used in affirmative action do not always work perfectly in all instances to link wrongs and remedies. Despite imperfections, it is doubtful that any substitute set of classifications would address the needs of affirmative action as well or better. Efforts to limit affirmative action to

persons who are "identifiable victims" of discrimination or who can demonstrate disadvantage would unduly narrow the remedy or make the policy unadministrable.

Critics of affirmative action cite the persistence of high levels of unemployment and poverty to argue that the policy does not help minorities who are most disadvantaged. Defenders of affirmative action concede that it is not a self-sufficient policy that will deal adequately with the combined effects of discrimination and disadvantage. The availability of employment opportunity is determined in large measure by the business cycle and macroeconomic policies. Affirmative action also will be of little benefit to people who are functionally illiterate, who do not possess basic skills, or who suffer other disabilities that prevent them from readily acquiring the skills to function effectively in the job market. But this means only that affirmative action is not a self-sufficient policy for providing mobility, not that it is ineffective. The gains made by minorities in police and fire departments, in the construction trades and other areas show that affirmative action is not merely a policy for the advantaged. Similarly, studies show that many minority students in medical schools come from families of lower income and job status.

Some in the business community have complained about the costs, paperwork requirements and administrative burdens posed by the contract compliance program. Without having undertaken a full

evaluation of these criticisms, it should be noted that complaints about the administration of affirmative action requirements do not call into question the basic need for such a remedy, nor do these concerns go to the overall effectiveness of affirmative action in providing the remedy. The Commission's consultation with business leaders also suggested that affirmative action requirements have impelled business to simplify and regularize job requirements and personnel practices, thus offsetting to some degree the paperwork burden imposed by requirements themselves.

A further major criticism of affirmative action is that it runs counter to the use of merit standards which, in principle if not always in practice, is the prime means of allocating benefits and status among citizens in this country. This, it is said, works to everyone's detriment, including minorities who are stigmatized by the knowledge that they have not made it on their own merit.

This criticism is incorrect. Federal affirmative action policy recognizes and incorporates the principle of merit. Courts have said repeatedly that the purpose of affirmative action remedies is to create "an environment where merit can prevail." As one court has said, "[I]f a party is not qualified for a position in the first instance, affirmative action considerations do not come into play." While every public policy is subject to maladministration, unless abuses become overwhelming, the appropriate action is to cure the

specific problem, not junk the policy. The Commission found no evidence of serious abuse.

What affirmative action offers mainly is the opportunity to compete and prove one's own merit. People who are given the opportunity by affirmative action to enter the competition and who then compete successfully by their own efforts should have no fear of being stigmatized by affirmative action. The risk is, rather, that stigma will result from the continuation of longstanding prejudice. For the Commission, the important point is that as difficult as merit standards may be to define and apply, affirmative action policies have sought to stay consistent with them.

Critics also have argued that race-conscious remedies run counter to the ideal of a "color blind" society and elevate group rights over the rights of individuals. The criticism ignores the fact that past wrongs against groups have persistent, present-day effects which can only be countered by group-conscious actions.

In the end, the positions that people take in the debate hinge on their assessments of the relative dangers of "race conscious" or "race neutral" policies. Opponents of affirmative action fear that they will become ingrained in law and policy leading to a society permanently divided along racial lines. Proponents of affirmative action do not lightly dismiss these concerns, but they believe in a majoritarian

society there are built-in checks against excesses that favor minorities. Rather, for advocates of affirmative action, the real dangers lie elsewhere. The long history and experience of this nation's struggle against injustice suggest that without a positive program to currect past wrongs, they will never be remedied.

INTRODUCTION

"When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the law..." Justice Joseph P. Bradley in the Civil Rights Cases, 109 U.S. 3, (1883)

"In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." Justice Harry Blackmun, concurring in part in Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978)

Thirty years after the United States Supreme Court's decision in Brown v. Board of Education signaled the end of the official caste system in the South, the struggle over civil rights continues. In 1984, however, the ground of the struggle has shifted from the issue of whether the right to equality of opportunity should be recognized at all to debate about what remedies are just and appropriate to redress denials of the right.

Today, nondiscriminatory treatment of citizens by government and the major institutions of our society is mandated by law and widely recognized in principle if not always in practice. But there is far less agreement on what measures are needed or are effective to correct the impact of mistreatment of people because of their group status.

If there is any single phrase that encapsulates the current debate over remedies, it is "affirmative action," a term which broadly "encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future".1/ Advocates of race or sex "neutrality" place greatest reliance on simple termination of discriminatory practices and the prospective application of rules which appear fair to all groups. Advocates of race- or sex-conscious

remedies assert the need for a variety of affirmative measures designed to address current barriers to opportunity that remain from past discrimination.

While the contoversy is an old one (as the quotation from Justice Bradley suggests), its current implications are both broad and significant. Should election district lines be drawn in ways which maximize the political strength of previously disenfranchised minorities? Should school desegregation plans be fashioned to recognize "neutral" criteria such as neighborhoods or should they assure the effective desegregation of schools? What should be the role of government and private developers, whose practices helped to create housing segregation, in fostering the growth of residential integration? All of these are affirmative action issues.

The Citizens' Commission has chosen, however, to examine in some depth the single issue most closely associated with the debate over affirmative action policy - its application to institutions which provide employment and training opportunities. Most of the current techniques of affirmative action in employment have been in effect for a decade or more, long enough, we believe, to make an informed judgment about their fairness and utility.

In employment, affirmative action refers to a wide variety of measures including: development by employers

of articulated equal employment policies and dissemination of the policies; review of specific employment practices to determine whether their impact is discriminatory; equal employment training for those who make personnel decisions; special outreach and recruitment efforts by employers; the initiation of programs to train and upgrade the skills of employees; the keeping of records to ascertain the impact of employment practices on minorities and women;[2/] the establishment of numerical goals and timetables, and on occasion ratios, for the hiring or promotion of specified minorities, females, or others.

All of these measures are properly regarded as affirmative action in that they require something more than merely terminating discriminatory practices. They require race or sex conscious steps designed to remedy past discrimination or to prevent it from occurring in the future. All are measures that courts or other competent government bodies have found necessary in certain circumstances to address the systemic or institutional aspects of discrimination which remain after overt practices have been eliminated.

Some affirmative action steps have proved relatively uncontroversial. Even the most vocal opponents of affirmative action, Reagan Administration members of the U.S. Commission on Civil Rights and officials of the Justice

Department, support outreach, recruitment, training and education efforts extended to minorities. Other measures, however, have been the subject of fierce debate, most notably the use of numerical goals and timetables by federal agencies and of ratios by federal courts as remedies for past practices of exclusion and segregation. To critics, the use of numerical standards is viewed as "preferential treatment" as indefensible as the historically restrictive quotas imposed on Jews or as the wrongs against minorities and women that affirmative action was designed to correct. To proponents, such numerical standards came about through the failure of other techniques to root out discrimination and remain necessary to provide practical opportunities to people who have been denied them in the past.

In approaching the issues surrounding affirmative action, the Commission looked first, in Chapter 1, at the historic wrongs that gave rise to the policies, at the abortive efforts to provide remedies after the Civil War and at the evolution of federal fair employment policy over the past five decades.

In Chapter 2, we seek to describe with precision current federal policies that use numerical standards in judging compliance with fair employment laws and the Supreme Court decisions that govern the use of such standards. Chapter 3 examines the ways in which the Reagan Administration has diverged from its predecessors in its attitudes toward affirmative action and the activities it has undertaken in furtherance of its own policies.

In Chapter 4, drawing upon statistical and analytical reports, on a consultation with business leaders and on the results of a questionnaire circulated to employers, we assess the impact of affirmative action policies on minority and female employees as well as on employers and other employees and on the broader society. In the final chapter, the report identifies and analyzes the major issues involved in the debate over affirmative action.

Almost two decades ago, the need for affirmative action was articulated eloquently by President Lyndon Johnson in a commencement address at Howard University:

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the others, and still just believe that you have been completely fair.[37]

Implicit in President Johnson's statement are the dilemmas of affirmative action policy. How does one identify the people who have been "hobbled by chains?" What means are appropriate to give them a fair chance in the race? Are measures to advance those who have been disadvantaged in the race unfair to other competitors?

In addressing these and other questions, the Commission, of course, does not expect to resolve the controversy over affirmative action. Rather, our hope is to make a contribution

to public understanding of the issues and toward constructive solutions to what may be the nation's most serious and persistent problem - how to extend equality of opportunity to all its citizens.

Chapter 1

HISTORY OF AFFIRMATIVE ACTION

To understand the rationale of affirmative action policies and to assess their fairness and utility, it is helpful to trace the history of affirmative action and the problems it has sought to remedy.

In the Beginning

The term "affirmative action" was used early in the development of federal regulation of private-sector employment practices. Its first use had to do not with discrimination but with the rights of trade union members. Under the 1935 National Labor Relations Act, as amended, the National Labor Relations Board upon a finding of an unfair labor practice, issues an order to "cease and desist" from such practice, and "to take such affirmative action...as will effectuate the policies of this Act." [4] In 1945, New York State incorporated "affirmative action" into the remedies authorized for employment discrimination under its Human Rights Act.[5] The term "affirmative action," however was not used in federal civil rights law until President Kennedy's Executive Order No. 10925, issued March 6, 1961.[6] The techniques of affirmative action, as we know them today, were developed initially under the Executive Order programs of the late 1950s and 1960s, and later in Congress and in the courts. Conceptually, however, recognition of the need to take positive legal action to

assist and protect blacks (and later, other minorities, women, the handicapped and Vietnam War veteranss) has been with us for more than 100 years.

During the post-Civil War Reconstruction Period, the U.S. Constitution was amended three times,[7] and numerous federal laws were enacted to redress the wrongs committed against the blacks and to provide protection against future harm. Among these laws were provisions guaranteeing the right to make and enforce contracts; the right to buy, sell and own real and personal property; the right to sue, to be a party in legal actions, and to give evidence; and the right to full and equal benefit of all laws and proceedings for the security of person and estate.[8] The "Freedmen's Bureau",[9] providing for employment, education and housing assistance to freedmen, and federal support of Howard University (founded in 1867) are early examples of the recognition that special, positive actions were needed, and appropriate, to assist the former slaves.

While this federal support could not quickly uplift most blacks to any significant degree economically, it did make possible some remarkable achievements for the former slaves. Black voters under Reconstruction elected hundreds of black officials to state and local office and sent two United States Senators and twenty Representatives to Congress from 1870 to 1900. Throughout the South, Reconstruction governments extended the franchise to many

men of both races by reducing property qualifications, opened the jury box to thousands who had not been admitted before, and instituted public school systems, though of a skeletal nature.[10]

The resurrection was short lived. In the early 1870s Congress granted a general anmesty restoring full political rights to all but a few ex-Confederates. The 1876 presidential election compromise which brought to the Presidency Republican Rutherford B. Hayes set the stage for complete abdication of federal protections for blacks. In return for the support of the Southern presidential electors, Hayes agreed to make available federal funds to the South, to give Southern leaders greater influence over federal patronage in that region, and to withdraw all federal troops from the region.[11]

Almost immediately, disenfranchisement of blacks in the South began. "By 1889, Henry W. Grady, part owner of the largest newspaper in the South, the Atlanta Constitution...would remark, 'The Negro as a political force has dropped out of serious consideration.'"[12]

In the Civil Rights Cases of 1883, [13] the Supreme Court held that the public accomodations section of the Civil Rights Act of 1875 [14] did not, and could not, apply to actions by private persons, but only to state action. And, by 1896, in Plessy v. Ferguson [15], the United States Supreme Court had officially sanctioned governmental separation and segregation of the races. Thus, the abdication of the federal role as a protector of racial minorities which had begun in the 1870's was complete as America approached the Twentieth Century.

Rebirth In The New Deal

The federal effort to promote equal employment opportunity was revived in the 1930s, under the New Deal. Under implied authority of the National Industrial Recovery Act of 1933, which provided for an emergency public works program, the Administrator of NIRA issued regulations designed to end discrimination in employment and provided for sanctions against violators.[16] Administrators of other programs barred discrimination in employment in the construction of projects under the public low-rent housing and defense housing programs of 1937 and 1940.[17]

In 1939, Congress passed the Hatch Act. Although principally aimed at the exercise of political influence and coercion in federal and federally-assisted employment, it also prohibited employment discrimination on the basis of race, creed or color under federally-assisted work-relief programs.[18]

The Executive Order Program

The beginnings of a new era of federal responsibility in the struggle for equal employment opportunity can be dated to June 25, 1941. On that day, in response to protests by black Americans and to avert a planned march on Washington organized by A. Phillip Randolph, President Roosevelt issued Executive Order No. 8802. The Order "reaffirmed.. the policy of the United States to encourage full participation in the national defense program...,[19] found that "available and needed workers have been barred from employment industries engaged in defense production solely because of...race, creed, color, or national orgin...", and declared "that there shall be no discrimination [on those bases] in

the employment of workers in defense industries or government..." The Order required agencies and departments to include in their defense contracts a clause under which the contractors would pledge nondiscrimination in employment in the government project. A five-member Committee on Fair Employment Practices, was authorized to accept and investigate discrimination complaints and to seek a negotiated settlement, and to recommend measures to effectuate the provisions of the Order.[20] The Order did not however, provide for actual enforcement of the equal employment opportunity requirement.

Two years later Roosevelt extended coverage of his EEO Executive Order to all federal contracts and subcontracts.[21] A new and enlarged President's Committee on Fair Employment Practice was established; additional resources were allocated to it, and it was given express authority to "conduct hearings, make findings of fact, and take appropriate steps to obtain elimination of...discrimination... forbidden by this Order."[22] Successive Presidents contributed one or more Executive Orders to this program.[23]

President Truman's 1945 Executive Order (No. 9004) directed the Committee to "investigate, make findings and recommendations, and report to the President with respect to discrimination in industries... or to the effective transition to a peacetime economy." In its 1947 Final Report,[24] the Committee concluded that the Executive Order program had a positive effect; while blacks comprised only 3% of the

workers in war industries in 1942, their number had increased to 8% of such workers by 1945. [25]

Notwithstanding this progress, the Committee observed that "[d]iscriminatory practices were too ingrained to be wholly carved out by patriotism and presidential authority." [26] It further found that:

> The wartime gains of Negro, Mexican-American and Jewish workers are being lost through an unchecked revival of discriminatory practices. The war veterans of these minority groups today face far greater difficulties than other veterans in obtaining training and finding work.
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> **********
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> [T]he gains made by minority group workers began to disappear as soon as wartime controls were relaxed. [27]

Post World War II Action

Implementation of the Executive Order program was at a virtual standstill from 1946 to 1951, as Congress refused to permit the expenditure of funds for its implementation. But, as the Korean conflict escalated, President Truman, utilizing his war powers, issued Executive Orders in February, 1951, and December, 1951, which required defense contractors to promise nondiscrimination on the basis of race, creed, color or natinal orgin.

Early in his first Administration, President Eisenhower established by Executive Order [28] a 15-member Committee on Government Contracts comprised of representatives of industry, labor, government and the public. This Committee was chaired

by then Vice-President Richard M. Nixon. Eisenhower's Order reaffirmed the policy of the United States to promote equal employment opportunity under government contracts because all persons are "entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds." [29] A 1954 Eisenhower Order was issued on the recommendation of his Committee on Government Contracts that a "means of better explaining the present nondiscrimination provision of Government contracts," was needed.[30] For the first time in the program an Executive Order specified the text of the provision to be included in government contracts and subcontracts. [31]

Although in the early years the Federal nondiscrimination program may not have substantially increased the overall employment of blacks, President Eisenhower's Committee did lay the ground work for some advances. [32] It established the machinery necessary for implementation of the non-discrimination provision. [33] It publicized the program, and, through direct negotiations with government contractors, opened some jobs and training opportunities. [34] The Committee often attempted to foster minority group employment by urging the hiring of blacks on a limited "preferential"

basis, i.e. giving preference to a black applicant where he and a white applicant were equally qualified. [35] A number of factors, including a lack of enforcement power, hampered the effectiveness of the Committee; where the Committee was successful in securing employment of blacks in "non-traditional" jobs, it was generally only of a token nature. [36] And contracting agencies were unwilling to adopt the "firmer approach" recommended by Chairman Nixon with respect to disqualifying from further government work contractors that engaged in discrimination.[37]

In its Final Report to President Eisenhower, the Committee used words that proved prophetic. The Committee determined that "[o]vert discrimination... is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality." (Emphasis in original.) [38]

The Kennedy Order

On March 6, 1961, President Kennedy issued Executive Order No. 10925 establishing the President's Committee on Fair Employment Practices. Finding an "urgent need for expansion and strengthening of efforts to promote full equality

of employment opportunity," the President ordered that federal contractors be required to pledge nondiscrimination and to "take affirmative action to ensure" equal employment opportunity on the basis of race, creed, color or national origin (emphasis supplied).[39] The Committee also was directed to "study employment practices of the Government... and to...recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination..." [40] (emphasis supplied).

The affirmative action requirements of the Executive Order program were based upon an expanded view of the government support necessary to secure equal employment opportunities for racial and ethnic minorities. President Kennedy's Order declared that "it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons" [41] and "it is the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower." [42] Moreover, the Kennedy order, for the first time, set out strong and specific penalties (including suspension or termination of a contract) for non-compliance with the contractual obligations.

Vice-President Lyndon B. Johnson, in his capacity as Chairman of the President's Committee, requested a formal opinion of the Attorney General regarding the authority of the President to require the

inclusion in government contracts of the nondiscrimination and affirmative action clauses required by section 201 of the Order and to prescribe the sanctions and penalties for noncompliance set forth in section 312 of the Order. The Attorney General concluded that the provisions were lawful. [43]

Plans for Progress

On April 6, 1961, (the effective date of the Kennedy Order) complaints were filed with the President's Committee on Fair Employment Practices alleging discrimination in employment at Lockheed Aircraft Corporation's Marietta, Georgia, plant. [44] Complaints had been filed with the previous Committee in 1956, and since that time negotiations to secure compliance had been underway. [45] The case was settled on May 25, 1961, with a "Plan for Progress."

The Lockheed Plan marked the beginning of an effort to promote affirmative action through voluntary agreement. Its provisions required internal and external dissemination of EEO policies, use of outreach and recruitment, examination of available jobs, minority employees to consider for placement and upgrading opportunities, and the institution of "periodic checks to ensure that the policies and objectives of the plan are being carried out." [46] These components constitute the basic elements of current affirmative action policy and law.

Similar "Plans for Progress", were developed with almost 100 companies. There was considerable feeling at the time that the Kennedy Order could not be effectively implemented until leading government contractors agreed to the Plan.

While participation in the Plan enhanced minority employment in certain cases, on the whole the Plans for Progress had little impact in large part due to a lack of enforcement provisions. In fact, after studying the employment of minorities by 100 major corporations headquartered in New York, the Equal Employment Opportunity Commission in 1968 reported that the Plan member firms showed "consistently poorer records [than non-member firms] in white collar minority employment..." [47]

The Civil Rights Act of 1964

Within a year of the momentous 1963 civil rights "March on Washington" led by Dr. Martin Luther King, Jr., Congress enacted its first comprehensive response to the problem of employment discrimination: Title VII of the Civil Rights Act of 1964. [48] In Title VII, Congress extended the obligation of nondiscrimination to private employers which are not government contractors and to unions and employment agencies as well. Congress drew on the experience of the Executive Order program in framing the legislation. At the same time, it recognized that the equal opportunity obligations of those who do business with the federal government might be deemed more extensive than those of other private employers. Thus, when Senator Tower proposed an amendment to make Title VII the "exclusive means whereby any department [or] agency... may grant or seek relief from...any employment practice...covered by this title...," [49] the amendment was rejected. [50]

In an interpretive memorandum, Senators Joseph Clark and Clifford Case, the "bi-partisan captains" of Title VII, emphasized that the President's authority to enforce nondiscrimination and affirmative action was not

affected by the EEO legislation:

> Title VII, in its present form has no effect on the responsibilities of the [President's] committee or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts...[51]

Significantly, Congress referred to the Executive Order in Title VII, and incorporated its compliance activity into the Act's enforcement scheme:

> Where an employer is required by Executive Order 10925 or by any other Executive Order prescribing fair employment practices...to file reports relating to his employment practices...and he is substantially in compliance..., the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.[52]

Thus, Congress had thoroughly considered the Executive Order program and had contemplated its continuance.[53]

Executive Order 11246

President Johnson's Executive Order No. 11246[54] preserved and enhanced the contract compliance program implemented by President Kennedy. The Johnson Order continued the existing affirmative action requirement as well as sanctions for violating the order, and maintained the coverage of federally-assisted construction contracts established by Kennedy's Executive Order No. 11114.[55] Furthermore, President Johnson institutionalized the federal contractor equal employment opportunity program by assigning responsibility for it to the Secretary of Labor.[56] The Secretary of Labor delegated his authority for administration of the Executive Order program to a newly created Office of Federal Contract Compliance (OFCC).

The Road To "The Philadelphia Plan"

The construction industry, which in 1963 had been included in Executive Order coverage, was an important potential source of employment for undertrained and excluded minority workers. Traditions of nepotism and overt racial discrimination among construction unions, coupled with the exclusive bargaining and referral agreements these unions had with the major construction contractors, virtually excluded minorities from employment on government construction projects. In April, 1965, the President's construction industry compliance activities committee set up a system of "area coordinators for construction."[57] To enhance this area concept, the OFCC established government-wide compliance programs for construction; the first four "special area programs" covered in St. Louis, San Francisco, Cleveland and Philadelphia.[58]

The OFCC did not initially specify in detail the required affirmative action measures,[59] but the OFCC did approach the affirmative action program with a greater emphasis on "results" than existed previously. In 1967, Edward Sylvester, Jr., Director of the OFCC, described affirmative action in the following way:

> ...[A]ffirmative action is anything that you have to do to get results. But this does not necessarily include preferential treatment. The key word here is 'results'.[60]

This result-oriented approach to affirmative action received more precise definition with the implementation of the four "special area programs" for the construction industry.[61]

The St. Louis Plan

Implementation of the OFCC'S new construction industry initiative commenced in St. Louis as a result of local minority group protests regarding job discrimination on a large, federally supported construction job, the St. Louis Commemorative Arch. [62] An attempt by a contractor to comply with the Executive Order by hiring minority subcontractors [63] resulted in a boycott by the building construction unions in December, 1965.

On January 7, 1966, prior to the approval of federal funding, OFCC requested an investigation of the employment practices of all prospective general contractors and major subcontractors. [64] The Departments of Defense, Commerce, and Health, Education and Welfare were specifically requested to include an inquiry into the affirmative action programs of each planned contractor. [65] The agencies were provided with guidelines for their reviews which, in addition to requiring information on recruitment sources and hiring procedures, contained a checklist which included the following:

> Contractors will actively recruit minority group employees for work in the trades where they are not now frequently represented (emphasis ours). [66]

The government, acting through the National Labor Relations Board, obtained an injunction against the St. Louis unions on the basis that a secondary boycott was being maintained. [67] Restraint of the boycott, although under a different law, at least temporarily maintained the efficacy of the OFCC construction effort. [68]

The San Francisco Plan

The San Francisco Area Plan came about as a result of a large Federal fund commitment for the Bay Area Rapid Transit (BART) project.[69] In early 1967, the OFCC instituted a slightly expanded plan for affirmative action in construction of the BART project. While the St. Louis plan focused primarily on pre-award reviews and a demand that compliance programs be developed by contractors, the Bay Area plan specified nine points on which contractors' proposed affirmative action programs would be required to cover in detail.[70] In addition to active recruitment and participation in joint apprenticeship committees, contractors were required under the Plan to "encourage minority group subcontractors, and subcontractors with minority representation to bid for sub-contracting work" (emphasis ours).[71]

The Bay Area Plan called for BART to enforce the affirmative action program but BART failed to do so. Significant minority entrance into the local building trades did not take place and the plan was considered a failure.[72]

The Cleveland Program

The Cleveland Area Program was announced on March 15, 1967.[73] It proved to be a catalyst for the first use of numerical employment goals to remedy and prevent discrimination. The Plan reinforced the concept of "minority representation" referred to in the earlier area plans with the requirement that the low bidder submit an affirmative action plan designed to

"have the result of assuring that there was minority group representation in all trades on the job in all phases of the work."[74]

What came to be referred to as "manning tables," (and later as goals) was first put forward by a Cleveland contractor as a way of meeting his affirmative action requirements.[75] The contractor set forth a specific proposal in which he detailed the total number of employees he would use in each trade and how many of that number would constitute his "goal" of minority employment.[76] The government adopted the idea for all federal construction in the Cleveland area.

By November, 1967, after almost $80 million in construction contracts for this area had been delayed, Cleveland contractors had committed themselves to hire 110 minority group persons out of a total of 475 in the mechanical trades and among operating engineers.[77] Serious efforts to implement the Executive Order affirmative action requirements brought about the first test litigation regarding the program.

Weiner v. Cuyahoga Community College District,[78] involved a federally-supported construction project at an Ohio community college. A contractor brought suit to enjoin the affirmative action bid conditions and the requirement of submitting a "manning table." Plaintiff had submitted the lowest bid, but the college rejected it when he refused to submit a manning table.

The court rejected plaintiff's argument that the affirmative action program required a racial "quota" system and upheld the Cleveland Plan and its manning tables under Title VII and Ohio Law.[79] The decision was upheld by the Ohio Supreme Court, and the U.S. Supreme Court declined to grant review.[80]

The Cleveland area program was successful. At its inception, only a dozen minorities were in the mechanical trades as operating engineers.[81] After two construction seasons with affirmative action commitments on 65 projects, contractors had undertaken to seek to employ about 500 minority persons in these trades among crews totaling about 2100 workers.[82] OFCC representatives interviewed 135 minority workers who were employed in these trades as a result of the program.[83]

The Philadelphia Plan

The Philadelphia pre-award plan, similar in many respects to the Cleveland Plan, was initiated by the Philadelphia Federal Executive Board (FEB), a group representing several federal agencies, in the fall of 1967.[84] It was a carefully planned program under which information was compiled continuously on the racial composition of the available work force in construction, on minority recruitment sources, on population ratios, and on the expected volume of construction in the area.[85] The FEB got the prior approval and support of the Equal Employment Opportunity Commission,

OFCC, and the local U.S. Attorney's Office.[86] Although the "manning table" concept was implemented at the outset of the program (commitments were obtained to seek to employ 226 minority persons out of 920 mechanical tradesmen), the FEB pre-award plan contained no express requirement regarding the use of numbers or "manning tables."

On November 18, 1968, in response to a request by Congressman William Cramer (R-Fl.), the Comptroller General issued an opinion on the Philadelphia Plan in which he found the affirmative action program invalid.[87] The opinion said that the plan did not meet the requirements for competitive bidding because it did not inform prospective bidders of "definite minimum requirements to be met by the bidders' [affirmative action] program and any other standards or criteria by which the acceptability of such program would be judged."[88]

Congress also had expressed concern about the lack of specificity in the Cleveland and Philadelphia Plans' affirmative action require ments. During consideration of the Federal Aid Highway Act of 1968, Congressman Cramer, who had originally requested the Controller General's opinion on the Cleveland Plan, proposed an amendment prohibiting the imposition of conditions precedent to the award of the contract "unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications."[89] His amendment was adopted.

During the first year of the Nixon Administration, the Department of Labor, under Secretary George Shultz, moved to meet objections regarding specificity. The revised Philadelphia Plan was ready to be implemented. Three days of hearings were held by a panel headed by Assistant Secretary of Labor Arthur Fletcher. Facts sufficient to warrant a special order for the Philadelphia area were gathered and from them "findings" to justify the promulgation of "Plan" order were made.[90] The premise of the post-1961 Executive Order program was that systemic discrimination in employment existed and had existed for many years, and that mere neutrality would not undo the present effects of such practices. The panel found that even after eight years of operation under a positive program of EEO, special procedures were necessary for seven construction trades in the five county area surrounding the city.[91] The order went on to require contractors to commit themselves to self-determined numerical goals of minority manpower utilization, within a range of acceptable numerical standards set by the government.[92] The Department established the following guidelines which contractors were to use in determining their utilization goals: (1) the current extent of minority group participation in the trade;

(2) the availability of minority group persons for employment in such trade; (3) the need for training programs; and (4) the impact of the program upon the existing labor force.

On the basis of finding that federal projects in the Philadelhpia area averaged between two and four years duration, the plan established an escalating set of ranges for the following four years. Thus, e.g., the 1970 range for ironworkers was 5%-9%; for 1971 it was 11%-15%; and for 1973 it was 22%-26%.

The Legality of the Philadelphia Plan

A major concern regarding the use of minority employment goals was that they might be construed as fixed hiring quotas requiring racial preference and violating Title VII. To avoid this, the Plan required employers only to make a "good faith effort" to reach the goals, and further emphasized that the purpose of the commitment to numerical goals was to meet the contractor's affirmative action obligation and that these goals should not be used to discriminate against any person.[93]

The Philadelphia Plan withstood critical challenges in the Congress and in the Courts. The Comptroller General had thought the original Philadelphia Plan unlawful because its affirmative action requirements were not sufficiently specific. Secretary of Labor Shultz responded to this objection with the revised Plans's employment goal system. In response to a request from Senator John McClellan (D.-AR.) for an opinion on the revised plan,

the Comptroller General concluded that the new plan established quotas in violation of Title VII, although it did meet the lack of specificity objection he had earlier raised.[94] The Comptroller General sought to prevent the expenditure of funds to implement the Plan.[95]

Attorney General John Mitchell disagreed.[96] He advised Secretary Shultz that the revised plan was legal and that he could continue its implementation.[97] The Comptroller General, however, persisted. He urged the Senate Appropriations Subcommittee to include in a pending supplemental appropriations bill a prohibition against the use of funds to force contractors to attempt to meet minority employment goals.[98] The subcommittee attached such a rider to the continuing resolutions containing funds for the Department of HEW and Labor, among others.[99] The Senate passed the rider, and the issue moved to the House.

The White House strongly opposed the rider. "Just before the House was to convene, Secretary of Labor Shultz and Assistant Secretary of Labor Fletcher held a news conference during which Mr. Shultz implored members of the House to defeat the rider, calling the vote 'the most important civil rights issue in a long, long time.'"[100] President Nixon threatened to veto the supplemental appropriations bill if it contained the restrictive rider.[101] The rider was defeated in the House,[102] and, on reconsideration, was also defeated in the Senate.[103]

In Contractors Association of Eastern Pa. v. Secretary of Labor [104], the Third Circuit thoroughly considered both the authority of the President to institute the Executive Order program and the assertion of executive power to implement the revised Philadelphia Plan. The Court concluded that the revised plan was within the implied authority of the President to protect federal interests in the expenditure of federal funds. The federal interest protected by the plan was monetary, since the "exclusion from the available labor pool of minority tradesmen is likely to have an adverse effect upon the cost and completion of construction projects...."[105] Moreover, the Circuit determined that the plan did not contravene Title VII and other statutes. The U.S. Supreme Court declined to grant review.[106]

Other courts have upheld the legality and appropriateness of the goals and timetables approach to affirmative action which the federal government had developed to meet the needs of its construction compliance program. Prior to the Third Circuit decision in Contractors Assoc. of Eastern Pa., the Newark Plan had been upheld in Joyce v. McCrane,[107] and in the two years following Contractors Assn., the Seventh Circuit (So. Ill. Builders Assn. v. Ogilvie),[108] and the First Circuit (Assn. Gen. Contractors Altshuler),[109] upheld the goals and timetable requirement.[110] By 1974, when the Supreme Court had for the second time refused to consider a challenge to the use of race-conscious hiring goals under the Executive Order program, the lawfulness of such techniques was well established.

Congressional Endorsement of Affirmative Action

The early 1970s were a momentous period for affirmative action in employment. Executive Branch initiatives under the contract compliance program were endorsed by significant court decisions, and Congress echoed that endorsement in three legislative pronouncements: (1) the 1972 amendments to Title VII; (2) the Rehabilitation Act of 1973; and (3) the 1972 and 1974 Vietnam Era Veterans Readjustment Assistance Acts.

In early 1972, Congress passed comprehensive amendments to Title VII of the Civil Rights Act of 1964. These amendments expanded the coverage of Title VII to include federal, state, and local employment, and for the first time authorized civil suits by the Equal Employment Opportunity Commission (EEOC). During its deliberations on these amendments Congress rejected several amendments which would have limited the contract compliance program and prevented the use of goals and timetables, thus implicitly reindorsing federal affirmative action policy. The first of these amendments, offered by Senator Sam Ervin (D. S.C.), provided:

> No department, agency, or officer of the United States shall require any employer to practice discrimination in reverse by employing persons of a particular race... or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges.[111]

Opponents of this amendment pointed to the Third Circuit's decision in Contractors Assn. of Eastern Pa. v. Sec. of Labor,

and expressed concern that the provision might be interpreted to preclude court-ordered goals and timetables.[112] The Ervin amendment was defeated.[113]

During the debates on the Title VII amendments, Congress rejected two other proposals to alter the Executive Order contract compliance program. One amendment would have transferred enforcement authority for the program from the Secretary of Labor to the Equal Employment Opportunity Commission;[114] the other would have made Title VII the exclusive federal remedy for employment discrimination.[115] Moreover, Congress explicitly endorsed enforcement of the affirmative action obligation undertaken by federal contractors under the Executive Order program in the the following amendment to Title VII:

> No government contract...shall be denied... by any agency or officer of the United States under any Equal Employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the government for the same facility within the past twelve months without first according such employer a full hearing and adjudication... Provided, that if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply....[116] (Emphasis added.)

Thus, Congress thoroughly considered and conclusively approved the contractor affirmative action program, including goals and timetables. Moreover, the amendments continued previous judical authority to order affirmative action remedies. The statutory language in Title VII under which courts had ordered affirmative relief - "the court may ... order such affirmative action as may be appropriate" - was retained.[117]

Congressional Expansion of Affirmative Action Coverage

In 1972, Congress expanded the coverage of federal affirmative action policy to include employment in the federal government itself.[118] Section 717, added to Title VII in that year, provided in pertinent part:

> The Civil Service Commission[119] shall:
> 1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency...shall submit in order to maintain an affirmative program of equal employment opportunity....[120]

The 1972 amendments made federal agencies responsible for implementing affirmative action programs to employ minorities and women. Later Congress expanded the targets of affirmative action to include disabled veterans, and veterans of the Vietnam era and handicapped persons.

The Vietnam Era Veterans Readjustment Assistance Act of 1972 directed the President, the Veterans Administrator, the Secretary of Labor and the Civil Service Commission to "establish an affirmative action plan for every federal department or agency" and for federal contractors "for the preferential employment of disabled veterans and veterans of the Vietnam Era...who are otherwise qualified."[121] The Vietnam Era Veterans' Readjustment Assistance Act of 1974 continued the contract compliance affirmative action program for most federal contracts of $10,000 or more.[122] The 1974 Act went

on to direct the President to issue regulations which, among other things , would require contractors to list openings with local employment service offices and require such local offices to give veterans "priority in referral to such employment openings."[123]

During the same period, Congress extended the benefits of affirmative action to handicapped persons. In the Rehabilitation Act of 1973, Congress required federal agencies and departments and federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. [124] Again, affirmative action was advanced as a necessary national policy to address the special needs of a segment of society that had suffered discrimination.

Beyond the Philadelphia Plan

Contemporaneously with the special area affirmative action plans OFCC was instituting for construction contractors, the agency began to develop a comprehensive approach to affirmative action for non-construction contractors. In May, 1968 the OFCC issued its first regulations describing the

affirmative action obligations of non-construction contractors.[125] Under these regulations, each contractor with 50 or more employees and a contract of $50,000 or more was required to develop a written affirmative action compliance plan for each of its establishments. For the first time, the concepts of "utilization evaluation" [126] and "goals and timetables," were introduced into the Executive Order regulatory program:

> A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractors program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of minority groups, including where there are deficiencies, the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity.[127]

In February, 1970, partially in response to the Comptroller General's criticism that contractors' affirmative action obligations were insufficiently specific, Secretary of Labor Shultz issued Order No. 4.[128] It described in great detail the nature of contractors' affirmative action plans and the steps which the OFCC

required and recommended for implementation of the plan. Twenty months after Order No. 4, Secretary of Labor J.D. Hodgson, in December, 1971, issued Revised Order No. 4.[129] A principal change made by the revised order was that for the first time, women were included in contractors' affirmative action obligations.[130]

Under these orders, the required "utilization evaluation" (now known as "utilization analysis") was considerably expanded into what is now known as the "eight-factor analysis."[131] If, in considering the specified eight factors, a contractor concluded that minorities or females were "underutilized" (i.e. that there were fewer in its workforce than would be expected based on their availability as determined by the eight-factor analysis), then a contractor would be required to establish goals and timetables to increase the number of minorities or females in its workforce to the level of availability as determined by the contractor.[132]

Revised Order No. 4 went on to include ten required components of an affirmative action plan (AAP), in addition to the utilization analysis and goal setting, and recommended additional affirmative steps contractors. Among the required AAP components were (and still are):

1) development and dissemination of a contractor's EEO policy;

2) design and implementation of internal audit and reporting systems to measure the effectiveness of the total program;

3) establishment of responsibilities for implementation of the contractor's AAP; and

> 4) consideration of minorities and women not currently in the workforce having the requisite skills who can be recruited through affirmative action.[133]

Actions recommended as components of an AAP included more than 100 suggestions on matters such as developing and disseminating the EEO policy, identifying problem areas by organizational unit and job groups, and how to implement and measure the effectiveness of the AAP.[134] The "lack of specificity" objection to the Executive Order affirmative action program dissipated after issuance of Order No. 4 and its revision, and these affirmative action regulations remain substantially unchanged.[135]

In 1973, government agencies issued two important new statements on federal affirmative action policy. In February, the U.S. Commission on Civil Rights published its "Statement on Affirmative Action for Equal Employment Opportunities."[136] The Commission found that while "both intentional...and systemic discrimination remain widespread...a point of even greater significance is that the consequences of years of discrimination in the past remain" (emphasis in original).[137] The Commission went on:

> Although it is possible that underutilization results from one practice of an employer, it is more likely that a number of accepted and institutionalized practices[138] have caused an exclusion of women and minority groups from fair opportunity for employment.[139]

The Commission endorsed affirmative action, including the numerical remedies which the courts and the federal government had been implementing,

as a necessary tool to eliminate discrimination and its consequences:

> The necessity for goals and timetables arose out of a long and painful experience in which lip service was paid by employers who then did little to correct the situation. It also arose out of the realization that procedures for assuring equal employment opportunity can accomplish little unless they are tied closely to results. (emphasis in original) [140]

The Commission's "Statement" articulated distinctions between "goals" and "quotas" which presaged a landmark joint memorandum on federal affirmative action policy. In March, 1973, the Chairmen of the Civil Service and Equal Employment Opportunity Commissions, the Assistant Attorney General for Civil Rights, and the Acting Director of the Office of Federal Contract Compliance, declared that "goals and timetables are in appropriate circumstances a proper means for helping to implement the nation's commitments to equal employment opportunity ...," and articulated the distinction between "proper goals and timetables on the one hand, and impermissible quotas and preferences on the other..." 141 Goals were recognized as:

> ...numerical objectives fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market. Thus, if through no fault of the employer, he has fewer vacancies than expected, he is not subject to sanction, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if he has demonstrated every good faith effort to include persons from the group which was the object of discrimination into the group being considered for selection,

> but has been unable to do so in sufficient numbers to meet his goal, he is not subject to sanction.[142]

A quota system was described as one which, on the other hand, "would impose a fixed number or percentage which must be attained, or which cannot be exceeded...." Under such a system, that number would be fixed without regard to the number of potential applicants who meet necessary qualifications:

> If the employer failed [to achieve his quota], he would be subject to sanction. It would be no defense that the quota may have been unrealistic to start with, that he had insufficient vacancies, or that there were not qualified applicants, although he tried in good faith to obtain them through appropriate recruitment methods.[143]

In this joint policy statement the federal government reiterated its determination that race-conscious numerical remedies which are flexible, are realistically attainable, and do not require the hiring of unqualified persons or the displacement of current employees are lawful and proper.

Affirmative Action Consent Decrees in the 1970s

The mid-1970's were a period of active implementation of affirmative action policies. The Office of Federal Contract Compliance continued its efforts to open the construction industry to minorities, with an expansion of its Philadelphia Plan model, and to foster employment of women, minorities and disabled people by other federal contractors. The EEOC and Department of Justice continued to seek affirmative action remedies in the courts. Two landmark consent decrees during this period reflect the tangible results of government efforts.

In January, 1973, the American Telephone and Telegraph Company (AT&T) and its 24 subsidiary operating companies entered into a consent agreement with the EEOC and the Departments of Labor and Justice.[144] In addition to providing approximately $50 million in back pay to be distributed among several thousand employees who had suffered discrimination, the decree provided for an affirmative action plan, including goals and timetables, for the hiring and promotion of minorities and women.[145]

In a good faith effort to meet such goals, each Bell company was required to establish intermediate targets for one, two and three year periods.[146] The progress made under the consent decree in the hiring of minorities and women[147] is indicated by the following data:

1) Progress made in non-management positions during the 1970s

Non-Management	1972	1978
Women in Craft	6417 2.8%	23567 10.1%
Minorities in Craft	18993 8.4%	26974 11.6%
Males in Clerical	8250 4.1%	25490 11.1%

2) Gains in management positions during the 1970's

Management	1972	1978
Minorities in Management	8534 4.6%	22462 10.0%
Women in Management	62091 33.2%	80376 35.9%

Fifteen months after its success with AT&T, the EEOC and the Labor and Justice Departments entered into the "Steel Industry Settlement" with nine major steel companies and the United Steelworkers of America.[148] More than 40,000 minority and female employees who had suffered discrimination shared almost $31 million in back pay. The consent decree established goals and timetables which, among other things, sought the hiring of women for 20% of all vacancies in clerical and technical jobs and the selection of minority and women employees for 25% of the vacancies in supervisory jobs or for management training.[149]

Judicial Endorsement of Numerical Relief

During the mid-1970s the government participated in a number of cases which sought and achieved race-conscious numerical remedies, including goals and ratio hiring (e.g., one black for one white hired). In each instance, the government advocated numerical race-conscious remedies as necessary and appropriate to correct the consequences of past discrimination.

In the late 1970's, the Supreme Court issued three decisions of major significance to the use of race-conscious remedies. These three decisions, which together upheld race-conscious remedies and set guidelines for their use, will be discussed in detail in Chapter 2.

Futher Policy Developments

As the decade neared its end, two other important statements of policy in supprot of race conscious measures were inssued by the federal government, one by Congress and the other by EEOC.

Civil Service Reform Act of 1978

Section 310 of the Civil Service Reform Act of 1978 [150] established a minority recruitment program for federal employment. Known also as the "Garcia Amendment," [151] the program requires the office of Personnel Management (OPM), the successor to the Civil Service Commission, to conduct a contunuing program of recruitment for minorities. It also requires that each agency undertake a program to eliminate underrepresentation [152] of minorites in various categories of federal civil service employment.[153]

EEOC 's Protective Guidelines

In January, 1979, EEOC isssued its "Guidelines on Affirmative Action Appropriate Under Title VII." [154] The Guidelines established standards for the techniques of afirmative action that are appropriate under Title VII. They also described the action the Commission would take with respect to charges of discrimination which whites or males might lodge against implementation of a properly devised affirmative action plan. In issuing the guidelines, the Commission sought to provide reassurance and protection to employers who implemented affirmative action plans and then were faced with claims of "reverse discrimination". [155]

The Commission stated that Congress enacted Title VII in order to "improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place": 156

> Congress, by passage of Title VII, established a national policy against discrimination in employment....In addition, Congress strongly encouraged employers, labor organizations and other persons subject to Title VII... to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunities without awaiting litigation or formal government action.[157]

The Commission outlined three circumstances under which voluntary affirmative action is appropriate: where analysis of an employer's employment practices "reveals facts constituting actual or potential adverse impact;"[158] to correct the effects of prior discriminatory practices;[159] or if "because of historic restrictions by employers, labor organizations, and others, the availability pool, particularly of qualified minorities and women, for employment or promotional opportunities is artifically limited."[160]

Where such conditions exist, an employer or other organization may implement an affirmative action plan which should contain:[161] a reasonable self-analysis to determine whether employment practices do, or tend to, exclude, disadvantage, or otherwise adversely impact upon previously excluded groups; and whether

a reasonable basis exists for concluding that affirmative action is appropriate.[162] Among the techniques of affirmative action which the Commission concluded were reasonable and lawful were:

> [T]he establishment of a long term goal and short range, interim goals...all of which should take into account the availability of basically qualified persons in the relevant job market; a recruitment program; and the establishment of a system for regularly monitoring the effectiveness of the...program...[163]

Where an employer follows the "Guidelines" in developing a written affirmative action plan, the Commission said it would issue a "no cause" decision on a charge of discrimination which challenges an employment decision made reasonably in pursuit of the objectives and consistent with the procedures of the plan.[164]

Conclusion

Thus, as the 1980's approached, affirmative action, including race and sex-conscious numerical techniques, had been endorsed and advanced by each branch of Government. Most or the basic issues which had been raised regarding the legality or propriety of affirmative action had been resolved in favor of such measures by both Republican and Democratic Administrations. The implementation of affirmative action measures had brought concrete benefits for minorities and women. While some controversy remained, the

federal government had placed itself squarely behind affirmative action including numerical remedies as a necessary tool to remedy the consequences of historical discrimination.

Chapter 2

GOALS, RATIOS AND QUOTAS

Definition of Terms

At the center of the controversy which surrounds affirmative action is the use of numerically-based remedies which take race, sex or national origin into account. Such measures are commonly known as goals and timetables, ratios, or quotas. For some, the distinction between goals and quotas is more semantic than real.[165] Others perceive a theoretical distinction between the two, but assert that in practice permissible goals become impermissible quotas.[166] Still others, however, find a significant distinction between goals and quotas. This section of the report will discuss the legality and utility of such numerically-based remedies.

Much of the public debate concerning numerically-based remedies has turned on the word "quota." Unfortunately, the debate has been obfuscated and reasoning clouded by the fact that the word has been used with varying meanings, ranging from any numerically-based measure to only those which require rigid adherence to predetermined ratios, percentages or numbers. Moreover, the word comes to us freighted with an historical connotation that arouses great emotion: historically, a "quota" meant an exclusionary limit directed against a disadvantaged group, rather than an inclusionary target designed to overcome disadvantage. Since there is no commonly agreed definition of the term, and because objective analysis is hindered by the

word's history, we avoid its use altogether and define carefully the terms we do use.

A hiring goal [167] is a numerically expressed estimate of the number or percentage of new employees who will belong to a certain class, for example, black or female. Typically, an employer undertaking affirmative action establishes an ultimate employment goal, for instance, that 10% of its workforce will be black, and a projected timetable for achieving that goal, for example, 5 years, 10 years or longer. As part of its plan to achieve its ultimate goal, an employer will establish annual hiring goals for the duration of its timetable, e.g., that 20% of new hires in the first year will be black. These numerical estimates are based upon several factors including the number of vacancies anticipated, the percentage of the specified class with the requisite qualifications in the relevant labor market or in the relevant population and the results anticipated from targeted recruitment.[168]

Having established a goal, an employer pledges to make a "good faith" effort to achieve it, utilizing a variety of affirmative action techniques.[169] Failure to achieve a goal, in and of itself, does not subject the employer to sanctions. If for example, the projected vacancies fail to materialize, or if insufficient numbers

of qualified minorities or women apply, or if, with respect to certain vacancies, the white candidates are significantly better qualified than the minority candidates, an employer may fail to meet its goal with impunity. The determinative issue in assessing employer performance under an affirmative action plan is whether the employer made a "good faith effort," [170] not whether it has achieved its goal. Goals, thus, serve as one measure of nondiscrimination and of the effectiveness of affirmative action efforts, not as a mandate for minority or female employment.

A hiring ratio is also a numerically-expressed estimate of the number or percentage of new employees expressed as a ratio. An employer, for example, might hire one female for each male hired. In practice, the ratio remedy is more rigorous than a goal because it focuses on each hiring decision rather than on the overall results achieved over time by hiring practices. It also limits (but does not eliminate) employer discretion as to the selection of new employees by establishing race or sex as a factor for selection from among the qualified candidates. Also, where a court is convinced that an employer has not or may not implement such ratio relief in good faith, an employer may be required to delay the hiring of some male candidates so that the required ratio can be achieved. As with a goal failure of an employer to achieve a hiring ratio, in and of itself, does not subject the employer to sanctions.

The unavailability of minority or female candidates who meet non-discriminatory qualification standards may excuse failure to achieve the ratio.

Ratios do, however, reflect a greater expectation and provide a greater impetus to achieving results. Therefore, courts and other institutions have limited their use of ratios to circumstances of compelling necessity and have been sensitive and responsive to allegations of abuse.[171]

These definitions track generally a statement of federal policy issued in March 1973, by the chairmen of the Civil Service and Equal Employment Opportunity Commissions, the Assistant Attorney General for Civil Rights and the Acting Director, Office of Federal Contract Compliance.[172] That statement defined the term "quota" as well. As there defined, the term meant an absolute requirement that an employer hire a certain number or percentage of employees from a specified group, without regard to the availability of qualified candidates to or the presence of more qualified members of other groups. This Commission knows of no case in which a federal court or agency ever has imposed on an employer a "quota" as so defined. Nor has any federal court or agency favored such a remedy. Affirmative Action concentrates on goals and ratios and not on quotas.

The Need for Goals and Ratios

Affirmative action, as noted previously, refers to the various

techniques which, taking race or sex into account, seek to undo the consequences of past or current discrimination To understand the need for and the essential justice of affirmative action, it is necessary to recognize the problems of discrimination and its consequences. This recognition is especially important where the most controversial affirmative action techniques, goals and ratios are concerned.

Overt and conscious discrimination by individuals or organizations exists today in residual pockets of our society. Where it does, it must be addressed. The more pervasive problem is, however, what may be called "institutional discrimination" - institutional norms, customs and practices which, generally without conscious intent, place previous victims of discrimination at a continuing and unfair disadvantage. As the First Circuit said in Associated General Contractors v. Altshuler,[173]

> Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible.[174]

A few examples from the employment context may be mentioned without seeking to provide a comprehensive list:

+ Word-of-mouth recruitment which provides notice of job openings only to those known professionally or socially to members of the employer's present (predominantly white and male) workforce;

+ The "old boy network" which gives first consideration to those who attended the same colleges,

belong to the same clubs or engage in the same leisure activities as present members of the employer's workforce;

+ Stereotyping of minority-group members or women, leading to their confinement to lower-level or particular types of jobs;

+ Educational qualifications and employment tests which have little or no proven relationship to job performance but which disproportionately exclude minorities or women;

+ Height, weight or physical strength requirements that disproportionately exclude certain minorities and women but whose relationship to job needs is not established;

+ Seniority rules and "last-hired-first-fired" provisions that perpetuate the discrimination that caused minorities and women to be the last hired and to have the least seniority;

+ Rules requiring that only English be spoken on the job;

+ The common tendency of supervisors to view as "promotable" people who are basically like themselves;

+ The difficulty that minority or female-owned businesses (the ones most likely to hire and promote minorities and women) have in securing business credit because past discrimination has prevented them from establishing credit records.

These "built-in headwinds"[175] (to use the phrase of Chief Justice Burger) against minorities and women are exacerbated by discriminatory structures in other areas of society. Racially or sexually exclusive social clubs, where business contacts are made or cemented, provide opportunities for white males which facilitate advancement in the corporate hierarachy.[176] Confinement of minority students to segregated schools results in educational disadvantage that in turn hampers their employment prospects. When they reach adulthood, disadvantage in the labor market limits their income, and this factor, combined with discrimination in the housing and mortgage lending markets, confines them to ghetto areas where their own children must attend inferior schools. As the U.S. Commission on Civil Rights has stated:

> [O]ur history of discrimination based on race, sex, and national origin has not been readily put aside. Past discrimination continues to have present effects.... Discrimination against minorities and women should now be viewed as an interlocking process involving the attitudes and actions of individuals and the organizations and social structures that guide individual behavior. That process, started by past events, now routinely bestows privileges, favors and advantages on white males and imposes disadvantages and penalties on minorities and women. This process is also self-perpetuating. Many normal, seemingly neutral, operations of our society create stereotyped expectations that justify unequal results; unequal results in one area foster inequalities in opportunity and accomplishment in others; the lack of opportunity and accomplishment confirms the original

> prejudices or engenders new ones that fuel the normal operations generating the unequal results.[177]

Experience recounted in Chapter 1 of this report has demonstrated that mere neutrality is inadequate to reverse the interrelated and multifold consequences of discrimination. Affirmative action is intended to enable minorities and women to swim upstream against the pervasive current of disadvantage. The policy rests on a practical need to intervene on behalf of people who, directly or indirectly, have suffered discrimination and to give them a chance to succeed.

In this context, numbers take on very specific significance. First, they are an indication that discrimination may be at work, producing unequal results. The Supreme Court has said, "absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[178] Accordingly, under the Executive Order program, analysis of the workforce is the starting point for seeking out areas of possible discrimination and for the establishment of goals and timetables if problem areas are discovered. Likewise, in litigation, numerical analysis is a standard means for establishing the prima facie existence of discriminatory employment practices.[179] Statistical disparities, of course, do not establish that discrimination has in fact occurred. They simply permit the inference and, if the disparity cannot otherwise be explained, suggest the need for remedial action.

The second significance of numbers has to do with remedy. If unexplained racial or sexual statistical disparities are the proven or likely result of discrimination within the institutional operation or structure, then numerical goals are the appropriate means for measuring progress toward full equality of opportunity. The goals, of course, must be set in accordance with the "expectation" referred to by the Supreme Court: absent discrimination somewhere in the system, the workforce in time will reflect roughly the composition of the labor pool of applicants having the requisite qualifications.[180] The Executive Order "goals and timetables" requirement presupposes an appropriate "availability" analysis to determine the composition of the labor pool.

Numerical goals, however, will not be achieved unless there is a good faith effort by the employer to achieve them. An employer who has practiced some of the more egregious and open forms of discrimination may not abandon quickly and willingly past practices and in good faith take the affirmative steps required to remedy their consequences. In the case of some employers, courts have found that long-term goals are unlikely to yield results (or, having been tried, have in fact failed). In such cases, they have ordered quite specific hiring ratios to ensure immediate action and steady progress. These "ratio-hiring" cases are discussed later in this section where the legality of goals and ratios is reviewed. Here it is sufficient to note that ratio hiring is a more

stringent form of numerical relief. Like a goal, it is determined in light of the availability of qualified minorities and women. Its greater stringency is justified because the remedy is used only in cases where an egregious history of discrimination or obduracy in resisting less stringent measures convinces the court that sole reliance cannot be placed on the defendant's "good faith" efforts.[181]

The Legal Status of Goals and Ratios

The legality of numerically-based measures to overcome the effects of discrimination has been considered by the United States Supreme Court in three major cases. The matter has troubled and divided the Court, but there is some common ground on which a majority of the Justices seem to agree.

Of the three cases decided by the Court, United Steelworkers of America v. Weber,[182] is the only one involving a strict ratio in the context of employment. There, the employer (the Kaiser Aluminum and Chemical Corporation) and the union representing its employees (the United Steelworkers) agreed to establish an in-plant program to train assembly-line workers for jobs in the skilled crafts. It was agreed that 50% of the positions in the training program would go to black employees and 50% to white employees. Within each racial group, positions would be filled on the basis of seniority, but it was foreseen that junior blacks in some cases, would

be admitted to the program ahead of more senior whites. This arrangement was to continue until the percentage of black skilled craftsworkers at Kaiser's Gramercy, Louisiana, plant approximated the percentage of blacks in the local labor market.

Brian Weber, a white employee, sued the company and the union when a black employee with less seniority than his was admitted to the training program ahead of him. He charged that the ratio arrangement violated Title VII of the 1964 Civil Rights Act. Though recognizing that Title VII bars discrimination against whites as well as minorities, a 5 to 2 majority of the Court upheld the ratio agreement.[183] The Court ruled that Title VII does not prohibit "all voluntary race-conscious affirmative action."[184]

The Court held that Title VII permits affirmative action efforts by private parties "to eliminate traditional patterns of racial segregation," such as existed in Louisiana where the plant was located. As to the particular plan, the Court stated that the plan and Title VII "both were designed to break down old patterns of racial segregation [and] to open employment opportunities for Negroes in occupations which have traditionally been closed to them."[185] The Court went on to articulate the counterbalancing factors it considered in determining that any harm suffered by Mr. Weber and others similarly situated did not render the program unlawful:

> [T]he plan does not unnecessarily trammel the interests of the white employees... [it] does not require the discharge of white workers and their replacement with

> new black hires. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white.[186] Moreover, the plan is not intended to maintain racial balance, but simply eliminate a manifest racial imbalance. Preferential selection of craft trainees...will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force.[187]

With these limitations on the duration, scope and goals of the agreement, the Court concluded that it was lawful and proper under Title VII for private parties voluntarily to take race-conscious affirmative measures to remedy past discrimination in "occupations which have traditionally been closed to them." It held that the Kaiser-Steelworker ratio plan was a permissible way to implement such measures.

In Fullilove v. Klutznick,[188] the Supreme court upheld a 10% minority business "set-aside" of federal funds available to support state and local public works under the Public Works Employment Act of 1977.[189] Six members of the Court concurred in the judgment, but this majority divided into two groups of three in announcing their reasons. Justice Marshall, joined by Justices Brennan and Blackmun, upheld the "set-aside" on the basis of their view that racial classifications designed to remedy the effects of prior discrimination were valid provided that they were reasonably designed to achieve that important objective.[190] Chief Justice Burger, joined by Justices Powell and White, subjected the "set-aside" to more rigorous scrutiny but nevertheless found it valid.

Certain aspects of the "set-aside" program, as outlined in the statute and as elaborated in regulations issued by the Commerce Department's Economic Development Administration, seem to have been important in the view of the Burger group. First, the statutory provision, specified that recipients of federal funds should see to it that 10% went to contractors or suppliers that were owned or controlled by members of any of six named racial and ethnic groups. [191] It was predicated on a Congressional conclusion, reflected in legislative history, that members of these groups had suffered discrimination and disadvantage. Secondly, a waiver of the 10% requirement was available if fund recipients established that there were insufficient minority firms available. [192] Thirdly, the set-aside was not to be used for the benefit of minority firms which had not been victims of discrimination or disadvantage. [193]

In upholding the set-aside, it was clearly important to the Burger group (as it was to the Marshall group) that the measure was remedial in nature:

> The legislative objectives of the [set-aside] provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity. [194]

Chief Justice Burger and a majority of the Court concluded that both the objectives of the legislation and the means for achieving them did not violate constitutional non-discrimination

standards. The Chief Justice stated:

> The program was designed to ensure that ...grantees [of federal funds under the Act]...would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority business to public contracting opportunities. The [set-aside] program does not mandate the allocation of federal funds according to inflexible percentages based solely on race or ethnicity. (emphasis added).[195]

With respect to "innocent" white contractors who might be deprived of contracting opportunities by virtue of the set-aside program, the Chief Justice said:

> It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible (citations omitted). [I]t was within Congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.[196]

Thus, the 10% minority set-aside provision was lawful because it was within Congress's power to remedy the effects of prior discrimination, it did not unduly abridge rights of nonminorities, and it included administrative mechanisms to ensure flexibility in its implementation.

The third numerical-remedy case decided by the Supreme Court (actually the first in point of time) is Regents of the University of California v. Bakke.[197] Bakke differed from Weber in that Bakke involved admission to medical school, not employment, and that the challenged policy was that of a state agency, not private employers. These differences raised constitutional questions rather than simply issues of interpreting the civil rights laws. The case involved the special admissions program in effect at the University's medical school at Davis. Pursuant to the program, 16 of 100 spaces for entering students were set aside for minority applicants.[198] These applicants were considered by a different admissions committee under different criteria than were others, and those with numerical indicators (grade averages and test scores) lower than some white applicants, often were admitted. Allan Bakke, a white applicant, sued the University after he was twice rejected while minority applicants with lower indicators were accepted. By a 5 to 4 vote, the Supreme Court ruled that the medical school's special admissions program violated Title VI of the 1964 Civil Rights Act, which requires nondiscrimination in activities or programs receiving federal funds. At the same time, by 5 to 4, the Court ruled that race lawfully could be considered as one of the criteria for admission to the medical school.

In Bakke, the Court divided into two blocks of four Justices, with Justice Powell providing the fifth vote for each of the two parts of the ruling. Justice Brennan, joined by Justices

White, Marshall and Blackmun, would have upheld the Davis program in its entirety. They found that neither Title VI nor the Fourteenth Amendment's Equal Protection Clause prohibited the racial preferences involved.

> [O]ur prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large....[199]

In the case of medical school enrollment, the Brennan group found that there was ample reason for the University to believe that the extreme underrepresentation of racial minorities was the product of discrimination in many aspects of society and to conclude that this disparity would be perpetuated without the institution of a race-conscious remedial admissions program. As to the setting aside of a ~~specific~~ number of spaces for minority applicants, these four Justices made no objection. They found no legal difference between using race as a "plus factor" in the admissions process (which Justice Powell approved) and reserving a specified number of places for members of one or more racial groups (which Justice Powell found unlawful under the circumstances of this case).[200]

Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, found the Davis program invalid. Without ruling on whether it might have been upheld under the Fourteenth

Amendment, the Stevens group found it outlawed by the terms and intent of Title VI which provides that "no person...shall, on the ground of race, color, or national origin, be excluded from participation in...any program or activity receiving Federal financial assistance."[201] White applicants were excluded from 16 spaces in the Davis entering class, and since these Justices found no Congressional intent to permit racial preferences under Title VI, they found the program unlawful.

Justice Powell provided the fifth vote forming the majority for the Court's ultimate judgment. His opinion, therefore, has received the greatest attention by those seeking to determine the limits of permissible affirmative action. He acknowledged, first, that remedial racial preferences had been upheld in a variety of contexts, based upon some judicial, legislative or administrative finding of discrimination:

> ...The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference....[202] Such preferences have also been upheld where a legislative or administrative body charged with responsibility made determinations of past discrimination by the industries affected and fashioned remedies deemed appropriate to rectify the discrimination.[203]

As the case was presented to the Court, however, there had been no finding and no evidence introduced indicating that the University of California or its medical school at Davis had engaged in discrimination.[204] The special admissions program was justified in part on the basis that it was needed to remedy "societal discrimination," or discrimination by unspecified other institutions. Justice Powell said:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations [citations omitted]. After such findings have been made, the governmental interest in preferring members of the injured group at the expense of others is substantial, since the legal rights of victims must be vindicated....[205]

In the absence of such a finding, Justice Powell held the Davis program to be a violation of Title VI and of the Fourteenth Amendment which embodied the same standard.

Nonetheless, the Justice did not forbid all use of race in the Davis admissions process. He found that the medical school could lawfully pursue the objective of diversifying its student body and, indeed, that its wish to do so was to a degree within the First Amendment protection of academic freedom. Accordingly, he ruled, "race or ethnic background may be deemed a 'plus' in a particular applicant's file...."[206] The rigid set-aside of 16 spaces, for which white applicants could not be considered even in competition with racially preferred groups, went too far, however, in the absence of an appropriate finding of prior discrimination.[207]

A fourth case dealing with the limited, although important, issue of the authority of federal courts to preserve affirmative action gains in layoff situations where more senior white male employees would be displaced, was decided by the Supreme Court on June 12, 1984. That case, Memphis Fire Department v. Stotts will be discussed in chapter 5, infra.

It seems clear from the cases that race-conscious remedies are lawful means for dealing with the effects of prior discrimination, and that goals and ratios are no exception. The Court seems to require that, where government avails itself of such remedies, there be some prior finding of discrimination by an appropriate judicial, legislative or administrative body. Private parties, it appears from Weber, may act voluntarily upon evidence of such discrimination without awaiting a governmental finding. The remedy, however, should be tailored to the problem: it should be designed to redress the effects of discrimination and should terminate when the effects have dissipated; it should not displace or otherwise unduly disadvantage whites or males; and it should be flexible enough not to require admission of members of the group of former victims to positions for which they are not qualified.

Affirmative Action in the Lower Federal Courts

Turning to decisions of lower federal courts, we find a large body of cases specifically upholding numerically based remedies. The caution of the courts in imposing such remedies, however, is typified by this quotation from one of the first cases to do so, NAACP v. Allen:[208]

> It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary, carefully circumscribed resort to racial criteria, whenever the chancellor determines that it represents the only rational, non-arbitrary means of eradicating [the] past evils.[209]

Courts of appeals have held uniformly that the authority to eliminate the vestiges of discrimination includes the use of prospective employment goals designed to remedy discrimination

by increasing the participation in the workforce of those previously excluded.[210] Such measures have been used only to remedy patterns and practices of unlawful discrimination.[211] A pattern or practice of discrimination exists "only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine or of a generalized nature."[212] Such patterns are documented not only with statistical evidence of exclusion of minorities and women, but also with evidence of discrimination against individuals: for example, the failure of a union hiring hall to grant blacks referrals; [213] a union's practice to refuse to consider blacks and Hispanics for membership or referral, while at the same time referring white persons of limited experience; [214] and an employer's relegation of black employees to the lowest paid, unskilled jobs. [215] Moreover, numerical remedies based on race have been imposed because they were essential: "[w]e...approve this course only because no other method was available for affording appropriate relief...;" [216] "[such] relief was essential to make meaningful progress" as "no Negroes were hired in...support

positions until the Allen court ordered affirmative relief ...;" [217] and "[t]he effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential." [218]

Courts have rejected race conscious remedies where it was determined that effective relief can otherwise be afforded, [219] where is no "compelling need" for such relief because the employer, subsequent to the effective date of Title VII, made convincing and satisfactory progress toward the goal of equal hiring opportunity, [220] or because the district court did not adequately explain the basis for its numerical relief order. [221] Courts also have invalidated race-conscious employment decisions ostensibly made pursuant to an affirmative action plan but which in fact were not. In Thomas v. Basic Magnesia, Inc., [222] nineteen unsuccessful black job applicants challenged an employer's implementation of an affirmative action plan (AAP) which loosely operated on the principle of one-to-one, black-white ratio hiring.

In wrestling with the question of what was an acceptable affirmative action plan after Weber, the Court declared:

> [C]ommon sense compels the conclusion that an "affirmative action plan" must at least, in fact be a plan.[223]
>
> * * * *
>
> [T]he so-called "affirmative action plan" utilized [here] only existed in the mind of the personnel manager....[It] was so conclusively erratic as to be more of a loosely formulated concept which deviated on one occasion to a degree that there was a "streak" where eleven whites were hired...without a single black being employed.[224]

Factors which have justified affirmative relief for employment discrimination, including race-conscious numerical remedies, have included:

1. The existence of traditional patterns of racial segregation and exclusion from certain occupations;[225]

2. A long history of racial discrimination by the employer or union;[226]

3. No significant change in the employer's policies until the government filed suit and a comparatively short history of attempts to end racial discrimination by increasing minority hiring and promotion;[227]

4. The employer's recalcitrance in taking action to correct past discrimination, [228]

5. Lack of significant improvement in the employer's practices under the district court's prohibitory injunction. [229]

In summary, goals, and ratios evolved from the persistent effects of past discriminatory practices, from the ways in which seemingly neutral current practices (e.g., word-of-mouth recruiting) disadvantage minorities and women, and from the failure of lesser measures to produce change.

The Supreme Court, Congress and the four previous Administrations, which developed goals and ratios, have articulated carefully both the legal basis and the practical need for such remedies. The current Administration's position on affirmative action, as will be seen in chapter 3, ignores the considerable body of experience, legal precedent and logic which has impelled the federal government to undertake such measures.

THE REAGAN ADMINISTRATION RECORD

The signals of the Reagan Administration on affirmative action have been mixed. The President has endorsed some voluntary affirmative employment measures;[230] and the Department of Labor and the Equal Employment Opportunity Commission (EEOC) have supported affirmative action including numerical race-conscious measures.[231] The Department of Justice, however, has launched an assault in the courts on key elements of affirmative action policy and Justice, Labor and the EEOC have weakened the resources and enforcement tools previously used to implement the policy.

The Departments of Labor and Justice and the EEOC have the major responsibility for implementing federal policy regarding affirmative action in employment. In addition, the U.S. Commission on Civil Rights has, during the past twenty years, issued a number of carefully considered reports calling for improvements in federal equal employment opportunity policy, including affirmative action. Our examination of the Reagan Administration's treatment of affirmative action will focus on the policy and enforcement activities of these four agencies. We begin with the most comprehensive and longstanding expression of federal support for affirmative action in employment: the federal contract compliance program.

Office of Federal Contract Compliance Programs (OFCCP)
Department of Labor

OFCCP administers two statutes and an Executive Order which require federal contractors to take affirmative action to ensure non-discrimination on the basis of race, sex, color, religion, national origin, handicap, and Vietnam-veteran status.[232] Its regulations form the basis of and provide impetus for affirmative employment practices in virtually every American industry. OFCCP estimated in 1981 that almost 17,000 employers, with a total workforce of more than 26 million employees, were covered under the contract compliance program requirements for a written affirmative action plan.[233] Thus, the contract compliance program provided an important opportunity for the Reagan Administration to begin to make its mark on federal affirmative action policy.

Almost immediately upon assuming office, the Reagan Administration suspended implementation of comprehensive revisions to the regulations of the contract compliance program. These amendments, which were scheduled to go into effect ten days after the President's inauguration, had been issued by the Carter Administration after extensive consultation with a cross-section of the OFCCP'S constituents, including business, labor, employer attorneys and consultants, civil rights organizations, and other governmental agencies. Several months into his term, President Reagan proposed substantial changes to the affirmative action regulations.[234]

A major stated objective of this Administration's proposed revisions to the affirmative action rules was to reduce the burden and cost to contractors of complying with them. The Department of Labor planned to achieve this objective by releasing most contractors (75%) [235] from the requirement of preparing written affirmative action plans (AAPs). [236] For contractors which would remain under the written AAP requirements, other measures were proposed to reduce the impact of the contract compliance program: contractors with approved long-term AAPs were to receive five-year exemptions from routine compliance reviews; compliance reviews prior to the award of large contracts ($1 million) were to be eliminated, although such reviews had been used to secure specific commitments for improvements from employers with poor employment records; and employment goals for women in construction were to be established on an aggregate rather than craft basis (e.g., that 6.9% of persons employed by a contractor should be women, rather than 6.9% of persons employed by a contractor within each craft: carpenters, bricklayers, etc). [237]

The reaction to these proposed regulations from business interests was not completely anticipated by the Reagan Administration. The contractor community endorsed many of the regulatory reductions, but significant elements of that

community felt OFCCP had gone too far in relieving contractors (particularly small and medium-sized contractors) from the requirement of developing written AAPs, and many contractors believed the proposal had not gone far enough in relieving contractors from potential back pay liability for discriminatory practices.[238]

The civil rights community, the EEOC and the U.S. Commission on Civil Rights were resoundingly critical of the Reagan Administration's proposals.[239] EEOC comments were divided into three major sections with headings that summarize the thrust of EEOC's concern that the revisions would undermine equal employment policy. They are titled: "Inconsistencies with Title VII/The Weight of Case Law and EEOC Policy and Practice"; "Policies Under Which a Contractor May Be in Compliance With OFCCP's Affirmative Action Rules But Susceptible to a Finding of Discrimination"; and "Policies Which May Impair OFCCP's Ability to Identify Discriminatory Employment Practices."[240] In an April, 1983 letter to Under secretary of Labor Robert Collyer, EEOC chairman Clarence Thomas highlighted some of the serious concerns of the EEOC with respect to the regulatory proposals:

> We must express to you our concern over the effect on Commission programs of the proposed rules

> which frequently appear inconsistent with established Title VII law and which may create a situation where two appreciably different legal standards exist.
>
> *****
>
> [I]ssues such as shifting burdens of proof...and the appropriate statistical test for establishing discrimination are threshold issues of liability which have been settled. OFCCP's policy proposals, in effect, reopen these and other critical issues.

As of June, 1984 the Labor Department had not finalized its proposal or issued any other new affirmative action regulations. Failure to issue revised regulations has not, however, stopped the Department from significantly altering the contract compliance program outside of the context of the regulations.

Using an internal directive system and other management devices, the Department has successfully reduced the impact of the Executive Order program. OFCCP has narrowed the standards for employee eligibility for back pay by limiting the period of harm for which back pay will be sought.[241] It has also made it more difficult to prove patterns and practices of discrimination by statistical evidence[242] and instituted a program under which certain contractors may monitor their own affirmative action performance with little oversight by the OFCCP.[243] Other measures initiated include restricting the ability of OFCCP investigators to go on-site

during compliance reviews and lending OFCCP personnel to work on non-OFCCP matters, e.g., investigation of workers' compensation claims.[244] This latter action, in particular, decreased staff availability for EEO and affirmative action compliance activities at a time when OFCCP was suffering one of the most severe staff reductions in the federal government.

At the outset of this Administration, OFCCP employed approximately 1,350 persons; within two years, OFCCP staff had been reduced about 25% to approximately 940.[245] These reductions were brought about by severe budget cutbacks: in FY-80, the OFCCP expended almost $50.6 million; by FY-82, it had been reduced 16% to $42.5 million.[246] The outlay in FY-83 was $42.8 million and the estimated funding level for FY-84 is 46.7 million..[247] The budgetary and staff reductions were reflected in results achieved through OFCCP enforcement activities. Although the number of compliance reviews completed increased from FY-80 to FY-83 from 2,627 to 4,309 the number of "affected class cases" (i.e., analyses which show a likelihood of discrimination against a class of persons) has declined significantly (391 in FY-80 to 213 in FY-82).[248] Most significantly, the number of people who received monetary relief as a result of OFCCP enforcement activities and the total dollars resulting from these activities has decreased: in FY-80, $9.2 million went to 4,336 persons; in FY-82, $2.1 million went to 1,132 persons; [249]

and in FY-83, $3.56 million went to 1,748 people. [250]

Thus, while the Administration has not yet formally reduced affirmative action requirements, its actions in curtailing enforcement and reducing the costs of failing to comply have had a serious impact on the program.

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission is the agency principally responsible for investigating job discrimination and enforcing equal opportunity requirements. The Commission administers three statutory provisions authorizing affirmative action: Section 706(g) of Title VII [251] authorizes courts, after findings of discrimination in suits brought by the EEOC or private parties, to order "such affirmative action as may be appropriate" [252]; Section 717 of Title VII requires that EEOC "be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each [federal] department and agency... shall submit in order to maintain an affirmative program of equal employment opportunity...;" [253] and Section 501 of the Rehabilitation Act of 1973 requires federal agencies to undertake affirmative action in the hiring, placement, and advancement of handicapped employees.[254] Additionally, and significantly, EEOC has been designated, (pursuant to Executive Order 12067 and Reorganization Plan No. 1 of 1978), as the principal agency responsible for the formulation of federal equal employment policy.

Although the Commission's enforcement activities have been hampered by a lack of permanent leadership during the first fifteen months of this Administration and by morale-defeating reductions in force and reductions in grade for some of its employees, the Commission has not retreated from pre-existing affirmative action policy. In fact, although the four current Commissioners [255] are Reagan appointees, EEOC has resisted attempts of the Departments of Labor and Justice to reverse current affirmative action principles.

There are several examples of EEOC support for affirmative action: 1) it has declined to revise its guidelines on permissible voluntary affirmative action; [256] 2) it has continued to endorse affirmative action remedies, including race-conscious numerical relief, for employment discrimination even where such endorsement puts it in direct conflict with the Department of Justice; [257] 3) it has retained the requirement that federal agencies submit for approval affirmative action plans covering their own employment practices, which include hiring goals, in spite of the Attorney General's view that such goals are not required and his refusal to submit them for the Department of Justice; [258] 4) it has resisted proposals of the Department of Labor which would have weakened the contract compliance program (see discussion, supra); and 5) it has continued to seek affirmative action relief, including hiring goals, in its own enforcement program. [259] EEOC is the only federal enforcement

agency which has remained fully faithful to principles of affirmative action which have been developed over the past twenty years. Its effectiveness in implementing its views has, however, been hampered by resource restrictions and challenges to its authority from within the Administration, notwithstanding EEOC's assigned role as primary interpreter of federal EEO policy.

EEOC was permitted to languish without permanent leadership for the first fifteen months of this Administration; for several months during that period, EEOC did not have a quorum of Commissioners to conduct its business. The first Reagan Administration appointee to the important position of General Counsel of the Commission lasted only nine months, but in that short period he seriously undermined the Commission's litigation enforcement capability by challenging Commission interpretations of Title VII [260] and by reassigning top EEOC lawyers, on a few days notice, from one city to another.[261] Other actions, such as staff reductions (3,433 in FY-80 to 3,167 in FY-83),[262] reorganization of agency functions, down-grades and reassignments of some EEOC staff, and budget constraints, have seriously hampered EEOC enforcement activities.

Notwithstanding the Commission's principled resistance to efforts to undermine its authority and enforcement capability, the assaults upon EEOC have been reflected in its compliance performance. The efficacy of charge processing has

declined, and litigation activity has decreased. Whereas the Commission anticipated complete elimination of its long-standing but substantially decreased charge backlog in FY-82, achievement of that goal has been postponed. The rate of successful settlements has declined from 50% in FY-80 to 38% in FY-83 [263] while the rate of charge dismissals has increased: 41% of new charges resolved in fiscal 1983 were determined to be unfounded, up from 23% in fiscal 1980. [264] New case filings have dropped from a high of 358 in FY-81, to fewer than 200 in FY-83.[265]

Of particular significance in assessing the efficacy of the EEOC's litigation enforcement activity is the number of lawsuits the agency filed which attack broad-based, systemic discrimination, as opposed to actions vindicating the rights of a few individuals. Of the 358 lawsuits filed by EEOC in FY-80, 62 were broad-based cases attacking patterns of discrimination.[266] In FY-81, the number of class-wide cases declined by more than half, and in FY-82 no such cases were filed.[267] In FY-83, 10 broad-based cases were filed.[268]

Thus, a number of actions and inactions of the Reagan Administration have sapped the vitality of the federal agency which is charged with principal responsibility for enforcing the law of equal employment opportunity. In addition, the Attorney General's interference with EEOC's authority in the area of affirmative action policy, as discussed in the next section, has seriously

impeded EEOC's ability to enforce Title VII fully.

Department of Justice

Soon after he assumed his duties, Assistant Attorney General for Civil Rights William Bradford Reynolds announced this Administration's rejection of affirmative action remedies which have been approved by Congress, the courts and the four previous Administrations. Under the new policy, the Department of Justice would no longer seek or accept prospective hiring or promotion goals or ratios which may benefit individuals who are not "identifiable victims of discrimination." Use of such race-conscious measures under any circumstances, in the Department's view [269], constitutes "preferential treatment" in violation of the "color-blind" mandates of the Constitution and Title VII.[270] As Mr. Reynolds stated in testimony before the House Subcommittee on Employment Opportunities:

> It seems to me that when you confine the use of goals to [recruitment practices] then you do not run into the difficulty of employers using goals as quotas, which seems to very frequently happen when you talk about goals and timetables as hiring standards.[271]

Ignoring the considerable body of legal precedent for such numerically-based remedies, and disregarding the views of this Administration's Department of Labor and EEOC, the Justice

Department embarked upon a concerted plan to implement its own views:

1. Assistant Attorney General Reynolds declared his intent to seek a reversal of the 1979 Supreme Court decision in United Steelworkers v. Weber, supra, permitting voluntary, employer and union sponsored affirmative action, because he thinks it was "wrongly decided." [272]

2. The Department no longer seeks hiring goals or ratios as remedies for patterns or practices of discrimination. Instead, its approach emphasizes...

> specific affirmative relief for identifiable victims of discrimination; increased recruitment efforts aimed at the group previously disadvantaged; and colorblind as well as sex-neutral nondiscriminatory future hiring and promotion practices. [273]

Regardless of the severity of the violations or the recalcitrance of an offending employer, the Department will not seek hiring goal remedies that numerous courts have found justified by "compelling necessity" and "essential" to ensuring equal opportunity.

3. The Department has sought to intervene in litigation to request reconsideration of goal or ratio relief to which the parties and the courts have consented. In Williams v. New Orleans, [274] the Department requested en banc reconsideration of affirmative action relief to which the parties had agreed, and which a three-member panel of the Fifth Circuit had upheld.

The Department's request was granted. The en banc Court of Appeals for the Fifth Circuit squarely rejected the Department's argument that race-conscious numerical remedies (in this instance, ratio relief) are unlawful.[275] Quoting from its opinion in United States v. Miami, the Fifth Circuit dismissed the Justice Department's argument as unfounded in law:

> [A]t this point in the history of the fight against discrimination, it cannot be seriously argued that there is any insurmountable barrier to the use of goals or quotas to eradicate the effects of past discrimination.[276]

In Bratton v. City of Detroit, the Department's request for en banc reconsideration of an unsuccessful challenge to goal and ratio relief was denied.[277] The Department then joined as amicus curiae in the petition for Supreme Court reversal of the affirmative action relief. The Supreme Court declined review.[278]

4. The Department has refused to comply with EEOC requirements regarding the submission of affirmative action plans covering its own employment practices.[279] In 1982, the Department made an unsuccessful attempt to thwart other federal agencies' compliance with these requirements.[280] It has maintained its refusal to submit goals and timetables as part of its own affirmative action plan[281], making it, as of January, 1984, one of two agencies whose plans have not

been approved by EEOC; 110 federal agencies have complied and have had their plans approved.[282]

5. Perhaps the most unusual of all its efforts to impose its opinions and override those of other agencies having civil rights responsibilities was the Department's action to prevent EEOC from expressing its views on the legality of the goal and ratio relief under consideration by the en banc court of appeals in Williams v. New Orleans, supra. The Commission had voted 5-0 to submit a brief in support of such relief, making point-by-point rebuttals of the Department's arguments in opposition to the remedy. After discussions between the Department and EEOC regarding the latter's authority to express its views in this case, the Commission voted 5-0 not to file its brief.[283] It was reported that these discussions included the subject of whether the Commission and its five members were independent and able to speak their own minds on matters of Title VII law, or whether the Commission was obligated to espouse Administration policy (in this instance, as dictated by the Justice Department).[284]

By statute [285] and Executive Order [286], EEOC is the agency charged with the primary responsibility for implementing and enforcing federal EEO policy. Its views on Title VII have been held by the Supreme Court to be entitled to "great weight." [287] On a matter of Title VII interpretation, it seems clear that the court and the parties are entitled to

have the benefit of the Commission's experience and expertise on the legality and appropriateness of such remedies. The Department's action was intended to, and almost did, prevent the Fifth Circuit from considering those views. However, the EEOC brief was obtained and published by the Bureau of National Affairs.[288] Two public interest organizations incorporated the published brief into their own amicus brief and asked the court to consider it. The court accepted the brief and considered the case with opposing views from EEOC and the Department of Justice.[289]

The Department's opposition to hiring goals or ratio relief is grounded in a belief that certain race-conscious numerical remedies (e.g., hiring goals or ratios) benefit individuals who are not themselves shown to be victims of discrimination by the employer which is implementing them, and that this constitutes unlawful "preferential treatment."[290] The courts, however, have quite consistently disagreed with that interpretation of the Constitution and Title VII and have, therefore, utilized race-conscious numerical remedies which have opened employment opportunities to members of the victimized racial or sexual group without requiring proof that each individual who benefits from such a remedy was subjected to discrimination by the offending employer (see, discussion in Chapter 2.)

Regrettably, neither the Constitution nor the laws and institutions of our society have been "color-blind" - a fact conclusively demonstrated in the legal and social history of our nation. The Constitution itself is not interpreted even today to prohibit all governmental classifications based on race; such classifications are "strictly scrutinized", avoided if at all possible, and ordinarily sustained only if justified by a "compelling need" to achieve a legitimate governmental objective.[291] In the case of affirmative action, the governmental interest served by such race-conscious remedies is the Congressional objective under Title VII of eradicating the effects of past discrimination by integrating unlawfully segregated work-forces. In the words of Judge John Minor Wisdom, racial distinctions made to remedy a racial wrongs have a different status:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. [citations ommited] [292]

The Justice Department does not argue that the Constitution and Title VII prohibit all race-conscious remedies which benefit persons who are not identified as specific victims of the offending employer's unlawful employment practices. The Department draws its line between permissible and impermissible race-conscious conscious numerical relief at the personnel-decision stage, i.e., at the point of decision to hire or promote. It has sought and obtained, through its litigation, race-conscious numerical goals regarding the racial composition of the applicant pool for employment. Employers have been required to establish "recruitment goals", e.g., that 20% of the applicant pool for State Trooper positions within the Maine State Police Department be female. [293] These recruitment goals, like hiring goals, are to be achieved through a number of specified affirmative action measures including a "program of recruitment directed at increasing substantially the number of qualified female applicants," [294] and record-keeping and reporting requirements typically associated with affirmative action plans.

There is a striking anomaly that results from the Department's limitations on race- and sex-conscious numerical relief. Since the Department no longer approves of hiring goals, it no longer advocates establishing an overall employment goal which a defendant must attempt in good faith to achieve as part of the relief awarded in cases in which

a pattern or practice of discrimination has been found. Thus, while significant underrepresentation in an employer's workforce is important evidence of a practice of discrimination, the remedy prescribed by the Justice Department does not encompass a good faith effort to elevate the injured group's representation to the standard against which the absence of equal employment opportunity was measured.

Another difficulty with the Department's approach is that while its consent decrees reflect the principle that an appropriate remedy should include increased minority or female representation in the employer's workforce, that principle is vaguely expressed:

> The parties expect that the proportion of female Troopers selected will be approximately equal to the proportion of qualified female applicants....
>
> * * * * * *
>
> The objectives set forth in this Decree are not and will not be treated as quotas. They are, rather guidelines to assist in the measurement of the Defendant's progress in achieving a more representative work force. (Emphasis added). U.S. v. State of Maine, Consent Decree (D.C. Me., C.A. No. 83-0195P), May 26, 1983. See also, U.S. v. Maryland Department of Transporation, Consent Decree (D.C. Md. C.A. No. B83-3889, November 10, 1983).

Such vagueness leaves an employer with only general guidance as to the level of minority or female hiring the Department expects from the defendant's equal employment opportunity program. Additionally, it may make unenforceable the central purpose of the consent decree: namely that minorities or women be hired as part of the remedy for past discrimination. Assistant Attorney General Reynolds has expressed the intent that some minorities and women be hired as a result of the Department's litigation in this way:

> [I]f there were an expectation that some 20 percent of the applicant pool in a job market would be represented by minorities, and we had only two minorities that were hired in a particular job for 100 places, I think that that would suggest to us that there is reason for inquiry.[295]

In this instance, 20% is the ceiling of the government's expectation, and 2% is the floor, but what, an employer must wonder, does the Department really expect in terms of a numerica measure of good faith performance?

Another glaring inconsistency in this Administration's approach to affirmative action is revealed by the comparison between the Department's activities in the area of equal employment opportunity and the President's initiatives with respect to affirmative action for minority business enterprises (MBEs).

President Reagan, in contrast to the Department's views with respect to employment, evidently believes that numerical goals for MBE participation in federal procurement are necessary, appropriate and lawful.

On December 17, 1982, President Reagan announced steps to "provide the basis for a renewed and vigorous minority business effort in the 1980s." He said:

> The Minority Business Development Agency ...and the Small Business Administration will assist directly in the formation of at least 60,000 new minority businesses over the next ten years. During this same period, this Administration will assist in the expansion of at least 60,000 minority businesses or 10 percent of the approximately 600,000 minority businesses that already operate in America today.
>
> * * * * * * *
>
> The Federal government will procure an estimated $15 billion in goods and services from minority businesses during the three-year period comprising Fiscal Years 1983, 1984 and 1985.... Actual procurement objectives will be set on an annual basis and will be based upon this Administration's objective of increasing the share of total procurement supplied by minority businesses.[296]

* * * * *

> In order to ensure the success of these Federal initiatives, I will be issuing a new Executive Order on Minority Business Development which ...will also direct the Cabinet Council on Commerce and Trade to submit an annual plan specifying minority-enterprise-development objectives for each agency.[297]

* * * * *

> I am directing Federal contracting agencies to increase minority business procurement objectives for 1983 by at least 10% over actual procurement in 1982.[298]

Thus, the "goals" which this Administration's Department of Justice deplores for minority and female workers became approved "objectives" when applied to minority business utilization.

President Reagan was true to his word. On July 14, 1983, he issued Executive Order 12432, entitled "Minority Business Enterprise Development". Although the language in this Executive Order differs from the typical affirmative action language, it is a difference without a distinction.

Section 1 of the Order requires each federal agency to develop a Minority Business Development Plan. "These annual plans shall establish minority enterprise development objectives for the participating agencies and methods for

encouraging" [299] utilization of MBEs. The Order goes on to require reporting of performance under the agencies' plans (§§ 1(d) and (e)), and to require agencies to establish "programs" [300] and "incentive techniques to encourage greater minority business subcontracting by Federal prime contractors." [301] Lastly, each federal agency "shall encourage recipients of Federal grants and cooperative agreements to achieve a reasonable minority business participation in contracts let as a result of its grants and agreements (emphasis added)." [302]

Less than one month after issuance of this Executive Order, the President issued a memorandum for department and agency heads, entitled "Minority Business Procurement Goals." In that memorandum, the President announced the progress achieved since his December 17, 1982, Statement, supra, and urged them to continue in their efforts:

> Since that Statement was issued, the Small Business Administration has negotiated an aggregate increase of ten percent in Section 8(a) contracts.... I urge you to take appropriate steps to ensure that these procurement objectives [10% increase in MBE procurement] are met. In order to meet these goals I also urge that you continue active consideration of minority firms for contract awards...." (Emphasis added) [303]

These initiatives by the President make unmistakably clear that President Reagan believes that at least in some circumstances, numerical goals and objectives can be implemented fairly, reasonably, and without discrimination.

Given the Department's general expressions of support for equal employment opportunity and for affirmative action remedies other than hiring goals and ratios, it may appear that the elimination of these tools for affording remedial relief would not justify the outcry that has greeted its new policy. The Department's initiatives, however, are significant and serious for several reasons.

The views of the Department of Justice have substantial impact. The Attorney General and the Department are the chief attorney and law firm of the United States government. That status, coupled with the personal relationship which, as in this Administration, often exists between a President and his Attorney General, provide a unique opportunity for the Department to influence federal policy and law. Moreover, although some agencies, like EEOC, are authorized to represent themselves in judicial proceedings at the district and appellate court levels, it is the Solicitor General of the United States, within the Department of Justice, who speaks for the United States in the Supreme Court.

With respect to civil rights, the Department has responsibilities which extend to all protections guaranteed by the Constitution, by federal laws and by Executive Orders.[304] In the area of equal employment opportunity, the Department has enforcement authority under the Constitution, Title VII, the Exeuctive Order contract compliance program, as well as EEO

requirements which are associated with federal grants, (e.g., Title VI of the Civil Rights Act of 1964 [305], and the General Revenue Sharing Act [306]). And, with few exceptions (e.g., EEOC), the Department represents federal agencies which are sued for alleged employment discrimination. Although the Department has not yet been able to impose its views on EEOC and the Department of Labor, it has served as a rallying point for those who oppose race-based and gender-based numerical relief and who believe that the government's role in ensuring equal employment opportunity should be diminished. [307]

The Department's position on race-conscious and gender-conscious numerical relief is undisputably a reversal of the policy of the four previous Administrations, both Republican and Democratic. The sudden and dramatic nature of the policy reversal is reflected in the fact that as late as March 27, 1981, two months into this Administration, the Department utilized hiring goals in appropriate consent decrees.[308] Three months later, William Bradford Reynolds assumed his duties and the new policy followed. The reversal was particularly striking in view of the important role the Justice Department previously played in the development of numerical relief for employment discrimination.

From 1965 to 1972, the Department of Justice was the only federal agency authorized to litigate claims of employment

discrimination under Title VII. The Department prosecuted several of the earliest cases leading to race-conscious numerical remedies for employment discrimination. [309] Its arguments were among the "first [to establish] the principle that affirmative steps must be taken to correct the effects [of] past discriminatory employment practices." [310] "[T]he landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination were either cases brought by the Civil Rights Division [Department of Justice]...or in which the Department participated as amicus".[311] Moreover, the Department consistently advocated the legality and propriety of race-conscious numerical relief from Local 53 v. Vogler [312] to the U.S. v. Statesville consent decree negotiated by Justice and filed March 27, 1981. [313] The Department's brief before the First Circuit in U.S. v. City of Boston, [314] exemplifies the view it repeatedly advanced:

> Affirmative hiring relief in numerical form, has been approved as appropriate by nine of the eleven Federal courts of appeals [citations omitted]...Because the hiring ratios called for by the district court are subject to the availability of qualified minority applicants, the relief ordered here is well within the above cited

> precedents. As this Court noted in Altshuler..., where courts grant affirmative hiring relief in overcoming the effects of past discrimination, they do not violate the anti-preference provisions of Title VII...for they are remedying the present effects of past discrimination, and 'any other interpretation [of that anti-preference language] would allow complete nullification of the stated purpose of [Title VII]....' [315]

Now, however, the Department's position is to oppose precisely those numerical remedies it previously advocated and which courts have found essential. It has adopted an interpretation of Title VII which, in the words of the Department and the First Circuit in Altshuler, "would allow a complete nullification of the stated purpose of Title VII." [316]

Another impact of the Department's new policy is to sow confusion as to what actually is the government's policy, because it contradicts both the weight of legal authority and the policies and practices of OFCCP and EEOC. Assistant Attorney General Reynolds' statements that Weber was wrongly decided and that the Department would seek to overturn that decision add to the uncertainty among employers about what kinds of affirmative action are lawful. Employers inevitably will be concerned about

whether they should implement hiring goals approved by another federal agency, or whether the settlement of litigation involving hiring goals will motivate the Department to initiate or support an attempt to undo such relief, as it has done in several cases thus far. [317]

This confusion regarding government policy on such remedies has caused the Sixth Circuit to decline the Department's petition to reconsider a decision upholding numerically-based remedies, [318] and, as revealed in this Commission's consultation with business leaders, [319] has fueled the flames of resistance to affirmative action.

U.S. Commission on Civil Rights

One of the most sudden and striking reversals of federal affirmative action policy occurred with respect to the U.S. Commission on Civil Rights. The Commission was established under the Civil Rights Act of 1957 [320] as an independent, non-partisan collegial body to investigate deprivations of civil rights and to recommend legislative and other measures to eliminate discrimination. The Commission has traditionally served as the conscience of federal civil rights enforcement and policy, establishing the facts and urging federal action.

In Chapter 1 of this report, we cited the Commission's first "Statement on Affirmative Action," issued in 1973. That "Statement" pointed out the way in which institutional discrimination has erected arbitrary and artificial barriers to the achievement of equal employment opportunity for minorities and women. Affirmative action, including numerical remedies, was advanced by the Commission as a necessary and proper tool for eliminating discrimination and its effects. [321]

Four years later, in October, 1977, the Commission issued a second "Statement on Affirmative Action." [322] The Commission found that:

> While progress has been made during the past decade, the current employment situation provides disturbing evidence that members of groups historically victimized by discriminatory practices still carry the burden of that wrongdoing. [323]

The Commission reaffirmed its support for affirmative action remedies, including goals and timetables, as "unavoidable while the effects persist of decades of governmentally-imposed racial wrongs:" [324]

> A society that, in the name of the [color-blind] ideal, foreclosed racially-conscious remedies would not be truly color-blind but morally blind. The concept of affirmative action has arisen from this inescapable conclusion. [325]

In November, 1981, the Commission issued a third statement on affirmative employment policies: "Affirmative Action in the 1980s: Dismantling the Process of Discrimination." [326] This report on federal affirmative action policy was the product of extensive consultation [327] with lawyers, social scientists and others knowledgeable in the field of equal employment opportunity. Again the Commission affirmed the need for affirmative action remedies to combat institutional and other forms of discrimination:

> Discrimination, although practiced by individuals, is often reinforced by the well-established rules, policies and practices of organizations. [328]

* * * * *

> There is a classic cycle of structural discrimination that reproduces itself. Discrimination in education denies the economic resources to buy good housing. Discrimination in housing confines its victims to school districts providing inferior education, closing the cycle in a classic form. [329]

* * * * *

> Measures that take race, sex and national origin into account intervene in a status quo that systematically disfavors minorities and women in order to provide them with increased opportunities. Experience has shown that in many circumstances such opportunities will not result without conscious efforts related to race sex, and national origin. [330]

The Commission concluded, in its 1981 statement:

> Without affirmative intervention, discriminatory processes may never end. Properly designed and administered affirmative action plans can create a climate of equality that supports all efforts to break down the structural, organizational and personal barriers that perpetuate injustice. [331]

By 1984, however, the U.S. Commission on Civil Rights was a different body. Acting without precedent, President Reagan removed four of the six incumbent members of the Commission and replaced them with his own appointees. [332]

The newly constituted Commission held its first meeting on January 16, 1984, a few months after installation. Almost immediately, it arrived at a new policy position on affirmative action, reversing without investigation or hearings the stand which the agency previously advocated based upon in-depth examination of the issue. [333]

The Commission's 1981 affirmative action policy statement for example, was unanimously approved on a bipartisan basis after more than two years work. That work included analysis of existing civil rights laws and policies, the preparation and issuance to the public of a draft statement for comment, and a series of consultations at which lawyers, government officials, social scientists, and management and labor officials presented written and oral statements and were questioned by the Commission. [334] The newly constituted Commission reversed the prior endorsement of numerical race-conscious remedies after

a single day's meeting at which no witnesses were asked to, or did testify. Commissioners Blandina Cardenas Ramirez and Mary Frances Berry characterized that day's meeting as "...a group of people sitting around a table giving public expression to their visceral or ideological reactions to issues." [335]

The Commission now appears to follow the new Justice Department view on numerically-based remedies, and in particular, on ratio relief. Like the Department, the newly constituted Commission rejects these court-approved remedies for discrimination without offering any new initiatives for the elimination of institutional barriers to equal employment opportunity. Its January 16, 1984, "Statement of the U.S. Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quotas," parroted the Justice Department's opinion that ratio relief:

> ...benefits nonvictims as well as victims of past illegal discrimination ...in derogation of the rights of innocent third parties, solely because of their race. Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and, when used in public employment, offend the Constitutional principle of equal protection of the law for all citizens. [336]

In response to criticism that the Commission was making sweeping policy judgments without any study, Commissioner Morris B. Abram said he did "not need any further study of a principle that comes from the basic bedrock decision of the Consitution...; equal means equal." [337] Mr. Abram did not explain how his view of the Constitution squared with Supreme Court decisions in the Bakke, Weber, or Fullilove cases.

Chapter 4

THE IMPACT OF AFFIRMATIVE ACTION

Thus far in this study, our examination has focussed on an analysis of the content of affirmative action policy and its rationale. We have described the persistent, systematic problems of discrimination that gave rise to the policy, the ways in which the policy has been validated and circumscribed by the federal judiciary, and the challenge to affirmative action posed by the current Administration.

In Chapter 4, we turn to questions of results. What has been the impact of affirmative action upon the employment and economic status of minorities and women? Are there broader effects that can be discerned on employers and society as a whole?

In the first part of this chapter, we examine indicators, both general and specific, of the changing economic status of minorities and women and the line between these changes and affirmative action. In the second part, drawing upon a consultation between the Commission and business leaders and upon a questionnaire circulated to a wider group of employers, we focus on other results of affirmative action, for instance, its impact on expanding markets for business and improved employment procedures.

Affirmative Action Has Aided Minorities and Women

The evidence shows that two decades of affirmative action have helped produce many gains for minorities and women in our nation's workforce. While neither a panacea nor a substitute for economic growth, education, job training and ambition, affirmative action has made significant contributions to improved occupational status for many minorities and women, a closing of the gap attributable to discrimination.

Reflective of the results of affirmative action are improvements in the occupational status and mobility and reductions in the segregation of minorities and women. A 1978 report by the U. S. Commission on Civil Rights, entitled "Social Indicators of Equality for Minorities and Women", concluded that for black men and women and for Hispanic men, the years between 1960 and 1976 showed a substantial increase in their representation in occupations considered more important, prestigious and desirable by the rest of society.[338] Upward mobility as reflected by higher earnings had increased steadily and consistently for black males and females over the same period.[339]

Black occupational segregation, meanwhile, had substantially declined. The Commission compared the racial compositions of 441 specific occupations at different points in time and found that black individuals had entered new occupations in large numbers between 1960 and 1976. [340] Another indication of the breakdown of traditional patterns of segregation is the results of a survey of contact that whites polled said they had with a black as a coworker. By 1978, 49% of whites said they had contact with a black coworker, an increase of 17%. When asked in 1970, 6% of whites said they had contact with a black as their employer or supervisor at work. In 1978, 25% stated they had such contact, reflecting a 19% increase in interracial contact at the workplace. [341]

Specific evidence that government affirmative action requirements have played a significant role in the improved job situation for minorities and women is provided by an unreleased study conducted by OFCCP in 1983. [342] The study showed that minorities and women made greater gains in employment at those establishments contracting with the federal government -- and thus subject to OFCCP affirmative action requirements -- than at non-contractor companies. Based upon a review of more than 77,000 companies with over 20 million employees, the study found minority employment to have increased 20.1% and female employment 15.2% between 1974 and 1980 for federal contractors, despite total employment

growth of only 3%. For non-contracting companies, minority employment increased 12.3% and female employment 2.2% with an 8.2% growth in total employment over the same period. [343]

Furthermore, the study found that federal contractors had a smaller proportion of minority and female employees in lower-paying jobs than non-contractors. Among contractors, the study concluded the proportion of minority employees who were performing skilled and white collar jobs rose 25% in six years, increasing from 37.9% in 1974 to 47.4% in 1980. The movement of minorities into these job categories was slower in non-contractor companies, from 35.9% to 39.1% during the same period, an increase of only 8.9%. [344] Among contractors, the number of black and female officials and managers increased 96% and 73%, respectively, while the number of white men rose only 6% during the 1974-80 period. Among non-contracting firms, the proportion of black officials and managers grew by 50%, of women, by 36% and of white men, by 7%. [345] These advances in occupations were deemed to be especially significant as contractors had started off in 1974 with worse records than non-contractors and had managed in six years to equal and surpass the gains made by non-contractors for minorities and women.

A similar study of federal contractors and non-contractors, submitted to the Department of Labor in 1983 by Professor Jonathan Leonard of the University of California at Berkeley, "The Impact of Affirmative Action", concurred with the

Department of Labor's findings.[346] According to the Leonard study,

> Black male employment share increased relatively more in contractor establishments under the affirmative action obligation than in non-contractor establishment between 1974 and 1980. This holds true in a number of specifications, and it holds true controlling for establishment size, growth industry, region, occupational structure, corporate structure, and past employment share. This appears to reflect changed establishment behavior, rather than the selection into contractor status of an establishment with high or growing black male employment share. This positive employment impact has been relatively greater in the more highly skilled occupations, and has resulted in net upgrading for black males.[347]

The greatest gains have been made in the higher-paying managerial, professional and craft areas, but gains have occurred across the spectrum of occupations. For example, according to data provided by the Census Bureau's Labor Force Statistics Branch, the percentage of blacks among attorneys rose between 1970 and 1980 from 1.3% to 2.7%, and white women increased from 4.6% to 13%. Among physicians, white women increased from 8.9% to 12.7%. The number of black male and female psychologists rose from 962 in 1970 to 6,765 in 1980. The number of black women bus drivers grew from 4,084 in 1970 to 22,652 by 1980. Among computer operators, 7.5% were black and 16.85% were white females in

1970. By 1980, black workers comprised 11.9% and white women made up 52.1% of the growing field of computer operators.[348]

When one turns to specific companies subject to affirmative action requirements, changes in workforce composition become especially vivid. The most frequently cited example is The American Telephone and Telegraph Company. AT&T entered into a six-year consent decree with EEOC in 1973 to correct its prior discriminatory employment practices. According to figures provided by AT&T, the company has increased its representation of minorities and women during the period of the consent decree as well as after the decree ended in 1979.[349]

	1972	1978	1982
Minorities in Management	4.6%	10.0%	13.1%
Women in Management	33.27%	35.9%	39.6%
Minorities in Craft	8.4%	11.6%	14.0%
Women in Craft	2.8%	10.1%	12.3%
Males in Clerical	4.1%	11.1%	11.4%

Another major company, IBM, also has shown a dramatic change in the composition of its workforce since setting up an equal opportunity department in 1968 to comply with government contractor affirmative action requirements. Black employees at IBM increased from 750 in 1962, to 7,251 in 1968, to 16,546 in 1980. While in 1971 IBM had 429 black,

83 Hispanic and 471 female officials and managers, by 1980 the numbers had risen to 1,596, 436 and 2,250, respectively.[350] From a situation of token representation (1.5% minority and 12.7% female employees) in 1962, IBM has moved to significant integration of its workforce (13.7% minority and 22.2% female employees).

Two other companies, Levi Strauss and Sears Roebuck, also have made significant strides in minority employment. Levi Strauss, after adopting its first affirmative action plan in 1972, has added to its minority representation in every job category, increasing its total minority employment from 33% in 1972 to 51.5% in 1980.[351] Sears has increased its Hispanic representation in management, professional, technical, operative and craft positions from 8.1% in 1966 to 25.2% in 1981.[352]

Affirmative action efforts, including litigation, have particularly targeted police and fire departments and the construction trades in part because of their especially poor records in employing minorities and women. One of the first construction trades investigations by OFCCP found that fewer than 1% of construction workers were minority before the Philadelphia Plan, an affirmative action plan was adopted to in the late 1960s. By 1982, more than 12% of Philadelphia's construction workers were minority, a dramatic increase, though far short of the government's established goal of 19 to 20 percent.[353] Nationally, black workers have risen to 7% of the labor force

in construction trades as of 1980.[354] Among police departments, black officers have increased by 20,000 to represent 9% of all police officers in 1982. Since entering into a consent decree in the early 1970's, the City of Boston's police and fire departments, have changed from being 1.73% minority in the aggregate to 11.7% in the police department and 14.7% in the fire department as of 1981.[355]

The strides made by women in some traditionally all-male occupations, such as coal mining, have been no less dramatic. When OFCCP looked at the coal mining industry in 1953, there were no female coalminers employed in the United States. By 1980, there were 3,295 women coal miners and 8.7% of all coalminers being hired were women.[356] The nation's largest coal producer, Peabody Coal Company, found in its Kentucky mines that the number of women applying for coal mining jobs rose dramatically as it became known that the company was beginning to hire women. No women applied in 1972 and only 15 applied in 1973. Thereafter, the number rose each year until, by 1978, the number was 1,131.[357]

In 1978, OFCCP reviewed the employment practices of the five largest banks in Cleveland, Ohio. Three years later, the percentage of women officials and managers at these institutions had risen more than 20%.[358]

These diverse examples all illustrate a single point: affirmative action has helped to produce marked improvement in

employment and advancement opportunities for minorities and women.. The improvement has been especially dramatic among companies subject to the affirmative action requirements developed by federal agencies and by the courts over the past twenty years.

The Broader Benefits of Affirmative Action

Results of the Business Consultation

Eight members of the Commission met on November 30, 1983 in an all-day session with representatives of four major corporations drawn from diverse segments of American business: the Equitable Life Assurance Society, represented by its recently-retired Chairman and Chief Executive Officer, Coy Eklund; the Hewlett-Packard Company, represented by Harry Portwood, the company's Manager for Staffing and Affirmative Action; the Kaiser Foundation Health Plan, represented by Robert Erickson, its Senior Vice President for Legal and Government Relations; and the Control Data Corporation, represented by Sam Robinson, the corporation's General Manager for Staffing and Equal Opportunity Planning. Three other companies that were unable to send representatives submitted written material: American Telephone and Telegraph, Xerox Corporation, and Federated Department Stores. Those attending opened with general statements about their affirmative action programs and then responded to questions from the Commissioners. What follows is a summary of their remarks.

Each of the companies represented at the consultation had made significant strides in the employment of minorities and women after initiating an affirmative action plan.[359] Each of the corporate representatives present stated that his company believed that affirmative action had been beneficial to the company as well as to society, as a whole. While specifics varied, all could point point to particular benefits. Although minority, female and handicapped employees were the immediate beneficiaries, the company

as a whole and, in many cases, white male employees benefitted as well. These benefits will be summarized after outlining the affirmative action techniques used by each of the corporations.

Each of the representatives present stated unequivocally that the most important prerequisite for a successful affirmative action program is the expressed commitment of the Chief Executive Officer (CEO). In each of the companies represented, that commitment had been made clear repeatedly over the years, and had been reaffirmed since the advent of the Reagan Administration.

The specific techniques used to realize the commitment by top management fall roughly into two categories: 1) steps required to change attitudes and create the environment needed for success, both with respect to white male supervisors and with respect to minority and female employees; and 2) the application of standard management techniques generally used to achieve corporate objectives.

The clear commitment of top management was viewed as an indispensable ingredient in changing attitudes down the line. In implementation, a variety of specific types of training for mid-level managers is used by the four corporations. Equitable has held regular seminars with white supervisors. Kaiser has annual equal employment opportunity (EEO) conferences of its regional employment managers. Control Data trains its managers regularly and has a specific "awareness" program for newly-hired employees.

Hewlett-Packard uses an outside consultant to conduct "sensitivity" training sessions for its managers.

Hewlett-Packard and Equitable in particular spoke about the need to make those previously excluded or held back feel that they were welcomed as a part of the organization. At Equitable, separate councils constituted of minorities and women meet regularly with members of top management to discuss the affirmative action program and problems perceived by the minority and female employees. In addition, volunteering senior officers act as "mentors", counseling minority "proteges" on a one-to-one basis. Informal networks have grown up as a support system among female employees.

Mr. Eklund pointed out that affirmative action did not require "preferential" treatment, but that it did involve "special treatment" which took into account the needs of people previously excluded or made to feel unwelcome in the corporate system. He also spoke of the importance of overcoming historical stereotyping. He acknowledged that early in his career, he was opposed to hiring women as life insurance salespersons, because he felt that they belonged "at home."

Mr. Portwood of Hewlett-Packard stressed that minority and female employees will begin to feel more at home when they begin to see minorities and women in top executive positions and on the board of directors. Mr. Eklund of Equitable added that management should encourage the development of mutual support

systems and promote socialization among all of its employees -- even simple steps, such as making sure that new women executives feel welcome in the executive dining room where only men previously had lunch. To create a favorable climate, Hewlett-Packard also has an "open door" policy on employee complaints. Employees are encouraged to discuss their problems with anyone they wish without fear of reprisal. Control Data also feels that its internal complaint procedures have contributed to a constructive attitude on the part of minority employees.

The other set of affirmative action measures consists of applying management techniques that are standard in other areas to the objective of increasing the employment of minority, female and handicapped persons and of advancing them to higher levels of responsibility and authority. An initial step is establishing numerical goals--as is done in the areas of sales, production, budgeting, and other corporate activities. All of the corporate representatives saw the establishment of "goals and timetables" as an important part of their affirmative action programs. Control Data establishes goals and timetables even where there is no "under-utilization" by government standards. Its representative, Mr. Robinson, said the company could not possibly have made the progress it has achieved without setting goals for itself. Equitable considers numerical goals as a necessary benchmark

against which to measure progress in achieving the company's employment objectives.

The second step in the achievement of these objectives is to allocate responsibility clearly to managers and supervisors and hold them accountable for their results. All four corporations include the achievement of affirmative action goals in their personnel evaluation system for managers. This factor enters into the determination of merit pay increases, bonuses and promotions. Mr. Erickson of Kaiser stated that poor performance on the part of one Kaiser senior manager was a principal factor in his demotion. Control Data managers file monthly affirmative action reports.

The companies listed several techniques by which they increase the pool of qualified potential employees so hiring goals can be achieved. All four recruit at black colleges and other colleges with high concentrations of minorities, and all have summer employment programs for young people for which they try especially to recruit minority youth. Some of whom these youth later join the company as full-time employees. Hewlett-Packard reported that its summer program consists of one-third minorities and one-third women. Kaiser recruits through employment and social service agencies in minority communities. Equitable specially recruits and trains severely handicapped people. It has put computer terminals in the residences of some to make it possible for them to work at home. According to Mr. Eklund, the best recruitment incentive is the presence

of minorities and women in responsible, visible positions within the company.

Mr. Portwood of Hewlett-Packard, a company which requires a high proportion of technically-trained workers, was asked whether hiring standards had been lowered in connection with its affirmative hiring program. He said that there had been no change in standards and that it would be a mistake for a firm to hire just "to meet the numbers." He then spoke of his company's participation in programs aimed at improving the educational qualifications and attainments of minority and female young people and at providing early motivation for them to enter high technology careers. Hewlett-Packard has made a heavy financial commitment to a California program to motivate high school students toward academic achievement and college entrance and participates in a summer tutorial program for high school youth.

Affirmative action, of course, involves advancing minorities and women to higher levels within the corporate structure as well as increasing hiring at the lower levels. Three of the four companies represented follow a policy of promoting from within--a policy sometimes criticized by federal agencies and civil rights groups in the case of companies whose lower ranks include few women or minorities. All three representatives stated, however, that this policy was fundamental and that it had not impeded progress in advancing women and minorities.

In each case, however, the company is taking specific steps to help advance minorities and women.

One such step is that all four of the firms provide in-service training opportunities for its employees. At Control Data, employees can take a wide variety of computerized courses during work hours. Hewlett-Packard has regular three-day Affirmative Action workshops, a Technical Apprenticeship program, and classes in English as a second language. Kaiser has a program to train licensed practical nurses to become registered nurses and other programs to upgrade skills. Both Hewlett-Packard and Control Data see the need for a constant effort to ensure upward mobility for minorities and women. Coy Eklund observed that supervisors sometimes use "promotion from within" as an "excuse" for not meeting affirmative action goals. Control Data's Harry Robinson commented that people in charge of promotions tend to recommend people who are "like themselves" and that this tendency could be overcome only by pressure from above and from setting numerical goals for advancement.

In various ways, the companies attending the consultation have extended the affirmative action concept beyond the immediate requirements of hiring and promotion. Control Data has placed some of its plants in central city areas of minority concentration and has put minority personnel in senior

management positions in these installations. In Minneapolis, the company provided part-time employment in the morning for welfare recipients and in the afternoons for high school students. Control Data, Equitable and Hewlett-Packard have directed purchasing and other business opportunities to minority firms. Control Data has set minority business goals for its purchasing department. The summer job programs of all four companies focus to a large degree on minority or disadvantaged youth.

As a result of Hewlett-Packard's involvement with affirmative action in its broadest sense, the corporation's charitable foundation has devoted a larger share of its grant program to the needs of the minority community. Kaiser is working with the Oakland school system to upgrade its programs and is engaged in a special project to help children with learning disabilities in the Watts area of Los Angeles. Kaiser also is devoting increased attention to the problems of non-English speakers and of the handicapped in gaining access to its health-care facilities.

Each of the corporate representatives was asked to comment on his firm's relations with the principal federal EEO agencies--the EEOC (Equal Employment Opportunity Commission) and the OFCCP (Office of Contract Compliance Programs). To varying degrees, most had complaints about paperwork and other requirements. Equitable said that the requirement to report separately on the hundreds of company units scattered

throughout the country was extremely burdensome, and the results were meaningless since many of the units were very small. Excessive requirements such as these breed resentment which is damaging to a company's affirmative action efforts. Hewlett-Packard stated that OFCCP compliance reviews were sometimes helpful but often focused too heavily on "dotting the 'i's and crossing the 't's."

On the other hand, Control Data's representative said that while OFCCP's requirements were onerous, they were also educational. The company's EEO coordinators undergo four days of training in affirmative action in order to understand the government's requirements and the company's requirements --some of which go beyond the government's. Hewlett-Packard said that in the past some government requirements have been a hindrance and that government technical assistance had been of little value. Nonetheless, he said, the pressure exerted by these requirements had been effective in getting business firms to recruit harder and to find additional qualified women and minorities. Despite his complaints about the OFCCP's reporting requirements, Coy Eklund acknowledged that federal law "is definitely the impetus" to affirmative action.

Each of the company representatives commented on the changes they had observed since the change of administrations in 1980. None had noted any decline in the frequency of OFCCP compliance

reviews, but Kaiser commented that the time allotted for individual reviews had been cut and that investigators often did not use even the amount of time allotted. Control Data, on the other hand, said that the reviews had become less "nit-picky" and more substantive. Equitable reported no observable change.

The most significant consequence of the change of administration, according to three of the four participants, flows from the Reagan Administration's often expressed negative attitude toward goals and timetables and the overt attacks on numerical goals emanating from the Department of Justice. Control Data's Mr. Robinson said that these attacks made the company's job more difficult: mid-level managers were now asking why they must continue their affirmative action efforts, forcing top management to reaffirm constantly the company's continuing commitment to the program. Kaiser reported that, following the election of Ronald Reagan, the company's president sent a memorandum to all employees stating that its affirmative action program would continue without change, but that nevertheless, the Justice Department's attacks had encouraged the resisters within the corporate hierarchy. Hewlett-Packard's representative observed that signs of reduced federal enforcement encourage those companies that resist affirmative action to follow their own bent. Where the CEO makes clear that the company's policy and program are unchanged, however, the relaxation of outside enforcement has little

effect.

The day's discussion made it clear that all four companies felt strongly that affirmative action had been of substantial benefit to them. The benefits, moreover, went beyond the most obvious one--increasing the pool of qualified potential employees outside the company. Equitable reported, for example, that when it lowered the barriers to the advancement of women into middle and upper management levels, it found that there was a large pool of highly capable, experienced women with long service to the company. Those women could be moved up quite rapidly, much to the company's benefit. Affirmative action also opened up the promotion process. The earlier system, characterized by some as a "buddy" system, was broken, promotions were "demystified", and the entire staff felt less excluded and more comfortable.

In other ways, affirmative action has improved personnel policies to the benefit of all employees. For example, in connection with its inner-city plants, Control Data established a twenty-four hour employee counseling service. This service has now been extended throughout the company and is much appreciated by its employees. Hewlett-Packard has introduced flexible work hours and time off for all employees. Job descriptions are now more job-related, and qualifications are "not cluttered with unnecessary requirements", as the company's representative stated it. Equitable felt that it has

received favorable publicity. Its employees have greater pride in their company and feel that they are part of a socially responsible organization. Control Data also reported a greater sense of fairness among its staff. Kaiser's affirmative action program opened opportunities at its upper levels for all of its staff because, for the first time, these openings were posted publicly. Also, for the first time, the company introduced regular performance evaluations for supervisors (including an affirmative action evaluation).

Finally, both Kaiser and Equitable stated that affirmative action had resulted in an expansion of their business. In the case of Kaiser, the presence of a significant number of black doctors and other employees has attracted a larger black enrollment in its health plans. Coy Eklund stated that in his early days with Equitable (in the 1930s), marketing its insurance policies in the black community was eschewed actively. Now the company has the largest number of black salespersons of any major insurer and, as a consequence, has a large number of black policy-holders.

Thus, at least at the level of top management, each of the companies represented sees affirmative action as good business. They see it also as part of "good corporate citizenship", both with regard to the communities where they operate and with regard to the nation at large.

Results of the Questionnaire

In December 1983, the Citizens Commission distributed questionnaires to some 200 corporations to gather data on the effects of their affirmative action programs. The primary focus of the survey was to determine whether such programs had resulted in benefits other than an increase in minority and female employment. The Commission wanted to know whether affirmative action had improved personnel policies and other practices redounding to the benefit of the participating companies and their non-minority employees. Fourteen percent of the companies responded, reflecting a sample varying in company size and geographical and industry diversity.[360] Among the respondents were McDonalds, Merck & Co., Miller Brewing Co., and Johnson and Johnson. Each firm was asked to assess the effect of its affirmative action activities on practices related to hiring, promotion, discipline and employee evaluation, on employee productivity and job satisfaction, and on public goodwill toward the company. A copy of the survey instrument, including data on the responses to each survey question, appears as an appendix to this report.

Effects of Affirmative Action on Personnel Practices

We asked the companies whether affirmative action had resulted in the establishment or improvement of those

personnel procedures and standards which effect all employees. Almost 90% of the respondents said that affirmative action had resulted in the establishment or improvement of procedures and standards regarding hiring (10.7% established, 78.6% improved); 89.3% said standards and procedures had been established or improved regarding disciplinary actions (3.6% established, 85.7% improved); 85.7% said procedures and standards had been established or improved regarding promotion (7.1% established, 78.6% improved); and 82.1% said procedures and standards had been established or improved regarding employee performance reviews (7.1% established, 75.0% improved).

The respondents who included written comments on this question considered affirmative action to be a positive force behind improved personnel practices. As Johnson & Johnson states, "affirmative action and equal opportunity compliance [requirements] literally caused many of our practices to be questioned and resulted in standardized policies which benefitted all employees."

As to other improvements in personnel practices which have flowed from the implementation of their company's affirmative action programs, 92.8% of the respondents stated that affirmative action has helped their companies better identify relevant qualifications for certain jobs; and 82.1% said that implementation had helped through improved outreach and recruitment to identify well qualified candidates

for employment. Some of the companies included specific examples to show that affirmative action has contributed to the well-being of the company. IT&T stated that its affirmative action plan has resulted in a broader recruiting base with more options. Miller Brewing Co. said that it expanded its human resource planning department to further job analyses and evaluations.

In response to inquiries on the effect of their companies' affirmative action programs on the establishment or improvement of procedures and standards for bonuses, awards and other incentive benefits, 35.7% responded positively that uniform standards for such incentives had been established or improved.

The survey also revealed that improvements in personnel practices linked to affirmative action have had a positive impact on employee job satisfaction and overall labor-management relations. More than one third of the companies replied that they had found implementation of their affirmative action plans to have increased employee job satisfaction as reflected by one or more of the following: fewer employee grievances or complaints, decreased absenteeism, decreased employee turnover, improved employee climate, or improved employee sense of working conditions and opportunities. Many companies underscored the difficulty in measuring the actual effects of affirmative action in this area but also expressed the common observation that noticeable increases in employee awareness of their rights

had resulted because of their affirmative action plans.

The companies were asked to assess, on a scale of 1 to 10, whether implementation of their affirmative action programs had contributed to improved labor-management relations and efficiency and productivity. (On the scale, "1" meant "not at all;" and "10" meant "a great deal.") Forty-six percent of the companies responded, between 5 and 10 on the scale, that affirmative action had contributed to improved labor-management relations (28.6% said they did not know). When asked to use the 1 to 10 scale to assess any contributions to improved efficiency and productivity which derived from their affirmative action plans, 28.5% answered, between 5 and 10 on the scale, that affirmative action had had such an effect; 50% stated that they "did not know" whether affirmative action had made such contributions. The written comments regarding the assessment of these factors expressed the difficulty of concrete measurement of them. The Brunswick Corporation, however, noted that its affirmative action plan had "definitely contributed to improved understanding of EEO and social obligations" within the company.

Companies felt better able to assess the contribution of affirmative action in improving public relations and in increasing good will toward the company. Over 78% of the respondents

indicated that implementation of their affirmative employment programs had enhanced the companies' public image and overall good will. Asked whether their affirmative action programs had resulted in the hiring of an employee whose inventions or discoveries had benefitted the company or society at-large, 21.4% answered yes, that affirmative action has brought about such concrete benefits.

In sum, responses to the questionnaire reinforced the views expressed by companies at the consultation that affirmative action has often resulted in benefits that go beyond the increased participation of minorities and women in the workforce. Improvements in personnel practices, communication and training are reported to have resulted in increased efficiency, job satisfaction, and public relations. These changes work to the advantage of the companies involved, of all their employees, and, ultimately, of society at large.

Chapter 5

THE DEBATE OVER AFFIRMATIVE ACTION

As we have seen, the concept of affirmative action as a remedy for discrimination evolved slowly and often arduously. Affirmative action policy and the techniques for implementing it have been probed and challenged at each step of the way in the courts, in Congress, in the Executive Branch and elsewhere in the public arena.

Yet affirmative action, most particularly the race-conscious remedies of goals and timetables and ratios, remains subject to great controversy. It is charged that such remedies constitute "preferential treatment" that is unfair to white males, that they benefit some who do not need assistance while failing to help others who do, that they impose undue bureaucratic burdens on employers and that they threaten standards of merit that are ingrained in American society.

In this final chapter, we describe these criticisms in detail and seek to evaluate them in the light of what we have learned about the needs that gave rise to affirmative action, the ways in which the policy has been administered and the impact that it has had on employers, employees and upon society as a whole.

Is Affirmative Action Fair to White Males?

The most consistently and vigorously voiced objection to affirmative action is that it constitutes "preferential treatment" or "reverse discrimination" based on race or sex, and that the victims of such action, both in theory and in practice, are white males. This report has discussed the legality of race-conscious action in greater detail in chapters 2 and 3. It is important to reiterate here, that the prevailing legal view is that properly developed and implemented race or sex-conscious action is neither "reverse discrimination" nor "preferential treatment" prohibited by the Constitution or by Title VII. The Supreme Court, while establishing limits, has upheld this view and applied it to affirmative action techniques that have involved the use of ratios or other relatively firm measures based upon race.[361]

In delineating the appropriate scope of affirmative action remedies, the courts have been sensitive to concerns of white males and others who might be affected by such a remedy. Thus far, courts have made it fairly clear that while affirmative action plans may result in disappointing the expectations

of white workers, they will not be displaced from positions they already hold to make room for minorities (or women) deserving of a remedy. Courts and other institutions have attempted to distinguish permissible affirmative action by balancing the interests of the parties directly concerned, as well as of society at large. Guidelines have been articulated to focus on a fair resolution of the competing interests.

In Weber, for example, the Supreme Court upheld the race-conscious measures to which the employer and union had agreed because they were necessary to break down "old patterns of racial segregation and hierarchy."[362] In doing so, the court carefully examined the impact of the plan on white workers:

> [T]he plan does not unnecessarily trammel the interests of the white employees...[or] ...require the discharge of white workers and their replacement with new black hirees...[or]...create an absolute bar to the advancement of white employees...[and]...the plan is a temporary measure not intended to maintain racial balance, but simply to eliminate manifest racial imbalance.[363]

In this and other cases, the courts have taken care to ensure that white males and others who are innocent of any wrongdoing do not bear an unnecessary or unreasonable burden in correcting the efforts of an employer's prior discrimination. Even where an identifiable white worker may actually have profited from the employer's discrimination (e.g., where a white worker was hired or promoted because of discrimination against a minority or female), the white worker is not displaced to make room for the injured minority or female applicant. In such cases, the injured worker may receive monetary compensation, and priority consideration for a future vacancy, rather than the position to which he or she would otherwise be entitled.[364] In fact, in at least one case, a court ordered that a white worker whose expectation of a promotion was disappointed by implementation of an affirmative action plan receive compensation for that disappointment.[365]

To the extent that implementation of affirmative action may have temporarily disadvantaged white males, such disadvantage is the inevitable consequence of compensating for the advantages white males have heretofore enjoyed in the labor force. It is indisputable that, to some unquantifiable degree, the economic status of white males has been enhanced because discrimination against others

freed them from competition.

Until the Supreme Court addressed the issue on June 12, 1984, layoff situations constituted a potential exception to the general rule that the vested status, as opposed to expectations, of whites will be protected. The dilemma arose in situations where the effect of a layoff according to the "last hired first fired" seniority principle would be to wipe out the minority and female employment gains of an affirmative action plan (i.e., where all or most of the minority or female employees would be laid off pursuant to strict seniority layoff). The Supreme Court resolved the issue in favor of white employees with seniority in Memphis Fire Dept. v. Stotts.[366]

In Stotts[367] and in Boston Chapter NAACP v. Beecher[368], the 6th and 1st Circuit Courts of Appeals, respectively, had upheld District Court orders which modified the seniority rules governing layoffs in order to preserve some of the gains in minority employment which had been achieved under affirmative action plans. In both instances, the hiring plans had been instituted following judicial proceedings brought to remedy historical discrimination in those cities' police and fire departments. Several years after implementation of their remedial hiring plans, but prior to fulfillment of the goals established to remedy past discrimination, the cities

determined that budget constraints required layoffs in their police and fire departments. The district courts determined that the planned layoffs in these departments by strict seniority would completely undo the remedial gains in minority employment which had been achieved under the affirmative action programs. To preserve part of the gains, the lower courts ordered that seniority layoff should be altered so as to retain the same percentage of minority employees after layoff as existed prior to layoff, even if some minorities were retained in place of more senior whites.

The Boston case became moot when the white employees were rehired.[369] But in the Memphis case, Stotts, the Supreme Court disagreed. Justice Byron White, speaking for a 6-3 majority, said that

> "Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination..."[370]

Justice White noted the special deference that Congress had accorded to bona fide seniority systems in Title VII, adding that even a person who is adversely affected by discrimination "is not automatically entitled to have a non-minority employee laid off to make room for him."[371] He also based the decision on Section 706(g) of Title VII, which states that a court may not order the reinstatement of an individual as an employee if he was discharged for a reason other than discrimination (in this case less seniority).[372] His opinion specifically left open the question of

whether the city of Memphis could voluntarily have modified its seniority system to assure the retention of minorities during a layoff. [373] Justice Blackmun, though disagreeing with the majority, viewed the ruling as limited, saying that the majority opinion "is a statement that the race-conscious relief ordered in these cases was broader than necessary, not that race-conscious relief is never appropriate under Title VII." [374]

Situations in which vested seniority rights are modified are rare. In many other situations, affirmative action has no adverse effect on white males or may actually expand opportunities. One obvious example is the previously discussed Weber case, [375] in which a new training program was adopted to remedy historical discrimination in certain skilled craft trades. Although half of the trainee spaces were reserved for minorities, the other half of the trainees were white males, none of whom would have had any opportunity for training if implementation of affirmative action had not brought about establishment of the program.

Other affirmative action and equal employment opportunity initiatives have also opened new opportunities for white males. For example, historically, many all-white construction craft unions restricted membership to the male relatives of members, thus excluding all other white males. Minimum height and weight requirements which have been invalidated under EEO law for exclusion of Hispanics and women, also excluded many other white males. Moreover, this Commission's consultation with business leaders and survey on affirmative action (see Chapter 4) both confirm that affirmative action has brought about changes in employment practices that have enhanced fairness for all persons, including white males. Thus, in many areas, all workers have benefitted from EEO initiatives developed to address the serious disadvantages caused by discrimination against minorities and women.

In other situations where opportunities were growing rapidly, e.g., law and medical school enrollment during the 1970s, affirmative action policies have been implemented without in any way diminishing the number of opportunities available to white males. It should also be noted that even in "shrinking pie" situations, e.g., layoffs,

public policy sometimes came to the rescue of white workers whose jobs were threatened even before the Supreme Court's decision in the Stotts case. In the Boston police and fire department case, after a court determined that whites would have to share layoffs with blacks the city rescinded all layoffs at issue and white and minority employees were reinstated. The City Council went so far as to pass a law that prohibits these officers from being laid off again. [376]

Although sometimes avoided, the dilemma caused by a conflict between seniority layoff and preservation of affirmative action gains can be real. Constructive policy approaches are needed to assure that the burden is not borne by either "innocent" whites or "innocent" minorities but by the party whose discrimination created the problem in the first place, usually the employer. The employer can be made to carry the burden in several ways, one of which is to compensate white employees who would not have been laid off but for the need to preserve affirmative action gains or minority employees who stand to lose the opportunities provided by an affirmative action decree or agreement. [377] It can also be argued that in Boston-type situations, government authorities who are responsible for past discrimination should be precluded

from solving their budgetary problems by layoffs. Once a government entity is found to have committed unlawful employment practices the fairest solution may be to require that entity to bear the full costs of remedy. In a layoff, no employee would be required to make a financial sacrifice; government would be required to assume the full burden and would meet it by achieving economies elsewhere or by distributing the additional costs of maintaining a full complement of workers among the taxpayers.

In some circumstances, however, remedies designed to hold white and minority employees harmless and to affix the entire burden of redress on the wrongdoer may be beyond the authority of the judiciary or may be impractical, e.g., where a private employer who has discriminated is near bankruptcy. In these situations, fairness can best be achieved through legislative or other public policy initiatives. Various proposals have been made to avoid layoffs or to allocate the burdens more equitably through various forms of work sharing.[378] One variation on work sharing is short-time compensation in which employees whose hours have been reduced are able to supplement their incomes through payments from the state unemployment insurance system. Six states have instituted short-time compensation programs [379] and the Congress in 1982 encouraged the states to pursue such initiatives by providing technical assistance through the Department of Labor.[380]

Finally, it should be emphasized that the courts have worked hard to assure that the remedy is tailored as carefully as possible to the wrong. As the Supreme Court has noted on several occasions:

> "...a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove barriers that have operated to favor white male employees over other employees..." [381]

The more stringent affirmative action remedies, i.e., goals and timetables and ratio hiring, have been applied in industries and job categories that were almost totally restricted to white males in the past. For example, the construction trades were the initial focus of numerical remedies under the contract compliance program and Justice Department litigation supporting it. Other racially restrictive industries such as utilities, trucking and police and fire departments were among the early targets of EEO litigation and remedies. In these industries where minorities, and often women had been systematically excluded from skilled work, it is reasonable to conclude that the numerical remedies adopted were necessary to withdraw the unfair advantage that white male employees had enjoyed. Yet, even in extreme cases, the courts have taken care to assure that the interests of individual white employees, e.g., to retain their job status, were not unnecessarily trammeled.

Does Affirmative Action Benefit the "Wrong People"?

Affirmative action has been criticized on the grounds that it establishes racial/ethnic categories that are arbitrary and either over-, or under-inclusive, that it has benefitted people who do not need assistance and has failed to benefit people who do. For example, Southern Europeans and Jews have suffered discrimination in the United States, but they are not generally the beneficiaries of affirmative action. At the same time, some blacks or Hispanics who are "middle class" and who have never been directly victimized by discrimination may benefit from affirmative programs, while some poor blacks and Hispanics are untouched by them. Those who argue that affirmative action has not assisted the minorities with the greatest need point to the persistence of poverty and high unemployment among minorities for the past two decades, notwithstanding the implementation of affirmative action.[382]

With respect to the criticism of arbitrary, under-inclusive racial categories, public policy determinations of which groups are eligible for the benefits of affirmative action are based on a principle. The principle is that members of groups that

have been subjected to official, governmentally-sanctioned discrimination are entitled to the remedial measures provided by affirmative action. The groups include blacks and Hispanic Americans who for long periods in our history were officially branded as second class citizens and subjected to state and local laws which segregated them in public schools, other public facilities and excluded them from opportunities in public and private employment.[383] Also included are women who were barred from educational opportunities and who, under the guise of protective legislation, were restricted in the job market.[384]

Certainly other groups such as Southern Europeans and Jews have been victims of serious discrimination, but the crucial distinguishing factor is that the discrimination was largely private in character, not part of a governmentally-imposed system. Thus, members of these groups are entitled to the protections of the civil rights laws (e.g., Title VII), but not to all of the benefits of affirmative action. Moreover, nothing in federal EEO law or policy would prohibit implementation of affirmative action where necessary to remedy an employer's historical discrimination against Southern Europeans, Jews or other non-minority ethnics.

Admittedly, the categories used in affirmative action do not always work perfectly in all instances to link wrongs and remedies. Recently-arrived immigrant groups have not been

subjected to a history of discrimination in the United States. Some, e.g., refugees from Vietnam, Cambodia, or Haiti, may need affirmative action measures because they face at least the residuum of governmentally-sanctioned or tolerated discrimination in this country. Others may not have as strong a need for such protections.

Despite such imperfections, it is doubtful that any substitute set of classifications would address the needs of affirmative action as well or better. One suggestion is that affirmative action be predicated on the criterion of disadvantage rather than race or sex. But the difficulties of measuring disadvantage seem insurmountable. If strict economic measures are used, many people deserving and needing protection would be excluded. For example, people who have achieved a measure of economic security may still suffer the effects of racial isolation--inferior education, disadvantage in test taking, lack of access to many of the channels of employment, professional and business opportunities. Moreover, remnants of racism and sexism still operate to foreclose or narrow opportunities even for minorities and women with education and experience. Efforts to restrict eligibility for affirmative action to minorities who demonstrate "disadvantage," like the Justice Department's efforts to limit such redress to "identifiable victims of discrimination," would serve only to deny benefits to people who, as a matter of

fairness and efficacy as well equal protection of the laws, should receive them.

Measures to try to achieve more sophisticated means of measuring disadvantage are likely to be unadministrable in any setting where large numbers of people are involved. It would require a very unwieldly administrative apparatus to make case-by-case determinations under any likely set of criteria.[385] In other settings, it may be possible to design measures of disadvantage that would serve to provide additional opportunities to people who are striving to overcome deprivation. But, if such measures are not themselves to be exclusionary, they must be used as a supplement to, not a substitute for affirmative action. No one, it is fair to conclude, has yet devised a better practical system of compensatory justice.

Critics of affirmative action also say that the policy, while benefitting those who need it least, does not help minorities who are most disadvantaged. While acknowledging the significant increase during the 1970s in minority college and professional school enrollment and in the growth of the black middle class, these critics note that the number of blacks and other minorities living below the poverty level has increased, that black unemployment has grown and that black family income has declined relative to white family income.[386]

No defender of affirmative action, however, has asserted that it is a self-sufficient policy that will deal adequately with the combined effects of discrimination and disadvantage. Proponents of affirmative action recognize that the availability of employment opportunity is determined in very large measure by the business cycle and macroeconomic policies. When the economy is shrinking, minorities will suffer joblessness and a lack of opportunity for advancement despite the existence and enforcement of affirmative action policy.

Proponents recognize also that, grounded as it is on the principle of merit, affirmative action will be of little benefit to people who are functionally illiterate, who do not possess basic skills or who suffer other disabilities that prevent them from functioning effectively in the job market. What is needed, proponents say, is a realization that past discrimination accounts for the disproportionate numbers of minorities who lack those skills, and a national determination to provide the kinds of basic education and training that will enlarge the numbers of people who can benefit from affirmative action.

Thus, in evaluating the impact of affirmative action, one must focus not on overall data on income

and employment (which is affected by macroeconomic policy and other factors) but on education, employment and mobility data in the areas where the policy has received specific application.

As noted in chapter 4, affirmative action has focussed not just on white collar jobs, but on a broader spectrum of employment opportunity. Federal executive action and litigation has targeted industries such as the construction trades, manufacturing, trucking and police and fire departments. As we have seen, substantial gains have been made in each of these areas. The numbers of black police officers rose from 24,000 in 1970 to 43,500 in 1980.[387] In Philadelphia, where the concept of goals and timetables was first applied, minorities constituted only 1% of skilled construction workers in 1969 and 12% in 1981.[388] At the American Telegraph and Telephone Company and other large concerns that have entered into affirmative action agreements, the numbers of minorities and women in skilled and other craft positions has increased strikingly.[389]

As to opportunities in the professions, the criticism that affirmative action policies have benefitted only minorities who already are advantaged is not supported by data. Studies show that of the increased enrollment of minority students in medical schools during the 1970s significant numbers came from families of lower income and job status.[390] This indicates that rising enrollment

in professional schools reflects increased mobility, not simply changing occupational preferences among middle class minority families.

In sum, the evidence shows that affirmative action programs have afforded opportunity and mobility not only for minorities who already possess some advantages, but for many who do not. Advocates of affirmative action do not neglect other policies needed to provide genuine opportunity for those who are worst off. Indeed, typical affirmative action programs encourage - and sometimes require - employers and unions to establish and expand training and apprenticeship programs to assist those who do not have the required skills for entry level positions. They do insist, however, that the persistence of poverty and deprivation hardly demonstrates a failure of affirmative action.

Does Affirmative Action Pose Undue Administrative Burdens?

If the alternatives suggested to current affirmative action policy are unadministrable, critics would say that the policy now in effect is barely so. Some in the business community have railied against the administrative burdens posed by the contract compliance program. Major recurring criticisms include: excessive and unreasonable paperwork requirements, harassment by compliance personnel, and an unreasonable concentration on certain employers or industries.[391] Representatives of the 500 largest federal contractors estimated in 1981 that they spent almost $1 billion per year on OFCCP affirmative action requirements.[392]

An evaluation of these criticisms in beyond the scope of this report, but conceding that at least some of them may be valid, they should be viewed in context. First, criticisms of the administration of the contract compliance program do not call into question the basic need for affirmative action to remedy discrimination practiced in the past or continuing in the present. Nor do the concerns expressed about paperwork go to the overall effectiveness of affirmative action in providing such a remedy. Second, any paperwork requirements are to some degree burdensome and are likely to seem onerous to those subject to them. While the complaints voiced by industry are not often subterfuges for opposition to affirmative action, we know of no way to effectuate and monitor affirmative action without substantial record-keeping.

In fact, paperwork requirements increased in the early 1970s in part because the Comptroller General invalidated previous affirmative action requirements for lack of specificity, i.e., the failure to indicate in some detail the government's expectations regarding techniques for undertaking and measuring the results of affirmative action.

As noted in Chapter 1, Congress has repeatedly recognized the necessity of record-keeping and reporting for compliance purposes: Title VII has, since its inception, authorized EEOC to establish such requirements.[393] Even in the current climate of deregulation, Congress has imposed statutory record-keeping and reporting requirements for the contract compliance program regarding affirmative action for veterans.

Further, the consultation with business leaders (Chapter 4) suggested that affirmative action requirements have impelled business to simplify and regularize job qualifications and personnel practices, thus offsetting to some degree the paperwork burden imposed by the requirement itself.

This Commission endorses efforts to eliminate unnecessary paperwork and to simplify, to the extent practicable, any indispensible reporting requirements. But we are firmly convinced that it is impossible for employers to measure the effectiveness of their equal employment opportunity efforts, and impossible for the government effectively to monitor compliance, without recordkeeping and reporting by those subject to the law.

Does Affirmative Action Undermine Merit?

A further, major criticism of affirmative action is that it runs counter to the use of merit standards, which, in principle if not always in practice, is the prime means of allocating benefits and status among citizens in this country. While some critics acknowledge that affirmative action as a principle incorporates merit, they argue that in implementation, qualifications often are disregarded. This, they say, works to everyone's detriment, including minorities who are stigmatized by the knowledge that they have not made it on their own merit.

There can be no question that federal affirmative action policy recognizes and incorporates the principle of merit. Courts have said repeatedly that the purpose of remedies is to create "an environment where merit can prevail."[394] Court decisions, administrative rulings and other policy pronouncements stress that the extension of employment or other benefits to unqualified people is not required or contemplated. As one court has said, "[I]f a party is not qualified for a position in the first instance, affirmative action considerations do not come into play."[395]

While every public policy is subject to maladministration, unless abuses become overwhelming, the appropriate action is to cure the abuse, not junk the policy.

There is no evidence of any widespread abuse; most of the cases cited by opponents are anecdotal and scattered, often not substantiated. Indeed, the evidence available indicates that merit principles have not been compromised. Employers reported in this Commission's consultation and questionnaire that, after initiation of affirmative action plans, their productivity has not suffered and has in some cases improved. Affirmative action often widens the labor pool and may introduce more competition for jobs, which typically enhances productivity and quality of effort.

It should also be noted that while affirmative action policies apply to promotion as well as entry positions, the greatest application has been at the gateways to advancement--opportunities for higher education and professional training and at entry level positions in business, industry and government. Affirmative action has not been applied to bring people without experience into top executive and management positions.

What affirmative action offers mainly is the opportunity to compete and prove one's own merit. People who are given the opportunity by affirmative action to enter the competition and who then compete successfully by their own efforts should have no fear of being stigmatized by affirmative action. The risk is, rather, that stigma will result from the continuation of longstanding prejudice. Minorities and women (in different respects) have historically been stigmatized and stereotyped. While such prejudices are less widespread today, few would argue that they have disappeared. It may be that affirmative action provides an excuse for those who wish to do so to continue to denigrate the beneficiaries of affirmative action by attacking the merits of their selection. But this hardly provides a reason for abandoning the policy.

Finally, it should be noted that merit principles are not always easy to define, and however defined, have often been modified in their application. For example, paper and pencil tests used by many employers have been found on scrutiny not to measure ability to perform the particular job. The same is true with respect to minimum height and weight requirements and other employee selection criteria which have been more useful as screening devices for narrowing the labor pool than for identifying the best qualified candidates. Some aspects of job performance are not easily measured by objective criteria, e.g., the ability to

deal effectively with people. Many police departments have found that community relations and consequently law enforcement have improved with the addition of minorities to the force.

Even the institutions that profess the highest allegiance to merit standards make accommodations. Universities admit sons and daughters of alumni and large contributors and also modify standards to serve other values, such as geographical diversity. These facts of life do not suggest that merit principles ought to be abandoned in the name of the goals of affirmative action or any other goal. They do suggest that discussion of purist principle should be tempered by an understanding of the complexities and realities.

For the Commission, the important point is that as difficult as merit standards may be to define and apply, affirmative action policies have sought to stay consistent with them.

Affirmative Action and the American Tradition

Beyond the specific criticisms discussed above, affirmative action has been subjected to broader charges on a more philisophical or legal plane. Race-consciousness, it has been said is anathema to the American legal system and to the American ideal that we should be a "color blind" society. Moreover, it is argued, such color-conscious policies encourage a notion of superiority of group rights over the rights of individuals. In the words of one critic, race conscious remedies may be opposed without the need for study because they violate "a principle that comes from the basic bedrock of the Constitution...; equal means equal." [396]

A principal difficulty with these arguments is that the courts have consistently recognized affirmative action, including race-conscious, numerical measures of implementation, as an "essential" remedial tool for group wrongs. It is clear that the individuals have suffered discrimination because of their membership in a group or class (e.g., black, Hispanic, female), not because of their characteristics as individuals. The wrong they suffer is

a group wrong, shared with other members of the group, making it appropriate to adopt group remedies. As Justice Marshall stated in his separate opinion in Bakke, supra:

> Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in the 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact.[397]

In practice, it is clear that, as the U.S. Commission on Civil Rights once said, "Such group wrongs simply overwhelm remedies that do not take group designations into account.[398]

Furthermore, affirmative action does not imply proportional representation or any other system of allocation that ignores ability or merit:

> We again caveat that quota relief does not seek to confer proportional representation in public employment upon any minority or identifiable ethnic group, and that no individual or group has a right to be represented in any particular program or body. The constitution only warrants the right of equal availability to and even-handed dispensation of public benefits.[399]

Affirmative action critics seem to overlook the fact that the historical group wrongs have persistent, present-day effects which can only be countered by group-conscious actions.

Most critics and defenders of race-conscious remedies share the ideal of a color-blind society governed by a Constitution that "neither knows nor tolerates classes among citizens". [400]

The difference is that advocates of such remedies believe, with Justice Blackmun, that race-consciousness will be needed for a time if the goal is ultimately to be attained:

> "In order to get beyond racism, we must first take account of race...[a]nd in order to treat some persons equally, we must treat them differently. We cannot...let the Equal Protection Clause perpetrate racial supremacy" [401]

In the end, the positions that people take in the debate hinge on their assessments of the relative dangers of "race conscious" or "race neutral" policies. Opponents of affirmative action remedies fear that, despite continued emphasis by the courts on the temporary character of these remedies, they will become ingrained in law and policy leading to a society permanently divided along racial lines. They are concerned too that the consequence will be to advance minorities to a point in the race that they would not have reached through their own efforts and talents.

Proponents of affirmative action do not lightly dismiss these concerns, but they believe in a

majoritarian society there are built-in checks against excesses that favor minorities. Where "the majority favors a minority at the majority's own expense...the risk of invidious discrimination is diminished". [402]

Rather, for advocates of affirmative action, the real dangers lie elsewhere. The long history and experience of this nation's struggle against injustice suggest that unless people remain steadfast in their determination to act affirmatively to correct past wrongs, the policy will be abandoned while the person who has been hobbled by chains is still far behind in the race.

FINDINGS

1. Affirmative action policies were developed by the Federal government as a response to the persistent effects of practices in both the public and private sectors which excluded minorities and women from the employment market, practices which government often fostered and tolerated.

2. Goals and timetables required by the Executive Branch and ratio hiring mandated by federal courts after findings of systemic discrimination are specific forms of affirmative action relief. These remedies were developed in the 1960s and 70s by the Executive Branch, Congress and the courts to address forms of institutional discrimination - such as "old boy networks" and word-of-mouth recruiting, and non-job related tests - which carried forward the effects of older forms of discrimination. Lesser measures had failed to provide genuine access to job opportunity for minorities and women.

3. The Supreme Court's decisions in the Bakke, Weber, and Fullilove cases strongly indicate that race-conscious remedies, including goals and ratios, are a lawful means for dealing with the effects of prior discrimination. Contrary to the position taken by the Justice Department, the Court's decision in the Memphis Firefighters case is confined to protecting white workers who have seniority from being laid off, and does not throw prior decisions or race-conscious remedies in hiring or promotion into doubt.

As the Court's decisions have suggested, government-mandated remedies should be predicated on findings of past institutional discrimination made by an appropriate judicial, legislative or administrative body and should be tailored to eliminate the discrimination found. Employees and unions may, however, enter into voluntary agreements to use such remedies without findings or admissions of discrimination. Lower federal courts have uniformly upheld goals and timetables measures and ratio hiring relief.

4. The Reagan Administration has reversed the policy of its four predecessors and has attempted to undermine the use of affirmative action. The Administration has launched a concerted attack on affirmative action remedies in the courts and has sought to weaken regulations governing the use of goals and timetables. It also has sought to undercut implementation of affirmative action policy by slashing agency budgets and enforcement activities. Except for its view that whites with seniority should not be laid off to protect affirmative action gains, the Administration has met with failure in the courts. Nevertheless, the Administration's opposition poses a serious threat to equal job opportunity for minorities and women.

5. Affirmative action remedies have led to significant improvements in the occupational status of minorities and women. Gains have occurred in the professions, in managerial positions, in manufacturing and trucking, in police and fire departments and other public service

positions. These gains are linked specifically to enforcement of the goals and timetables requirements of the contract compliance program and to court orders and consent decrees for ratio hiring.

6. Affirmative action remedies have not been unfair to white male workers. The courts have held that the expectations of such workers in some circumstances may be disappointed by affirmative action remedies in order to withdraw the unfair economic advantage that white males have derived from discrimination. But the courts have protected the interests of white male workers by carefully constraining affirmative action remedies. They have held for example, that such workers may not be displaced from their jobs and that remedies must be limited in duration.

7. The persons protected by affirmative action appropriately are those who are members of groups that have been subjected to official, governmentally-sanctioned discrimination. Persons who have been subjected to other forms of discrimination enjoy the protections of the civil rights laws. No alternative proposal for implementing affirmative action policies has been advanced that would be feasible and that would provide adequate relief for institutional discrimination.

8. Affirmative action policy alone is not adequate to afford genuine opportunity to poor people. True opportunity for the poor requires macroeconomic policies that provide job

growth and other policies that transmit the basic skills needed for people to function effectively in the job market. Nevertheless, affirmative action policies have provided mobility for many people of lower socioeconomic status.

9. Affirmative action policies enjoy wide support in the business community. For many companies, affirmative action has resulted in a larger pool of qualified workers, streamlined personnel procedures with a more precise identification of job requirements and expanded markets for their products.

10. In many companies, affirmative action has resulted in benefits to the workforce as a whole, not just to minorities and women. Benefits include fairer and more open procedures for hiring and promotion (altering "old boy networks" and nepotistic practices), the elimination of job criteria that are not related to performance, and enhanced employer sensitivity to such employee needs as counseling and fair grievance procedures.

11. Affirmative action policy is consistent with principles of merit. It has not required or encouraged the hiring or promotion of unqualified persons. Nor is there evidence that the policy has been abused in practice. Rather, affirmative action has offered to people the opportunity to compete and prove their own merit.

12. The most serious danger is not that race-conscious policies will become permanently ingrained in law, but that affirmative

action policies will be abandoned before minorities and women are afforded equal economic opportunity. If the Nation retains its commitment to affirmative action there is the prospect that it may one day become a society that is truly color-blind.

RECOMMENDATIONS

Executive Action

President Reagan should reexamine the opposition of his Administration to the affirmative action policies developed and implemented by his five predecessors - Presidents Kennedy, Johnson, Nixon, Ford and Carter. Consistent with such a reexamination, the President should give consideration to the following recommendations:

1. The President of the United States should reaffirm the national commitment to equal employment opportunity through affirmative action and lead the Nation in eradicating the effects of past discrimination and in providing practical opportunities to people who have been denied them.

2. The President should direct the Department of Justice to support court decisions that have interpreted the constitution and laws to require or permit numerically-based remedies for past employment discrimination. He should further direct all departments and agencies of the Executive Branch to uphold and enforce these decisions.

3. The President should include in the Federal budget the funds and personnel needed for vigorous enforcement of equal employment laws and affirmative action requirements by each of the responsible agencies.

4. The President should direct the Secretary of Labor to withdraw proposed revisions to contract compliance

affirmative action requirements in order to maintain the impetus for affirmative employment practices which the current regulations provide.

5. The President should nominate and appoint to the judiciary, independent agencies and to Executive Branch positions having equal employment opportunity responsibilities only persons who have a demonstrated commitment to the enforcement of the civil rights laws.

6. The President should emphasize the importance of affirmative action by according public recognition to employers, unions and individuals who have made outstanding contributions to the advancement of equal employment opportunity through the implementation of affirmative action programs.

Legislative Action

1. Congress should seek to enlarge the numbers of persons who have access to the benefits of affirmative action by enacting legislation designed to create jobs to meet pressing national needs and to improve basic skills through education and job training.

2. Congress should assure that the Federal budget contains the funds and personnel needed for vigorous enforcement of nondiscrimination laws and affirmative action requirements by all responsible agencies.

3. Congress should extend affirmative action requirements to its own employment practices.

4. The Senate, while according appropriate deference to the President in nominations, should exercise its constitutional authority to "advise and consent" by confirming to the judiciary, independent agencies and Executive Branch position having equal opportunity responsibilities only those nominees who have a demonstrated commitment to enforcement of the civil rights laws.

5. Congress should take immediate steps to address the problem of layoffs that threaten to wipe out the gains of affirmative action plans in ways which preserve the jobs of all workers. Among the measures that should be considered are (a) incentives to state and local governments and private employers for shared work arrangements (e.g., short-time compensation) that would avoid layoffs and (b) requirements that state and local employers that have engaged in discriminatory practices not lay off employees where the results of such dismissals would be to eliminate the gains of affirmative action plans. Under (b), employers who participate in work sharing programs could be deemed to have satisfied the requirement that they not lay off employees.

State, Local and Citizen Action

1. State and local governments should take immediate steps to address the problems of layoffs that threaten to wipe out the gains of affirmative action plans in ways which preserve the

jobs of all workers. Among the measures that should be considered are the wider adoption of plans now in effect in six states to provide work sharing through short-time compensation.

2. Organizations and associations that serve the needs of state and local governments should make available to such governments information on the operation of affirmative action policies, including useful techniques, positive results and model statutes and ordinances that may be used to implement such policies on the state and local level.

3. Organizations and associations that serve the needs of employers and unions should make available information on the techniques that have proved successful in implementing affirmative action policies and about the positive results that have been achieved through affirmative action programs.

4. Law firms that furnish advice to corporations and unions on employment practices should provide information to their clients about the broad scope that courts have afforded to affirmative action programs and on the positive results for employers that many of these programs have achieved. The organized Bar and individual law firms should undertake on a pro bono basis, efforts to monitor the activities of the Justice Department and other federal agencies in equal

employment opportunity cases and should scrutinize with particular care any settlement or consent decree proposed by the Department of Justice to determine whether it protects fully the rights of classes who have been subjected to discrimination.

5. Public school systems, colleges and universities, employers, unions and government at all levels should seek means of closer cooperation to assure that programs designed to enhance opportunity - basic skills, job training, affirmative action - are coordinated to achieve the goal.

Footnotes

1. U.S. Commission on Civil Rights, Statement on Affirmative Action, at 2 (October, 1977).

   Additional, recently proferred definitions include:

   (a) "...[A] set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort...[the object of which] is equal employment opportunity." 41 C.F.R. Sec. 60-2.10 (Office of Federal Contract Compliance Programs); and

   (b) "...[T]hose actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity" 29 C.F.R. Sec. 1608.1(c) (Equal Employment Opportunity Commission); and

   (c) "Actions that take race, sex, and national origin into account for the purpose of remedying discrimination" U.S. Commission on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination, at 3 (November, 1981).

2. Handicapped persons and Vietnam Veterans were added by Congress to the federal contract compliance affirmative action programs by the Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act of 1974.

3. Lyndon B. Johnson, Public Papers of the Presidents, at 636 (1965).

4. 29 U.S.C. §160(c). See, Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940), in which the Court stated in regard to affirmative action:

   > The remedial purposes of the Act are quite clear. Id., at 10.
   >
   > * * * * *
   >
   > Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining-representative of his employees; he may be ordered to cease particular methods of interference,...to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation to the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. Id., at 12.

5. 1945 N.Y. Laws §132, ch. 118.

6. See, discussion of the Kennedy Order, infra p. 36.

7. The 13th Amendment (1865) abolished slavery; the 14th Amendment (1868) established the citizenship of blacks and the requirement of equal protection of the laws; and the 15th Amendment (1870) prohibited abridgement of the right to vote "...on account of race, color, or previous condition of servitude."

8. The Civil Rights Act of 1866, portions of which are codified at 42 U.S.C. §§1981 and 1982.

9. Created in March, 1865, the Bureau of Refugees, Freedmen, and Abandoned Lands, was one of the most significant acts of Congress in the closing months of the Civil War. "During the five years of its existence, during which its powers were increased by Congress, the Bureau served as a sort of ombudsman for the nearly four million blacks freed from slavery and for countless whites who were war refugees. Food, clothing, and shelter were provided (more than 21 million rations were issued between 1865 and 1869). Within two years of the Bureau's creation, it had set up forty-six fully staffed hospitals. (The death rate among freedmen was reduced from 38 percent in 1865 to 2.03 percent in 1869). Freedmen were almost always denied fair treatment in the courts, so the Bureau organized special courts and arbitration boards which had civil and criminal jurisdiction over minor cases involving freedmen. Unquestionably, the greatest achievements of the Freedmen's Bureau were in education. Day schools, night schools, industrial schools, colleges, even Sunday schools - all were either set up or supervised by Bureau personnel. By 1870, when the Bureau halted its educational work, more than five million dollars (a wholly inadequate sum, historians note) had been spent on the education of freedmen." Ebony Pictorial History of Black America, by the Editors of Ebony, Vol. II, at 15, 17 (1974).

10. R. Kluger, Simple Justice, at 59 (1977).

11. Id., at 61-62.

12. Id., at 62.

13. Civil Rights Cases, 109 U.S. 3 (1883).

14. Public accomodations are restaurants, inns, theaters, and public conveyances. 42 U.S.C. §200.

15. Plessy v. Ferguson, 163 U.S. 537 (1896).

16. U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort at 8 (1961).

17. Id.

18. Id.

19. This sentence continues "...in the firm belief that the democratic way of life within the nation can be defended successfully only with the help and support of all groups within its borders."

20. Exec. Order No. 8802. In his first Order, Roosevelt recognized that even the President could not just declare a policy of equal employment opportunity and make it a reality. He, therefore, ordered "...all departments and agencies...concerned with vocational and training programs for defense production to take special measures appropriate to ensure that such programs are administered without discrimination..." (Emphasis ours). Exec. Order 8802. See also, Manuel Ruiz, Jr., "Latin-American Juvenile Delinquency in Los Angeles: Bomb or Bubble", Crime Prevention Digest 1 (December, 1942), in which Mr. Ruiz details some of the tensions between the Los Angeles Hispanic and Anglo community at the beginning of World War II and proposes affirmative steps which the President and Los Angeles officials should take to address the concerns voiced by the Hispanic community. Among the measures recommended by Mr. Ruiz for Presidential action was an executive order to ensure equal employment opportunity for Hispanics in defense contracts.

21. Exec. Order No. 9346 (May 27, 1943). In this Order the "special measures" provision referred to in note 20 had become "all measures appropriate" to ensure EEO.

22. Id. Still, no enforcement authority was provided.

23. The major executive orders dealing with the EEO obligations of government contractors and subcontractors are:
President Roosevelt: Exec. Order Nos. 8802, 9001, 9346;
President Truman: Exec. Order. Nos. 10210, 10231, 10243, 10281, 10298, 10308;
President Eisenhower: Exec. Order Nos. 10479, 10557;
President Kennedy: Exec. Order Nos. 10925, 11114;
President Johnson: Exec. Order Nos. 11246, 11375; and
President Carter: Exec. Order No. 12086.

24. Final Report of the President's Committee on Fair Employment Practice (GPO: Washington, D.C.) (1947).

25. Ruchames, Race, Jobs and Politics - The Story of FEPC, at 159 (1953).

26. Final Report, supra note 24, at VI.

27. Id., at VIII.

28. Exec. Order No. 10479 (August 13, 1953).

29. Id.

30. Exec. Order No. 10557 (September 3, 1954).

31. The clause provided as follows:

> In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. The contractor agrees to post hereinafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause.
>
> The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplied or raw materials. Exec. Order No. 10557 (September 3, 1954).

32. U. S. Commission on Civil Rights, Statutory Reports - Employment at 66 (1961).

33. Id.

34. Id.

35. Id., at 68. The Committee also encouraged outreach and recruitment and attempted to foster counseling and training opportunities for minorities.

36. Id.

37. Id.

38. Committee on Government Contracts, Pattern for Progress, Final Report to President Eisenhower (GPO: Washington, D.C.) (1959/1960).

39. Exec. Order No. 10925, Sec. 301.

40. Id., at Sec. 201.

41. Exec. Order No. 10925. Only "males" were actually covered. Women had not yet been included in the protections afforded by the Executive Order program.

42. Id.

43. 42 Op. Atty. Gen. 97 (September 26, 1961).

44. U.S. Commission on Civil Rights, Statutory Reports - Employment at 77 (1961).

45. Id. Publicity surrounding the complaints was heightened by a proposed award of a $1 billion contract to Lockheed and by the fact that the Federal Government owned the Marietta plant (it was located on Dobbins Air Force Base).

46. Nathan, Jobs and Civil Rights, at 1202 (1969). Under the Plan for Progress, Lockheed agreed to:

1) provide all management levels with an up-to-date statement of its nondiscriminatory policy:

2) aggressively seek out more qualified minority group candidates for many job categories, including engineering, technical, administrative and clerical positions, and factory operatives;

3) instruct State Employment Offices and other recruitment sources that job applicants are to be referred irrespective of race, creed, color, or national origin;

4) reanalyze its available salaried jobs to be certain that all eligible minority group employees have been considered for placement and upgrading;

5) reexamine personnel records of minority group employees to determine whether those qualified and eligible can be used for filling job openings;

6) institute a program of familiarizing universities with employment needs and opportunities, to include hiring teachers who are members of minority groups for summer work and arranging plant tours for teachers and student counselors;

7) support the inclusion of minority group members in all its apprenticeship and other training programs including supervisory and pre-supervisory training classes;

8) encourage the establishment of vocational training programs and participation of minority group employees in such programs;

9) maintain eating facilities, rest rooms and recreational facilities on a nonsegregated basis; and

10) institute periodic checks to insure that the policies and objectives of the plan are being carried out.

47. Equal Employment Opportunity Commission, Help Wanted... Or Is It?, at 14 (1968).

48. 42 U.S.C. §2000e, et seq.

49. 110 Cong. Rec. 13,650 (1964).

50. 110 Cong. Rec. 13,652 (1964). The House, however, rejected a provision which would have given specific authorization for an Executive Order program. See, Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964, at 2014 and 2087 (1965).

51. 110 Cong. Rec. 7215 (1964). See, Teamsters v. U.S., 431 U.S. 324, at 351, n. 35 (1977), in which the Court discusses the significance of the Senator's roles in the Congressional debates.

52. Sec. 709(d), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-8(d).

53. It should be noted, however, that neither goals and timetables nor hiring ratios were part of the Executive Order program at the passage of Title VII, in 1964.

54. September 24, 1965.

55. June 22, 1963.

56. See, Secs. 103 and 201, Exec. Order No. 11246.

57. Jones, "The Bugaboo of Employment Quotas", 1970 Wis. L.Rev., 341, at 343 (1970).

58. Id.

59. Of course, affirmative action techniques such as targeted outreach, recruitment, job training, and EEO policy development and dissemination preceded even the Kennedy executive order. See, discussion, supra p. 36.

60. Report of 1967 Plans for Progress Fifth National Conference, at 73-74; quoted in Nathan, supra note 46, at 93.

61. U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort at 53 (1971).

62. Id.

63. Minority firms did not have referral agreements with the local, white craft unions and could, therefore, hire non-union workers independently.

64. Jones, supra note 57, at 344.

65. Id.

66. Id. Also included in the checklist were instructions to obtain contractor promises to "...actively seek minority group candidates for apprenticeship classes..." through means which will "...effectively reach the minority groups" and to ensure that contractors understand "...that the compliance of the subcontractors is his continuing responsibility."

67. IBEW, Local 1, AFL-CIO, 164 N.L.R.B. 313 (1967).

68. Jones, supra note 57, at 345.

69. U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort at 54 (1971).

70. Jones, supra note 57, at 345. The "specific details" included actions to:

1) cooperate with the unions with which [the contractor] has agreements in the development of programs to assure qualified members of minority groups of equal opportunity in employment in the construction trades;

2) actively participate individually or through an association in joint apprenticeship committees to achieve equality of opportunity for minority group applicants to participate in the apprenticeship programs;

3) actively seek and sponsor members of minority groups for pre-apprenticeship training;

4) assist youths with minority group identification to enter each apprenticeship program;

5) improve opportunities for the upgrading of members of the construction force;

6) seek minority group referrals or applicants for journeymen positions;

7) make certain that all recruiting activities are carried out on a nondiscriminatory basis;

8) make known to all of its subcontractors, employees all sources of referral its equal employment opportunity policy;

9) encourage minority group subcontractors, and subcontractors with minority representation among their employees, to bid for subcontracting work.

71. Id.

72. U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort at 54 (1971).

73. See Jones, supra note 57, at 346.

74. Jones, supra note 57, at 346, quoting a memorandum from Edward Sylvester, Director of OFCC, entitled "Operational Plan for Pre-Award Examinations in the Cleveland Contract Construction Program" (March 15, 1967).

75. Jones, supra note 57, at 346.

76. Id.

77. Id.

78. 238 N.E. 2d 839 (Ct. Comm. Pleas of Ohio 1968).

79. 249 N.E. 2d 907 (1969).

80 396 U.S. 1004 (1970).

81. Jones, supra note 57, at 347.

82. Id.

83. Id.

84. Id. The FEB was composed of top federal officials from each contracting agency in the area.

85. Id.

86. Id.

87. 48 Comp. Gen. 326. A similar opinion had been issued by the Comptroller General with respect to the Cleveland Plan. 47 Comp. Gen. 666 (1968).

88. 1970 Wisc. L. Rev. at 360 citing 48 Comp. Gen. ___ ([B-163026] Feb. 25, 1969)(to the Secretary of Health, Education and Welfare); 48 Comp. Gen. ___([B-163026(4)] April 11, 1969)(to the Philadelphia Urban Coalition); 48 Comp. Gen. ___([B-163026(6)] May 6, 1969 (to Cong. Green of Pennsylvania); 48 Comp. Gen. ([B-163026(6)] May 12, 1969 (to the Philadelphia Urban League).

89. 23 U.S.C. §112(b) (Supp. IV 1969); quoted in Jones, supra note 57, at 362.

90. Jones, supra note 57, at 367.

91. Id.

92. Id.

93. Comment, 39 U. Chi. L. Rev. 723, at 741 (Summer 1972).

94. 49 Comp. Gen. 59 (1969).

95. Comment, supra note 93, at 747.

96. 42 Op. Atty. Gen. 405 (1969).

97. Id.

98. Comment, supra note 93, at 748.

99. Id.

100. Id., at 749; quoting from; N.Y. Times, December 21, 1969, p. 39, col. 1 (City Ed.).

101. Comment, supra note 93, at 749.

102. See, 115 Cong. Rec. 40,921-22 (1969).

103. See, 115 Cong. Rec. 40,749 (1969).

104. 442 F.2d 159 (1971).

105. Id., at 175.

106. 404 U.S. 854 (1971).

107. 320 F. Supp. 1284 (D.N.J. 1970).

108. 471 F.2d 680 (1972).

109. 490 F.2d 9 (1973), cert. denied, 416 U.S. 957 (1974).

110. See also, Rosetti Construction Co. v. Brennan, 508 F.2d 1039 (7th Cir. 1974); and Northeast Construction Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973).

111. 118 Cong. Rec. 1662 (1972).

112. 118 Cong. Rec. 1664 (1972).

113. 118 Cong. Rec. 1676 (1972).

114. 118 Cong. Rec. 1398 (1972).

115. Sen. Comm. on Labor and Public Welfare, Legislative History of the EEO Act of 1972, at 1406-07 and 1519-20.

116. Sec. 718 of Title VII, as amended, 42 U.S.C. §2000e-17.

117. See discussion of judicial imposition of affirmative action remedies, including goals and timetables, infra Chapter 2, "Goals, Ratios and Quotas".

118. Title VII does not apply to Congressional employment practices.

119. The Civil Service Commission's authority hereunder was transferred to the EEOC under Reorganization Plan No. 1 of 1978.

120. Sec. 717(b)(1) of Title VII, 42 U.S.C. §2000e-16(b).

121. Pub. Law No. 92-540 (1972).

122. 38 U.S.C. §2012(a), as amended. At the time Congress established this $10,000 threshold for contractor affirmative action for veterans, the Secretary of Labor had, by regulation, established a $50,000 and 50 employee threshold for written affirmative action plans (based on race, sex, or national origin) under the Executive Order program.

123. Id. President Nixon had implemented the 1972 Act and delegated enforcement authority to the Secretary of Labor by virtue of Exec. Order No. 11701 (January 24, 1973).

124. Secs. 501 (federal employment) and 503 (contractor employment), 29 U.S.C. §§791 and 793, respectively.

125. 33 Fed. Reg. 7804 (May 28, 1968).

126. "Utilization Evaluation" was described as including:

1) An analysis of minority group representation in all job categories;

2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories; and.

3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded. 33 Fed. Reg. 7811 (May 28, 1968).

127. 33 Fed. Reg. 7811 (May 28, 1968).

128. 35 Fed. Reg. 2586 (February 5, 1970); this Order, as amended, is now codified at 41 C.F.R. Part 60-2.

129. 36 Fed. Reg. 23,152 (December 4, 1971).

130. "Sex" was not included in the Executive Order program as a prohibited basis of discrimination until 1967, Exec. Order No. 11375; 32 Fed. Reg. 14,303 (October 17, 1967).

131. The eight factors to be considered were and still are the following:

1) The minority and female population of the labor area surrounding the facility;

2) The size of the minority and female unemployment force in the labor area surrounding the facility;

3) The percentage of the minority and female work force as compared with the total work force in the immediate labor area;

4) The general availability of minorities and females having requisite skills in the immediate labor area;

5) The availability of minorities and females having requisite skills in an area in which the contractor can reasonably recruit;

6) The availability of promotable and transferable minorities and females within the contractor's organization;

7) The existence of training institutions capable of training persons in the requisite skills; and

8) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities and females.

132. 41 C.F.R. Sec. 60-2.11.

133. See, 41 C.F.R. Sec. 60-2.13.

134. 41 C.F.R. Secs. 60-2.20 through 2.26.

135. As discussed in Chapter 3, the Reagan Administration has proposed major amendments to the contract compliance affirmative action regulations.

136. U.S. Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities, Clearinghouse Publication No. 41 (1973). The Commission also issued affirmative action statement in 1977 and 1981. See discussion in Chapter 3, "The Reagan Administration Record".

137. Id., at 6.

138. E.g., recruiting at all male colleges, using employee selection criteria that are unrelated to ability to perform the job.

139. U.S. Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities, supra note 136, at 17.

140. Id., at 21.

141. "Permissible Goals and Timetables in State and Local Government Employment Practices", March 23, 1973 (unpublished memorandum).

142. Id., at 3-4.

143. Id., at 3. In the minds of many, this distinction between goals and quotas has been somewhat blurred by inexact usage over the years. Some numerical remedies have been characterized as "quotas" although they do not meet the definition provided herein. The Commission, however, is aware of no instance in which a true quota (e.g., a rigid numerical requirement which must be met, notwithstanding the existence of vacancies or qualified applicants) has been imposed by any court or agency. Even remedies which have characteristics of quotas, such as ratio-hiring orders (e.g., one black should be hired for each white hired), are established with due consideration of attainability and are not to be implemented with unqualified persons or by displacing current employees.

144. 1 CCH Employ. Prac. Guide 1860 (1973).

145. U.S. Commission on Civil Rights, 5 Federal Civil Rights Enforcement Effort - 1974: To Eliminate Employment Discrimination, at 552-53 (1975).

146. Id., at 553.

147. American Telephone and Telegraph Co., letter to the Citizens Commission on Civil Rights, dated November 23, 1983.

148. U.S. Commission on Civil Rights, supra note 145, at 556.

149. Id., at 558.

150. Pub. Law No. 95-454; codified at 5 U.S.C. §7201 (October 13, 1978).

151. The program has come to be known as the Federal Equal Opportunity Recruitment Program (FEORP).

152. The term "underrepresentation" is defined to mean "...a situation in which the number of members of a minority group within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category that the percentage that the minority group constitutes within the labor force of the United States as determined by the most recent decennial or mid-decade census or current population survey..." 5 U.S.C. §7201.

153. Under the Garcia amendment, EEOC was directed to establish guidelines for a federal recruitment program, develop initial measures of underrepresentation, and transmit such information to OPM, other Executive Agencies, and Congress. Under these guidelines, issued in January, 1979, EEOC defined minorities to include: Blacks, Hispanics, Asian American/Pacific Islanders, American Indians/Aleutians, and Women. See, EEOC, Guidelines for the Development of a Program to Recruit Minorities and Women in the Federal Service (January 17, 1979).

154. 44 Fed. Reg. 4422 (January 19, 1979); codified at 29 C.F.R. Sec. 1608 et seq.

155. 29 C.F.R. Sec. 1608.1(a) and (b).

156. 29 C.F.R. Sec. 1608.1(b).

157. Id.

158. 29 C.F.R. Sec. 1608.3(a).

159. 29 C.F.R. Sec. 1608.3(b).

160. 29 C.F.R. Sec. 1608.3(c).

161. 29 C.F.R. Sec. 1608.4.

162. A reasonable basis may be an adverse impact of an employment practice or other disadvantage. "It is not necessary that the self-analysis establish a violation of Title VII." 29 C.F.R. Sec. 1608.4.

163. 29 C.F.R. Sec. 1608.4(c)(1), quoting from "Uniform Guidelines on Employee Selection Procedures", issued jointly by the Commission, the Departments of Justice and Labor, and the Civil Service Commission (now the Office of Personnel Management), 43 Fed. Reg. 38,290-38,300 (August 25, 1978).

164. 29 C.F.R. Sec. 1608.4.

165. See e.g., Morris Abram, Consultation on Affirmative Action, Papers Presented, Volume I, at 26 (U.S. Commission on Civil Rights) (1981).

166. See e.g., Oversight Hearings on Equal Employment Opportunity and Affirmative Action, Part I, Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor, 97th Cong., 1st Sess., 139 (1981) (Testimony of W. Bradford Reynolds, Asst. Atty. Gen., U.S. Dept. of Justice).

167. Numerically-based remedies have also been utilized in the context of promotion, see e.g., Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), cert. denied, 104 S.Ct. 703 (1984); training, see e.g., United Steelworkers of America v. Weber, 443 U.S. 193 (1979); and layoff, see e.g., Boston Chapter NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), cert. granted, 103 S.Ct. 293, cert. vacated, 103 S.Ct. 2076 (1983).

168. See e.g., 41 C.F.R. Sec. 60-2.12 (OFCCP Regulations).

169. See e.g., 41 C.F.R. Part 60-2, Subpart C.

170. See e.g., 41 C.F.R. Sec. 60-2.12(a).

171. See, discussion infra Chapter 2.

172. Robert Hampton, Chairman, U.S. Civil Service Commission; Stanley Pottinger, Asst. Atty. Gen.; William Brown, Chairman, Equal Employment Opportunity Commission; Philip Davis, Acting Director, Office of Federal Contract Compliance, "Federal Policy on Remedies Concerning Equal Employment Opportunity in State and Local Government Personnel Systems" (March 23. 1973) (Unpublished Memorandum).

173. 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).

174. Id., at 16.

175. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

176. Employers often foster this form of discrimination by paying dues for their employees to belong to such clubs, recognizing that membership enhances business opportunities.

177. U.S. Commission on Civil Rights, Affirmative Action in the 1980's, at 13 (1981).

178. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, at 339-40, n. 20 (1977). See also, Dothard v. Rawlinson, 433 U.S. 324 (1977), for an application of this principle in the context of sex discrimination.

179. Hazelwood School District v. U.S., 433 U.S. 299 (1977).

180. "Requisite qualifications", of course, must be read to mean qualifications that are properly related to job performance.

181. Weber, supra note 167, was a case in which two private parties (an employer and its union) agreed to a ratio training program voluntarily, although under threat of imminent litigation or government sanction. The Supreme Court approved this arrangement in light of the well-known history of rigid segregation and discrimination in the industry, concluding that it was a reasonable measure by which to remedy the consequences of that history.

182. 443 U.S. 193 (1979).

183. Justices Powell and Stevens did not participate in the decision.

184. Weber, supra note 167, at 206.

185. Id., at 208. Prior to 1974, only 1.83% (5 out of 273) of the skilled craftworkers of the Grammercy plant were black, even though the workforce in the Grammercy area was approximately 39% black.

186. It is important to note that in the absence of the affirmative action plan, no employees, black or white, were receiving craft-training by Kaiser.

187. Weber, supra note 167, at 208-09. It is also interesting to note that the Court majority did not characterize the 1 to 1 selection ratio (to achieve the 50% goal) as a "quota", although it acknowledged that it did constitute preferential selection based on race.

188. 448 U.S. 448 (1980).

189. Petitioners raised constitutional claims under the equal protection clauses of the 5th and 14th Amendments. Statutory claims under the following laws were also raised: 42 U.S.C. §§1981, 1983, 1985; and Title VI and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000d and 2000e, respectively.

190. 448 U.S. 448, at 517 (1980).

191. A minority business enterprise eligible to participate in the set-aside was defined as a business at least 50% (51% of a publicly owned business) of which is owned by the following minority group members: citizens of the U.S. who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

192. Fund recipients were required, however, to take steps to help minority firms participate, such as providing technical assistance, lowering performance bond requirements, and helping secure low-cost loans from government sources.

193. Nonetheless, no white firms, regardless of disadvantage, were permitted to benefit from the set-aside; the classification was clearly racial.

194. 448 U.S. 448, at 463.

195. Id., at 473.

196. Id., at 484-85.

197. 438 U.S. 265 (1978).

198. In terms, the 16 spaces were reserved for "disadvantaged" applicants without regard to race, but in fact no non-minority applicant had ever been admitted under the program and the Court dealt with it as if it had been limited to racial minorities.

199. Bakke, supra note 197, at 369.

200. Id., at 378.

201. 42 U.S.C. §2000d. The California medical school at Davis was the recipient of federal funds and hence covered by Title VI's non-discrimination requirements.

202. 438 U.S. at 301; citing e.g., Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973); and Carter v. Gallagher, 452 F.2d 315, modified on rehearing en banc, 452 F.2d 327 (8th Cir. 1972).

203. 438 U.S. at 301; citing e.g., Contractors Assoc. of Eastern Pa. v. Sec. of Labor, supra note 104, and Assoc. Gen. Contractors of Massachusetts v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974). Justice Powell also stated: "This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under...the Voting Rights Act...". Id., at 302, n. 41.

204. Of course, neither of the parties to the litigation - the University or Allan Bakke - had any reason to attempt to show that the University had engaged in racial discrimination.

205. Bakke, supra note 197, at 307.

206. Id., at 317.

207. In this regard, Justice Powell clarified his views in his opinion in the Fullilove case, by stating that "...the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation...First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. (Citations omitted.) Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In Bakke, the regents failed both requirements. They were entrusted only with educational functions and they made no findings of past discrimination." Fullilove, supra note 188, at 498.

208. 493 F.2d 614 (5th Cir. 1974). Allen, involved claims of a pattern and practice of discrimination in hiring of Alabama state police personnel. "Indeed, defendants do not challenge the district court's finding that they 'have engaged in a blatant and continuous pattern and practice of discrimination'...both as to troopers and supporting personnel." Id., at 617. The district court ordered, and the Fifth Circuit upheld,..."the hiring and permanent employment of one qualified black trooper or support person for each white so hired until approximately 25% of [those forces were] comprised of blacks". (emphasis in original). Id.

209. Id., at 619.

210. First Circuit: Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1974), cert. denied, 421 U.S. 910 (1975); Assoc. Gen. Contractors v. Altshuler, 490 F.2d 9 (1973), cert. denied, 416 U.S. 957 (1974), Second Circuit: Rios v.

Enterprise Assoc. Steamfitters Local 638, 501 F.2d 622 (1974); Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (1973), cert. denied, 421 U.S. 991 (1975), Third Circuit: Erie Human Relations Commission v. Tullio, 493 F.2d 371 (1974); Contractors Assoc. v. Sec. of Labor, 442 F.2d 159, cert. denied, 404 U.S. 854 (1971); Fifth Circuit: NAACP v. Allen, 493 F.2d 614 (1974); Morrow v. Crisler, 491 F.2d 1053 (1974) (en banc), cert. denied, 419 U.S. 895 (1974); Local 53, Int'l Assn. of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (1969); Sixth Circuit: U.S. v. Masonry Contractors Assn., 497 F.2d 871 (1974); U.S. v. Local 212, IBEW, 472 F.2d 634 (1973); Seventh Circuit: U.S. v. City of Chicago, 549 F.2d 415, cert. denied, 434 U.S. 875 (1977), remedial order reconsidered and aff'd., 631 F.2d 469 (1980); Crockett v. Green, 534 F.2d 715 (1976); Eighth Circuit: Setser v. Novack Investment Co., 638 F.2d 1137, cert. denied, 454 U.S. 1064 (1981); Firefighters Inst. for Racial Equality v. City of St. Louis, 588 F.2d 235 (1978), cert. denied, 443 U.S. 904 (1979); Carter v. Gallagher, 452 F.2d 327 (1971) (en banc), cert. denied, 406 U.S. 950 (1972); Ninth Circuit: U.S. v. Ironworkers Local 86, 443 F.2d 544, cert. denied, 404 U.S. 984 (1971); Tenth Circuit: U.S. v. Lee Way Motor Freight, Inc., 625 F.2d 918 (1979) (remanded with instructions for adoption of affirmative hiring plan).

The Fourth Circuit, although it has not ordered the use of ratio or percentage selection systems as remedies for proven employment discrimination, has stated that "hiring quotas should be imposed only in the most extraordinary circumstances and where there is a compelling need." U.S. v. County of Fairfax, Virginia, 629 F.2d 932, 942 (1980), citing Sledge v. J.P. Stevens & Co., Inc., 585 F.2d 625, 646 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979).

211. See, supra note 210.

212. Teamsters v. U.S., 431 U.S. 324, 336, n. 16.

213. U.S. v. Ironworkers Local 86, supra note 210.

214. Local 53 of International Assoc. of Asbestos Workers v. Vogler, supra note 210.

215. U.S. v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969).

216. Vulcan Society v. Civil Service Commission, 490 F.2d 387, at 398 (2nd Cir. 1973).

217. NAACP v. Allen, supra note 210, at 620-21.

218. Rios v. Enterprise Assoc. of Steamfitters Local 638, supra note 210.

219. Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

220. Sledge v. J.P. Stevens & Co., Inc., 585 F.2d 625 (4th Cir. 1978).

221. Assoc. Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306 (2nd Cir. 1979).

222. 22 Fair Employ. Prac. Cases 1284 (N.D. Fla. 1980).

223. Id., at 1285.

224. Id., at 1285-86.

225. Weber, supra note 167.

226. U.S. v. City of Chicago, supra note 210; Rios v. Enterprise Assoc. Steamfitters Local 638, supra note 210.

227. U.S. v. IBEW Local 38, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970).

228. U.S. v. City of Chicago, supra note 210.

229. Morrow v. Crisler, supra note 210.

230. The Washington Post, December 18, 1981, at A8.

231. See, discussion infra Chapter 3; see also, Oversight Hearings on Equal Employment Opportunities and Affirmative Action, Part I, Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor, 97th Cong., 1st Sess., 282 (1981) (testimony of Malcolm Lovell, Under Secretary of Labor).

232. Section 503 of the Rehabilitation Act of 1973, and section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 and Exec. Order No. 11246, as amended.

233. Office of Federal Contract Compliance Programs, Preliminary Regulatory Impact Analysis on Proposed OFCCP Regulations, at 21-22 (1981).

234. See, 46 Fed. Reg. 42968 (August 25, 1981); and 47 Fed. Reg. 17770 (April 23, 1982).

235. OFCCP, supra note 233.

236. The current regulations, which have been in effect since October, 1978, require "supply and services" contractors or subcontractors which have over 50 employees and a $50,000 or more contract to prepare written affirmative action plans. 41 C.F.R. Sec. 60-2.1(a).

237. Compare, the current regulation, 41 C.F.R. Sec. 60-4.6, with proposed regulation 41 C.F.R. Sec. 60-4.2 printed at, 47 Fed. Reg. 17781 (April 23, 1982).

238. See, American Electronics Assns., comment on proposed OFCCP regulations (October 26, 1981) (unpublished letter):

> "[W]e believe the changes, as a package, do not go far enough towards creating a positive, understandable and cost effective program. We believe that in some instances, where substantive changes are required, there are no proposed changes at all...While we have no specific recommendations as to where that [written AAP requirement] cutoff should be, we suggest the proposed threshold [for preparing a written AAP] is too high."

See also, Business Roundtable, comments on August 25, 1982 Proposed OFCCP Rule Changes (October 26, 1982) (unpublished letter):

> "The proposal [to increase the written AAP requirement threshold] is a praiseworthy attempt to relieve smaller contractors of present excessive regulatory burdens. However, the political cost and practical impact of simply exempting such a large portion [75%] of contractors from AAP requirements suggests alternative means for affording needed relief should be found, especially because it unnecessarily dilutes the concept of affirmative action as an obligation of government contractors."

and see, Associated General Contractors of America, comments on back pay standards and procedures, coverage of non-federal construction projects, and construction industry goals, Daily Labor Reporter, at F-1 (June 2, 1982): "AGC regards some of the proposals as positive improvements, but must emphasize that the proposals do not go far enough."

239. See, Leadership Conference on Civil Rights, comments on OFCCP regulatory proposal of April 23, 1982 (May 24, 1982) (unpublished letter); see also, EEOC, letter to Ellen Shong, Director of OFCCP (July 2, 1981) (unpublished) and Appendix to EEOC comments on Final OFCCP Affirmative Action Rules Revised, February 28, 1983; and see, U.S. Commission on Civil Rights, comments on OFCCP regulatory proposals of August 25, 1981, and April 23, 1982 to Ellen Shong (October 26, 1981 and May 24, 1982) (unpublished letters).

240. EEOC, supra note 239, at Appendix to EEOC comments.

241. This has been accomplished by two measures: First, OFCCP no longer seeks to obtain "pro rata back pay" relief for discrimination, under which a class of persons which has been denied employment opportunities based on race, for example, receives a pro rata share of a determined sum. This remedy technique avoids the virtually impossible determination of, for example, which ten black applicants are entitled to back pay when twenty qualified blacks applied for ten jobs. The new OFCCP policy requires determination of the ten "individual victims" of discrimination. OFCCP Order No. 760a1 (March 10, 1983). Second, OFCCP has instituted a new two year limitation on back pay recovery: "In the case of a compliance review, the two years is measured from the date of the notice of the audit. In the case of complaints, the two years is measured from the date the complaint is filed..." Id., at 13.

242. On March 10, 1983, OFCCP issued Order No. 760a1, which established new standards for proving broad-based discrimination. EEOC Chairman Clarence Thomas' comments on this order are instructive:

> [The March 10, 1983, order] also establishes policy not in the regulations. For example, it improperly construes the Supreme Court's decision in U.S. v. Hazelwood School District, 433 U.S. 299 (1977), to require a showing of 5 or 6 standard deviations to establish a prima facie case of discrimination through statistical comparison, whereas the Court actually indicated that in large groups a showing of 2 or 3 standard deviations is sufficient to establish such a case...The directive should be withdrawn until it can be corrected and coordinated.

(Chairman Thomas' comments are on file in the Citizens' Commission office).

243. The program is called the National Self-Monitoring Reporting System. Under it, OFCCP and contractors agree to standardized reporting formats and data bases; the contractor monitors and reports its AAP performance to the OFCCP periodically. Data on racial and ethnic minorities are aggregated, rather than reported by racial or ethnic group. Furthermore, the data is reported on a national rather than a regional or plant basis. See, Women Employed, "Analysis of National Self-Monitoring Reporting System (March, 1984) (unpublished memorandum).

244. Robert B. Collyer, Deputy Under Secretary of Labor for Employment Standards, letter submitting additional testimony before the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies of the House Comm. on Appropriations (March 17, 1983).

245. Telephone conversation with Charles Pugh, Deputy Director of OFCCP (December, 1982).

246. Office of Management and Budget, The 1984 Budget, "Special Analysis J Civil Rights Enforcement", at table J-2.

247. Office of Management and Budget, The 1985 Budget, "Special Analysis J Civil Rights Enforcement", at table J-1.

248. Women Employed, "Damage Report, The Decline of Equal Employment Opportunity Under the Reagan Administration" (November, 1982).

249. Id.

250. Office of Federal Contract Compliance Programs, letter from Susan Meisinger, Acting Director (April 9, 1984) (unpublished).

251. 42 U.S.C. §2000e-5(g).

252. See, discussion supra Chapter 2, "Goals, Ratios and Quotas".

253. 42 U.S.C. §2000e-16(b)(2).

254. 29 U.S.C. §791.

255. The last Carter appointee, Armando Rodriguez, left office in late 1983.

256. See, 29 C.F.R. Sec. 1608 (1979). These guidelines encourage those covered by Title III to engage in a three- step process in implementing an affirmative action plan: (1) A reasonable self-analysis to identify discriminatory practices; (2) determine whether a reasonable basis for concluding affirmative action is appropriate; and then (3) to take reasonable corrective action, including race, ethnic and sex conscious measures. Where an employer makes reasonable personnel decisions consistent with its plan for corrective action, the EEOC will "no cause" a charge challenging such decisions.

257. See, draft of EEOC brief in Williams v. City of New Orleans, 67 Daily Labor Report, at E-1 (April 6, 1983). See also, The Washington Post, "Private Groups Plead Case for Stifled EEOC", April 20, 1983, at A-17.

258. 201 Daily Labor Report, at A-3 (October 19, 1981).

259. See, EEOC conciliation agreement with General Motors.

260. See, The Washington Post, "Quarreling at the EEOC", January 20, 1982.

261. See, The Washington Post, "Counsel at EEOC Shifts 9 Attorney", April 21, 1982.

262. U.S. Commission on Civil Rights, Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance, at 140 (November, 1983).

263. The Washington Post, March 12, 1984, at A-24, col. 1.

264. Id.

265. Id.

266. Id.

267. Id.

268. Id.

269. The discussion here will focus on the statements of Mr. Reynolds because he has been the primary Department spokesperson on this issue. As reflected in Department briefs and in other public statements, Attorney General William French Smith endorses Mr. Reynolds views.

270. See, Reynolds testimony before House Subcommittee on Employment Opportunities, Housing Report (1981), at pp. 131-156.

271. Assistant Attorney General W. Bradford Reynolds, supra note 270 at 139-140.

272. The Wall Street Journal, Dec. 8, 1981, at 1.

273. Reynolds, supra note 270, at 138-139.

274. Williams v. City of New Orleans, 729 F.2d 1554, 1557 (5th Cir. 1984).

275. Williams, supra note 274, at 1557.

276. Id., quoting United States v. City of Miami, 614 F.2d 1332, 1335 (5th Cir. 1980), aff'd in part and in part vacated and remanded on other grounds, 664 F.2d 435 (5th Cir. 1981)(en banc).

277. Bratton v. City of Detroit, 704 F.2d 878, vacated and remanded and reh'g and reh'g en banc denied 712 F.2d 222, 223 (6th Cir. 1983), cert. denied 104 S.Ct. 703 (1984).

278. Id., 104 S.Ct. 703 (1984).

279. BNA Daily Labor Reporter, at A-3 (Oct. 19, 1981).

280. Id.

281. The Washington Post at D-1 (Jan. 19, 1984).

282. Id.

283. Details of this episode appear in BNA Daily Labor Report, "EEOC Bows to White House Pressure, Says it Won't File New Orleans Brief", BNA Daily Labor Reporter, at A-6. (April 6, 1983). See also, N. Y. Times, "Pressure Seen in Vote to Withdraw Brief on Quotas", at D-15 (April 8, 1983).

284. Id.

285. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. as amended; and see, Reorganization Plan No. 1 of 1978.

286. Executive Order 12067 (June 30, 1978).

287. Griggs, supra note 175.

288. BNA Daily Labor Reporter, at E-1 (April 6, 1983).

289. The Washington Post, at A-17 (April 20, 1983).

290. The following passage reflects the Department's position:

> We are concerned about the adoption of race-conscious, non-victim-specific remedies, particularly by any institution other than Congress. We have profound doubts whether the Constitution permits governments to adopt remedies involving racial quotas to benefit persons who are not themselves the victims of discrimination - at least in the absence of a clear statement by Congress itself, acting pursuant to its broad remedial authority under the Thirteenth and Fourteenth Amendments, requiring the use of such remedies.

Memorandum of U. S. in support of Petition for Certiorari, Bratton v. Detroit, at 9.

291. See, e.g., police and fire department cases cited herein.

292. U. S. v. Jefferson County Board of Education, 372 F.2d 836, 876 (5th Cir. 1966); aff'd on rehearing en banc 380 F.2d 385 (5th Cir.); cert. denied 389 U. S. 840 (1967).

293. U. S. v. State of Maine, Consent Decree, C. A. No. 83-0195P (May 26, 1983).

294. Id.

295. Assistant Attorney General W. Bradford Reynolds, supra note 210 at 140.

296. Statement by the President, Office of the White House Press Secretary, at 2, December 17, 1982.

297. Id. at 3.

298. Id.

299. Executive Order 12432, section 1(b).

300. Id., section 2(a).

301. Id., section 2(b).

302. Id., section 2(c).

303. President Reagan, Presidential Memorandum (unpublished) August 5, 1983).

304. See, Special Analysis J, The Budget for Fiscal Year 1985, for a summary of the civil rights enforcement responsibilities of the Department of Justice and other departments and agencies.

305. 42 U.S.C. §2000d et seq.

306. State and Local Fisoal Assistance Act of 1972, PL 92-512, as amended by State and Local Fiscal Assistance Amendment of 1976, PL 94-488, 31 U.S.C. 1221, et seq.

307. See, The Washington Post, "NEH Chief Rejects Job Rules", at D-1 (Jan. 19, 1984); and "Agriculture's Minority Affairs Chief Would Purge Rights Rules", at A-22 (Feb. 17, 1983).

308. U. S. v. City of Statesville, Consent Decree, C. A. No. ST-C-81-39 (March 21, 1981).

309. See, e.g., Local 53 Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); and U. S. v. Ironworkers, 443 F.2d 544 (9th Cir. 1971).

310. The Washington Council of Lawyers, Reagan and Civil Rights: The First Twenty Months, at 105 (1983)(citing 1972 CRC Report at 277, n. 763 (quoting a memorandum of the Chief, Employment Section, U. S. Department of Justice).

311. Id.

312. 407 F.2d 1047 (5th Cir. 1969).

313. See, note 308.

314. 504 F.2d 1017 (1974); cert. den. 421 U.S. 910 (1975).

315. Brief, pp. 40-41, citations omitted.

316. Id.

317. E.g., Williams v. New Orleans, supra note 274.

318. See, Bratton, supra note 277.

319. See, discussion in Chapter 5.

320. 42 U.S.C. sec. 1975, Pub. L. No. 85-315 (1957). The Commission was authorized initially for only five years, but it has been reauthorized for five year periods by successive Congresses and Administrations, including the present ones. See, Pub. L. No. 98-183 (1983).

321. See, discussion in Chapter 1.

322. Clearinghouse Publication 54.

323. Id., at 1.

324. Id., at 12.

325. Id.

326. Clearinghouse Publication 70.

327. A "consultation" as used by the Commission is a relatively formal process under which experts are invited to submit written statements on the topic at hand, and are then asked to testify before the full Commission and to answer questions on the positions they have advanced. The papers presented and testimony were published in two volunes: "Consultations on the Affirmative Action Statement of the U. S. Commission on Civil Rights", vol. I: Papers Presented; vol. II: Statements Submitted (1982).

328. U. S. Commission on Civil Rights, supra note 326, at 9-10. For example, height and weight requirements that are unnecessarily geared to the physical proportions of white males, nepotism-based membership policies of some unions, and standardized academic tests or criteria that are geared to the cultural and educational norms of the middle-class or white males are such organizational policies.

329. Id., at 11.

330. Id., at 35.

331. Id., at 41.

332. For a discussion of the removal of these commissioners and the circumstances of their replacement, see, W. Taylor, "Farewell Civil Rights Commission", The Nation Magazine, Feb. 4, 1984.

333. See, Commissioners Bladina Cardenas Ramirez and Mary Frances Berry, Press Statement (U.S. Commission on Civil Rights), Jan. 16, 1984.

334. Id.

335. Id.

336. U. S. Commission on Civil Rights, Jan. 16, 1984, Statement, at 1.

337. U. S. Commission on Civil Rights, Civil Rights Update, at 2 (March, 1984).

338. United States Commission on Civil Rights, Social Indicators of Equality for Minorities and Women, at 36 (August 1978).

339. Id. at 58.

340. Id. at 39-40.

341. Nat'l Conf. on Christians and Jews, A Study of Attitudes Toward Racial and Religious Minorities and Toward Women (1978).

342. Office of Federal Contract Compliance Programs, Employment Standards Administration, U. S. Department of Labor, A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on Employment Opportunities of Minorities and Women (1983).

343. Id. at 8.

344. Id. at 19.

345. Id. at Appendix II.

346. Jonathan S. Leonard, The Impact of Affirmative Action (1983).

347. Id. at 38.

348. Census Shows Gains in Jobs by Women and Blacks in the '70s N. Y. Times, APril 24, 1983, at 1, 38.

349. See supra note 147.

350. Affirmative Action Coordinating Center, A Statement in Support of Affirmative action: The IBM Story (1981) (unpublished paper).

351. A. Flores, How Hispanics Have Benefitted from Affirmative Action (1981) (available from Mexican American Legal Defense Fund) at 4.

352. Id. at 3.

353. Affirmative Action: Birth and Life of a "Bugaboo", Washington Post, April 11, 1982, at a-1, a-10.

354. Id., supra note 348.

355. Beecher, supra note 167, 679 F.2d at 970.

356. Women's Work Force, Wider Opportunities for Women, Inc., Affirmative Action Works for Women, (1982) (unpublished paper) at 8.

357. Id. at 4.

358. Id. at 7.

359. Information on the employment patterns of the companies is on file in the Citizens' Commission office.

360. The 29 companies which responded to the questionnaire are: American Hospital Supply Co.; American Television and Communications Corp.; AT&T Bell Laboratories; Avis; Bank of the Southwest; Brunswick Corp.; Burroughs Wellcome Co.; Celanese Corp.; Delta Data Systems Corp.; Diamond Shamrock Corp.; Herman Miller, Inc.; Hewlett-Packard Co.; ITT Corp.; Johnson and Johnson; Joseph E. Seagram and Sons, Inc.; Kaiser Foundation Health Plan, Inc.; Merck and Co., Inc.; McDonald's Corp.; Miller Brewing Co.; Potomac Electric Power Co.; Rohm and Haas Co.; Ryder Systems, Inc.; Security Pacific National Bank; Swift and Co.; Tandy Corp./Radio Shack; Whittaker Corp.; Xerox Corp.; and two companies which responded anonymously. Responses cited in the text are on file in the Citizens' Commission office.

361. Fullilove, supra note 188; Weber, supra note 167; and Bakke, supra note 197.

362. Weber, supra note 167 at 208.

363. Id.

364. See, e.g., Teamsters, supra note 51; and Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

365. McAleer v. AT&T, 416 F. Supp. 435 (D.D.C. 1976).

366. 52 U.S.L.W. 4767 (U.S. June 12, 1984).

367. Stotts v. Memphis Fire Dept., 679 F.2d 541 (6th Cir. 1982).

368. Beecher, supra note 167.

369. Id.

370. Stotts, supra note 366, at 4771 n. 9. In a separate concurrence Justice Stevens concluded that district court had not offered an adequate justification for enjoining the layoff of minority employees, but suggested that he would have upheld the order if the lower court had concluded it was necessary to effectuate the consent decree. Id. at 4775. In another separate concurrence, Justice O'Connor also took a narrow view of the case. She noted that a court may use its remedial powers not only to compensate identified victims of unlawful discrimination but also "to prevent future violations" (the justification that courts of appeals have used in upholding orders for ratio hiring). Id. at 4774.

371. Id. at 4772.

372. Id.

373. Id. at 4773.

374. Id. at 4783 (Blackmun, J., dissenting). In contrast to Justice Blackmun's reading of the majority opinion, Assistant Attorney General Reynolds interpreted the ruling as applying not only to layoffs but to all aspects of affirmative action, including hiring and promotion. Terming the decision a "monumental triumph for civil rights," Reynolds announced a Justice Department review of court-ordered affirmative action plans with a view toward removing all provisions of a "race conscious nature." Los Angeles Times, June 14, 1984, at 1.

375. Weber, supra note 167.

376. 1982 Mass. Acts, 190, ¶25, cited in Beecher, supra note 167, 103 S.Ct. 2076, 77 L.Ed.2d 1409 (1983).

377. See McAleer, supra note 365, and discussion of work sharing, infra, p. 156.

378. Work sharing can take several forms including rotating layoffs, restricting overtime, voluntary layoffs, reducing hours, and short-time compensation, a recently explored method of work sharing. See generally R. MaCoy and M. Morand, Short-Time Compensation A Formula for Work-Sharing (1984) (twelve articles by numerous authors on state, federal, and European short-time compensation programs; J. Roscow and R. Zager, New Work Schedules

for A Changing Society (1981) (chapter 6 is directed to work-sharing alternatives); Lay-Offs and Equal Employment Opportunity, 45 Fed. Reg. 60832 (1980) (notice of Equal Employment Opportunity Commission strongly urging employers, labor organizations and others affected by Title VII to consider work-sharing as an alternative to lay-offs); U.S. Commission on Civil Rights, Last Hired, First Fired: Layoffs and Civil Rights (1977) (chapter 4 discusses work-sharing in the context of Title VII); Brief for the American Jewish Congress, Amicus Curiae in support of Respondents at 28-39, Stotts 52 U.S.L.W. 4767 (arguing that there are alternatives to last hired, first fired which do not unsettle affirmative action programs). See also New York City's 1975 proposal with regard to worksharing as applied to public and private employers. Under then commissioner Eleanor Holmes Norton's guidance, the New York City Commission on Human Rights stated that when contemplating layoffs, specific attention should be given to the impact of such layoffs on women and minorities. Consideration of alternatives to layoffs, such as work sharing, was specifically encouraged. U.S. Commission on Civil Rights, supra this note at chapter 4.

379. The six states are Arizona (Ariz. Rev. Stat. Ann. § 23-761 et seq.); California (Cal. Unemp. Ins. Code § 1279.5 (West 1984)); Florida (Fla. Stat. Ann. § 443.111 (West 1984)); Maryland (1984 Md. Laws 969); Oregon (Or. Rev. Stat. § 657.329 note); Washington (Wash. Rev. Code Ann. § 50.60.010 et seq.). Colorado has encouraged work-sharing since a 1977 Executive Order. Colo. Exec. Order (June 10, 1977). For example, enrollment in the California program has jumped from 8,245 employees per year in 1979 (the program's first full year) to 99,332 in 1982. The number of employers participating during this same time period rose from 474 to 2,567. Hammers and Lockwood, The California Experiment in R. MaCoy and M. Morand supra note 378 at 65. Similar participation rates have been found in Arizona and in Oregon, where short-term compensation programs have been in use since 1981 and 1982, respectively. See St. Louis, Arizona, Motorola, and STC and Hunter, Oregon Tries the "Workshare" Idea, both in R. MaCoy and M. Morand supra note 378. Under these programs, intended beneficiaries of short-time compensation are not only women and minorities, but all workers who might otherwise be laid off.

380. 26 U.S.C. § 3304 note (1982) (Short-Time Compensation) directs the U.S. Department of Labor to provide technical assistance to the states, to provide model legislation for the states, and to submit to the Congress an evaluation of the states' programs by October, 1985 (the Act's

sunset date). Importantly, the Department of Labor study must direct attention to the impact of short-time compensation on the protection and preservation of workers' jobs, "with a special emphasis on newly hired employees, minorities and women." Id. at (g)(1)(B).

381. Teamsters, supra note 51, at 364.

382. See, Comments by Morris B. Abram, in 1 Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights at 25-29 (1981); Thomas Sowell, "Debate: Equal Opportunity or the Numbers Game?", American Educator, 11, at 12 (Fall 1978).

383. See generally, Chapters 1 & 2, D. Bell, Race, Racism, and American Law (1973) (Chapter 2 outlines examples of governmentally-sanctioned discrimination against American Indians, Chinese, Japanese, and Mexicans.)

384. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 684-685 (1973) (Opinion of Brennan, J.); Muller v. Oregon, 208 U.S. 412 (1908); and Bradwell v. Illinois, 83 U.S. 130 (1873).

385. Family income and educational attainment are obvious factors which may be advanced as criteria of disadvantage. Other important factors, however, are less easily measured. These include the impact of past discrimination on confidence, self-esteem and motivation.

386. See Bureau of the Census, U.S. Department of Commerce, America's Black Population: 1970 to 1982, at 4-5 (1983); and Center for the Study of Social Policy, A Dream Deferred: The Economic Status of Black Americans, at 4, 18 (1983); and see, e.g., T. Sowell, Affirmative Action Harms the Disadvantaged, reprinted in 127 Cong. Rec. E4277 (Sept. 17, 1981); Hot Disputes and Cool Sowell, Washington Post, October 1, 1981, at C-1; and The Blacklash Against Sowell, Bus. Wk., November 30, 1981 at 119.

387. The Washington Post, April 11, 1982, at A-10.

388. Id.

389. See infra chapter 4 at 125. See also Statement of Bernard Anderson, Hearings before Subcommittee on Employment Opportunities, House Committee on Education and Labor, 97th Congress, 1st Session, v. 1, at 219-220; Letter from AT&T to Citizens' Commission supra n. 147.

390. Marcus M. Alexis, The Effect of Admission Procedures on Minority Enrollment in Graduate and Professional Schools, in Working Papers: Bakke, Weber and Affirmative Action (Rockefeller Foundation, 1979), 52-71.

391. See, e.g., Conclusions F, J, and N, Committee Analysis of Exec. Order No. 11246, prepared (but not officially adopted) by the Senate Committee on Labor and Human Resources (April 1982) at 81-83; and R.T. Thompson, Statement of the Chamber of Commerce of the United States, before the Senate Committee on Labor and Human Resources (October 22, 1981): "Over the last decade, the regulatory requirements of OFCCP have proven to be arbitrary, unnecessarily burdensome, and repetitive." Id. at 2.

392. Id., Committee Analysis, at 64.

393. See, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-8.

394. NAACP v. Allen, supra note 208 at 621.

395. Bratton, supra note 167, 704 F.2d at 892.

396. Abram statement, supra note 337.

397. Bakke, supra note 197, at 400 (opinion of Marshall, J.)

398. U.S. Commission on Civil Rights, Affirmative Action in the 1980's, supra note 177, at 39.

399. NAACP v. Allen, supra note 210, at 621.

400. Plessy, supra note 15, at 559 (Harlan, J., dissenting).

401. Bakke, supra note 197, at 407 (opinion of Blackmun, J.).

402. Williams, supra note 274, at 1574 (Wisdom, J. concurring part and dissenting in part); see also, J. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723,727-35 (1974).

APPENDIX

CITIZENS' COMMISSION ON CIVIL RIGHTS
AFFIRMATIVE ACTION QUESTIONNAIRE

We urge you to answer each of the questions and, where possible, to provide examples of your company's specific experience with affirmative action. Attach additional sheets, if necessary to expand on your answers.

1. As a result of your company's affirmative action program, have procedures and standards been established, or, if already established, been improved for...

a. hiring?

(89.6%) yes, established 3 (10.3%)
yes, improved 23 (79.3%)
no 3 (10.3%)
don't know 0

b. promotion?

(86.2%) yes, established 2 (6.9%)
yes, improved 23 (79.3%)
no 4 (13.8%)
don't know 0

c. disciplinary actions, including terminations?

(89.7%) yes, established 2 (6.9%)
yes, improved 24 (82.8%)
no 2 (6.9%)
don't know 1 (3.4%) (10.3%)

d. employee performance reviews?

(82.8%) yes, established 2 (6.9%)
yes, improved 22 (75.9%)
no 5 (17.2%)
don't know 0

e. bonuses, awards and other incentive benefits?

(34.4%) yes, established 3 (10.3%)
yes, improved 7 (24.1%)
no 14 (48.3%)
don't know 4 (13.8%) (65.5%)
no ans. 1 (3.4%)

Comments _____

2. Has implementation of your company's affirmative action program contributed to increased employee job satisfaction as evidenced by:

	Yes	No	Don't Know	No Ans.
A. Fewer employee grievances or complaints	6(20.7%)	9(31.0%)	13(44.8%)	1(3.4%)
B. Decreased Absenteeism	4(13.8%)	8(27.6%)	17(58.6%)	
C. Decreased Employee Turnover	3(10.3%)	13(44.8%)	13(44.8%)	
D. Other (Please specify)	2(6.9%)	1(3.4%)	2(6.9%)	24(82.8%)

Comments _____

3. On a scale of 1 to 10 (circle one), implementation of my company's affirmative action program has contributed to improved labor management relations:

1 (not at all) ... 2 ... 3 ... 4 ... 5 ... 6 ... 7 ... 8 ... 9 ... 10 (a great deal)

(3.4%) (3.4%) (3.4%) (3.4%) (6.9%) (13.8%) (6.9%) (13.8%) (3.4%) (0.0%)

Don't know ___

Comments Don't Know 8(27.6%) No Ans. 3(10.3%)
Neutral 1(3.4%)

4. Implementation of my company's affirmative action program has contributed to improved efficiency and productivity (on a scale of 1 to 10, circle one).

1 .0 2 .2 3 .1 4 .1 5 .3 6 .2 7 .2 8 .1 9 .1 10 .0

(not at all) (a great deal)

(0.0%) (6.9%) (3.4%) (3.4%) (10.3%) (6.9%) (6.9%) (3.4%) (3.4%) (0.0%)

Don't know ___

Comments: Don't Know 14(48.3%) No Ans. 2(6.9%)

5. Implementation of my company's affirmative action program has:

	Yes	No	Don't Know
A. Helped to better identify relevant qualifications for certain jobs	27(93.1%)	1(3.4%)	0
B. Helped, through improved outreach and recruitment, to identify well qualified candidates for employment	24(82.8%)	3(10.3%)	1(3.4%)
C. Resulted in hiring an employee who has invented or discovered a product, process, or technique that has benefited the company and/or public	6(20.7%)	7(24.1%)	16(55.2%)
D. Contributed to improved public relations and good will towards the company	23(79.3%)	2(6.9%)	4(13.8%)

Probably 1(3.4%)

No Ans. 1(3.4%)

(Please provide examples or explain responses)

Comments _____

6. Please use this space (and additional sheets if necessary) to make any other comments

Your Name _____ Title _____

Company _____

Company Address _____ Phone _____

Number of Employees _____

City _____ State _____ Zip _____

May we contact you for follow-up information _____ yes _____ no