Selected Affirmative Action Topics in Employment and Business Set-Asides

A Consultation/Hearing
of the United States
Commission on Civil Rights
March 6–7, 1985

Volume 2

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

MEMBERS OF THE COMMISSION

Clarence M. Pendleton, Jr., *Chairman*
Morris B. Abram, *Vice Chairman*
Mary Frances Berry
Esther Gonzalez-Arroyo Buckley
John H. Bunzel
Robert A. Destro
Francis S. Guess
Blandina Cardenas Ramirez

Linda Chavez, *Staff Director*

Selected Affirmative Action Topics in Employment and Business Set-Asides

A Consultation/Hearing
of the United States
Commission on Civil Rights
March 6–7, 1985

Volume 2

CONTENTS

Selected Affirmative Action Topics in Employment and Business Set-Asides

PROCEEDINGS, March 6, 1985

The consultation/hearing was convened at 8:30 a.m., March 6, 1985, Clarence M. Pendleton, Jr., Chairman, presiding. Present: Chairman Clarence M. Pendleton, Jr.; Vice Chairman Morris B. Abram; Commissioners Mary Frances Berry, Esther G. Buckley, John H. Bunzel, Robert A. Destro, and Francis S. Guess; Staff Director Linda Chavez; and General Counsel Mark Disler.

OPENING STATEMENT OF CHAIRMAN CLARENCE M. PENDLETON, JR.

CHAIRMAN PENDLETON. Good morning. I'd like to open these proceedings.

What I'd like to know first: Is there anyone in the room who is hearing impaired other than some of us up here?

[Laughter.]

CHAIRMAN PENDLETON. We have a person here to do the translation, for lack of another term, if you'd like. If not, you can just rest until somebody does come in.

Thank you very much for being here.

I'd like for the first panel to please assemble. Today is going to be long, and we'd like to get started as soon as possible.

Most of my colleagues are present this morning. My name is Clarence M. Pendleton, Jr., Chairman of the United States Commission on Civil Rights. On behalf of my colleagues and myself, I would like to welcome you to the Commission's first consultation/hearing on "Selected Affirmative Action Topics in Employment and Business Set-Asides."

Let me just say, first, that this is the first time we have had a combined consultation/hearing. We don't intend to continue this discussion on affirmative action topics, I think, any further than this consultation/hearing.

The purpose of this consultation/hearing is to provide Commissioners and the public with the opportunity to explore a variety of affirmative action topics with experts and business owners.

The Commission has previously stated its opposition to quotas as a means of achieving equal employment opportunity. The Commission favors what it considers nondiscriminatory affirmative action such as additional recruiting, training, educational and counseling programs targeted to attract minorities and women, but open to all. There are other affirmative action issues, however, which the Commission has not yet addressed. These proceedings will enable the Commission to formulate more specific policy on these other issues, including business set-asides for minority- and women-owned businesses. The issue of when, or if, underrepresentation and underutilization in employment should trigger a finding of discrimination and affirmative action will also be considered.

During the next 2 days, participants in these proceedings will discuss underrepresentation and underutilization as a basis for a finding of discrimination. The appropriateness of set-asides as a remedy for discrimination and their overall effect on minority and women's businesses and contracting generally will be addressed. The current state of the law with regard to affirmative action and set-asides will also be considered. Participants will assess preferential and nonpreferential affirmative action in employment and business contracting and will discuss what remedies are appropriate for discrimination in these areas.

The panels and speakers for the first day and the morning of the second day constitute the consultation component of these proceedings. The partici-

pants will present papers prepared by them and submitted to the Commission prior to these proceedings, followed by a question and answer period with the Commissioners and staff. Also included in this segment, the morning segment, are remarks by two Members of Congress. Late on the morning of the second day, the hearing component of these proceedings will commence. This consists of four panels of public witnesses who will testify with regard to their knowledge and experience regarding business set-asides.

Due to the time constraints, we will be unable to entertain questions from the audience.

I turn now to the first panel on "Underrepresentation and Underutilization: Do They Reflect Discrimination?"

This first panel will define underrepresentation and underutilization and will consider whether such statistical analyses can reflect discrimination. Whether nondiscriminatory hiring practices will result in work forces reflective of the racial and ethnic compositions of the communities from which the employees are hired will also be explored. An analysis of the Office of Federal Contract Compliance Programs' regulations as they relate to underrepresentation and underutilization will also be undertaken.

Our five panelists are here: Dr. Charles M. Mann, president of Charles R. Mann Associates in Washington, D.C.; Dr. David H. Swinton, director of the Southern Center for Studies in Public Policy at Clark College in Atlanta; Dr. Carl C. Hoffmann, president of Hoffmann Research Associates in Chapel Hill, North Carolina; Dr. Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; and Barbara R. Bergmann, professor of economics at the University of Maryland.

We will begin the morning with Dr. Mann. I would just ask, if you will—we have been deluged with paper. I think the people who came this morning had no idea that they would be deluged with paper, and we ask you, in some sense, would you please summarize as best you can your paper, and then the Commission and the staff can ask questions. Would that be acceptable to the Commissioners and to the presenters?

Dr. Mann is currently president of Charles R. Mann Associates Inc., a Washington-based firm engaged in statistical consulting and data processing, with emphasis on providing services to the legal profession. He has taught and consulted in mathematical and applied statistics at the Universities of Maine and Missouri and at George Washington University. He has developed affirmative action plans, utilization and hiring analyses, and work force analyses for corporations, and has provided expert testimony in statistics in a number of legal cases. His publications address statistics in equal opportunity analysis. He received his Ph.D. from the University of Missouri.

Dr. Mann, you may now start us off.

Underrepresentation and Underutilization: Do They Reflect Discrimination?

STATEMENT OF CHARLES R. MANN, PRESIDENT, CHARLES R. MANN ASSOCIATES

DR. MANN. By way of introduction to what must, at least in part, be a technical conversation, I'd like to recall an incident that occurred when I was at the university.

A department secretary asked a young professor what he thought of her new hairdo, and his response was, "Scientists don't make value judgments."

To the extent that we are going to be making value judgments, we must, at least in part, depart from being scientific. I am going to try to stress the analytic end, the scientific end, and the statistical end of this type of analysis.

As in any discussion, we must first have some agreement on the meaning of the terms. We must first have some definition.

The first term that occurs, possibly the most important, is the term "discrimination." This reminds me of the concept of defining intelligence. You have heard that intelligence is what is measured by intelligence tests. To some extent, discrimination is what is defined to be discrimination by the courts and by the regulatory agencies.

"Underutilization" is not, however, an abstract or subjective term. It has a very specific definition. And since I am going first in this presentation, I think I will present that because we'll all be using it.

Quoting from the Department of Labor regulations, underutilization is defined as "having fewer minorities or women in a particular job classification than would reasonably be expected by their availability."

In making this definition, there are several terms that in themselves need further explanation.

The courts and the regulators have considered underutilization as evidence of discrimination. So one of the questions we want to consider is: To what extent does underutilization measure what you as individuals would consider to be discrimination and what the courts consider to be discrimination?

Some consider discrimination to have two components, one being a historical component and the other being an employer-regulated component. It appears to me that, for the purpose of judging an employer's actions, the only part that is of particular interest is the part that is under the employer's control. That is, for the purpose of judging the employer, we must consider the employer's actions versus what they could have been.

Underutilization, then, in general, measures the difference between the observed and estimated under some assumed set of values which we call availability rates, profile of minorities and women in the employer's work force.

The concept of looking at departure from expectation under fixed assumptions is also the general concept of statistical hypothesis testing, which is the reason that statistics comes into play in this area. In fact, it is one of the reasons that statistics is being used in legal applications in recent years, and particularly in the equal employment opportunity area.

In using statistics, perhaps the most important point to remember is that the existence of a statistical relationship, no matter how strong, does not imply causality. Statistics considers whether there is a relationship, but cannot consider what the explanatory reasons are for it. That is just not a component of this methodology. So an inference of discrimination, based solely on statistics, is not possible. One must bring other things to bear in determining whether discrimination has occurred.

To show an extreme example of this, even in the sciences when one studies, for example, crop yield and rainfall, the existence of a correlation does not imply that the rainfall causes higher crop yield without some element beyond statistical methodology.

Statisticians and social scientists who use the statistical tools can and, probably more often than they do, should say that they don't know if discrimination exists. In fact, that is not a valid conclusion of a statistical methodology. The existence of discrimination the existence of disparity, are the terms that may be used, but not the existence of discrimination. We can say that there exists a difference. After that point we stop being scientists and start making judgments.

We can virtually always name alternative explanations that have not been eliminated. As statisticians or social scientists, we can simply say that we are unable to consider these other possible explanations or unable to go further along this process. The courts don't have that luxury. The courts, and to some extent the regulators, must come to a decision. Regardless of the strength or weakness of the information presented to them, they must end with a conclusion.

The way they achieve this, that is, the way they go beyond the statistical methodology, is to introduce the concept of "burden of proof." That is, the courts obtain legal conclusions of discrimination by drawing inferences based on whether or not an assertion has been proved, not simply on the strength of the data itself.

With this in mind, let's reexamine the definition of underutilization. There are basically three components to it which need attention. One is the concept of job classification. Some guidance has been provided by the regulatory agencies to the extent that it is suggested that job groups be similar in wage rate, content, and opportunity. This does not uniquely define job groups, but it does provide a basis for constructing them.

The second component is that of availability. And I stress that availability, true availability, can never be known. Consider if someone were to offer you a job tomorrow, you would think about whether to take that job. You don't know at this moment whether or not you are available for that particular job.

The true concept of availability in terms of: Who would accept it? Who has the exact qualifications? Who's overqualified? Who finds it interesting?—is something that cannot be known.

What we try to do, and as statisticians what we gather data for, is to try to find a group with known race and sex components that is proportionate to, that in some sense, and in our opinion, matches the group of interest. That is, we *estimate* availability. In fact, all utilization analyses take place not with availability rates, but with estimated availability rates. By its very nature, the quality of the remainder of the analysis is a function not only of the methodology that is being used for analysis, but of the quality of the estimated availability rate.

The third component of utilization analysis, or underutilization analysis, is the consideration of what would be expected, and whether we have fewer than would reasonably be expected, of minorities and women.

There are a variety of other considerations that go into the examination of the three characteristics. For example, in looking at the job classifications, if we adhere too closely to the concept of making them homogenous, we will find that we have very small groups and we will know ahead of time that any reasonable statistical analysis will fail to find underutilization. If we instead define large groups, we are faced with a statistical principle that says as the group gets larger we approach certainty with respect to finding a disparity from our expectation. All of this has to be taken into account and enters into the judgmental portion of performing utilization analysis.

With respect to availability, we have guidance in another area, the *Teamsters'* decision, which I will quote because it is both brief and of general interest with regard to utilization analysis. "Absent explanations, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the population in the community from which employees are hired."

In considering this statement, we notice that there is a concept of geography, the area where employees are hired. But now we have to question whether, in fact, the statement is even correct. Should we be considering where the employees are hired, or should we be considering where the employees could be hired? The Office of Federal Contract Compliance Programs suggests consideration of where one could reasonably recruit. There are a variety of approaches to the geography question. For example, in the Washington, D.C., area, should recruitment for a company located in Arlington be from Arlington, Virginia, from the D.C. SMSA [Standard Metropolitan Statistical Area], from the Nation? Will the answer differ by job group?

Similarly, the concept that we will eventually approach the work force percentage leaves open the question: What if there is a job which has a characteristic which is dependent upon sex? For example, there are jobs that require upper body strength, lumberjack being one. There have been very expensive studies conducted to show that upper body strength is, in fact, required for those positions. Once that becomes a factor and the distribution of upper body strength among men and women is known, we find that we cannot expect the work force percentage, but rather the percentage of women among people that have sufficient upper body strength is what should be approached.

We recall the original meaning of affirmative action; to provide affirmative action to assure equal opportunity in employment. And that, in fact, is the concept we are trying to reach through utilization analysis.

The most important issue here in terms of actually conducting an analysis is what should be the basis for comparison: the world as it currently exists or as it could have been and as it might someday be?

Since our purpose is to make a judgment concerning the employer's actions, it appears logical to compare what the employer actually accomplished with what the employer could have accomplished, which is what is under the control of the employer. Otherwise, the employer bears the brunt of society's actions, which are not under his control and, in fact, may have taken place before the business came into existence.

When it comes to actually constructing the availability rates, the Department of Labor regulations state that there are eight factors which should be taken into consideration. They are slightly different as stated for race and sex, but cover essentially the same areas. It may be noted that, to some extent, the eight factors are incommensurate. They involve different geographies; they involve unemployment rates. Further, one may question what the relationship is between the general unemployment rate and the availability of rates for specific occupations.

In some instances, weighted averages have become fashionable. There is nothing intrinsically wrong with this approach, but monitoring agencies, by placing arbitrary and unrealistic requirements on the weights used, have abused it, to the point of requiring illogical and misleading methodology.

Generally speaking, the internal and external availabilities control, or at least receive prime consideration, in determining the proportion of minorities and women available for specific positions. It is possible to list the mutually exclusive sources for various occupations, and of course, then a weighting is appropriate, but the resulting weightings will generally differ from occupation.

A major source of information for estimating availability rates in this context is that of census data. The 1980 census makes great detail available to the

public, more so than the 1970 census, because we have available the full 514 occupations with race, sex, and geographic detail.

In addition, the EEOC and the Census Bureau collaborated on what is called a crosswalk and established a mechanism for comparing the occupations recognized by the EEOC and those of the Census Bureau. Thus, we can modify the census data to take into account the matched EEO categories and the jobs within them.

The important point to remember again is that it is the estimated proportion that is of interest, not the actual numbers. We will not be able to list the people that are available. We can only find a comparable group and attempt to estimate representation. It is the quality of that estimate that controls the quality of the analysis.

The third component of the analysis is expectation. Our intuition tells us that if we flip a fair coin 100 times, we expect to see 50 heads. If we flip that coin 101 times, what do we expect to see? By the same logic, we would expect to see 50½ heads. But, if there is one result we know is not possible, it is 50½ heads. We are not going to see that.

So, in fact, the expectation may be an impossible event. What is important is that we expect to see a result close to the expectation, and statistics is capable of quantifying that closeness. Statistics is capable of providing a measure of the variation which is permissible. We can determine when the results we have observed are sufficiently unusual compared to the availability rate that we are estimating or that we believe to exist, so as to let us conclude that either our model is incorrect, meaning the employer may not be hiring at the rate we consider available, or that we were unlucky. That is all statistics can do. It piles up the evidence and at some point says, "We just don't believe we are that unlucky." Therefore, we conclude they are not hiring at the estimated availability rate.

The concept of rejecting an assumption because of the occurrence of a rate event, an event with low probability, is also the concept of hypothesis testing and statistics. We, therefore, use statistical methodology to compute that probability based on the three components of utilization analysis that have been discussed.

It should be noted that despite the court's mentioning of the "inexorable" zero, it may even be possible to have zero minorities or women and not be underutilized. An extreme example of this could occur when considering mechanical engineers and, say, only had a few employees, say two. Given a [realistic] estimated availability rate (say 2 percent for blacks), we would expect fewer than one black and should not be surprised to see that occur. In this instance, there is no threshold below which we would call the result unusual. The courts have provided guidance on what such a threshold would be. Generally, it should have a probability below 1 in 20. There is, in this example, no event with such a low probability.

Since the problem we have is parameterized, we must focus on the quality of the parameter estimates that we are using. Thus, the quality of the estimated availability rates that are of paramount importance.

We do have checks on our availability rate estimates through the use, for example of applicant flow analysis, considering the people who actually apply for a position. Applicant flow representation differing substantially from estimated availability suggests at least the need for further examination of the assumptions being made.

The important point to keep in mind is that statistics provides a methodology for determining what is unusual, but not an interpretation for what is causing that event which is unusual.

Thank you.

CHAIRMAN PENDLETON. Thank you, Dr. Mann.

You've stayed within your scheduled time of about 20 minutes, and we appreciate that.

Dr. Williams is currently a John M. Olin Distinguished Professor of Economics at George Mason University. He has also served on the faculties of Los Angeles City College, California State University, and Temple University. He has written extensively on economics and minorities, and his most recent book, *The State Against Blacks,* has been made into a television documentary. Dr. Williams serves on the advisory boards of the American Enterprise Institute, Young Americans for Freedom, the Reason Foundation, the National Science Foundation, and the National Tax Limitation Committee.

Dr. Williams received his Ph.D. in economics from the University of California, Los Angeles, and holds a Doctor of Humane Letters from Virginia Union University. Dr. Williams.

STATEMENT OF WALTER E. WILLIAMS, JOHN M. OLIN DISTINGUISHED PROFESSOR OF ECONOMICS, GEORGE MASON UNIVERSITY

DR. WILLIAMS. I'm going to make a few remarks about my paper and confine the rest of my time to some other comments.

It seems just by a casual observer the new civil rights movement is not a push for equality before the law, and indeed, equality before the law was the dream of the *Brown* plaintiffs, who strongly argued that the Constitution is colorblind. To the contrary, the new vision of the civil rights movement holds that the Constitution is color conscious.

The position of the High Court of the land is that racial discrimination to achieve certain social objectives is a form of compensatory justice. This feeling is not only expressed in the Supreme Court rulings on racial cases, but it's expressed by Justice Thurgood Marshall who said, "You guys have been practicing discrimination for years. Now it's our turn."

The evolution of the new civil rights is an effort by some people to impose greater government control as a means to more personal wealth and political power. But for many others, the new civil rights vision represents an erroneous view of the world. My comments and my paper are directed to those people who have an erroneous view of the world but who are long on good will and honesty, but short on understanding.

The creed of the new vision of the civil rights movement is that statistical imbalance, underrepresentation or underutilization, reflects racial discrimination. These concepts, however, imply that there exists a theory on the numbers of people by race or sex in given occupations, schools, and income groups. But what is that theory? That is, in the absence of racial or sexual discrimination, how many blacks would we find as engineers, etc., etc.? That is, there is no theory.

Underlying the creed of the new civil rights vision is that people are all the same. But we know that people differ significantly by personal traits, preferences, abilities, at any one point in time and over time.

One example is that at the turn of the century the immigration authorities at Ellis Island held that they had to have special IQ tests for Jews because they said that Jews were good Americans, but they had an intelligence so low that we had to devise a special IQ test. Those people, if they were resurrected, would be quite surprised to find that nearly 30 percent of all the Nobel prizes held by Americans are held by Jews.

People differ significantly according to age by ethnic group. Russian Orthodox Jews have a median age of around 45, Polish Americans around 40, blacks around 22; the median age on Asians is around 31, and for Mexican Americans the median age is around 16 or 17.

At another point in the paper, in terms of talking about statistics, I point out some findings of a report done by statistics on national education. Fifty-five percent of the black Ph.D.s awarded in 1980 were awarded in education, 2 percent in engineering. By contrast, 8 percent of Asian Americans got Ph.D.s in education, but 25 percent in engineering.

Now, I'm sure that the universities do not deny blacks access to engineering classes and Asians access to the education department. But what explains that difference? A wide difference in ethnic curricula choice is going to lead to significant differences in income. Engineers earn considerably more than people in education or high school principals.

Now, what does all this mean? Is it because the university does not allow blacks to major in the hard high-paying sciences? Does it reflect preferences? Does it reflect that maybe blacks like education more than engineering? Might it reflect some other things that we have not investigated?

But if people lament that there are only 2 percent blacks getting engineering Ph.D.s, one is obliged to say, "What is the right percentage of blacks getting engineering Ph.D.s, and why is that the right percentage?"

Now, if racial discrimination accounts for few engineers, there are some other things we tend to ignore. And some reasonable evidence on why blacks may not major in the hard sciences at the university or are underrepresented in the hard sciences. Part of the answer can be seen by black performance on standardized tests such as the California Achievement Exam, the SAT [Scholastic Aptitude Test], and the GRE [Graduate Record Exam], where blacks are well below the national norm on performance on these tests, and well below the performance of any other ethnic group except Puerto Ricans.

If you look at the black performance on the quantitative portion of the exam, namely, the math

part of the exam, it is well below the national norm, being roughly around 354. And keep in mind, on the GRE if you write your name on the exam you get 200 points.

None of this poor performance changes with the level of education. That is, you find the same thing at high school, you find the same thing at the beginning of college, and you find the same thing at the beginning of graduate school.

When the Civil Rights Commission and many other organizations make a statement that blacks have the same number of years of education as compared to some other group, that statement is meaningless. They say, "Well, blacks have the same years of education as some other group, but yet they earn less or they have a lower occupational status," etc., etc. The statement is meaningless because they are assuming that years of education is the same thing qualitatively among blacks and whites.

Failing to recognize qualitative differences in black/white education causes us to misidentify certain outcomes as racial discrimination. Recently, the PACE [Professional and Administrative Career Exam] exam was eliminated because it was alleged to be racially discriminatory. That is, blacks and Hispanics were doing less well on the exam. You can understand why they would do less well if you look at performance on standardized tests.

The balance of my comments will focus on the new civil rights vision that is clearly seen in the papers that will be presented by Professors Bergmann and Swinton. In the interest of common sense, fair play, and effective policy formulation, I will comment on the folly of the new civil rights vision.

This vision holds that racial discrimination, now or in the past, is the bedrock cause of virtually every black problem. But we all know that if Z is known to be associated with a multiplicity of factors, including A, one cannot say upon the observation of Z that it was caused by A.

For example, cigarette smoking is known to be a cause of cancer. But not even an expert would assert that all cancer is linked to cigarette smoking. In fact, as Mr. Charles Mann points out in his paper, one is on very tenuous grounds positing the cause of any relationship. It is just very difficult to discern cause. After all, not everyone who smokes contracts cancer.

But the new civil rights vision will say with considerable confidence that observed differences by race and sex are caused by discrimination. Such a view of the world has yielded several premises, and one of the premises is that statistical disparities, disproportionality, and underrepresentation in incomes, occupations, education, etc., etc, are moral injustices caused by a racist or sexist society. Its underlying assumptions of this new civil rights vision is that discrimination leads to adverse effects on the achievement of those discriminated against; two, statistical differences imply or measure discrimination; and this assumption depends on a third, that statistical differences would not arise and persist but for the fact of race or sexual discrimination.

The new civil rights vision can be subjected to evidence. For example, Japanese Americans were discriminated against. However, according to the 1980 census, Japanese Americans have the highest family income in the United States; they have the highest representation among professional workers, 25 percent versus 15 percent for the rest of the population; they have low divorce and crime rates.

If racial discrimination can explain all that it is purported to explain, then what about the Japanese? Have the Japanese, as Professor Swinton suggests in his paper, had advantages they gained because of discrimination, or should we ignore that question? Is the Japanese occupational status high because they have excluded blacks? Do Japanese benefit from high family stability and low crime rates because blacks have high family instability and high crime rates?

And it is amazing; the whole notion of looking at the Japanese and some other ethnic groups such as West Indian American blacks—these people vanish in the civil rights reports. For example, on page 58 of the 1982 civil rights report, they say: "In the relatively small number of occupations, Asians were allowed to participate and they were able to attain a moderate level of success."

Now, this is what they mean: They mean the Asians were allowed in a small number of occupations, such as engineering, physics, computer analysis. These are high-paying occupations, and they attained a moderate level of success. Well, if you call that a moderate level of success, white people are abject failures because whites have not entered into the professional and technical field to the extent that Asians have.

The new civil rights vision holds that statistical differences would not arise and persist without discrimination. But what do statistical differences

mean? Well, let's look at some of these statistical differences other than the ones we are familiar with.

Fifty percent of Mexican Americans marry in their teens while only 10 percent of Japanese marry that early. What does that mean?

Three out of the five highest home run hitters were black. Every time 100 or more bases are stolen each year, a black holds the honor. Of the 10 highest slugging averages in a season, 7 were German. Now, does this constitute denial of somebody else's civil rights?

Nearly 75 percent of NBA players are black and represent the highest paid players. Zero percent of professional ice hockey players are black. Of America's Nobel prize winners, 30 percent are Jewish, who are also discriminated against.

These and many other statistical disparities exist among America's mosaic of ethnic groups. How much confidence can we have in saying that it is all caused by racial discrimination? For that matter, how much confidence can we have in having Professor Swinton's assumption of "equal distributions of inherent abilities?"

Another part, and I will be finished in a minute, of the new civil rights vision involves distortion and selective data presentation. Professor Bergmann reports and I quote:

> A recent estimate based on 1981 data suggests that black men earn 15 percent less than white men with the same number of years of education and experience, while white and black women earn 30 percent less.

Given the recent evidence of the President's National Commission on Excellence in Education, showing that over 40 percent of black 17-year-olds are functionally illiterate, and given the results of black performance on standardized tests such as the CAT, SAT, GRE, and LSAT [Law School Aptitude Test] tests, it is no less than resolute ignorance to say that years of education held by blacks and that held by whites is qualitatively the same.

So far as women are concerned, the new civil rights vision omits statistics that might call their premises and assumptions into question. For example, in 1970, while black male college graduates had median earnings of only 73 percent of their white counterparts, black female college graduates had median earnings 125 percent of their white counterparts. For black females, that figure was 99 percent in 1950, 102 percent in 1960. Furthermore, by 1970, the black-white female income ratio, with the exception of the South, exceeded one. In 1960 it was near parity.

If we subscribe to the conspiracy doctrine of the new civil rights vision, we would conclude that white males and black females are involved in a conspiracy against black males and white women. Of course, a more satisfactory explanation can be found in my book, *The State Against Blacks.*

Much of the new civil rights vision requires a myopic view of the world. It requires that we ignore the effects of price and income and consider that all human behavior is a result of individual or group wishes, desires, and attentions. A classic part of this vision is the 59 percent cliche on the earnings of women. This 59 percent cliche holds that women are just as productive as men, but they only receive 59 cents on the dollar earned by men, and hence, the government must eliminate this rampant sex discrimination by equal pay for comparable worth.

This 59 percent cliche requires that we believe that employers are out there paying 70 percent higher labor costs just to hire men over equally productive women. Even if employers had that kind of generosity, stupidity, or blind allegiance to their brothers, they would be out of business as competitive victims to other employers anxious to cut costs by hiring the equally productive women.

Far smaller differences in costs relative to those of their competitors has driven many businesses to the industrial trash heap. The 59 percent cliche also ignores that the income of the husband is jointly produced. That is, in other words, just because a man's name appears on a big pay check and a wife has a paycheck half its size or not at all does not mean that he produced those earnings all by himself with no help from his wife. This is suggested in part by the fact that married men earn more than unmarried men, or could employers be discriminating not only against women but against unmarried men as well?

The point is not to say that race or sex discrimination does not exist, nor is the point to say that it does not explain anything. The point is: How much of what we see is explained by discrimination? Considerable and mounting evidence suggests that very little of current statistical differences between people can be explained by discrimination.

The Civil Rights Commission can play an important role in assuring that all Americans have equal opportunity. Its focus should be directed against the use of government by powerful vested interest

groups to cut off opportunities for the poor. The Civil Rights Commission should question whether the civil rights of people have been denied through laws like the minimum wage law, the Davis-Bacon Act, occupational licensing laws, business regulation, and a myriad of other governmental acts at Federal, State, and local levels.

The Civil Rights Commission should focus its attention on the fact that blacks pay taxes just like everyone else, yet are delivered grossly fraudulent education by the public education establishment. Blacks pay taxes just as everybody else, but are subject to a level of lawlessness and violence in their neighborhoods that has the full force of a law that says, "There shall not be economic development in black neighborhoods and citizens shall remain huddled in their homes behind bars while criminals are free to roam the streets."

If the entire plight of blacks is attributed to racial discrimination as seen by the new civil rights vision, a large percentage of the black population is doomed to perpetual despair, degradation, and defeat.

Thank you very much

CHAIRMAN PENDLETON. Thank you, Professor Williams.

We now go to Dr. Bergmann who is currently professor of economics at the University of Maryland. She has also taught at Brandeis University and has served with the U.S. Agency for International Development and the Brookings Institution, and as senior staff economist with President Kennedy's Council of Economic Advisors. For 8 years she has directed the University of Maryland's project on the economics of discrimination. Dr. Bergmann's research and publications have centered on urban problems and employment policy.

Dr. Bergmann earned her doctorate at Harvard University in the major fields of economic theory, statistics, money and banking, and business cycles.

Dr. Bergmann.

STATEMENT OF BARBARA R. BERGMANN, PROFESSOR OF ECONOMICS, UNIVERSITY OF MARYLAND

DR. BERGMANN Thank you, Mr. Pendleton.

I have to precede my remarks on affirmative action by saying that I was very disturbed to read in the paper that you had said affirmative action was dead. That rather reminded me of the Red Queen in Alice in Wonderland who said, "Verdict first, trial afterwards."

However, on thinking about it, I decided that really the old Civil Rights Commission had also had its mind made up in truth. So perhaps that is not as bad as it sounded, but I must say that at least the old Civil Rights Commission didn't hit one over the head with that fact.

Let me start by discussing the question of discrimination. I was very glad to hear Dr. Williams say that maybe there is some discrimination. I think the evidence that we have indicates that discrimination exists, is extremely important, both by race and by sex, and that it is a crying shame; it's an injustice; it's a lie—it's not just a mistake; it's a lie, a dirty lie—to say that it is not important.

And we need to do something about it because it is a serious blot on our national life. It threatens us more than, say, the Russians threaten us, and we need remedies.

So I don't think the question is: "Is affirmative action bad or good?" The question is: "What is an appropriate remedy for this situation?"

My predecessor's talked about engineers. Let me give you a few stories.

I think that we can just open our eyes and see the racism and the sexism in American life and in American employment practices. The restaurant I have eaten in for 20 years has never had a black person waiting on tables, never, in 20 years, not one.

In this hotel where we are sitting right now, if you go upstairs to a banquet—I'm sorry to see Mr. Abram is not interested in my testimony; I didn't expect he would be. If you go upstairs and have lunch at a banquet—the last time I was here was at a banquet with the Women's Legal Defense Fund, and there were no female waitresses.

I give a course where I try to discuss with my students sex discrimination in employment. All my students work, virtually all my students work—at the University of Maryland—and one student raised her hand a couple of years ago and said, "Gee, that's funny, I'm the personnel director at the Baltimore-Washington Airport, and our policy is we only put blacks in the food jobs."

All you have to do is look around. All you have to do is go into a department store and see that there is segregation by sex in who sells what. And this is reflected in differences in pay. The men are being paid very high commission rates and the women are there earning the minimum wage.

Now, Mr. Williams is telling us about the theory very common among economists that businesses

would go out of business if they did this. Well, thousands of businesses go out of business every year, but we have never observed any business going out of business because of discrimination. So I think there's something wrong with that theory.

Given that there is discrimination, what do we do about it? And how do we diagnose it?

I think that affirmative action is in the same situation as democracy. You know, Winston Churchill said, "Democracy is a terrible system, except when compared with all the others." And I think affirmative action also has problems associated with it but no one has been able to think of any alternative.

For example, one of the problems with affirmative action is that it is very wounding to the ego of blacks and women who have made it like me and Mr. Williams. It is, for example, wounding for me to think that maybe I was invited here because of my sex, so that there could be some representation of women rather than for what I know to be my own sterling qualities. And that is upsetting to me to think that.

[Vice Chairman Abram returned to the conference room.]

DR. BERGMANN. But then I think, "Well, maybe they did invite me to fill a quota, but it's better to be here than not here at all, and maybe that's where I would be if there weren't a quota."

A great deal is said about the injustices perpetrated by affirmative action. In fact, once after I gave a talk on affirmative action, somebody came up to me and said, "How would you feel being the mother of a Jewish boy who was not admitted to medical school because of some affirmative action program?" to which I was able to answer, "I am the mother of a Jewish boy, and I know that when I compare him to my daughter and I compare him to the children of my black friends, he is overprivileged. Certainly, I wish him the best, but I think it is more important for him to live in a world where there is justice than for him to get to medical school."

I think some of the problems with affirmative action have to do with selection processes. Affirmative action louses up the selection process. The selection processes are very much attuned to making sure that the people who work on the job are compatible. People are taken around before they are hired and they are sort of paraded before their possible supervisors and their coworkers, and these people are given a voice in who is selected. And that serves a very useful purpose. It serves a productive purpose, because one of the most unproductive things is to have dissension and fights and insults in an establishment.

So these procedures do serve a purpose, but they also have the side effect of making sure that people are compatible by race and sex, that men don't have to associate with women as equals, or blacks in some cases as equals, that women are not in line to be promoted to supervise men, and so on. So what we've got in the workplace is a reproduction of the larger society, and that makes for compatibility, but it also makes for perpetuation of the present disparities.

When thinking about this issue of underrepresentation, and I am not a lawyer so this very much represents a nonlawyer's point of view, I am not too interested in the exact definition of underutilization because I think the enforcement authorities ought to go after the egregious cases, the case of this restaurant that I eat in where there has never in 20 years been one black person waiting on tables. We don't need a very finely tuned definition of underutilization to take care of that particular situation.

Now, I'd like to close by saying that I challenge those who are against affirmative action to come up with some plans for reducing discrimination which don't involve goals and timetables because I for one would like to see that. I'd like to see what can be done apart from numerical goals.

And by the way, I am not one who cares very much whether you talk about goals or quotas. I'm in favor of quotas. I think we have a severe problem here, and it needs to be addressed. But I am willing to give up my quotas if the people who are against them can come up with an alternative. But the only alternative that anyone has come up with is to say, "Well, let's get some assurances that discrimination will end, if indeed it has ever taken place."

But how do you ever enforce anything like that? How do you make any progress on that kind of basis? How do you hold people's feet to the fire? And you have to hold their feet to the fire because it's a difficult business, trying to integrate. It's expensive; it's annoying. And people's feet have to be held to the fire. The only way that I can see to do it is through quotas, through goals and timetables. There is no other way that has been invented.

Now, unfortunately, even in the era under President Johnson, President Nixon, President Ford, and

President Carter, where we supposedly had enforcement of goals and timetables, in reality there was very little. Very, very few firms were ever disbarred from Federal contracting. I give in my paper an example of what went on in one part of the Bell Telephone Company with respect to female craftspeople. If you look at the data I give in this paper, you'll see there has not been enforcement. There has been possibly some fakery, but there has not been enforcement in this very leading case.

So I am waiting and hoping. I am waiting and hoping that we can all have a change of heart, maybe 4 years from now, and that we won't be doing what we did under those Presidents, although it was better than what's going on now. Now what's going on is insults, insults of people who are down there in the dirt. And that's low; it's low.

So I am hoping that 4 years from now we can get a change and we won't be doing what we did under those old Presidents, but we will start some better enforcement procedures.

And again, I don't think we need to bother with the fine points that if it's 51½ percent that's called for, is 49 percent enough? We have to go after the egregious cases, and there are plenty of them around.

Thank you.

CHAIRMAN PENDLETON. Thank you, Dr. Bergmann.

We will now move to Dr. Hoffmann.

Dr. Hoffmann is currently president of Hoffmann Research Associates, Inc., a social science research firm specializing in human resource management/analysis and data processing in Chapel Hill, North Carolina. Dr. Hoffman has served as a consultant to a number of major corporations. He is the past director of Educational Services at the Institute for Research of the Social Sciences, University of North Carolina, Chapel Hill. He has written extensively on human resource analysis and research methodology.

Dr. Hoffmann earned his Ph.D. in sociology at the University of North Carolina at Chapel Hill.

STATEMENT OF CARL C. HOFFMANN, PRESIDENT, HOFFMANN RESEARCH ASSOCIATES

DR. HOFFMANN. Thank you for having me here. It is a privilege. When I looked over the names of the people who were presenting, mine was the only one I didn't recognize. Thank you for the privilege of the invitation. It was attractive to take up the basketball challenge that Mr. Pendleton introduced into the papers a while back largely because I am from North Carolina, and I wondered why he chose Georgetown instead of a better team.

[Laughter.]

CHAIRMAN PENDLETON. Purely because of merit.

[Laughter.]

DR. HOFFMANN. Well, fortunately we can decide who is the better team shortly.

I found when I started writing my paper that it was almost impossible to talk strictly on the subject of underutilization and underrepresentation without getting involved in the debate on affirmative action and particularly quotas, goals, and timetables. And the more I looked into affirmative action, the more I realized that a very small part of affirmative action programs as prescribed by the OFCCP and, in fact, as instituted by most companies involves goals and timetables. That is a secondary and latter stage of the process. In fact, I started to become very irritated at the debate itself on quotas, goals, and timetables because it overlooks some very valuable parts to affirmative action.

I believe the debate on goals and timetables is misstated on both sides, and that actually the art and the science of determining underrepresentation and underutilization is, in fact, one of the strongest parts of affirmative action because it invites a company to determine what a job is and how they use people to fill that particular position, what qualifications are required for that job. It invites companies to look at the historical ways that they have filled that job and ways they might improve overall the types of people who fill that position. And affirmative action provides some guidelines for monitoring labor market imperfections and improving labor markets within corporations and within society as a whole. I am against goals and timetables as they are prescribed presently in the affirmative action plans and definitely as they are enforced. But there is a great deal to be saved in the regulations as well as to criticize.

I think that affirmative action also has one other advantage in that there are questions that can be asked under affirmative action programs which now are difficult to argue and ask in the Federal courts.

I take the debate on goals and timetables to be stereotypically this form. Proponents argue that they are solutions for past and present discrimination. The purpose of discrimination is institutionalized in an effort to keep wages of minorities and women

down. As long as there are differences that can be measured by census or global categories among minorities and between sexes, there is evidence of discrimination. Quotas are a way of achieving, directly, equality and, indirectly, changes in attitudes toward minorities and women in society as a whole.

The proponents argue that there are, in fact, few skill differences in most jobs and most people are capable of doing a broad range of jobs and can be trained for those jobs or easily acquire them, and that, therefore, these differences are unacceptable and the methods to change those differences are easily borne by companies.

The opponents of goals and timetables argue that they are, in fact, a subversion of the free market system, that they are essentially a reverse of favoritism towards white males, now favoritism towards minorities and women, and that, therefore, they counteract and, in fact, deny the process to which women and minorities have recently been given admission. They tend to argue not that jobs are fungible, but that jobs are of such a technical and highly qualified type that you have to work hard at obtaining qualifications and years of experience to achieve them.

I think both sides are somewhat myopic, although both have a good deal of truth to them.

Finally, the opponents of goals and timetables say, "Of course, there are differences because there are differences in background characteristics of minorities and women compared with white males, and as long as there are differences, of course we are going to have occupational and income differences."

Both are surprisingly similar in some respects because they both admit to differences in background characteristics. They both admit to differences in outcomes. They concede historical issues of, especially, the position of blacks in American history, and they concede the traditional role of women in society and in the family.

But both debate on a macro level. Both debate on abstractions of how these distributions exist in society. And frankly, I get confused myself when I leave the macro level and go into corporations, because then the patterns are no longer very clear.

Both sides also have one characteristic which I heartily agree with, that there are many market imperfections and inhibitions in society, among them union agreements, work rules, seniority systems, irrational job requirements and definitions, minimum wage laws, and irrational licensure laws.

Both sides make an additional mistake, however, in that they look at static distributions. One side feels that these imbalances will be gradually rectified, and the other says that no, they should be rectified immediately.

Surprisingly, neither side—and it's largely because of the level of specificity that they deal with—looks at the process by which people acquire skills and are promoted. People can actually change quickly, and it is in the nature of the American system that people still today start at the bottom as laborers or operatives, become foremen, and move to managerial positions. In that process, they are developed and they develop themselves as an interaction with the corporations. The training and development costs are costs which are normally borne by corporations in the process of rewarding and developing their work forces.

Proponents of the regulations, I think, also take the simplistic view in that they tend to feel that they can set a standard that needs to be achieved. Geographic mobility of people, economic factors related to the expansion and contractions of the labor forces, the characteristics of individuals being produced by technical and professional schools, the motivations and the transient motivations that exist in society are, in fact, very volatile and lead to constant changes.

I'd like to now reduce it to an example—and this is a hypothetical example—of a job that actually, I think, exists quite often, especially in the transportation field, where there is an entry-level job that requires upper body strength; this would be lifting of packages or bags. Associated with this job are height and weight requirements and also a decent amount of geographic mobility required for movement from site to site.

Women will be underrepresented in this job according to their representation in the community for a number of reasons: first, a lack of upper body strength, the lesser height and weight of the female population as a whole, and generally a problem of geographic mobility, especially among women in marriages.

The solution as to how women can be entered into this stereotypic job, from a conservative point of view is, "Eventually there will be some asymptomatic achievement of the number of women who are

actually capable of doing the job as long as companies hire fairly."

The activists would argue, "No, that will never happen as long as men predominate in the job because men will not think that women can do the job and women will not think they are capable of getting the job unless the job is opened to them by some mechanical, artificial form."

A better solution and a solution that is inherent in the regulation is one which invites the company to look at the requirements of the job. Is it necessary that people be required to lift or have the upper body strength or the height and weight requirements, in fact, associated with what the job requires? And is geographic mobility, a requirement to move to advance, actually necessary in order to develop personnel for management positions?

I think that the regulations—and, in fact, as Dr. Mann testified earlier—invite companies to find out whether or not these requirements are necessary and then to look outside and see who is capable of taking these positions.

In fact, a utilization analysis as defined by the OFCCP is to look at an analysis of group representation in all similar jobs after the job has been defined: An analysis of hiring practices for the past year, including recruitment sources and testing, where these people came from, how you got them, and what kind of qualifications they had; an analysis of upgrading, transfer, and promotion for the past year to determine whether equal opportunity employment is being afforded. And again, jobs are similar if they have equal content, opportunity, and pay.

The regulations, I think, are basically asking the questions: "Is your internal labor market perfect? Are you drawing people from the maximum supply that you could be able to draw them from?"

Now, I think also that this elaborates some stages in affirmative action which I also think are reflected in the regulations. What are jobs? What do you expect of them? How do you fill them? Are people being treated fairly—in other words, drawn from the sources that you recruit from equal to their representation in those sources? And how can progress be made to increase the supply of labor for particular jobs? One of the problems with this way of defining availability and, therefore, underutilization is that it varies from company to company. It depends upon how they define their jobs. It depends upon how they perceive their labor markets and supplies. It depends on the promotion processes and the amount of training which they are willing to engage in. This all reflects on the philosophy and the culture within the corporation itself.

But, basically, the employment processes can be easily defined and tracked mathematically and statistically and then evaluated for their fairness.

I use, in my paper, an example of two wholesale food producers working in exactly the same sales environment in Charlotte, North Carolina, where the census states that there is 3 percent minority availability for sales. However, one food producer, Armour Meat Packing, clearly promotes over 50 percent of the people who move into sales from their internal labor force, many of whom started as laborers, meat cutters, foremen, and clerks.

Another company promotes very few of their people from within to their sales positions. Again, these people originally started as operatives and clerks and moved into sales positions.

One company, by the mix of internal promotion and outside hires, produces an availability figure of approximately 10 percent minority, while the other 14 percent minority, largely because their internal labor forces and the places that they draw from on the external labor market are far more reflective of the general population than the sales figure the census would seem to indicate.

The question is: Why should and how do we force a company to consider all of the aspects of its labor force, and should we? I think it's clear that most companies are engaged actively in developing employment and that the process of affirmative action is merely to elaborate and codify what those rules are for people and provide them this information. It is amazing to me how many times in the 50 or 60 cases that I've done over the past 6½ years—how many companies, after a very thorough analysis of labor force has been accomplished, are amazed at the variety of people they have hired to fill those positions.

Unfortunately, affirmative action is even more complex than the basic philosophies the companies have with respect to what they define as supply, because there are characteristics within that supply that differentiate minorities and women, among those the interests that they have in obtaining particular jobs, the ability that they have in following through on those levels of interest, the qualifications that they have to take those particular jobs or that they see themselves as having.

The competition for jobs at particular times varies greatly. It is entirely possible that, at some point in time, people will be totally unqualified for a job, and then 6 months later when the job comes open many people applying are qualified. And a combination of all of these events works in some very bizarre ways to determine availability and availability figures.

Again, I see the goal of the regulations as ensuring market perfection and encouraging companies to actually acquire good personnel processes because, of all of my clients, the clients that have the least trouble with affirmative action and actually pay the least attention to it are the ones who pay a great deal of attention to their employees and to their work forces. Unfortunately, there are not many of that type of employer around.

I would like to read three examples of the regulations which I find extremely heartening.

One says that, "A company should ensure that promotion decisions are in accord with the principles of equal opportunity by imposing only valid requirements for promotional opportunities." Translated, that has the profound statement of saying, "Make promotional decisions rationally."

"Disseminate personnel information internally," another proviso, "and make sure that promotion information is prominently posted, hold special meetings with employees and unions, and hold plant tours." This translates into, "Integrate the employee into the company and use the internal labor force to your advantage. Provide extra information to overcome employee ignorance."

"Reduce seniority in job requirements." I take this to mean, "Check to make sure the labor market is not defined so narrowly as to increase the price of labor." The long term with respect to employment processes will, I think, work out. But there are a surprising number of companies who are capable of supporting inefficient employment practices because technically they are in a very good market position where they have technical expertise which can get around inefficient employment practices and essentially still provide them a profit.

I think that one of the beneficial things of the regulations—and for me the beneficial part of doing this paper—was that a great deal of the regulations are involved with the free market system, are designed to encourage the free market system, and can be operationalized to measure the ability of a company to perfect its labor market and still provide also a measure of affirmative action in terms of the effectiveness of integrating minorities and women into the labor force.

I think that it is at the level of the corporation and not at the level of societal debate at which the regulations become particularly relevant. Again, I think that quotas which say that companies are required to hire at a particular level are somewhat silly because I have seen too many companies go out and hire women and minorities to fill positions without having changed the structure of the job. And, inevitably, that leads to a large number of terminations among women and minorities. Yet they have made the numbers game, but they have made it unintelligently. But they have made it easily because all they have had to do was hire people.

Again, thank you very much for inviting me.

CHAIRMAN PENDLETON. Dr. Hoffmann, thank you.

We will now move to Dr. David Swinton.

Dr. Swinton is currently director of Clark College's Southern Center for Studies in Public Policy in Atlanta. Formerly a program director at the Urban Institute, Dr. Swinton has also taught at the State University of New York at Stony Brook, the City College of New York, and Harvard University. He has written extensively on economics and higher education in the black community. Dr. Swinton's affiliations include the National Economic Association, the American Economics Association, the editorial board of the *Review of Black Political Economy,* and Howard University's Institute for the Study of Educational Policy. He received his doctorate in economics from Harvard University.

STATEMENT OF DAVID H. SWINTON, DIRECTOR, SOUTHERN CENTER FOR STUDIES IN PUBLIC POLICY, CLARK COLLEGE

DR. SWINTON. Thank you, Mr. Chairman, Commissioner Berry, and other Commissioners. I consider it a high responsibility to come and testify before this Commission, despite my misgivings that the Commission had probably already reached a decision about this matter, based on the material that I have been able to read concerning Commission pronouncements in this area.

Nonetheless, I think it is important to make a historical record that what this Commission is doing was not done without sufficient warning about the hazardous course the Commission is taking the civil rights movement and this Nation on.

I am going to speak a little about what I have already written. It's there for you to read if you care to. I tried to write it on a relatively accessible level, although I observed from Professor Williams' remarks, despite that effort, he still was unable to understand what was being said.

My view about this Commission is that it was established to be a watchdog and an advocate for civil rights and the interests of minorities in this country. This Commission was not established to be neutral. It was not established to promote the interests of white men. They don't need your help. They control everything in the society.

I would like to start my remarks by citing what I thought was our assignment. We were asked to talk about the connection between underutilization, underrepresentation, and discrimination. We were given a quote and we were asked to determine or to give our opinion about the extent to which underutilization implied the existence of discrimination.

We also were asked in the course of this discussion to comment on the following quote: "Absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the population in the community from which employees are hired."

That is a quote from the Supreme Court decision in the *International Brotherhood of Teamsters* v. *U.S.* I observed in reviewing the papers that were submitted that at least three of the papers that commented on that quotation were seemingly not particularly in favor of that quotation. However, each paper then moved to provide explanations of why nondiscriminatory hiring would not lead to equal representation. The quotation says "absent explanation." If the explanations Mr. Williams advanced are accurate and correct, his position would not be inconsistent with the quotation. The quotation does not say that there should be numerical parity, population parity, under all circumstances. It says "absent explanation there should be parity." If you have an explanation, for example, that black folks are too dumb to be employed proportionately, then, according to the quotation, employment at a rate less than the population representation would be fine. If a legitimate explanation has been established, advance it, and you will be consistent with the policy. So I believe the question is about evidence. It's about explanation. It's about causation.

There's a lot of nonsense in this debate, a lot of it, constantly, continuously. There's a lot of misrepresentation about affirmative action guidelines imposing strict racial quotas, reverse discrimination—utter nonsense. Anybody who knows anything about this country, who knows anything about institutions of higher education or any other employers, knows that it is not a major problem in this country that employers are using quotas to displace white people. That's asinine.

In the introduction to my written presentation, I attempted to point out the connection between the historical facts of racial discrimination against blacks, by whites, and the establishment of an active equal employment opportunity policy in the early 1960s.

Equal employment opportunity and affirmative action policy were not imposed out of the blue on a well-functioning labor market to give privileges to minorities. Rather, the historical record is perfectly clear that these policies were developed after literally centuries of experience in which free market forces led whites to use their superior and socioeconomic position to systematically discriminate against blacks.

The systematic discrimination resulted—we all know this history—in restricted access to good jobs, higher rates of unemployment, limited opportunity to develop abilities and talents, and so on. These systematic economic hardships brought about by discrimination—that I don't think anybody denies—worked great hardship on these populations, created lower incomes, caused high rates of poverty, created great difficulties in raising families, etc., and so on.

It was in that context that equal employment opportunity policies were developed. They were developed for one purpose: to end white discrimination against blacks and other protected groups, and to prevent its reoccurrence.

I want to leave that thought and come back to it because a lot of people have forgotten about the job of preventing the reoccurrence of this situation. Even if it were true—as I will maintain it's not—that discrimination had been ended, it still would not follow that there was no need for an enforcement effort to prevent the reoccurrence of discrimination.

Those who advocated active EEO [equal employment opportunity] policies believed that preventing white discrimination against blacks was a necessary condition for ensuring racial equality. It is a necessary condition. They believed that it was also a

sufficient condition in the short run for permitting some immediate gains in the labor market position of blacks. And they also believed that an active effort was required to prevent whites from discriminating against blacks. They didn't believe it would happen voluntarily. History showed that it wouldn't. They believed an active effort was required.

By what I said there, it is to be understood that anybody thought that ending discrimination by itself was sufficient to establish racial equality, although the critics of affirmative action keep saying that. You know, civil rights advocates were not dummies. They knew that after hundreds of years of discrimination that there were differences produced by that process of discrimination, even ignoring any of the other differences that people suggest, which would prevent immediate racial equality.

As a matter of fact, if you think about the history of the civil rights movement, there was always an advocacy of other activities besides EEO activities as part of the strategy of ultimately eliminating the legacy of racial inequality. So we don't believe that all of racial inequality is caused by discrimination.

I don't know anybody that believes that.

COMMISSIONER BERRY. Inequality.

DR. SWINTON. Inequality, yes. Thank you.

COMMISSIONER BERRY. Anytime.

DR. SWINTON. A secondary objective of EEO policy was to contribute to ending the legacy of discrimination. But I think that most people understood this was a secondary objective, that under certain circumstances and in certain conditions it may be possible, through EEO policy, to do some compensation for the legacy. But that was not the primary objective. The primary objective was to end discrimination and prevent the recurrence of discrimination.

After these policies were passed into law via the Civil Rights Act of 1964, some revised Executive orders, etc., some gains were noted immediately in the economic positions of minorities. Some gains have been measured from specific EEO activities, even continuing through the 1970s. Nonetheless, wide gaps remain. Blacks are still utilized at a low rate in good jobs and at a high rate in bad jobs, continue to have high unemployment rates and low employment rates, and low total earnings. And these trends are worsening, have been worsening, for the last 6, 7, 8 years.

The issue we have been asked to address is: What are the implications of the persistent labor market problems of blacks; the implications of the persistent labor market problems for EEO policies? Most of my remarks are addressed to the situation of blacks. I am more familiar with that situation; I have done a lot of work on that situation. I believe that many of the same arguments could be made in the case of the other protected groups. To what extent does the continued low utilization reflect the persistence of white discrimination against blacks?

Well, I'd like to talk about that. Since blacks really have not ever discriminated against whites to any significant degree, it is white discrimination against blacks that we have established EEO policy to prevent.

To what extent does the continued low utilization of blacks reflect the continuing impact of the legacy of discrimination?

I am going to address most of my remarks to the first question: To what extent does continued low utilization reflect the persistence of white discrimination against blacks?

Before I turn to these matters, however, I would like to place the policy significance of this discussion in context. A conclusion that current discrimination persists would suggest that affirmative action and equal employment opportunity policies need to be strengthened not simply to be maintained, but need to be strengthened to be made more effective. A conclusion that the legacy of past discrimination continues to have an impact would suggest a need for stronger compensatory and corrective action.

However, the conclusion that the legacy has been overcome or current discrimination has ceased would not necessarily imply that an active EEO policy should cease. These policies may, in fact, be the reasons for the reduction in current discrimination and thus, having been shown to be successful, ought to continue to prevent discrimination. It reminds me of people who say, "Look, we've gotten rid of measles. Let's stop vaccinating." Once we do that, and we've done it a little, the measles will come back. So the fact that there may or may not be current discrimination does not imply that the regulatory effort should cease.

I think we need to start talking about: What is discrimination? I'm going to suggest a definition and make a few comments about the nature of discrimination.

I would suggest that what we ordinarily mean by discrimination in everyday language is treating individuals from two population groups different on

the basis of some descriptive characteristic such as race when the individuals are otherwise productively equivalent.

In other words, if people from different population groups are equally capable and qualified at doing the job, then we would expect them to be treated the same with respect to opportunities to get the job, levels of pay, etc., otherwise we would say discrimination is occurring.

There are various forms of discrimination, and I think that part of the confusion over this issue is caused by not recognizing that all discrimination does not take the same form. Most of the confusion is caused by the simplistic identification of discrimination with what I have called direct overt discrimination. Direct discrimination occurs when the discriminatory act is done directly because of the race of the individual. Overt direct discrimination is when it is done openly, when one says, "Blacks need not apply here. I don't hire blacks."

It could also be covert. All direct discrimination is intentional.

It is quite apparent that prior to the Civil Rights Act of 1964, much discrimination was direct and overt, open, because it wasn't illegal. After discrimination was made illegal, only a fool would continue to discriminate directly and openly. Therefore, one would expect that if discrimination continued, the form of discrimination would change; it would become covert. And that is very important because it has a lot to do with the capacity to detect. It has a lot to do with the capacity of individuals to be able to file complaints, etc.

But there are other forms of discrimination besides direct discrimination. There is a form called institutional discrimination or indirect discrimination. And institutional discrimination may or may not be intentional. And this discrimination occurs whenever institutional mechanisms or employment practices are used that discriminate against some group because the practices are biased in favor of another group, even though the practice itself may have no particular relevance to the ability to do the job.

To give you a simple example, in many jobs over the last 15 or 20 years we have upgraded credentialism requirements. All the evidence I know of suggests that the content of the work has not changed.

Now, the fact of the matter is we know that there are substantial differences between the possession of credentials among different groups in the population, and therefore, by requiring higher credentials when they are not really needed, we, in effect, discriminate against the groups which have lower credentials. As a matter of fact, that kind of discrimination has also been declared to be illegal and it's been outlawed by the regulation.

There is one other form of discrimination or bias that is not dealt with, I don't believe, by any set of regulations. Nonetheless, it has its impact. This is locational discrimination; it again may be intentional or unintentional. This is when economic activities are located in such a fashion that the locations are advantageous to the majority population and disadvantageous to the minority population. And that form of discrimination has probably been increasing as more and more of our activities concentrate in certain parts of the metropolitan area which have fewer minorities.

The point is that discrimination is a very complex phenomenon. Once the Civil Rights Act of 1964 was passed, it no longer continued to be simple, open, explicit, intentional discrimination, and that has a lot to do with what kind of enforcement is required to deal with discrimination and what kinds of activities are required to detect the existence of discrimination.

The impact of discrimination is to reduce representation or utilization if it's effective. Thus, underutilization or underrepresentation can be defined as utilization or representation at a rate lower than the expected rate in a nondiscriminatory situation.

Contrary to some of the suggestions that have been made today, that there is no basis for determining the expected representation in a nondiscriminatory world, there is a perfectly clear basis in economics. It is no great mystery. And the fact that a statistician can't reach the conclusion is also not a surprise, because statisticians are not subject-area scientists, and so they really don't have the understanding of the phenomena that their statistics are describing.

I doubt if many agriculturalists would have much problem associating statistical evidence on the relationship between fertilizers and crop growth with a causative explanation. The fact that a statistician may have difficulty doing that is irrelevant.

Economics does have a theory and an understanding of how labor markets ought to work and how they would work in the absence of discrimination. The expected outcomes of fair labor markets is one of the most established propositions of economic

theory. It can be readily shown by most students who have gotten through the undergraduate school that the expected representation of blacks in a nondiscriminatory world would always equal the proportion of blacks in the availability pools. And that's a rather easily defined pool which, in general, would equal the proportion of blacks among those with the productive capacity to do the job.

It is also rather trivial to show that systematic, persistent variation from this result should not be expected in the absence of discrimination. Given the laws of large numbers, etc., consistent observations of underutilization in labor markets as a whole, in large firms, in any given group of small firms, etc., are indicators that discrimination is occurring.

Now, let me be clear about the way I define underutilization lest I create some unnecessary confusion. This definition makes a distinction between underutilization and low representation. Low representation does not necessarily imply underutilization. Expected representation is not necessarily equal to the population proportion. There is nothing anyplace in the regulations, in the rules, that says that expected representation is equal to the population proportion.

Why critics of EEO policy keep saying that is beyond me. It is quite clear that one is expected to do a fairly elaborate analysis of availability in order to determine what the expected representation would be, and all of the studies I have seen have shown that population parity is not the required availability concept. For example, I did a case study of Harvard University. They had many departments in which they defined their expected representation as zero. Their plan was approved with no problems by the enforcement agency because they gave reasonable explanations about why they would expect to have zero representation. The notion that somehow the civil rights enforcement agencies require people to have 12 percent black brain surgeons when there are only one-half of 1 percent blacks with training in brain surgery is nonsense. It is simply a debater's tactic to distract from the essence of what these regulations are intended to accomplish.

From what I have said, then, observed low representation would have two components. One would be what we would call a productivity difference component. And the other would be the underutilization or the discrimination component.

The question about today's problems of blacks or women or other protected groups is how much of this observed underrepresentation is due to the productivity component and how much of it is due to the discrimination component.

This is an empirical question. Citing differences between the education of blacks and the test scores of blacks is not a serious bit of evidence. Everybody on both sides of the debate knows those differences exist, you know! To provide meaningful evidence, those differences would have to be related to the outcome differences that we are trying to explain through some scientific procedure or another.

The fact of the matter is that there have been a lot of studies that have done just that—not a few, but a lot of studies—that have taken into account differences in productivity. Some studies, not as many, have taken into account differences in performance on standardized tests. This is not a new field. People have been studying this for a long time.

The evidence has consistently found that 40 to 60 percent of the racial gap in labor markets is attributable to discrimination. And it is important to understand that the racial gaps in the labor markets are not simply wages and wage ratios and earning ratios of employed workers. It also has to do with who has jobs, whether you are employed or not. All of those things matter.

The fact of the matter is in the last few years the biggest difficulty of black workers has been getting jobs, not getting equal pay or equal jobs, but just getting jobs at all.

I go into this more in the paper and suggest that it seems to me that no reasonable interpretation of the evidence can suggest that there is not a significant proportion of the racial gaps that continues to be due to racial discrimination.

I just want to wrap up; I noticed the Chairman signaling me that I only have 1 or 2 minutes left, so let me try to close this real quick. I would just like to make a comment about four things and skip the rest of what I would have said. These things have to do with suggested redirections and changes in civil rights policy.

One of these things is a notion that civil rights policy should be colorblind, that this is, in fact, the original intention of those people who advocated civil rights policies. In my view, this is a blatant piece of historical revisionism. I go into some of the reasons for why this makes absolutely no sense, in the paper.

One cannot enforce equal opportunity policy with a colorblind approach. It is just ludicrous to say that you are going to stop whites from discriminating against blacks by being colorblind. It makes no sense at all.

CHAIRMAN PENDLETON. I hate to do this to you, but you've gone over time and we want to have about an hour for questions, so if you can kind of wrap up.

DR. SWINTON. That's what I'm trying to do, sir. I'm trying to draw this to a close. Will you give me about 2 more minutes?

CHAIRMAN PENDLETON. I will. You've had 25 already. But go ahead.

DR. SWINTON. I'm sorry; I wasn't watching my watch.

You threw me off my train of thought.

COMMISSIONER BERRY. Colorblind.

DR. SWINTON. This notion that you can enforce civil rights policy by being colorblind is sort of a confusion. Certain civil rights advocates wanted to see a society where everybody was treated equally, had equal opportunities without respect to color, race, and all of this kind of stuff, but the point is that to achieve that society, to achieve that goal, you may have to in fact adopt color-conscious policies. You simply may not be able to achieve that goal any other way. There's a confusion between the goal and the means of achieving it.

There is a notion that we should rely on individual complaints. This makes absolutely no sense. If you have an understanding of the nature of discrimination, the distinction between explicit and implicit, the nature of institutional discrimination, etc., there is no possibility for many individuals to even know when they are being discriminated against. How are they going to complain about it?

Some critics say we shouldn't use statistical evidence. That shows a complete misunderstanding of economics and statistics. The fact of the matter is that statistical evidence of underutilization is perfectly legitimate proof and establishes quite clearly the existence of discrimination. It is, in fact, the only reliable evidence, given the fact that people dissemble their true intentions and their true behavior. Nobody admits to discriminating. You can't really expect to find it without using statistical procedures.

Finally, this notion about abandoning numerical goals in utilization analysis also makes very little sense, but for somewhat different reasons. The fact of the matter is that numerical goals, properly pursued, are not intended to provide preference for anybody. They are not intended to provide special treatment for anybody. They are simply intended to ensure that everybody is being hired in accordance with what one would expect from a nondiscriminatory situation. If that is happening already, if there are legitimate reasons for why disproportionately high numbers of a protected group aren't being hired, then there won't be any numerical goal higher than the current employment proportions.

Thank you. Thank you for the extra time.

CHAIRMAN PENDLETON. Thank you.

I think we will start the questioning from the right side of the table.

Commissioner Guess, do you have a question?

COMMISSIONER GUESS. Thank you, Mr. Chairman.

In the interests of time, I'm only going to ask a couple of questions. I'd like to start with Professor Williams.

Professor Williams, I'm a former member of the faculty at Meharry Medical College. I want to see if I can understand some of what you implied in your presentation to the Commission, and by way of doing so we'll use an example, particularly as it looks at the characteristics of underutilization and underrepresentation. Let us say for the purposes of this question that a medical school, such as Meharry, admitted 100 students a year over 10 years, and during that year it received 5,000 applications from whites, 1,000 applications from blacks, and admitted 1,000 blacks. Would you regard this as evidence of discrimination on the part of Meharry against whites?

DR. WILLIAMS. I don't know.

COMMISSIONER GUESS. What variables then do you take into consideration?

DR. WILLIAMS. It seems like if you are going to determine whether it's racial discrimination, surely you have to get some information about the intentions and follow it up with the actions that follow those intentions of the admissions.

COMMISSIONER GUESS. How would you ascertain the intentions on the part of a school like Meharry, a historical black medical college? What would you look for in terms of intent?

DR. WILLIAMS. I don't know. There's law on how you discern intentions. I can't read anybody's mind. That is a difficult thing to do. But I know alone, all by itself, that numbers alone do not show intentions. If numbers alone show intentions, you would have

to ask, and the Civil Rights Commission would have to bring a case against the NBA for underrepresentation of whites and Asians and women if you allowed numbers to be your guide to intentions.

COMMISSIONER GUESS. But in some instances could numbers be used as prima facie evidence of discriminatory action on someone's part?

DR. WILLIAMS. I don't know. They can serve you as to say, "Well, there might be." But all by itself it's no evidence.

COMMISSIONER GUESS. One point you did make, Professor Williams. In your written presentation, you say that, in effect, a numbers-oriented policy says we should help individual *A,* a black of today, by punishing *B,* a white of today, for what individual *C,* a white of yesterday, did to individual *D* a black of yesterday, if that is a warped criterion within social justice, especially if we accept the position of individual accountability.

What I was wondering from that perspective, Professor Williams is, as it pertains to individual accountability, how would you factor in what *C,* a white of yesterday, did for *B,* a white of today, in the transfer of wealth and property acquired as a result of what *C,* a white of yesterday, did to *D,* a black of today?

DR. WILLIAMS. How would I, in my opinion? There is no answer to that question, in my opinion.

COMMISSIONER GUESS. Well—

DR. WILLIAMS. Let me finish my answer if you want me to complete my answer. There might be a question of what blacks of today will compensate the Indians of today because surely the whole Nation took this whole land from Indians, and indeed, blacks are benefiting from the land that we took from Indians. A similar question could be asked: How could blacks compensate the Indians and the Mexicans—we took some land from the Mexicans as well.

COMMISSIONER GUESS. I understand. So are you suggesting, then, that an identification of those resources which were passed on as a result of what happened yesterday, and a subsequent redistribution of them to allow everyone to start at point zero, may be appropriate?

DR. WILLIAMS. No, I think that compensatory justice over time across generations is utter nonsense, and there is no particular moral value that that kind of action is consistent with.

COMMISSIONER GUESS. Okay, Professor Williams.

I'd like to ask the other members of the panel, Mr. Chairman—and I noticed Professor Bergmann referred to it in her arguments and Professor Williams just alluded to the same concept in looking at the NBA—and that's their view of the Georgetown basketball team argument.

Professor Bergmann, am I to understand that you agree or disagree that the Georgetown basketball team, and since its coach is black as you pointed out, may, in fact, be discriminating against white basketball players?

DR. BERGMANN. I would say that the spirit of the enforcement process should be that if we think that it is important, this certainly does suggest there is an exclusion. There have been exclusions. Certainly, blacks have been excluded from other teams, we know that, in the past. As a matter of fact, there's been some econometric work to suggest that blacks still have to do better than whites to make the team in some sports. So it wouldn't be out of the question for there to be discrimination against whites in this case.

What I am trying to emphasize in my testimony is that we have very limited enforcement resources. We ought to have more, but even in the best case we have very limited enforcement resources. And these ought to be concentrated on important cases.

Now, the difference between the Georgetown case and sort of your everyday case is that Georgetown is in a championship situation. They are trying to pick the best six people in the country—but let me refer to my example.

CHAIRMAN PENDLETON. They only have five on the playing floor at one time, Dr. Bergmann, not six.

[Laughter.]

DR. BERGMANN. Thank you. Let me refer again to my example of what goes on upstairs in the banquet hall.

COMMISSIONER BUNZEL. That's just another statistic, isn't it?

DR. BERGMANN. It's another example.

Let me refer to what goes on in the banquet hall of this particular hotel where there are very few, certainly disproportionately few, women waiting on tables at the banquets. You don't need to be the very best in the country, at anything, to get a job as a banquet waiter or waitress, but those things are segregated.

So I don't think that even if we were to conclude that it is unlikely that there is discrimination in the Georgetown case, that doesn't prove anything about

other cases. That is not the typical example. The typical example is what you see every day. If you walk around this hotel, you will see that all or a substantial proportion of the people in charge are white males. And I would again echo what Professor Swinton has said. It is ludicrous for the Civil Rights Commission to spend its time and energy promoting them.

COMMISSIONER GUESS. Mr. Chairman, I would like to yield to my colleague who is always to the left of me.

COMMISSIONER DESTRO. Are you certain about that?

COMMISSIONER GUESS. I try to be—and reserve the right to ask a question or two later.

CHAIRMAN PENDLETON. As we pass on to Mr. Destro, Dr. Bergmann, I only want to say that, with the good graces of ESPN, I am impressed that there are many basketball teams in this country, not just Georgetown, that when the first five go on the playing floor, they are all black, and I think that that's a sign of progress based on merit.

DR. BERGMANN. I wish it were going on in this hotel. That's more important, to say nothing about Sears and Woodies.

CHAIRMAN PENDLETON. Mr. Destro, you have been interrupted, but here you are.

COMMISSIONER DESTRO. Thank you, Mr. Chairman. I have a number of questions for various members of the panel, just to get a sense for some of the definitions that are being used by the panelists.

Dr. Mann, first, if I can just ask a technical question. This is just in an area that interests me particularly. You indicated in your paper and in your oral presentation that it is possible to correlate the data between the Bureau of the Census and the EEO categories. And you talked about a crosswalk. Is it possible, to your knowledge, based on whatever the factors are with the crosswalk, to correlate the nonavailability data with respect to the non-EEO-1 categories? You know the general EEO-1 categories?

DR. MANN. Yes.

COMMISSIONER DESTRO. Would it be possible using a computer to break down the availability data from the Bureau of the Census on further ethnic lines within the white community, for example?

DR. MANN. My understanding is that they have not collected the data in such a way that you can go into further ethnic detail.

COMMISSIONER DESTRO. So that would have to be limited, then, to the EEO-1?

DR. MANN. When you ask if it's possible, the Census has a substantial amount of data that it has not made easily available. This data has to be processed before you can use it. They have published something called an EEO file which definitely does not contain the information you're asking about.

As to whether the information is itself physically available on the forms that were requested of the subsample, they specify national background, national origin, and occupation. So, in theory, it will be possible to capture that data and cross tabulate it the way you indicate. But the cost would be enormous, and they have only done certain parts of the processing which they felt were of more general interest. To my knowledge, that is not included among the processing that has already been done.

Bear in mind, to generate any custom table one has to pass all the data, and therefore, it becomes very expensive.

COMMISSIONER DESTRO. I just wanted to know whether or not it was possible.

Dr. Swinton, if I can ask a couple of questions. What I am struggling with in your presentation as I understand it, I think, is its basic thrust. I need to understand what it is you mean by a couple of the ways in which you define the term "discrimination." You talk in one place about institutional discrimination. Am I to understand that your definition of institutional discrimination is that it exists whenever there is a disproportionate impact on minorities? Is that a fair reading of your paper?

DR. SWINTON. That's half of the definition. The other half of the definition is that the institution is either not productively relevant or there is some alternative productively relevant institution that can serve the same purpose and not have a disparate impact.

COMMISSIONER DESTRO. Okay. Then with respect to one other term—I'll leave some of the other questions for others. With respect to the term "locational bias," let me just run a hypothetical by you.

Assume that a company chooses its location for economic reasons, for example, a suburban location gives it a tax credit to locate, or that there is some access to a major transportation artery, and this creates a locational bias for members of a core city

minority community. Would you define this as being a discriminatory outcome?

DR. SWINTON. Well, it certainly is a discriminatory outcome. Whether or not it is something that should be interdicted by the law or any kind of public action is another issue. But it certainly does discriminate against minorities when all activities locate outside of their community.

Have I answered your question?

COMMISSIONER DESTRO. What I'm trying to get an understanding of is why that discriminates. It hasn't taken minorities into account at all.

DR. SWINTON. Because discrimination does not have to be intentional. Discrimination is having a disparate impact when there is some other alternative that would not have that disparate impact. Much discrimination is unintentional, may not take minorities into account.

COMMISSIONER DESTRO. Thank you very much.

Dr. Williams, one question for you. What do you suggest is the answer to those who view discrimination as institutionalized? Your focus seemed to be education, but it seems certain, at least, that some of the attitudes with respect to minority children in the educational community could also be described as discriminatory, and that those have a later impact under access to the labor market.

DR. WILLIAMS. Surely as Professor Swinton says, everything is discrimination—racial, sexual, etc., etc. I discriminated against white women when I was choosing a wife to marry and did not give every woman equal opportunity. So as a result of making a choice, we have to discriminate.

Now, there are some institutional discriminatory techniques that do have an adverse impact on blacks. In my book *The State Against Blacks,* I went through several licensing laws that were written with the stated intention to eliminate blacks from the field of plumbing, and electricians, and firemen on railroads. These laws still stay on the books, although they don't have that as the stated intention.

The Davis-Bacon Act, which is a super minimum wage law, is a form of institutional discrimination against blacks. In fact, every black civil rights organization supports the Davis-Bacon Act, despite the fact that in the legislative debate on the Davis-Bacon Act, and I quote from page 6513 of the March 31 *Congressional Record.* It's a statement by Congressman Algood in support of the Davis-Bacon Act: "That contractor over there has cheap colored labor that it brings up from the South and it is labor of that sort that white Americans have to compete with."

Then he later goes on to say: "This is why we need the Davis-Bacon Act."

The Davis-Bacon Act institutionally discriminates against the employment of nonunion labor on Federal construction jobs. Most blacks who are in construction are in the nonunion sector, whether as contractor or as workers. That is institutional discrimination, but it's still on the books today, but we just give it a nice name. They just kind of coat it over with some sugar when the black politicians and labor unions support that kind of law, but nonetheless, it still has a discriminatory effect against blacks.

But nobody is interested in that, nobody on the Civil Rights Commission, nobody in the EEOC, nobody in the NAACP. All they are interested in is these quota programs.

CHAIRMAN PENDLETON. I would hope, Dr. Williams, you wouldn't lump us all together in the same vein. Some of us think a little differently.

Is that all?

COMMISSIONER DESTRO. No, just one question for Dr. Bergmann and then I'll pass on.

One thing that has intrigued me throughout these papers is that usually the equation is between women and minorities, and I recognize there is occupational segregation, but it seems to me that in lumping them together you are really comparing two disparate groups who have unique problems. Why are they lumped together in your paper, and why do we generally hear them spoken about in the same vein?

DR. BERGMANN. Well, I believe that they do suffer from very similar problems. And black women, of course, suffer from both sets of problems.

The major problems, I believe, they suffer from today are that they are groups which are viewed as having a proper place in subordinate employment. And they are socially subordinate, and this is just a fact of life. And I believe also that the mechanisms of discrimination and exclusion are the same.

You know, in some places it is worse on black males or on black females or what have you, but it is the same mechanism. I believe employers have the same motivation. And the motivation that employers have is not to have trouble among their work people and not to have fights, and just to keep everything in an orthodox way.

By the way, I want to emphasize that I tend to disagree with Dr. Swinton. I don't believe we even ought to bring up this issue of past discrimination

and its effect today. I think we ought to go after whatever there is of discrimination today. That's plenty enough of a goal. I think that if we succeed in licking that and in making progress against that, and in making some progress—and there has been some progress; I think that ought to be said and celebrated; there hasn't been enough, but there has been some progress—if we can lick the discrimination that is going on today, that will be a clue to all kinds of other good things happening, I think, both in the educational field and so on.

By the way, let me also take the opportunity to say I agree with Dr. Williams on the Davis-Bacon Act.

CHAIRMAN PENDLETON. Thank you.

Commissioner Buckley.

COMMISSIONER BUCKLEY. Dr. Williams, I hear you saying that the quality of the educational experience for minorities is less than for whites. Can you possibly tell us briefly what you think are the causal factors for this lesser quality?

DR. WILLIAMS. So far as the quality of black education, there is enough blame to go around. That is, there is enough blame for everybody—blame for the students who come to school and assault the teachers and don't come to school regularly or don't do their homework. There's blame for parents who don't insist the kids do well. There's blame for teachers. Many teachers in their case can't read and write very well at the ninth grade level themselves. And there is blame for people in the administration.

But the solution is not necessarily finding the blame. The solution is to allow people options to find a solution to their own educational problems as blacks are, indeed, beginning to do today. That is, they are beginning to opt out of the public school system and going to nonpublic schools. There's roughly about 300 black independent schools across the Nation who are doing by and large a far superior job of educating the kids than the public school system.

Look at the public school system and its incentive structure. Teachers get paid whether the kids can read and write or not; principals get paid whether the kids can read and write or not, and the kids get their diplomas whether they can read and write or not. This perverse incentive structure might be changed by the method by which we produce or finance schools in our country.

COMMISSIONER BUCKLEY. Are you, then, in favor of tuition tax credits for these private institutions to improve education, especially, as you say, for the blacks wanting to go to better private schools?

DR. WILLIAMS. Yes, I am. The problem of education is not just a black problem. It's a human problem facing many parents across the country. It's just worse for blacks.

Yes, I'm in favor of a tuition tax credit or a voucher system that will give parents some of the options that middle-class parents have, but the key issue is to put greater power in the hands of parents to make choices about their kids' education, rather than leaving the choices up to some remote bureaucracy or some fat Senator in Washington that doesn't give a damn about a kid's education.

Excuse the expression.

COMMISSIONER BUCKLEY. You made the statement that black females of college level have—what?

DR. WILLIAMS. 1.25.

COMMISSIONER BUCKLEY. Over white males?

DR. WILLIAMS. No, white females.

COMMISSIONER BUCKLEY. White females. Do you have any suggestions as to why that is happening?

DR. WILLIAMS. When I did this study, I looked at the distribution of black and white females across about 29 professional occupations, and I did a rank-order correlation, a coefficient test, which is a measure to compare distributions, and I found out that black and white females had almost identical distribution across professional occupations. As a matter of fact, the rank-order correlation coefficient came to 0.94, which is very significant.

Now, black and white males who are college graduates had a significantly different distribution across the occupations, and the correlation coefficient came to 0.54.

Now, the most important category for females who are professionals, college graduates, is in nonuniversity teaching. Roughly about 46 percent of black females are in nonuniversity teaching and roughly about 44 percent of white females. And you find nursing is an important category and dieticians, etc., etc. But you find comparable percentages in these different occupations.

Now, I would guess that the fact that black female college graduates who work 50 to 52 weeks a year earn median incomes higher than white female graduates is not due to discrimination in their favor. The major difference is locational differences. Blacks are much more urbanized than are whites. It turns out that schools pay higher salaries in urban

areas; nurses earn higher salaries in urban areas, and dieticians earn higher salaries in urban areas. That may explain most of the differential, as opposed to some kind of racial discrimination against white women who are college graduates and professionals.

COMMISSIONER BUCKLEY. I was not implying racial discrimination. I was just asking for an explanation.

Would you concede that affirmative action may itself account for the differential between the white woman and the black woman?

DR. WILLIAMS. Well, that's what I said. When I first looked at that 1970 statistic—and this statistic is one of the best kept secrets since the Manhattan Project, by the way. I said, "Maybe the reason they're making 125 percent is because if you hire a black woman you get a double goodie, not only a woman, but you get a black as well, so you're willing to pay a whole lot."

So I said, "Let me check for 1960." In 1960 it was 102 percent. That is, they made 2 percent more than white females, and this was long before the Civil Rights Act of 1964 and surely before any revised orders.

Then I said, "Well, maybe it's because of Eisenhower or Kennedy." Then I went to 1950, and it turned out to be roughly 99 percent at parity.

So you can't trace this at all to affirmative action.

DR. MANN. May I address a point that came up in there?

COMMISSIONER BUCKLEY. Yes, sir.

DR. MANN. It seems to me I'm hearing a good deal of discussion that is opinion as opposed to fact. I'm not familiar with Dr. William's study. This is not meant to criticize his study, but to point out what is possible. It is possible to conduct such a study and to investigate the question as to whether urban representation is an explanatory variable and whether it, in fact, does explain the correlation that was observed or the difference that was observed.

I would like to point out—and it's irritating as I listen to the various speakers—that you are listening to people who, for the most part, are technically trained, but you are listening to them on a wide variety of subjects. I suggest that when we get off the concept of technical measurement of variation you are hearing personal opinion as distinct from professional opinion.

COMMISSIONER BUCKLEY. Dr. Swinton, you say that post the Civil Rights Act of 1964 there were some gains in the labor market position of blacks, from the mid-1960s to the first half of the 1970s. In making this determination, did you exclude what might have been attributable to drafting or voluntary enlisting of blacks at that time?

DR. SWINTON. I'm not quite sure I understand your question.

COMMISSIONER BUCKLEY. During the mid-1960s to seventies they were drafting, and there were a lot of people that were enlisting to go over to Vietnam, and you would suspect that a lot of blacks who were not in college would have been drafted. Did you consider that as one of the factors before you made your determination and exclude that?

DR. SWINTON. Let me say I didn't explain that. I didn't say why that gain occurred. I just pointed out a fact, that that gain did occur.

COMMISSIONER BUCKLEY. But you were saying it was because of the Civil Rights Act of 1964.

DR. SWINTON. No, I didn't say that at all. I did not say it was because of the Civil Rights Act. I said it followed the Civil Rights Act. As a matter of fact, there have been quite a number of studies, and there is some controversy as to what caused it. There is a question as to why that gain occurred and whether it was connected with the Civil Rights Act. Some people think it was and some people think it wasn't. And they have taken into account a variety of different factors that were going on at that time, including the level of development, etc.

The purpose of that statement was not to make that point. The point is if you read the paper, it was just making the point that there were some positive results that had more of an effect on people's beliefs about what had occurred and how much progress we have made against discrimination, etc., and so on. And that belief structure that followed that period is influencing the way we are viewing this situation nowadays. That is the point that is being made here.

COMMISSIONER BUCKLEY. Thank you.

CHAIRMAN PENDLETON. Mr. Abram.

VICE CHAIRMAN ABRAM. Dr. Bergmann, would you agree—in fact, it's the only definition I've ever found that is very satisfying—with Aristotle's view that justice is to give each his due? Does that satisfy you or ring a moral bell within you?

DR. BERGMANN. Well, I don't see anything against it. Why don't you go on?

[Laughter.]

VICE CHAIRMAN ABRAM. Well, I was interested in your relative attitude about your son and your daughter, if they each wish to be a doctor. I

understood you—maybe I'm wrong—to say that even if your son were better qualified, you would think your daughter was due the opportunity.

DR. BERGMANN. No, sir, I didn't say that. What I said was—someone asked me, since I had expressed a belief in quotas or in goals and timetables, wasn't I worried that the mother of a Jewish boy would have the anguish of seeing him unjustly denied admission to medical school.

And I said, "I'm a Jewish mother, and what I wish for my son is that he be fairly considered, but I happen to know that he is privileged. He can get a job as a waiter in this hotel; my daughter can't."

[Laughter.]

VICE CHAIRMAN ABRAM. Madam, to give meaning to the definition of justice, isn't justice a demand that a person receive that which he is best qualified for in the interest of society so we have better doctors and for the fulfillment of the individual, regardless of race? Isn't that justice? Isn't justice, for example, that your son should receive a waiter's job when he is better qualified than the person who might, on a racial basis or sexual basis, be given an opportunity to go to medical school, to say nothing of society's benefits?

DR. BERGMANN. One thing I have been trying to emphasize in what I've said is that enforcement and most of our discussion should be directed towards the egregious examples of exclusion. I am glad that there are attempts to get blacks in medical school more than they have been.

VICE CHAIRMAN ABRAM. So am I.

DR. BERGMANN. And I think their entrance to medical school will do us a great deal of good. But I think we shouldn't be talking so much about doctors, engineers—

VICE CHAIRMAN ABRAM. Well, I did only because you mentioned it.

DR. BERGMANN. —or brain surgeons; we ought to be talking about truck drivers.

VICE CHAIRMAN ABRAM. I did it because you mentioned it.

DR. BERGMANN. We ought to be talking about truck drivers; we ought to be talking about waiters; we ought to be talking about salesmen and saleswomen.

VICE CHAIRMAN ABRAM. All right, we heard you on that. Let me, if I may, ask you a couple more questions.

First of all, I want to thank you for your frank admission that you are for quotas because it's been a very difficult job to have this admission from a great number of persons in the civil rights movement. And I would like to say, because the record needs to be set straight, that while this Commission has taken a position with respect to quotas, this hearing—and Dr. Swinton particularly—was called to hear opinion on underrepresentation and underutilization, as a finding of discrimination, and minority set-asides, which we will be discussing later. Neither of these subjects has been the subject of Commission pronouncements or findings. So I'd like to get that straight.

Now, Dr. Swinton, if I may, please. You called simplistic the statement—well, I'll read it to you:

> Those who have latched onto the colorblind slogan appear to be victims of simplistic error in reasoning. They have been unable to distinguish between the long-run objective of the civil rights movement to ultimately create a society where race or other irrelevant attributes do not determine one's faith and the policies required to bring about such a society.

Now, that's your paper.

Would you say that Justice Thurgood Marshall in his briefs in *Brown* v. *Topeka* and numerous other briefs in which he appealed for a colorblind society was simplistic?

DR. SWINTON. I would say that you are reading his appeal out of context and you are misunderstanding what he meant.

VICE CHAIRMAN ABRAM. Have you read the briefs?

DR. SWINTON. I have read his brief in the *Bakke* case.

VICE CHAIRMAN ABRAM. He didn't write a brief in the *Bakke* case. He judged the *Bakke* case. Did you read his brief in *Brown* v. *Topeka?*

DR. SWINTON. No, I did not.

VICE CHAIRMAN ABRAM. Now, let me ask you this: How long, under your theory of the manipulation of a society by quotas and racial preferences, should we continue to use these preferences? When do we find out that the society is nondiscriminatory according to your standards? And isn't that the purpose of this hearing?

DR. SWINTON. Well, let me answer your question in two ways. You are setting up another artificial distinction which is why you probably can't understand what is being said. You are not listening to what is being said. I have made it very clear that I am not talking about quotas of preferential treat-

ment. You have retranslated what I said into quotas and preferential treatment. And I don't know how to answer you. You're not talking about what I'm talking about.

VICE CHAIRMAN ABRAM. Are you opposed to quotas?

DR. SWINTON. Not necessarily.

VICE CHAIRMAN ABRAM. Are you opposed to preferential treatment on the grounds of race?

DR. SWINTON. Not necessarily. However, that is not what I addressed and that is not what was being addressed here. What is being addressed here is the problem of underutilization, the use of utilization analysis, and the use of goals and timetables.

Let me answer specifically what I think you are trying to get at.

VICE CHAIRMAN ABRAM. Please.

DR. SWINTON. In my view, the proper use of goals and timetables is to correct discriminatory differences, to correct a situation of discrimination.

VICE CHAIRMAN ABRAM. Right.

DR. SWINTON. When such a situation ceases to exist—

VICE CHAIRMAN ABRAM. How will we know when it ceases to exist?

DR. SWINTON. When there is no longer any underutilization, when all of the gaps and differences are, in fact, explained by reasonable explanations. That is when the situation would indicate that discrimination has ceased.

VICE CHAIRMAN ABRAM. In other words, when all jobs and opportunities in the society are proportional to the representation of identifiable groups?

DR. SWINTON. No, sir, not necessarily.

VICE CHAIRMAN ABRAM. Would that be one of the—

DR. SWINTON. Not necessarily. That may not be an end of discrimination at all. It may be that blacks should be overrepresented in some jobs. I don't really know.

VICE CHAIRMAN ABRAM. Or whites?

DR. SWINTON. Or whites, sure.

VICE CHAIRMAN ABRAM. May I then finish with this: You stated at your opening that the Civil Rights Commission was not established to promote the interest of white men. I wonder—because this is a very fundamental question—if you would agree with Commissioners Berry and Ramirez who have said, "The civil rights laws were not passed to give civil rights to all Americans." Do you agree with that?

DR. SWINTON. Most Americans had civil rights.

VICE CHAIRMAN ABRAM. Sir, I'm—

DR. SWINTON. Listen, I can't answer your questions out of context. If you leave them out of context, I will put them in a context and answer them. I am not simply going to respond to your off-the-wall questions.

VICE CHAIRMAN ABRAM. I'm asking you whether you agree with the statement.

DR. SWINTON. I'm not going to answer your question because it's out of context.

VICE CHAIRMAN ABRAM. All right.

CHAIRMAN PENDLETON. Mr. Bunzel.

COMMISSIONER BUNZEL. I'd like to address first a comment to Professor Bergmann. I must say as a fellow academic I was somewhat disturbed—Mr. Abram didn't call it to your attention, but I would like to. When he left the room during your comments, you went out of your way to make a public statement implying that he left because he did not want to hear what you had to say.

Now, that may be your style and, indeed, that may be your way of inference. But I put it to you, Professor Bergmann, that that is less than the professional way of treating anybody in this room who walks in and out of these hearings at will. To rub some bitterness of your own, or some disappointment, without any evidence, and to suggest publicly, without any shred of evidence as to why he left the room, that he left the room because he didn't want to hear your views, and then to go on to say, "And I'm not surprised."—that seems to me to be beyond professional good taste.

DR. BERGMANN. Yes. I must say I did regret that remark the minute I made it, and I have to agree with everything you say about it. However, the remark was made because I really was anxious for Mr. Abram to hear what I had to say, and it represented my disappointment that he was missing some of it. Mr. Abram was the president of the university that I used to teach at, and since he and I are both Jews, I would like more Jews to hear how important affirmative action is.

So I accept your rebuke. It is entirely justified, and I apologize.

COMMISSIONER BUNZEL. Let me just proceed, Professor Bergmann, with a few other things because I was interested in your line of reasoning. I've gotten a pretty clear picture of what you think about this hotel.

[Laughter.]

DR. BERGMANN. It's just typical of the vast majority of American establishments. I don't mean to single it out.

COMMISSIONER BUNZEL. Well, you did a good job. I gather you don't eat here and don't want to stay here, but it was very generous of you to participate in a panel here.

[Laughter.]

COMMISSIONER BUNZEL. You also said at one point that discrimination is much more a threat than the Russians. I listened to you, and I was thankful that this wasn't a detour into foreign policy, and I thank you for that. I wasn't quite sure what you meant. I assume that you perhaps meant that heart attacks are more of a threat also than the Russians.

But I do want to ask—and this is not my central thrust of questioning: Do we somehow infer from this that there is some form of moral priority or some form of political priority in which discrimination as you defined it is, in fact, in your judgment more of a threat than the Russians? What does that mean? How do we compare—

DR. BERGMANN. What I mean is that for us even to predominate in the world or to give an example to the world, we need to have a more just society than we do. I happen to think that this is the best country in the world in many respects, but I think we are threatened—we are threatened by the Russians, obviously, but I think the more important threat and perhaps the threat we can do most about is the threat of the breakdown of our society due to race injustice. I think this Goetz case in New York is a perfect example of the breakdown or the threatened breakdown of our society by perceived injustice. I don't want to perhaps bring that in too much, and I certainly don't want to excuse crime. I think we ought to be much tougher on crime than we are. But a lot of crime does derive from the sense on the part of some people that they are not being given a fair chance.

COMMISSIONER BUNZEL. Let me see if you would simply agree with what I'm saying, because I don't want to dwell on this particularly. Is there any reason to believe that the problem of discrimination in this country and the problem of the Russians are somehow ones we can't deal with mutually at the same time? Are they mutually exclusive?

DR. BERGMANN. We are now being told we can't do certain things because of the deficit. Well, of course, the size of the deficit is not unrelated to the size of the defense budget.

COMMISSIONER BUNZEL. Or to a lot of other things, perhaps, arguably.

DR. BERGMANN. That's true.

I would just like to take 2 minutes to give a better response than perhaps I gave to one of Mr. Abram's questions. He asked me: Do I think that everybody should get his due, and do I think everybody should get the job he or she is most qualified for?

I do, but what I am concerned about is that that isn't happening now, that there is a lot of injustice, that there is a lot of denial that is not explained by incompetence, that is explained by exclusion, that is explained by discrimination.

So I am just as concerned about justice, I think, as Mr. Abram, but he is concerned about people who at least seem to be getting more than their fair share. I am concerned about justice to people who seem to be getting less than their fair share. Now, Mr. Williams says no, it's not true, everybody is getting exactly their fair share, or if they are not, it's the Davis-Bacon Act.

[Laughter.]

COMMISSIONER BUNZEL. I'm not so certain Mr. Williams said all of that.

DR. MANN. Only the IRS gets a fair share.

COMMISSIONER BUNZEL. You also made a passing reference that perhaps you're here because of the quota, that the reason you are here possibly was because you are filling a quota. May I suggest to you that since there is no evidence of that whatsoever, and that the comment, again, was not based upon any evidence, perhaps you are here because you articulate a point of view that the Commission and those who put the panel together thought was important to be heard, and that it had nothing to do with the quota.

DR. BERGMANN. What I'm trying to say was not that the Commission was being untrue to its bad attitude towards quotas—and certainly, I have no evidence that that was the case. I wouldn't be surprised—let me put it this way—if had the Commission, even this Commission, gotten together a list which had no females on it, somebody would have said, "That won't do. We've really got to have one or two." And I would say that even this Commission would be infected with that kind of good sense.

[Laughter and applause.]

COMMISSIONER BUNZEL. All I want to say to you—

DR. BERGMANN. Wouldn't you say that, Mr. Bunzel? If the whole list had been male, wouldn't

you have said, "Gee, we've got to get one or two of them"? Come on; admit it.

[Laughter.]

COMMISSIONER BUNZEL. If the Commission was going about trying to bring a representation of the different points of view, as we did with our comparable worth panel in the spring—which everybody has agreed publicly and privately was perhaps the most balanced presentation that has ever been put together—it wasn't done in an attempt to balance off people by Jews and by women and by blacks and a variety of other groups who could claim they weren't represented. It was an attempt to bring together people who had a variety of views that conflicted with each other, and that in the process of making that selection there would be women, there would be blacks, and there would be people who were white, and that in the process of putting this panel together your views are pretty well known. I daresay they were picked because they are well known. Now, it's not a quota, and that's all I wanted to say.

Let me ask you a different kind of question again.

In a political democracy, given your views about quotas and your candor in expressing your support—I ask you this as one social scientist to another as much as a member of this Commission to a panelist: How much weight in a political democracy do you think should be given to the views of the American people with respect to issues such as quotas?

DR. BERGMANN. Well, I think that this is a difficult question to answer. I certainly wouldn't accept the implication that, properly surveyed, people in the United States would be against quotas in every situation. I think that most people, if you ask them, are for fairness. And I'm for quotas where there is a demonstrated lack of fairness and an egregiously demonstrated lack of fairness.

I don't approve of quotas in situations where it's a borderline situation or even half and half. But I'm for quotas, as in the case where, for example, there are no black firefighters, no women firefighters. I'm in favor of that.

Now, we have institutions of this country, to again return to your question, which are not 100 percent—we don't do things by town meetings. We have courts which, for example, have imposed quotas where they have felt they were desirable and necessary. And we don't have a referendum every time that happens.

I don't think that in the cases where courts have imposed quotas or imposed the goals and timetables that if those cases were properly explained to a representative body of citizens, most of those citizens would say, "Oh, no, no, no, we can't have this."

COMMISSIONER BUNZEL. The thrust of my question was really to get at a larger issue to which I have addressed myself for some 10 years or more. It seems to me the Congress of the United States has defaulted in its responsibility in dealing with some of the most controversial issues in policymaking and has sidestepped a lot of these hard cases. Sometimes they have deferred, quite happily, these hard cases to the courts. And I'm wondering, just in terms of public policy—because the legislative branch of this country does make public policy—where you would agree with me that it is time for the Congress not to default some of these tough cases to the rulemakers and the bureaucracies, but to lay out some guidelines and to take some positions as to whether or not they believe in the redefinition of equality that is going on. They have a role to play, and shouldn't Congress say, as part of their commitment to the Civil Rights Act of 1964 and affirmative action as they define it, that they believe public policy should or should not include quotas, racially preferential treatment, and so on? Are these issues to which you think Congress ought to address itself?

DR. BERGMANN. Well, I'm not a political scientist or lawyer, so I think I would defer an answer to that question.

I think the Congress in its wisdom makes most rules fairly vague—I'm sorry, most legislation—not just this legislation, but most legislation. Again, this is my reading of it. There is a reason for that, and it is that we can experimentally go on and make more detailed rules as we go along and alter them as we see the necessity.

I think in this case, again, I would tend to favor very vigorous action against the egregious discriminators, large ones. And I would not favor that against individual cases or anything of that sort.

So I think things are about as bad as they should be.

COMMISSIONER BUNZEL. All right, that's fine. I have just one more question I'd like to ask Dr. Swinton, and I'll not ask two others that I had.

Dr. Swinton, you have been talking a little bit this morning about protected groups. I want to put this question to you and then ask a followup: Do you believe that Asian Americans today should be

included among protected groups as they are presently for a variety of purposes? Secondly, as a way of getting at this larger question, what do you think should be the criteria by which a group deserves to be classified as protected?

DR. SWINTON. Well, actually, the second question is easier than the first.

COMMISSIONER BUNZEL. All right, why don't you take the second one first, and then come back to the first.

DR. SWINTON. I think the criteria are very simple, and are already incorporated into the law and practices. A group that experiences significant discrimination at the hands of other segments of the society, a group that historically experienced significant discrimination, that, in fact, is having a substantial impact on their well-being and ability to live as a group. So I think that is the basic kind of criteria.

COMMISSIONER BUNZEL. As an educator, do you believe that Asian Americans should continue to be a protected group in higher education?

DR. SWINTON. As I said, that is a fairly tough question. I don't know enough about this specific situation. However, if the implication of your question is that they have already managed to achieve a position in higher education where they are no longer experiencing any discrimination and where they have fairly wide access, then I would say that the priority of enforcement action in that area is fairly low. But I would not say that the effort of monitoring should be discontinued completely. But the point is that if the implication of your remark is true, then there would be no underutilization and there would be no reason to set goals for that group, etc., and so on.

COMMISSIONER BUNZEL. Thank you very much.

CHAIRMAN PENDLETON. Commissioner Berry, you have a few minutes to ask questions.

COMMISSIONER BERRY. Thank you very much, Mr. Chairman. I had hoped the questions I wanted to ask would have been asked by everyone else and I wouldn't have had to ask them.

CHAIRMAN PENDLETON. No chance.

COMMISSIONER BERRY. I do see the distinguished Congressman from the State of Maryland has arrived, but I hope I would have a few minutes to ask the questions I need to ask.

Let me say first that this consultation today comes in a very untimely fashion. It would have been very timely if it had taken place last year when Blandina Ramirez and I begged our colleagues to have a consultation on affirmative action before they announced their position in the Detroit case, and they refused to do so.

This year has gone on, and we have had numerous statements about affirmative action on various subjects, not only about quotas, but goals, timetables, set-asides, underrepresentation, underutilization; and the transcripts of the meetings of this Commission as well as press releases and other statements made in congressional testimony will bear out my statements.

This has all happened. So now we come late in the day to have a consultation, which is not a hearing because no public witnesses are permitted to come, on this subject. And I wonder at the shyness of my colleagues in conceding that, in fact, this consultation is about affirmative action. The notice that was put in the *Federal Register* says it's about underrepresentation and affirmative action in employment, among other subjects. I don't know to what to attribute this reticence because my colleagues are not usually shy about such matters.

In any case, so here we are today, not because the law of affirmative action has changed so much—and this is very important to remember because if you listen to the discussion and you look at much of what goes on in the media, you'd think the law had changed. In fact, the Supreme Court, except for the *Stotts* case involving seniority, hasn't changed the law related to statistical remedies. It hasn't changed the law related to goals, timetables, and quotas. In fact, there have been over 20 cases in the courts of appeals which have upheld such remedies since *Stotts* was decided. And the Supreme Court has, in at least three cases, denied *certiorari* when people appealed to the Court to try to overturn such remedies.

What we are talking about is a political control of this agency and the administration which wants to overturn all of these remedies, which has won a propaganda debate politically and is now trying to consolidate that propaganda debate.

I must say to my colleague, Professor Bergmann, of whom I'm very fond and who was a faculty member with me at the University of Maryland when I was provost and professor, the issue is not whether the Commission before made up its mind about things. Everybody has their minds made up about all sorts of things. The issue is whether you publicly make pronouncements on issues before there is a decision and then schedule experts and other people to bring evidence, and whether that is

insulting in the first place, and whether it is a violation of due process of the parties involved in the second place.

My question, briefly, Mr. Chairman—

[Laughter and applause.]

COMMISSIONER BERRY. I would ask, and if there's no time to answer them, I'll just leave the questions hanging in the record.

CHAIRMAN PENDLETON. The record is left open, I think, Commissioner Berry.

COMMISSIONER BERRY. If anyone wants to answer them.

CHAIRMAN PENDLETON. In writing or otherwise.

COMMISSIONER BERRY. Right. Mr. Williams' paper, because it was the only one I did not really understand—the other papers I did clearly understand—and I know it's because I'm dense, and I know what his opinion of blacks folks is generally.

But in any case, he says, for example, on page 2 that black people are no longer lynched, and statistics from the Justice Department indicate it still happens in this country, and I just wonder where he got his information.

DR. WILLIAMS. At 100, 200 a year like they used to be?

COMMISSIONER BERRY. You said black people are no longer lynched. That is not true.

DR. WILLIAMS. I didn't know of the cases. How many cases?

COMMISSIONER BERRY. Ask the Justice Department. Lynching is a nonjudicial murder of a person by definition.

DR. WILLIAMS. Are you asking a question or are you just going on with a speech?

COMMISSIONER BERRY. I'm just putting questions into the record because they don't have time.

You say on page 7 that many blacks attend schools that are characterized by disorder, lack of discipline, and various other things, and I agree with you. But if we do have time, do you think there are some black people who attend schools that are not characterized by such problems?

DR. WILLIAMS. Yes, I do. The question is: Can we find a mechanism to enable most, if not all, blacks to attend such schools?

Now, going back to your inference, there is no statement in the record and no hint in my testimony about blacks are stupid, as you and several others have implied. The statement is—

DR. BERGMANN. That we implied that you implied.

DR. WILLIAMS. —blacks are denied access to proper public education to prepare themselves for the kind of education that they need in this kind of world, and the public education authority is supported politically and legislatively by so-called people who consider themselves friends of blacks.

COMMISSIONER BERRY. Okay. You talk a lot on pages 8 and 9 of your paper about blacks being in the softer fields, as you put it—I think you used that expression, "softer." You talk about people being in education and social sciences and the percentage of doctoral recipients. I have no quarrel with your data, but what I want to know, for purposes of figuring out whether there is any discrimination so I can understand it: What happens to the blacks who get degrees and doctorates in education and social sciences in terms of university employment, promotions, wages, and salaries, as compared to whites, since there are numerous white people who get degrees in those fields, too; right?

DR. WILLIAMS. It turns out that blacks who have degrees, Ph.D.s, who have the same years of experience, the same quality of school from which they get their Ph.D.s, the same number of publications as compared to whites, the blacks earn at the median $1,500 more than whites.

COMMISSIONER BERRY. Are you familiar with Thomas Sowell's study done in an article which is cited in the Commission study called *Asian American Success: Fact or Fiction?* —or something like that—which points out that Asian Americans who have Ph.D.s in scientific fields who are employed in universities made lower salaries than white Americans who have similar qualifications and are employed in the same universities?

I just wondered about that because you pointed out—which is accurate—the numbers of Asian Americans in those fields and the salaries that they are making and so on. I was wondering if you are familiar with the study which shows they make less money than their white colleagues similarly situated in those fields.

DR. WILLIAMS. No, I'm not familiar with the study.

COMMISSIONER BERRY. Another question: Would you agree that SAT scores relate to how much a person's achievement level is supposed to be before they enter college—would you agree with that?—and not after they've been in college?

DR. WILLIAMS. The purpose of the SAT exam is to predict the person's standing at the end of his freshman year.

COMMISSIONER BERRY. The data you cite in your paper on SAT scores, these students who are represented here—how do they relate in terms of the students who got the GRE scores? Are we talking about the same students, different students? Did all those students go to college? How many of them went, and what happened to them?

DR. WILLIAMS. We are talking about population groups just as everybody else talks about population groups. There is no data that I know that will give a cohort to be able to follow the people through from CAT to SAT to GRE.

COMMISSIONER BERRY. Are you familiar with the Ford Foundation study which was put out about 4 years ago which looked at black Ph.D. holders who had GREs that are less than the average that was usually represented in the admissions population and followed their success throughout graduate school and later to see what they were doing, and they found they were as successful as their colleagues who had higher GREs. Are you familiar with that study?

DR. WILLIAMS. No, I'm not—which doesn't mean I agree with the outcome. You have to measure or give us a definition of success.

COMMISSIONER BERRY. All right. There was a lot of talk about why blacks are basketball players and how that is progress, and there's some information in your paper about blacks going into basketball and tennis and ice hockey or field hockey or something like that. Do you have any idea why you would find more young black males in the field of basketball, football, than you would in tennis or ice hockey or field hockey?

DR. WILLIAMS. One thing I know for sure; it was not an affirmative action program.

[Laughter.]

DR. WILLIAMS. But I can give some guess. That is, to gain the skills to be a football or basketball player are relatively cheap as compared to gaining the skills to be a tennis player, a violinist, etc., so the income difference—

DR. BERGMANN. How about a quarterback? Why are there so few black quarterbacks?

COMMISSIONER BERRY. I'm asking the questions, Barbara.

DR. WILLIAMS. We have already talked about Mrs. Bergmann's manners already.

But the black population, on the average, is taller than other ethnic groups. And I don't lump all white people together. That is, they are Polish Americans, German Americans, Armenian Americans, Irish Americans, etc., etc., having different histories and different backgrounds; and you cannot lump all white people and say they are alike, no more than you can lump all black people and say they are alike.

COMMISSIONER BERRY. I just have three other questions.

In your paper you talk a lot about affirmative action only helping middle-class blacks and poor blacks aren't helped and all these measures do little for them, which is true directly. It does very little if they don't have the training. But am I to infer from this that you have some problem with any programs that help middle-class blacks, or is that just something in passing? You don't mind the numbers of middle-class blacks increasing so there'd be more of them?

DR. WILLIAMS. I'd love it.

COMMISSIONER BERRY. You'd love it.

DR. WILLIAMS. I mean I love the growth of middle-class and rich blacks, which is something I aspire to.

COMMISSIONER BERRY. Would you say the quality of higher education that blacks receive is inferior to the quality of higher education that whites receive? We're not talking about people going to elementary school but to college.

DR. WILLIAMS. Yes, I would say it's inferior. Given the evidence I see, particularly on matters such as the PACE exam where it shows something like 5 percent of blacks scoring 70 percent or more versus 42 percent of whites. Less than one-half of a percent of blacks score more than the 90 percent level. And these are all college graduates taking these exams. So it says something about the quality of education. Then, furthermore, the black failure rate and performance rate on LSATs and GREs says that there is something grossly fraudulent going on in the colleges.

The critical point, Commissioner Berry, that I want to make is that I share most of the goals of the people sitting here. But what I am urging here is that if we misidentify the problem, we are not going to find the solution. The discrimination pail just cannot carry all the water that is being put into it.

COMMISSIONER BERRY. How do you account for that lack of quality, particularly since the majority of

blacks go to predominantly white institutions? They don't go to black colleges.

DR. WILLIAMS. Well, I have talked to administrators and I have asked them, "Why do you allow this crap to go on so far as black education at this campus?"

They tell me, "Look, Williams, we have the EEOC and the HEW breathing down our necks, so we have to have a certain number. So we're going to put them over here so that white people can go on about their business and have chemistry and physics," etc., etc. And a lot of that is occurring on college campuses.

At George Mason University where I work, they are under orders by the Governor to increase the enrollment of black students at George Mason University. And what is happening at George Mason University, black students come there, and in the first year a very large percentage of them get academic warning letters. The second year a very large percentage are gone, and they're talking about retention rates.

So what good does it do to have some kind of pressure to put on colleges to admit more blacks when the effect of that law is to allow these rotten public schools to get off the hook. Instead of saying, "Well, look, we're going to require admittance on merit, and we're going to put the weight on these public schools to educate blacks correctly," we let public schools continue fraudulent education.

COMMISSIONER BERRY. Last question; last question.

About 2 years ago the College Entrance Exam Board recorded a rise in SAT scores for the first time in about 15 or 20 years, and the College Entrance Exam Board attributed most of the rise to increase in SAT scores of blacks, especially poor blacks in ghetto neighborhoods, where a lot of treatments had been going on in terms of motivation and what principals were doing and teachers. But, anyway, they accounted for most of the rise. That's what the CEEB said.

Now, statistics show that over the last 5 years as SATs, and GREs by the way, are increasing in the black community, the numbers and percentages of black students going to college, graduate school, professional school, and getting managerial and professional jobs when they graduate are declining.

Now, if the productive capacity is the problem—and that's what I think your arguments are directed at, productive capacity, as I understand the economist's term—if the SAT scores are going up, and the GREs, why are the numbers and percentages of people going to college and graduating going down at the same time?

DR. WILLIAMS. In general I don't know the answer to your question, but let me state in 1977, according to my data here, the mean black SAT score was 332, and by '83 it went up to 339. That's on the verbal. On the math it went from 354 in '76 to 369 in '83, which is not that dramatic a rise, given the fact that blacks are below average somewhere around 100 points.

COMMISSIONER BERRY. Mr. Williams, finally, what the CEEB said was that between 1981 and 1982 blacks' verbal scores rose 9 points and math scores rose 4 points, while scores for whites declined, and they had been declining since 1976, and the scores for minority groups were going up at the same time.

If that is the case, it seems to me, based on the other evidence you have in your paper, you would expect to see improvements in colleges and what the students were doing as their scores went up. You may not see marked improvement, but you would expect to see some decline in attrition rates, you might see a few more students there, more graduating, and the like. I don't know what the answer is, but don't you think that is something that bears watching, to figure out what those numbers mean?

DR. WILLIAMS. I don't know.

COMMISSIONER BERRY. You don't think it bears watching?

DR. WILLIAMS. I'm not saying it does not, but I'm saying a 4 point increase—I don't know whether it has enough elasticity to mean that you will find four more blacks at the Linear Acceleration Laboratory in Palo Alto.

COMMISSIONER BERRY. Thank you.

CHAIRMAN PENDLETON. Thank you, Commissioner Berry. It shows things will be lively for the next day and a half.

I want to make one statement here. There is talk about people making up their mind. I want to recall the last affirmative action hearing this Commission had. It was a consultation. There were approximately 30 witnesses, and 27 of those 30 people were pro quotas or race-conscious affirmative action, and there were 3 people that were not in that category. Two of them are seated here today, Commissioner Bunzel and Commissioner Abram.

So if there's talk about where we are and where somebody else is, I would hope that you would look at the panels today and see that we have a balance of panels; we have opposing points of view, and everybody has had a chance to say what he or she would like to say.

With that, I will conclude this session and ask Congressman Mitchell and Congressman Addabbo to take a seat at the table.

Thank you.

If we could assemble, Congressman Mitchell's time is short. Congressman Addabbo's testimony has been submitted for the record. And with the indulgence of those in the audience, we will proceed with Congressman Mitchell's testimony.

Welcome, Congressman Mitchell.

Let me read for the record that you represent the Seventh Congressional District of the State of Maryland since 1971. A veteran of World War II, he received the Purple Heart. He served as supervisor of postsentence casework before the Supreme Bench of Baltimore and as executive secretary of the Maryland Human Relations Commission. He had directed the Baltimore Community Action Agency and was a professor of sociology and director of the Urban Institute at Morgan State College.

He is a member of the House-Senate Joint Economic Committee; the House Committee on Banking, Finance and Urban Affairs; Chairman of that committee's Subcommittee on Investment, Jobs and Prices; Chairman of the House Committee on Small Business; and Chairman of the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems.

Representative Mitchell has been a leader in legislative efforts to increase minority business participation in Federal procurement.

Representative Mitchell received his masters degree at the University of Maryland and studied further at the University of Connecticut.

Welcome, Congressman Mitchell.

REMARKS BY PARREN J. MITCHELL, CHAIRMAN, COMMITTEE ON SMALL BUSINESS, U.S. HOUSE OF REPRESENTATIVES

MR. MITCHELL. Thank you very much, Mr. Chairman.

I request approval for my written statement in its entirety and those documents appended thereto, that that be submitted for the record.

CHAIRMAN PENDLETON. So ordered.

MR. MITCHELL. I would further request that the statement of Congressman Joseph Addabbo, who is not able to be with me here today, be submitted for the record in its entirety.

CHAIRMAN PENDLETON. So ordered.

MR. MITCHELL. Mr. Chairman, I will be very brief. I recently reread the joint statement that you and Mr. Abram made dated January 31, 1985, in which you said that the civil rights leaders' defense of affirmative action was immoral. You said it was immoral "because we believe in true affirmative action."

That was a repugnant statement to me and to others, and it confirms that some of the members of this Commission had already prejudged affirmative action. I think that prejudgment renders these hearings farcical and meaningless.

I respect the two members of the Commission who are willing to confront the present realities of racism and sexism. I respect those two.

After reading the press release this morning on your statement made at the National Press Club yesterday, I am more and more convinced that I could not, out of a sense of integrity for myself, give oral testimony nor respond to questions. I think that last statement made in the Press Club makes me feel that you neither deserve my response to any question, nor do you deserve any recognition, nor do you deserve any respect.

[Applause.]

CHAIRMAN PENDLETON. Thank you.

We shall break for lunch.

[Recess.]

Afternoon Session

CHAIRMAN PENDLETON. If we could convene, I think probably by starting I will have aroused the interest of my colleagues to come back.

I hope the sparseness of the afternoon crowd is not an indication of a lack of interest. I would have hoped there would be more people, but certainly, we welcome those of you who are here.

If you were not here this morning, my name is Clarence M. Pendleton, Jr., and I'm the Chairman of the United States Commission on Civil Rights.

There are other labels and tags and placecards here for people who will be coming back shortly.

General Counsel Mark Disler is here with me, and since we have read the papers and the like, maybe we ought to begin.

The afternoon session is panel 2: Minority and Women's Business Set-Asides: An Appropriate Response to Discrimination?

I would like to just back up and make a statement for the record. This consultation/hearing is for the purpose of establishing a record on the issues indicated. And I must say to you that everyone whose name is on this list, every organization represented, to my knowledge, absent correction from General Counsel, agreed to participate in these hearings, and some have already submitted papers.

From a personal point of view, if there is one thing that we need on this issue of affirmative action and set-asides and the like, it is to establish a new record. It is incumbent upon all people who have been invited to present testimony to present it. We do not go far down the road to understanding if we cannot get a record established. And I would hope that those of you who don't have copies of testimony can get it. Those of you who want to submit testimony later on, the record will be open for you to submit material to us. And I must say that the demand far exceeded the supply of time to have everybody come and testify.

A comment was made today that there would be no public hearing. Well, there will be, in a sense, a public hearing, but there just was not enough time based upon the interest. And this is our first experience at a hearing/consultation. We are going to work through the bugs of this one and hope that in the future we will be able to do all that we normally do at a hearing.

There was also some comment made to the effect that the Commission makes decisions before gathering facts. The testimony of the presenters are the kinds of facts this Commission needs, and the exchange and dialogue between presenters and Commissioners is critical to the debate. So I would urge those who know of people to urge them to give us testimony and to share the dialogue of the debate.

Having the benefit of all that, we would be able to establish as clear and as firm a factfinding record as we possibly can. I say that in the spirit of cooperativeness in the face of divergent points of view. I am one that believes that everybody's point of view should come to the table and we should have a chance to discuss it. I must say that at lunch time I had a chance to talk to several people, one or two presenters, who I'm sure have different points of view from mine on some of these issues, who agree that the record needs to be established from organizations that have labored long in the vineyard on these issues.

I want to congratulate the staff at this point for putting together such a list of witnesses if you will, consultants and participants, for these hearings.

With that, I will read the introductory remarks for the afternoon panel.

Please pardon me for taking the liberty, but I thought that had to go into the record.

The second panel will define and provide examples of set-aside programs. The panelists will consider whether the number of minority- and women-owned businesses and their percentage of public contracts are the result of discrimination and whether set-asides for minority- and women-owned businesses are fair and justified. The overall effect of set-asides on minority and women's enterprises, as well as the effect on contracting generally, will be addressed. Alternatives to set-asides will also be considered.

The five panelists are John W. Sroka, executive director of the Occupational Divisions of the Associated General Contractors of America; Dr. Joan G. Haworth, associate professor of economics at Florida State University; James H. Lowry, president of James H. Lowry Associates in Chicago; Peter G. Kilgore, a partner in the law firm of Kirlin, Campbell & Keating in Washington, D.C.; and Timothy Bates, professor of economics at the University of Vermont.

We will begin the afternoon panel with Ms. Haworth—Dr. Haworth. I have to be careful. I did that on another panel. I didn't call the woman "Doctor" and called the men "Doctor."

DR. HAWORTH. I won't be offended.

CHAIRMAN PENDLETON. Dr. Haworth is currently associate professor of economics at Florida State University, where she has consulted and taught for 16 years. Her writings have focused on the use of statistics in civil rights cases and on economic issues involving minorities and women. She has done work on computer applications in the social sciences and has consulted with corporations and government agencies on computer-oriented data handling. Dr. Haworth received her doctorate in economics from the University of Oregon.

We will ask you to give us about 20 minutes of where you are, and then we will be able to engage in some debate the rest of the afternoon.

Minority and Women's Business Set-Asides: An Appropriate Response to Discrimination?

STATEMENT OF JOAN G. HAWORTH, ASSOCIATE PROFESSOR OF ECONOMICS, FLORIDA STATE UNIVERSITY

DR. HAWORTH. Thank you, Mr. Chairman and members of the Commission. I appreciate very much this opportunity to be here today to talk to you.

I'm not sure if you can hear me.

CHAIRMAN PENDLETON. Can you hear in the back?

DR. HAWORTH. Let me start by telling you that, in the context of the university research that I have done, I have also done some consulting and am, myself, an owner of a firm that employs about 25 or 30 people. So while academicians often have no "real-world" experience, I have some. That does certainly not make me an expert in business organization. But I have studied business operation, business organization, at some levels, and in particular, I have been concerned about the role minorities and women have played in ownership of business enterprises, their success and failure rates.

The business set-aside programs are, as I'm sure you know, programs designed to set aside a certain portion of Federal, State, or local contracts either for preferential bidding by minority-owned or women-owned firms, or for exclusive bidding by minority- and women-owned firms. These business set-aside programs have been developed for a number of reasons, many of them political or social at the time they were passed, but according to the economic view, these programs are an implementation of the theory that redistributing the Federal and local governments' contract dollars to minority-owned firms and women-owned firms provides those firms with business that they could not obtain by themselves, that they could not obtain without some assistance.

Now, if that new business comes to these firms and results in a net increase in their sales dollars and, even better, if they have properly priced their product, in an increase in their profits, then these firms should be more economically viable, be able to promote a longrun pattern of growth and development and, as a role model as well as an economic entity in the community, provide sustenance to other minorities and women as well as the rest of the community.

The role that many of the business set-aside programs have played or have attempted to play is that of economic development. The difficulty is that the business set-aside programs have not always been legislated or implemented in such a way that they result in economic development. In fact, they may result in economic failure rather than economic development.

One of the reasons—some of the reasons why the business set-aside programs have generally not been successful with respect to minorities and women include inadequate capitalization, very low levels of capitalization in most women- and minority-owned firms, and a lack of experience both in Federal contracts and in business itself, since many firms owned by minorities or women are young firms, just recently entering the economy, less than 10 years old.

There are the same firms who may not have the expertise necessary to work in the contract environment once it has been let to them through the set-aside programs. They may have problems with the Federal work regulations; the red tape, bureaucracy, and paperwork that is necessary to complete the Federal contract—not to do the work but just to get the paperwork handled.

Firms that are not accustomed to working with Federal grants will find the regulation to be a big surprise. Those who are accustomed to working in Federal grant and contract arenas are not all surprised. They are prepared for it and have probably already have built it into their cost structure. The problem, of course, is that minority- and women-owned businesses typically have not been involved in Federal contracts or even State and local government contracts, so they are often caught by surprise, and have not set their prices at a rate that would allow them to handle this kind of paperwork problem.

The business set-aside program, on its face, is not designed to create businesses. It is also not designed to make viable an unviable business. If a business is viable in its own little setting, but has the potential for growth and further development, then the business set-aside program is a possible vehicle for allowing that development to grow and continue. There may be other vehicles as well.

Another problem with the business set-aside programs is that the people involved in the business set-aside programs—that is, those who are administering the programs—have not always been able to identify

potential women- and minority-owned contractors who might be able to work in these kinds of environments. It is well understood that there are a large number of women-owned firms. There are a significant number, but not large, of minority-owned enterprises in the country. But it is not well known which ones are in certain fields, such as construction of highways or procurement of certain kinds of supplies. It is difficult to identify those firms if you don't have any contact with minority business enterprise or with women enterprise associations. There are logical solutions to that problems, but that has been a problem for the business set-aside program.

A third—and perhaps it should have been stated as the first most important problem with the set-aside program—is that the contracts we are talking about, especially at the Federal level but even to some extent at the State and local level, are contracts that are of such a scale that minority- and women-owned businesses are not likely to be able to handle that scale with their current resources. That includes not just financial resources, but managerial resources, expertise resources, and experience resources as well. If the scale of the contract is too large for a minority-owned or women-owned business or, for that matter, any business, then they should not be involved in the contract without significant help.

One approach to solving this problem has been to encourage prime contractors who do have the scale of operation to develop and handle a very large contract to subcontract some of their work out to other contractors who are small businesses, preferably minority- and women-owned businesses. If we are going to support a minority-owned business or a women-owned business that is a small-scale firm, the reasonable, logical, and nonfoolish way to do it would be to support them with a contract that is of a size they can handle. If the prime contractors will subcontract that work out, then that could be used as a vehicle for affirmatively assisting the minority- and women-owned businesses.

The problem is that typically these vehicles have not worked the way they are supposed to work.

The prime contract awards that are awarded to small businesses alone account for approximately one-sixth of the contract dollars each year. I know Dr. Bates has done much research to determine where the minority businesses are and their scope and size and scale, and I believe the evidence will show that both for women-owned businesses and minority-owned businesses, the scale of the typical firms is so small that any work that we do, any research we do, with respect to the awarding of Federal contracts concerning small businesses, is going to be far more relevant than research we do concerning all Federal contracts.

The small business awards are roughly one-sixth of the Federal contract awards, or at least they were in 1981, a little smaller than that in 1982. Small minority-owned business awards, on the other hand, were about 2 percent of the Federal contracts. Women-owned businesses were less than half a percent of the Federal contract recipients.

So it is clear that there is very little participation—most would call it a negligible amount of participation—by women-owned firms in Federal contract awards—and there is a small amount, the 2 percent level, of participation of minority-owned firms in Federal contracts and grants. That 2 percent and less than half a percent is relative to the one-sixth that all small businesses have received.

Another fact that I believe needs to be raised is that the performance by different agencies in the awarding of contracts to businesses owned by minorities and women has been quite diverse. For example, the Department of Defense, which has, as we know, a large amount of contract money to award at various times, in recent years has been awarding about 13 percent of their awards to small businesses. Approximately 1.5 percent of the awards that have been made were made to minority-owned businesses. Less than one-tenth of 1 percent were awarded to women-owned businesses. And that's a very large amount of Federal contract dollars. On the other hand, a group such as the Veterans Administration or GSA has awarded approximately a third to 40 percent of their Federal contract awards to small businesses, and 6 to 10 percent of all of their awards go to minority-owned businesses.

So some agencies are able to find ways to find firms to whom they can award Federal contract dollars at a much higher rate than other firms. If you have an opportunity to look at my paper, you will find those statistics in, for example, tables 5 and 6 that review the way various agencies have performed. Those data I was giving you were for 1981 awards.

It is possible to try to develop a little index to determine, relative to the amount of awards that are given to small businesses, which agencies are more

successful at identifying and culminating a contract with a minority-owned business or a woman-owned firm. And we find that the GSA is a very high performer; Energy is a very high performer; Interior is a very high performer if you consider high performance awarding a fourth or more of the awards they send out to small businesses to minority-owned businesses.

You may believe that is not an appropriate standard of performance. As a matter of fact, that is one of the things which plagues this whole discussion, is what standards should be applied in determining whether Federal contracts have been awarded in such a way that minority-owned businesses and women-owned businesses are not any longer being discriminated against in the same way they were before.

What kind of a standard should we apply? Should we apply a standard based on a percent of all businesses that are owned by minorities? Should we apply a standard that is adjusted for the kind of products the minority-owned firms are involved in or the women-owned firms? And it would be my belief that you do need to take into account the product that the firms are dealing with, although leaving a vehicle open for entrepreneurs to get involved in other kind of operations as they see profit possibilities.

There is another factor that also needs to be considered in the contract award process, and that is that women-owned firms and minority-owned firms differ considerably from even the rest of all small firms in the kinds of contracts that they are successful in obtaining and in the way in which they are basically paid—on a fixed-price contract, a cost contract, time and materials contracts, etc.

This may partially be due to the scale of these contracts, but women- and minority-owned businesses rarely get involved in a cost contract or cost-plus contract. Most often they are involved in the labor-per-hour kind of contract where they charge a certain amount for the hours that they are involved. Similarly, minority-owned businesses have done, relative to the other kinds of procurement contracts, much better on noncompetitive negotiated contracts than they have done with any of the others. When they did obtain the contracts—and remember we're talking about a small group of firms—women have done better on the competitive negotiated contracts which, of course, are the most costly to produce.

There are a number of recommendations that we might want to consider and the Commission may want to consider as part of their decision as to what kind of policy stance they should take on business set-asides as an affirmative action device.

One recommendation is that we use the business set-asides, to the extent that they are used, to encourage economically viable firms, not to create and develop new firms that have not yet started, except, of course, through some sort of role model.

The second recommendation is that performance criteria be developed for determining how well an agency has done in awarding its contracts to minorities and women-owned firms and, having developed such performance criteria, the results should be publicized. Let various agencies and Congress know how well contracting agencies are doing in this regard. Let those agencies themselves be aware that there are ways to assess your performance in developing economic encouragement to minority-owned and women-owned firms.

A third recommendation is that we should separate the business and skill training that is a necessary and viable piece of policy from a business set-aside program; set training up entirely separately so that firms that are in need of those kinds of skills can operate in a skill training and business assistance environment separately from whether or not they have a business set-aside or would qualify for one.

The bottom line on all of this is that there is little question that encouraging women- and minority-owned firms is an important policy. It is also, it seems to me, of little question that these are the firms which—if they are able to develop into long term economically viable firms—these are the firms which will best promote the economic development of minorities. It may also do something to improve the economic status of women in the country.

Recognizing, of course, that the government has to operate in an efficient manner, there are ways to implement these programs in an efficient manner and still encourage minority-owned firms and women-owned firms.

My last recommendation—and perhaps it shouldn't be the last—is that some sort of information system has to be developed that is better than the current ones for identifying those minority- and women-owned firms that are economically viable and candidates for certain kinds of contracts, and for identifying the agencies who have contracts available that need to be either bid on or procured in

other ways. The present information system is inadequate, although there are improvements and there are a few better data bases. The information system itself is not available at present that will provide the best kind of vehicle for encouraging these firms.

I thank you very much for this opportunity to share my work with you.

CHAIRMAN PENDLETON. Thank you.

John W. Sroka is the executive director of the Occupational Divisions of the Associated General Contractors of America. Mr. Sroka was appointed to his present position as the executive director of that division in 1980. He first came to the Associated General Contractors of America in 1973 as assistant director of the Heavy Industrial Division. He was appointed an assistant executive director in 1977 with responsibility for supervision of the Occupational Divisions, which include Building, Highway, Heavy Industrial, and Municipal Utilities. The following year he was appointed assistant executive director for administration and management services.

Mr. Sroka earned a bachelor of arts degree in psychology at Fairleigh Dickinson University and also studied law at American University.

Welcome, Mr. Sroka.

STATEMENT OF JOHN W. SROKA, EXECUTIVE DIRECTOR, OCCUPATIONAL DIVISIONS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA

MR. SROKA. Thank you, Mr. Chairman.

I understand this particular panel is generally being called the expert panel on MBE set-asides, and I think I need to qualify that term, at least as it applies to me. I am not an attorney, so I cannot speak authoritatively about the legal implications of these programs. I'm not an economist, so I can't speak about the economic justification, if any, of these programs; nor am I a sociologist, management consultant, or an EEO officer, so again, I cannot speak authoritatively from these disciplines.

My expertise, if you will, lies in the area of sharing the very practical experiences of the damaging effects these programs are having on the construction industry, the experience of representing construction contractors who, on a day-to-day basis, ask some very basic questions. They ask why they are no longer allowed to bid on certain projects. They ask why they can no longer award their subcontracts on the basis of lowest price or merit. They ask why their bids, although the lowest, are being rejected in favor of higher bids. And they ask quite simply why they are being foreclosed from competing in their market.

The answer, unfortunately, to all these questions is all too evident. It is because they are not of the specified race, the specified ethnic origin, or the specified sex.

These questions and the answer that I just gave could very well have been questions and answers that were given prior to the passage of the Civil Rights Act, but they are not. These are current questions. They are not 20 years old. And they exist because government set-asides and mandatory subcontracting programs are being implemented which blatantly require race consciousness, ethnic origin consciousness, and sex-conscious decisions in the award of construction contracts. These experiences lead me to tell you today that these programs, under the banner of affirmative action, are in fact resulting in affirmative discrimination.

The Commission has already received my written statement, and I have been asked to assume that the Commissioners have read that statement, and I will make that assumption. Consequently, I will not review in detail in this verbal presentation all the areas addressed in my written statement. I will assume that the Commission has reviewed the section in the statement regarding the cost impact of these programs to the tax-paying public. I will also assume that the Commission has reviewed that section in my statement regarding the damaging impact on open competition as a result of these programs.

What I would like to concentrate on, instead, in this verbal presentation is, first, how public construction procurement works and, secondly, how minority and women's business set-aside and mandatory subcontracting programs are severely damaging innocent third parties.

The overwhelming majority of Federal, State, and local construction procurement must be awarded, by law or regulation, through open competitive bidding with award to the lowest responsible bidder. Under this method, the government agency makes detailed plans and specifications and bidding instructions available to all interested bidders. Contractors then begin estimating the cost of the project based on its design, materials, labor costs, overhead, and profit.

If subcontracting a portion of that work is contemplated by the general contractor, then he must solicit some subbids from subcontractors. In preparing his overall bid for the project, the general contractor uses the lowest bid received from subcontractors in order to assure that his overall bid will be the lowest possible.

The general contractor then prepares his overall bid, using the lowest subbids, if any, and submits a sealed bid to the government agency. Those sealed bids are then opened publicly by the government agency. They are read aloud and evaluated, and a contract is then awarded to the lowest responsible and responsive bidder. A responsive bid is simply one that provides exactly what the government has asked for, and a responsible bidder is one that has the ability to meet successfully the requirements of the contract; that is, he has the necessary personnel, the necessary equipment, the necessary financing.

By virtue of this award of a contract, that contractor binds himself to that firm submitted price, even though the project may take years to complete. And by virtue of that same contract, the contractor assumes all future price risks which may result during performance of that contract, that is, the risks of weather, of subcontractors' performance or default, labor disputes, material shortages, material price increases, among a host of other variables.

This procurement method, open competition with award to the lowest responsive and responsible bidder, does two things: First, it assures an intense competition in the industry and, secondly, it assures that the project will be completed at the most economical cost to the taxpayer.

Layered on top of this system at every level of government—Federal, State, and local—are minority and women's business set-aside and mandatory subcontracting programs. Perhaps the best current example of what this does is found in the section 105(f) program of the Federal Aid Highway Program.

Section 105(f) requires that 10 percent of the amounts expended in highway construction shall be expended with small businesses owned and controlled by socially and economically disadvantaged firms, more commonly known as disadvantaged business enterprises or DBEs. The implementing regulations then go on to require that black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Asian Indian Americans are to be presumed to be DBEs. That is, some minority groups are required to be presumed to be more disadvantaged than others.

The effect of this so-called MBE provision is to mandate that when general contractors are selected through the normal competitive bidding procedures, the grantee—that is, the State or local government—is to require that each bid include a commitment to set aside at least 10 percent of the contract funds to business concerns owned by the specially designated minority-group members, this to the exclusion of all other bidders.

Now, the amount of work that is subcontracted on a construction project varies with the type of construction. Building construction, for example, vertical construction, lends itself to much more subcontracting than does highway or heavy construction. Highway construction, the type that is affected by this 105(f) provision, does not easily lend itself to a large or significant amount of subcontracting. Highway construction is an equipment-intensive and capital-intensive industry. On the average, 90 percent of a typical highway construction contract is accomplished by the general contractor's own work force, leaving approximately 10 percent available for subcontract award. And this is usually in the specialty areas, such as guardrail installation, signing, barrier work, safety work, landscaping, and fencing.

The result of all this is that under a mandate to subcontract 10 percent of the amount of the total contract to an MBE, and with only 10 percent of the contract available to be subcontracted, the general contractor is, in effect, required to award 100 percent of the subcontract work to minority firms regardless of any other considerations. Another variation on this exclusionary theme, utilized by some States to meet their requirements for section 105(f), is to simply set aside the entire prime contract and then limit bidding and award to MBE firms.

But in either variation the result is the same. The awarding entity, be it the general contractor for subcontract awards or the public agency for prime contract awards, cannot make an award decision solely on the basis of lowest price, or merit, or competence, or any other relevant factor, but must, in fact, make award on the basis of whether the firm is owned and controlled by one who meets the appropriate racial or ethnic origin definition.

I can think of no other accurate way to describe this program and ones like it, than as a race-conscious program. There are some who defend

these MBE set-aside programs and claim that the government operates set-asides and other forms of preferential treatment and preferential benefits all the time, and they point to such things as programs based on size or veteran's preferences or farm price supports. And they are correct. Legislators are most assuredly in the business of providing and conferring benefits, and in fact, they do it all the time. But when we start to confer benefits based on nothing more than the pigment of one's skin, we enter an area that even I, a nonattorney, know becomes suspect—suspect because of our Constitution and suspect because of an innate feeling that it is simply wrong.

I have used the 10 percent provision of the Federal Aid Highway Program as an example. Unfortunately it is just that, merely an example of the plethora of such race-conscious programs now in existence for construction procurement all across the country. Recently, the Associated General Contractors asked for information from their chapters regarding such programs at the State and local level. Although responses were only received from 34 States, these responses identified 22 State preferential programs and 50 local government preferential programs. And to what end? The end that one would expect from the application of race consciousness. These race-conscious programs produce victims of discrimination every bit as real as the historical victims that these programs purport to benefit. I'd like to give you some examples, if I may. I'd like to read you some excerpts from some letters that were recently received from nonminority construction contractors from across the country. This from South Dakota:

> We are specialty subcontractors who have been in business for 28 years and have a very proud track record in our state doing high-quality work with very high relationships with both prime contractors and our highway department, but due to this unfair law of the land we are grossly discriminated against and forced out of business. Besides not having a market within which to sell our company, nobody can buy our business and hope to stay in business as long as this unfair law is in effect. We have tried to sell at 30 cents on the dollar but are still not able to.

From Ohio:

> Our firm specialized in concrete curb, curb and gutter, sidewalk, median barrier construction. What has been the detrimental impact of the DBE, MBE, and WBE set-aside programs on our corporation? As of December 1, 1984, we have ceased bidding. It is quite a sad event to see that which took 33 years to build and which you expected to see your family continue suddenly dissolve, not because of anyone's deficiency, but simply because of the color of their skin and Federal and state legislation.

From Michigan:

> We are primarily a subcontractor doing concrete work. General contractors don't need us or don't want a price from us because they are looking for DBE quotes only. I believe this quota system is discriminatory against contractors like ourselves, and we have been in business for 36 years.

There are many, many more examples.

It is difficult for these affirmative discrimination victims to understand, for example, the suggestion contained in Mr. Lowry's paper, that nonminorities should view their nonselection in an historical perspective, accepting the current situation as one based on past injustices and the dire need to develop a minority business base.

So, too, it is difficult for them to understand, as Dr. Bates suggests, that their victim status may be justified on the basis of empirical and econometric evidence that minority firms are not as well represented in the economy or as wealthy as nonminority firms.

What they do understand is that something went wrong. They understand that affirmative action somewhere along the way became disfigured into action requiring equal results rather than equal opportunity. They understand that their government, at the Federal, the State, and the local level, is no longer a provider of equal opportunity, but rather a dispenser of equal results.

And finally they understand one simple fact: No matter how described nor the reason for its use, no matter how laudable the intention, any program that affords a preference to one group over another because of the color of their skin or their ethnic origin or their sex is discrimination, plain and simple.

Thank you.

CHAIRMAN PENDLETON. Thank you, Mr. Sroka.

Mr. James H. Lowry is president of Lowry and Associates in Chicago. He is president and chief executive officer. He has in the past served as director of the public service practice for McKinsey and Company and as special assistant in the development of the Bedford-Stuyvesant Restoration Corporation. A former Peace Corps volunteer in Tanzania, Mr. Lowry has also consulted in Chile and Peru. He had advised corporations and governments on mi-

nority business development and business management. A former member of the National Advisory Committee of the Small Business Administration, he is presently a member of the Small Business Advisory Committee of the Illinois Chamber of Commerce.

Mr. Lowry received his M.A. in international economics from the University of Pittsburgh and also attended the Harvard Graduate School of Business Administration.

Mr. Lowry.

STATEMENT OF JAMES H. LOWRY, PRESIDENT, JAMES H. LOWRY & ASSOCIATES

MR. LOWRY. Thank you. It is a privilege and honor to be here today to discuss something that is highly controversial and very important.

I was assured by the Chairman that deliberations would be fair, there would be open hearings, and that no policy decisions had been made.

I have also been informed by the Chairman that there would not be controversy over the hearings. Already that has been done away with.

CHAIRMAN PENDLETON. So much for promises, Jim; I'm sorry.

[Laughter.]

MR. LOWRY. Let me also share with you how I came to be here today. I have been a management consultant for over 16 years who devoted most of my professional experience to designing, monitoring, assessing, supporting, and, on occasion, dismantling minority business development programs. I have also been a struggling minority entrepreneur, who in many ways has benefited from the many programs that are being discussed this afternoon. I am also a member of one of the so-called "protected races" who, on occasion, has not been protected, who has been forced to suffer discrimination.

More importantly, I am here as a United States citizen who strongly believes in the free enterprise system: a system that is the strongest in the world. I have worked all over the world. I have lived in Africa, under a socialistic government, and I strongly believe what we have here is something to be protected. I also will state to you this afternoon that the free enterprise system as we know it and live with here in the United States is not perfect, and because of those imperfections, many minorities are denied free access to it.

Unless we are sensitive to this, unless we really address these problems, there will be serious structural damage to the free enterprise system, and it will not be just minorities and women who will suffer; it will be all the citizens of the United States. So when I look at minority business development programs or set-aside programs, I look at them in that context, one of economic development. This is not to say I don't believe in moral things, and that there are not issues of morality involved here, or that I do not believe in merit, or that there are not issues created by a bureaucracy. The key thing is economic development in a free enterprise system as we know it.

One of the questions that was posed to us is: What is a business set-aside? And when I asked many people in the street what is a business set-aside, they instinctively said SBA. That is unfortunate because that is the stigma that SBA has suffered with over the years. Many people believe that set-asides are synonymous with fraud, mismanagement, excessive, which is not true.

I believe in 1979 the *National Journal* had an article which outlined over 35 different preferences or protected programs, set aside for procurement to effect an economic change. The vast majority of these programs had nothing to do with minorities or women. They had to do with steel; they had to do with farming; they had to do with labor, labor surplus, import regulations, etc.

As we look back over time, we see that many people benefited from those programs. Recently, a former Congressman from the State of Illinois informed me that once upon a time they had a very vexing situation because when they inquired or did research on the farm set-aside program in California, it was found out the Queen of England had substantial holdings in California and they had to pay her a check of $6 million.

So from my perspective, I do not begrudge the Queen of England $6 million. It was an established program. Why shouldn't she take advantage of it? The only thing I do take offense with is that no one asked her if she was socially and economically disadvantaged.

So basically as we look at these programs, we have to look at them in an economic context.

I go back to my Bedford-Stuyvesant experience and an incident that had a lasting impact on me. I was a young man in the corporation, and usually that person had the thankless job, and sometimes not-so-thankless job, of serving as a guide for the ghetto tour. That was back in the sixties, and

everybody wanted to see the ghetto. On one occasion, I had the awesome responsibility of directing the guided tour for the Board of Bedford-Stuyvesant Restoration Corporation. At that time we had such members as Roswell Gilpatrick, Mr. Dillon, Bobby Kennedy, and others. One person on that tour whom I did not know was a gentlemen who spoke in a very, very thick accent. I later found out that this person's name was Andre Meyer. This was before Harvard and I said, "Who's Andre Meyer and what's laissez faire?"

They said, "Well, Andre Meyer is a very important Wall Street firm."

I said, "How important?"

They said, "Well, Mr. Meyer manages the Pope's money."

So when he told me he managed the Pope's money, I started listening to him.

So on any very brief tour, I tried to tell him first all about Jim Lowry but, also more importantly, tell him about the Bedford-Stuyvesant Restoration Corporation, what we were trying to do, and how we were trying to save souls and effect change. So I told him about all the things that usually worked in the past like, "See those junkies over there? Those are junkies." He didn't care. And I tried to tell him about poverty. He didn't care. I tried to tell him about bad housing. He didn't care. I tired to tell him about school systems. He did not care.

The only series of questions he asked me about was economic development, the number of businesses in Bedford-Stuyvesant, what they were comprised of, and where were they going. Sadly, I could not tell him a glorious tale about the number of businesses in Bedford-Stuyvesant.

So, I guess, after about an hour of pestering him with all the symptoms of poverty in Bedford-Stuyvesant, he looked me dead in the eye and said, "Young man, I could care less. All I care about is creating an economic base in this community. In Bedford-Stuyvesant and all the Bedford-Stuyvesants of America, unless there is an economic base where wealth can be created and regenerated and entrepreneurs developed, the problems of poor education, of poor health and poor housing will never go away."

With that very, very stern lecture, my whole life changed. And that's the way I look at this kind of problem today.

Unfortunately, a lot has not changed in Bedford-Stuyvesant from the late sixties to the early eighties.

Recently, my learned nephew, who is a full professor at Harvard University, was quoted in the *New Republic,* when he stated:

> Today nearly three of every five black children do not live with both of their parents. The level of dependency on public assistance for basic economic survival in the black community has essentially doubled since 1964. About one-half of all black children are supported in part by transfers from the state and the Federal Government. Over half of the black children in primary and secondary schools are concentrated in the nation's 12 largest central city school districts, where the quality of education is notoriously poor, and where whites constitute only about a quarter of total enrollment. Only about one black student in seven scores about the 50th percentile on the standardized college admissions tests. Blacks, though little more than one-tenth of the population, constitute approximately one-half of the imprisoned felons in the nation.

That is the problem that I think we should concern ourselves with today, and tomorrow, and the next day. This is a very serious problem which I perceive as a time bomb, a situation that if not corrected will be catastrophic. All we will have to do is look at Italy, South America, Iran, and South Africa to see how it will affect us.

Recently, I wrote an editorial for the *Chicago Tribune,* and one of my learned wealthy friends said, "Why would you ever advocate business set-aside programs?" I looked the person dead in the eye and said, "Jay, have you been to Italy recently, and do you know the Chairman of Fiat?" I knew he did.

He said, "Yes, I had dinner with him last month."

I said, "How does he go to work every day?" It was a very vivid image of this man getting into an armored caravan of cars protecting him as he moved from his abode to his place of work.

I'm saying very seriously, unless we do something, we, too, will be confronted with the same kind of situation.

So when I look at minority business development programs, I don't care if people happen to get rich, because they earn their money. I look to Lee Iacocca; I look to Bill Agee; I look to people like that who received large bonuses and say, "You deserve them. You turned the companies around." And I say the same thing to minorities who happen to be successful entrepreneurs. I'm sure Mr. Bates will talk about that.

I think more importantly, as we look at programs, we should ask the people who implement these programs how well they did. In my paper I list 11 different criteria that I use to justify the expenditures

of public funds for such programs. It includes such things as: Were broad economic goals established and achieved? Did the programs provide comprehensive training? Did the programs hire or retrain people who are out of jobs? Etc, etc. If all those things worked, then I say it was a good, sound investment.

Unfortunately, too often minority business set-aside programs are not evaluated along those lines. This is the case with the SBA 8(a) program, Public Law 95–507, Public Works Employment Act as it was alluded to, and the Department of Transportation Surface Transportation Assistance Act. Too often these same programs get a disproportionate amount of press. I have never seen programs of such small expenditures receive the amount of press that these programs do. And I have to ask you, and I have to ask myself, why.

I think in terms of the programs, in terms of cost, and to be fair—and when analyzing these costs and the return on investment, I have to look at other things beyond the obvious. I will not, here today, ever deny that often some of the programs are inefficient, that too often people who are deserving are denied opportunities. And too often—and I think this is the biggest criticism I have had about these programs—that in Washington and in the Springfields of America and in the Chicagos of America, too many of the programs are redesigned over and over. That is the cost inefficiency of these programs, not the cost differential in contracting bids.

Let me just touch on that because I think it's very important.

This last year my firm worked with the city of Chicago in trying to analyze their procurement program, as well as their minority business program, and I think one of the things that kept coming out, over and over, as the point of departure on the effectiveness of these programs, was the low bids and the sealed bids. We looked at over 1,000 bids over the last 5 years that were sealed in the city of Chicago that went to the lowest qualified responsible bidder. And when we looked behind the obvious, we saw that many of the bids that were the lowest or the lowest responsible bids were then amended.

We had five last week that we discovered were amended within the first 6 months and had quadrupled the original price of the contract. So I think that we have to look beyond the obvious. If you look in terms of fat on contracts, there is more fat in materials, overhead, and delays and amendments and modifications than any subcontractor could ever, ever contribute.

In terms of justification—I think I talked about that. I won't go on about the inequities of the past. I discuss that in the paper.

I would like to highlight some of the things said by Dr. Haworth in the sense that minority- and women-owned businesses historically have not been a part of the economic mainstream of America. If you look at the total population of minorities, which represents approximately 20 percent of the total population, we account for only 5 percent of all the firms and only 0.6 percent of total employment.

Basically, we need a mechanism to achieve parity some time in the future—I don't know what it is. Is it having a viable base run and controlled and led by strong, responsible leadership, either Republicans, Democrats, women—I don't care—but who is leading the minority business community so that we can really take a place among the leaders at the table. We are not there now. We do not have leadership positions, and if we continue at the pace we are going now, we will be going backwards.

I think Mr. Bates will reveal some of the figures, but if you look at the difference in the census tract, the last one in '77 and the previous one in 1970, you will see, in terms of percent of gross receipts, minority businesses are going backward and not forward, although the number of business have increased.

You must look at it in terms of what the obvious problems are. I think we have gone over it. There is usually a lack of capital, lack of access to the larger markets that make a difference. I think there is also a lack of capable management. I've seen it and worked with it.

What we have to deal with as a major issue—and we cannot throw it under the table—is the real issue that discrimination is still alive and kicking in America in 1985. I speak from personal experiences. I'm not going to try to plead poverty—I couldn't do that because somebody would probably check me out—but I will speak in terms of my own personal experiences.

The first major contract I received was from a private corporation. The person who gave me this contract did so, not based on merit, not based on my Harvard training, not based on my 8 years at McKinsey, but because his CEO told him to give it to me. The same person came into my office 3 days

later, unbeknownst to me, took over my office, put his feet up on the table, and I said, "Why are you doing this?"

He said, "Well, I now own you."

That happens.

I have two letters that I will always keep in my files. One is from the managing partner of McKinsey, written to a CEO of a major corporation introducing me to that firm. Nowhere in that letter did he ever say that I was a minority or that the business I was in dealt with minorities. All he said was that I was a qualified person.

Stupidly I sent my brochure. I got a letter back from a senior vice president that said, "Dear Mr. Lowry: We have no use for any minority programs."

So by definition, once again, they assumed I was not qualified to do anything else but design and work in minority programs.

I don't want to bore you with this, but I just want to underline the fact that it is alive and kicking. Recently, I tried to do an executive search with a major corporation. They were impressed with my credentials and the credentials of my staff—which happens to be 50-percent women, and white, as well as black—and he said, "I think you could do the job, but unfortunately we cannot give you the job because my German partners would not accept it."

These things happen to me and others every day. To assume that they are not happening is really unfortunate. If you look at the many experiences that black contractors, Hispanic contractors, and women-owned contractors have had in Chicago and other cities, where inside information which cannot be easily proven, over cocktails, over breakfast, where people know about bids 6 months before the minorities know about it—they will have the specifications or generally outlined what the specifications for the bids are, which greatly facilitate the bidding and, on occasion, will have the specifications gerrymandered—if you want to use that term—so that they cannot lose. That happens every day. It has not gone away, and it will continue to happen unless the Federal Government, the State government, the local government and the courts take action to prevent this.

Enough of the doom. I really feel—and I have to say this in total candor—if I were somebody who happened to be white in Waterloo, Iowa, and bid on a contract and did not get the contract because a minority got it, I would be upset. I would be upset as an individual; I would be upset as a person who has worked hard and long and merited the attention. But, unfortunately, we have to do things to get things on the mark in a macro way, not always looking at it in a micro way. And because of that, I think the minority business programs justify themselves.

Lastly, I'd like to say that—in terms of positive things, I would first like to say that my firm, over the years, has done many different studies, but the two we are probably most proud of are one titled, "A New Strategy for Minority Business," done in 1978 for the Department of Commerce, and later in 1981 we did one called, "Minority Business in the Eighties" in which we went into great detail about what should be done in dealing with the total problem. We focused on several things, and I would like to share them with you, but I'd also recommend that you read the report.

One, if we are going to be serious, we have to deal with the positioning of minority businesses, which are basically service businesses and low-profitability businesses located in the inner cities. We must try to develop businesses in the growth areas, because that is where the action is and that's where it will be for the next 20 years.

Two, I think we should try to provide incentives for the private sector. I have been very fortunate over the last 4 years to work with such CEOs as Don Kendall, Peter Stroh, Michael Jordan, and Dick Munro of Time-Life, Frito-Lay, and Stroh Beer, and many others who are very sincere in terms of commitment, money, and expenditures of resources to enhance minority business. Unfortunately, these people are the minority, not the majority. Therefore, to get more people to come up and be a part of the dance, so to speak, I think there should be private sector incentives, and that's why I strongly support the free enterprise zones and whole modeling effect of such legislation. I've said it before and I'll say it again.

I think the last thing we should do is to phase out Federal programs. I think it would be catastrophic to do away with them immediately. I think we should have a 20-year horizon. We should do it in a way that makes sense. We should try the best we can, Democrats and Republicans, to get out of designing programs to benefit friends and allies and into design programs to get the best and the brightest to try and have accelerated growth and viability of economic development.

I think the last thing we as minorities should do—and there's a lot of discussion about this—is we should rely on the people who deliver when it's time to deliver. And there are so many qualified people out there who are basically invisible, so to speak. And to quote many different people, I think all we're saying is, "Let's give those people an opportunity to perform and to excel." And that has not been the case.

In the end, I'd just like to conclude by drawing on a statement by Michael Jordan—but I would kind of piggyback what I said before. I think it would be a mistake and castastrophic to throw minority businesses to the verities of the free enterprise system because, at this point, it is not free and it is not open. Hopefully in 20 years, with the right kind of comprehensive program, that might be true.

But to quote my good friend, Michael Jordan, who at the time was the president of Frito-Lay—he has now gone on to be the treasurer of Pepsi Cola—at a speech which he gave to the Association of the Private Enterprise Education Institute, Michael Jordan said last year:

> Think of your business community as a series of highways, roads, and small streets, all forming the map of a city. In some areas the roads are in terrible condition; in others they are a little worn. To make your city better for everyone you try to fix the worst roads first. You make them your top priority. Naturally, some people who live along the slightly worn roads can't see past their own front doors and they complain.

"Minority business communities," so Michael Jordan stated, "are the crumbled roads of America. They must be the cities' and the Nation's first priority. If people realized how important minority business development is for the entire city and the entire nation, both for the short term and long term future, they will support a program that encourages this."

Thank you.

CHAIRMAN PENDLETON. Thank you, Mr. Lowry.

Peter Kilgore is a partner in the law firm of Kirlin, Campbell & Keating here in Washington. He has participated in the litigation of major affirmative action cases, including *Fullilove* v. *Klutznick.* He is also a lecturer in labor relations in the construction industry at Catholic University. Mr. Kilgore formerly served as Assistant General Counsel in charge of appellate litigation at the Occupational Safety and Health Review Commission. He is the contributing editor of an upcoming book on occupational safety and health law and has written articles on racial preferences as well as on occupational safety and health.

Mr. Kilgore received his J.D. degree from Valparaiso University and a master of laws from Georgetown University.

Welcome, Mr. Kilgore.

STATEMENT OF PETER G. KILGORE, KIRLIN, CAMPBELL & KEATING, WASHINGTON, D.C.

MR. KILGORE. Thank you, Mr. Chairman.

I am the only lawyer on this panel, and so my perspective on the issue being addressed is perhaps framed in a context unlike the other panelists'. Accordingly, I believe that the question posed here is not what the present state of the law is in regard to the use of set-asides, but where use of these mechanisms is appropriate.

We are also not addressing affirmative action in its broadest context, but the use of a specific tool to effectuate the improvement of certain classes of individuals. Besides other factors mentioned by my colleagues here, I believe that the appropriateness of any tool to implement affirmative action, whether you call it a set-aside goal or a quota or whatever, must be examined from two perspectives: one, whether that particular mechanism is appropriate to improve the general standard of classes of persons, irrespective of any established harm to the beneficiaries; whether that particular mechanism is appropriate to make whole actual victims who have been denied contracts, refused jobs, or other employment benefits and, if so, under what circumstances.

More specifically, each of the cases submitted in my report to this Commission were inserted to highlight the following factors:

First, the mechanism used—whether you call it a set-aside in regard to contracts; a goal, a quota, or preferences in regard to employment—constituted a line drawn to give benefits on the basis of race, sex, or ethnic status which also caused detriments to specific companies or individuals on the same basis.

Second, groups and persons receiving the benefits did not suffer any identifiable harm in the form of a known lost contract or a job opportunity due to specific acts of discrimination committed by an entity either identified with the program or elsewhere.

Third, innocent third parties actually suffered harm in the form of not being given an opportunity

to bid or otherwise receive a contract or a job opportunity.

Instead, the mechanism selected was implemented to address historical or societal discrimination or to overcome a perceived imbalance in regard to statistics. For example, in the *Fullilove* case, an MBE quota of 10 percent was set aside for minorities. You have local quotas set up under various local programs, such as the one in Dade County, in which on a particular contract, a 100 percent set-aside was established for black contractors in the employment sector. A construction contractor in Iowa, which had never been charged with discrimination, never had a charge of discrimination filed against it in any State, local, or Federal agency, was not charged with discrimination in the particular case, was sued under the Executive Order 11246 for debarment because it did not statistically obtain a minority representation in particular crafts during a 20-month period in which it held one Federal contract. That contractor, because it did not statistically obtain the results which were imposed and incorporated into the particular contract, can no longer bid on Federal contracts, even though statistics were brought out in regard to Federal census statistics that in some of the grants in which it was found to not have statistically obtained, there were no minorities in the SMSA in which the contractor was located or in which it recruited.

Furthermore, in that particular case the contractor did not even have control over the particular employment status of its workers because it hired through exclusive hiring hall arrangements because it was unionized.

The question which is really posed—and in regard to further examples I would refer to Mr. Sroka's report where he lists numerous examples of set-asides, not only at the Federal, but also the State, local, and city level—the question which is really posed here in regard to discrimination is how we should define it as to the use of a mechanism such as a set-aside.

Benefits are given to nonvictims under the programs which are currently in use because of a historically perceived class harm, not any identifiable impact on the specific beneficiaries who would benefit under the programs. Also, known individuals and companies are actually harmed who, themselves, are innocent of any of the wrongdoing perceived in regard to historical discrimination.

For purposes of considering remedies such as set-asides, discrimination must be found. But I believe that the definition must be more narrow than that. It should be imposed only where beneficiaries have actually been denied a contract or a job due to race, sex, or ethnic status. Thus, for purposes of the twofold perspective, class remedies and individual remedies that I outlined at the beginning, a set-aside-type mechanism, in my opinion, is not an appropriate tool to effectuate affirmative action, to improve classes. It may be an appropriate tool to make actual victims whole depending on the circumstances of the particular case.

What do we have, on the other hand, if we use the system that currently is now in effect? We are granting benefits to groups, to classes, to persons who have no identifiable impact in regard to historical discrimination. If that is the case, then, in my opinion, the benefits that are given to persons and groups other than known victims require that we clearly define, first, the groups that are to receive the benefits and, secondly, the qualifications for individuals to be categorized in the particular groups. I believe that my report—without going into it at this point—specifies the numerous problems that we would get into in regard to that.

I might just add that in the dissent in the *Fullilove* case, Justice Stevens pointed out the problems which under the MBE program, under the Public Works Employment Act of 1977—that these were problems which were unanswered. Unfortunately, the case that happened to get up to the Supreme Court did not present a right decision, at least in regard to the majority opinion, to face those issues.

Nevertheless, if we are to be granting awards to classes rather than to individuals because of any identifiable harm, I believe that it necessitates a definition both in regard to the classes, the groups that are going to be the beneficiaries, and second, the qualifications for individuals to fall into those classes.

That turns to the issue of fairness.

Justifications for set-asides, for quotas, are exemplified by the few cases that I cited in my report. Theories are expounded, such as the fact that a set-aside is a limited and properly tailored remedy to cure the effects of prior discrimination, which allows an innocent class to share the burden. Another theory is that the rights of the injured third party are not unnecessarily trammeled. Mr. Lowry puts it that non-MBEs must view their nonselection

in historical perspective because of the past injustices against certain classes and the need to develop a minority business base.

I have no disagreement that we must explore avenues to improve the status of disadvantaged groups, including minorities and females, and particularly to improve a business base for each group. However, I also believe that additional elements need to be considered before use of these particular affirmative action tools is invoked.

One, in regard to beneficiaries the question becomes: Does justification exist to extol benefits to the chosen classes? In turn, this requires an analysis both in regard to the groups that are selected for the benefits and the individual beneficiaries.

As to groups, the question becomes: Why should certain groups be chosen to receive preferential treatment? The sorrowful history of treatment of blacks in this country is indisputable. On the other hand, the preferences now used generally treat all groups besides blacks on an equal basis regardless of the degree of historical class harm.

In the Supreme Court decision in 1978, *Bakke,* the lead opinion recognized the fact that this country is comprised of various minority groups, each of which has received some sort of discriminatory treatment in the past. As pointed out in *Fullilove,* how does the legacy of slavery and the history of discrimination against the descendants of blacks support a preference for Spanish-speaking persons? I would add it is not just Spanish-speaking persons, but how does a preference for blacks or any other group support a preference for another class?

If groups are to be given benefits, I believe studies should be undertaken as to the basis for either the inclusion or the exclusion of the groups. Even as to the inclusion, the question becomes: Should all groups, as is the case now under most of the programs, benefit equally if the extent of a past discrimination against a particular class or the effects of the discrimination vary as to each group. Should Asians, who Mr. Bates found not to be suffering statistically the same disadvantaged effects as other minorities, be given the same benefits as blacks?

Similarly, as to individuals, even if a set-aside is warranted as to certain groups, why should any contractor or individual be given a benefit when that contractor or individual has suffered no identifiable harm, when discrimination, whether it be historical or otherwise, has no identifiable impact that has caused a measurable detriment to that individual or contractor.

As recognized in *Fullilove,* it is far too gross an oversimplification to assume that every black, every Hispanic, every Asian, or any other minority is currently suffering from the effect of past or present discrimination. Moreover, as to the fairness issue, I also believe we must consider persons who are excluded from the benefits.

The basic question, I believe, becomes: Why should nonvictims receive advantages at the expense of creating harm to innocent third parties? We should strive to improve the economic condition of all disadvantaged groups, but I believe when we fashion a class remedy for this purpose the line should not be crossed where new victims are actually created.

Set-asides may be warranted, but I submit, only in the narrowest of circumstances: one, where specific contractors or individuals have been identified as suffering actual harm through an entity's discrimination; two, while we should make whole those victims, the appropriate remedy to make whole those victims must be examined, which requires a balancing of the use of a set-aside, if that is deemed a possible make-whole remedy, against means less harmful to innocent third parties.

As to the separate issue of improving the standard of certain classes, including females and minorities, I certainly would urge and I believe that exploration should be made about training and educational programs which this Commission has mentioned; assistance in bonding, joint venture considerations, and a host of others. Indeed, we should strive to improve minority and female class status as well as the class status of all disadvantaged persons through the exploration of the various assistance programs I touched on, as well as referenced by my copanelists. However, in carving out a remedy to help disadvantaged groups, let us be mindful that race, ethnic status, and sex should not be used as a sword to create new victims at the expense of awarding benefits to persons suffering no identifiable harm other than to simply say historically that his or her group suffered some form of discrimination in the past.

Remedies as to identifiable victims should include consideration of set-asides and perhaps even be used where appropriate because a less harmful means will not make the victim whole. Remedies as to class improvement, however, in my opinion, should not

create race, ethnic, or sexual barriers to benefit nonvictims in a misguided attempt to rewrite history and its class-perceived residual effects.

The constitutional guarantees of equal protection under the 14th amendment as incorporated with regard to Federal programs under the 5th amendment are geared toward protecting persons. Similarly, our Civil Rights Acts, section 1981, section 1983, Title VII, for example, are geared towards protecting individuals. I submit that our resolve, and I believe that the Commission's recommendation, should be similarly structured.

As to class remedies, equal treatment should be the objective, not unobtainable results. The civil rights of all persons should be protected, and those rights should not be sacrificed toward benefits to nonvictims who qualify simply due to the immutable factors of race, sex, and ethnic status.

Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. In the interest of something, may we allow our reporter a chance to stretch her legs. Let's have a 5-minutes recess.

[Recess.]

CHAIRMAN PENDLETON. Dr. Timothy Bates is currently a professor of economics at the University of Vermont. He has also taught at the University of California at Berkeley, UCLA, and the University of Wisconsin. He was a member of President Reagan's Task Force on Small Business in 1980–1981 and a member of the Republican National Committee's Small Business Advisory Group last year. He has published three books and numerous articles on minority business development.

Dr. Bates earned his Ph.D. in economics at the University of Wisconsin.

Dr. Bates.

STATEMENT OF TIMOTHY BATES, PROFESSOR OF ECONOMICS, UNIVERSITY OF VERMONT

DR. BATES. Thank you.

I'd like to spend a half-minute of my 20 summarizing very briefly what we have heard so far.

In Mr. Lowry's presentation, essentially defending minority business set-asides with some constructive suggestions for improvement, the historical perspective is introduced: The broader problem of groups of people is the topic of relevance.

Now, when people oppose minority business set-asides, they very rarely argue from a global perspective. Rather, they take a narrow perspective or a micro perspective. They talk about individual firms, individual people.

Now, in this micro versus macro consideration of minority business set-asides, there really is no one correct approach. Both are valid approaches to the problem, and they essentially boil down to fairness, what is fair. I think that is the proper paradigm for considering the issue today. And, as I consider what is fair, I'm sorry to hear about the firm in Colorado, but I must admit my heart goes out a bit more to the thousands of unemployed people in my home town of Chicago, unemployed in the ghettos and barrios. I am much more concerned with the equity issues involved in set-asides from that broad perspective.

One thing I have seen in many of these papers is a reference to a 1980 Supreme Court ruling which ruled in favor of the constitutionality of a minority business set-aside. I'd like to take a direct quote from one sentence out of that Supreme Court opinion to orient my remarks. The quote is this: "Traditional procurement practices, when applied to minority businesses, can perpetuate the effects of prior discrimination."

In other words, the struggle for the government's procurement contracts today is not an equal struggle. The competitive struggle, which I believe we'd all like to see as an equal struggle, does not allow everybody to line up at the starting line exactly equal. If we adopt a colorblind policy today, then minorities would be left behind in this competitive struggle. There are several identifiable reasons why they would be left behind in this competitive struggle in this day and age, and they have been mentioned already. One concerns capital formation for businesses.

In terms of capital formation, we are talking about a community of small businesses, and in small business formation and expansion, invariably the main source of capital is one's personal wealth, one's personal savings. Now, in order to generate personal wealth and personal savings, it is necessary to have a certain high level of income over a period of years.

We are all familiar with statistics on differentials in income by groups, so I'll just throw out one representative figure and go on from there. If we take a longer term perspective—I'll go back to 1959 as a starting point. If we look at college graduates aged 25 to 34—young people beginning their careers—black males were earning 59 percent as much as their white male counterparts. For this young group of black college graduates, it is rather difficult

to accumulate comparable wealth on 59 percent of the income. Fortunately, that has improved. In 1979 the same group was earning 84 percent of the income of whites.

But with the lagging in income differential, of course, there is necessarily going to be a differential in wealth accumulation. But the wealth accumulation differentials are much greater than the income differentials. If we are to compare blacks and whites, we find that, in terms of average-family wealth holdings, the source of most capital for small business, the average black household has less than one-fifth of the personal wealth of the average white household. Hispanics are slightly ahead of blacks, and Asians are on a par with white households.

Now, if we look only at households earning over $20,000 a year, within this group, black versus white households that are all earning over $20,000 annually, we find the average black household wealth holdings are roughly 30 percent of white household wealth holdings. So this is your differential among your higher income group, 30 percent of the wealth holdings.

That makes it pretty difficult, of course, to generate the initial equity to establish or expand one's small business. And an important ramification of this is that when the larger minority businesses have been established and have expanded, rather than relying on personal equity to the degree that nonminority firms do, the larger black and Hispanic firms rely much more heavily on long term debt, so their capital structure is different. Their capital structure is much more what we call leveraged. In fact, very, very high leverage emerges as the single most enduring trait that will characterize your larger minority businesses. The community does not have the wealth holdings. The high-income individuals have only 30 percent of the wealth holdings on average.

And there's form of wealth. It's not just aggregate wealth that's important, but if you look at form of wealth you will find that in the nonminority community, approximately 40 percent of all wealth is wealth in the form of either financial assets or business equity. This is investment money. If you look at the black community, of its total wealth holdings less than 16 percent is held in the form of business equity or financial assets. So, to the extent that wealth is there, it is predominantly in the form of automobiles or equity in homes.

So, the equity base is not there that has traditionally been relied upon to establish and expand small businesses in this country, and the predictable ramification is that the larger minority firms today are very, very highly leveraged. This is a manifestation of the past income differentials, pure and simple.

Now, being highly leveraged—actually, government programs such as SBA bank loan guarantees facilitated this very heavy debt load that the larger scale minority firms have assumed—can be advantageous in a period of inflationary growth and low interest rates, such as we saw in the late 1960s, when many of these programs got underway; but in periods of recession and very high interest rates, you have a combination of events that makes that very heavy debt burden a real killer. So, in recent years, when we have seen less of a growth-oriented and now less of an inflation-oriented economy, the real interest rates in our economy have reached historically unprecedented levels. And the larger minority businesses that have expanded and have received the procurement contracts are really caught in a bind in this period of record real interest rates, not having the wealth base to draw upon, opting instead for long term debt, and now being saddled with the capital structure which is the major cause of their lower profitability, higher incidence of zero profitability, and outright higher incidence of failure.

So, capital structure is probably the single most observable trait among the larger minority businesses that is a major handicap today, but there are other traits as well. Education and training—it is rather well established that there are identifiable gaps here. Once again, the gaps are closing, but as we look at education and training over the longer horizon, we have to keep it in the perspectives of the attitudes of the broader society.

In the first half of the 20th century in this country, the majority of all blacks that graduated from college went into two occupations: preaching and teaching. Those were the occupations that were really identified as acceptable roles for educated blacks historically. Fortunately, we have made progress, these stereotypes are breaking down. Progress, now, is shifting college students into areas such as business administration and engineering. But nonetheless, we do have this legacy that, even within the realm of the college-educated group of people in our society, it is only now beginning to come around to resemble the component of skills, the business and technical skills, that are vital to

achieve any kind of parity in the business competitive struggle.

Well, when you consider the difficulty of forming businesses without a wealth basis and you look at the education and training differentials, it is not surprising that you find that, overall, the minorities who are in business, excluding Asians—I am referring mainly to blacks, Hispanics, and Native Americans here—the minorities that are in business tend to be in those types of businesses that require the least capital, that require the least in the way of education and training, and you find them most underrepresented in areas such as finance, insurance, and real estate. There is heavy underrepresentation in construction, that being an area where, typically, skilled building trades have limited access in some instances to apprenticeship training programs. In professional services, minorities are once again heavily underrepresented. These are many of the most remunerative lines of small business, and this is where the minority firm is least likely to be, which is perfectly predictable in terms of community wealth holdings, lack of equity, and training and education disadvantages.

There is one area in which minorities who are self-employed today are most heavily overrepresented, and that is in the personal service realm. That, once again, typifies the past record because personal service firms can be opened with very little capital, and very little education and training is necessary. Another trait of personal services is it's the one line of business in the United States today that offers the lowest rate of return to the entrepreneurs in this field.

If we put it all together and get back to our topic at hand, which is government procurement, minority businesses are going to be severely hampered in competing for essentially three broad interrelated reasons. They have a very low incidence of firms in areas such as manufacturing or construction which are amenable to competing for the procurement business.

Within fields like construction and manufacturing and wholesaling, when we do study the minority firms that are there and are getting the contracts and are competing, we find that they are leveraged up to their eyeballs. They are very heavily indebted, and they are much more heavily indebted than similar nonminority businesses. By that I mean if we take a group of firms and we make sure that firm by firm they are from the same States, they have the same corporate status, they are in the same line of business, roughly the same sales volume—when we look at a matched group of firms that are in the procurement game, minority businesses have a much heavier debt burden.

As an example of this, wholesalers come to mind. If we look at the minority wholesaling firms that are receiving procurement contracts, we find that of their capital structure, two-thirds is debt; one-third is equity. That is a highly leveraged structure. If we look at the same group of firms who are nonminorities, about 56 percent of their capital structure is equity and 44 percent is debt. So for one group, 44 percent of the funds are being provided by debt; in the other case, 67 percent—very high indebtedness in a period of high interest rates. You have a severe competitive disadvantage for those large-scale minority firms in this particular realm.

It's across the board the same phenomenon in wholesaling and manufacturing, construction, and so forth. In every instance, the minority firms are going to be much more highly leveraged, and the high interest rates in periods such as this are the main reason for their lower profits vis-a-vis their competitors who are nonminorities.

So we have the low incidence of firms in the right areas, the debt-laden capital structure of the firms that are receiving the contracts, and then in all areas we have a minority business community that is shaped by weaker educational and training background of those entrepreneurs.

There is another less tangible reason for minorities lagging in certain fields. It has been alluded to by two of the previous presenters. As an example of this, something that I think of as an old boy network, is what economists often call statistical discrimination.

I'd like to look briefly at the construction industry. In construction we have a very high incidence of Federal procurement contracts covered by set-asides. Minorities are typically too small to be general contractors, or if they are large enough, they haven't been in business long enough to be general contractors, so they generally work as subcontractors.

Now, in this subcontracting network, a general contractor historically works with a group of subcontractors that he is very familiar with, that he has had dealings with in the past. A general contractor likes to work with subcontractors that have a track record, subcontractors he knows he can rely on. If I take a statement from a previous presenter, John

Sroka, the general contractor is "liable for subcontractor nonperformance." That is a very rational reason for wanting to know your subcontractor.

Now, your subcontractors generally belong to an old boy network that has close personal working relationships with the general contractor. This type of old boy network where you know each other, you have worked together for a long time—that is exactly what excludes minorities. That is exactly what economists would call statistical discrimination, a very rational practice from the standpoint of one general contractor, which, nonetheless, would exclude minorities.

Now, consider the impact of the set-aside that comes along and says, "You have to look for a minority subcontractor," or, "You have to have minority subcontractors or you can't compete." At that point it becomes rational for the general contractor to look around and try to find the most appealing subcontractors, but it's a difficult process because there is a real lack of information. You don't know how reliable the minority subcontractor is necessarily. You have no working relationship. The knowledge is lacking. So, at stage one when this type of set-aside is initiated, you expect maximum uncertainty and maximum costs, difficulties, cost overruns, etc., because the subcontractors and the general contractors are getting to know one another, and they are really unfamiliar with each other. Now, in this instance, if a subcontractor does not perform according to specifications, the general contractor has to bear the loss.

Once they get to know each other, however, once the subcontractors and the general contractors have been through a contract, the question is: Will the general contractors be willing to come back and use the minorities again, now that they have acquired some experience and learned who to work with?

In the evaluation of the 1977 Local Public Works Project, which was the first large-scale set-aside in construction, there were a lot of difficulties. There were cost overruns. There were minority subcontractors that did not perform according to specifications. It was a start-up problem. The groups didn't know each other. Indeed, some of the minority firms were high cost and some were unreliable. It doesn't surprise me a bit.

But in followup studies, the figure that most impressed me is that of the minority subcontractors who worked in this program, 61 percent of them then went on later to continue to do business with their general contractors. They had broken through that old boy network. They were now, if they had done a good job, eligible to be part of the network. We have a breaking down of traditional barriers. We have a breaking of statistical discrimination, and now we have a possibility of a more free and open network of subcontractors competing for the business of the general contractors.

The minority subcontractors that don't perform are very possibly going to be destroyed. They're going to go out of business. Those that do perform are going to get repeat business. They are the ones that are going to be able to expand, and in a more open process in which minorities have a better access, we are possibly making the transition to a more open, overall competitive economy.

In my allotted 20 minutes I have 9 or 10 other topics that I'd like to talk about in similar detail, but I will narrow myself to two very particular ones, both of which have been alluded to by my previous presenters.

The first is the fact that Asians as a group in this society are no longer a disadvantaged entrepreneurial class. If you go back and look at the 1960 data, they were. Asian entrepreneurs were overwhelmingly concentrated in laundries and restaurants. They were a low-income group, and they were discriminated against. In 1970 they had made tremendous progress, but they were still behind.

By 1980 Asian entrepreneurs had above average incomes overall, Asians taken as Japanese, Chinese, Filipinos, Korean—look at the individual subgroups and you'll find the same consistent pattern; break it down by industry and you'll find the same pattern. They are the highest earning entrepreneurial group in the United States. Nonminorities would have a case to argue that they are disadvantaged today relative to Asians.

Educationally, they have the strongest educational background, the highest incidence of college degrees. In terms of family income, personal income, income from self-employment only, total labor income—you name it—they're way ahead. In fact, 1980 family income among self-employed Asians was slightly under $35,000 on average. And among nonminorities who are self-employed, it was under $27,000. So this group, indeed, is way ahead, and there is no rationale whatsoever for their continued participation in minority business set-asides.

When we look at Hispanics, blacks, and Native Americans, then the sorts of figures I have been

talking about here, the wealth differentials, the highly leveraged firms, the lag in terms of education and training—these are the groups for which these concepts have relevance.

In my final 45 or so seconds, I'd like to say that a lot of minority business set-aside programs are run fairly inefficiently, as has been alluded to many times. But there is one principle that tends to identify the programs that are more effective in terms of generating the economic development process that will provide jobs and really benefit the minority communities. These are the minority business set-aside programs that try to target not the most disadvantaged minority firm, but the more viable minority firm, the minority firms that are headed by the younger, better educated entrepreneurs. These are the ones that have the development promise. These are the ones that are, indeed, creating the expanding undercapitalized firms in areas like construction and wholesaling. And these are the ones that can create the economic development motivation to make the ghetto more of a wealth-producing entity, to create jobs for the people who need the jobs. And if we are going to think in terms of overall fairness, the overall fairness comes in having a set-aside program that can successfully create an economic development dynamic, that will help the barrios and the ghettos, and make them wealth-creating entities because that is going to help hundreds of thousands of people who are unemployed and underemployed today, people who will benefit greatly from the resultant jobs that can potentially be created.

Thank you.

CHAIRMAN PENDLETON. Thank you.

We will start the questioning with Commissioner Berry.

COMMISSIONER BERRY. Thank you very much, Mr. Chairman.

Ms. Haworth, on page 15 of your paper you have some statistics on contracts. Do you have any idea why the TVA figure is 0.1 percent for MBEs while VA has 6 percent? Is there some reason for that?

DR. HAWORTH. There is a reason. I don't know what the reason is. It may be their location or it may be the kind of work they're doing, or maybe TVA isn't paying any attention to what they're doing with minority businesses.

COMMISSIONER BERRY. I see. Do you think, overall, that minority business enterprise is getting a fair share of Federal contract business?

DR. HAWORTH. At the present time I would doubt it, but I don't think we know enough to be able to say why or in what areas they should be getting more and what a fair share is. We can't define it clearly yet.

COMMISSIONER BERRY. How would you go about doing that?

DR. HAWORTH. The first thing we need to know is what the contract is being let for that minorities are not sharing in at all—what kinds of products are they looking for, what kind of work is being let, and where are the minority businesses that could have been bidding. If they don't bid, why didn't they bid? If they bid and got refused, why? Was it the fact that they were so overleveraged that their costs were always higher, or was it instead a situation in which they never bid?

I think what we do about it, then, is going to depend on what we find out is related to what's going on.

COMMISSIONER BERRY. Is anyone collecting that information or trying to find out the answers to those questions?

DR. HAWORTH. I believe that there are some scattered efforts. I know the Minority Business Development Commission has some data that they are trying to develop. I know the Small Business Administration is trying to develop some data. As far as a general collection of data in this area, I believe the answer to that is, "No, there is no concentrated effort to find the answers to those questions."

COMMISSIONER BERRY. Mr. Sroka, just to refresh my recollection, about what percentage of these government contracts that are at issue in these set-aside programs went to minority businesses before these laws were passed and before the SBA program was set up?

MR. SROKA. I have no idea.

COMMISSIONER BERRY. You have no idea? Do you think it was higher or lower than the amount now?

MR. SROKA. My guess would be it was probably lower.

COMMISSIONER BERRY. Would you think that it would be reasonable or tolerable to have a situation where government contracts, in the main, still went primarily to nonminority businesses as a permanent feature in American life and that it was just understood that that was the way it always had been and that was the way it was going to be forever?

MR. SROKA. That is a very difficult question to answer. I think I'd like to know why that was or was not taking place.

CHAIRMAN PENDLETON. They can't hear in the back, I don't think, Mr. Sroka.

MR. SROKA. Before I can answer the question, I'd like to know more about the evidence that existed. I'd like to know why a particular type of firm, for example, did that. I wouldn't be able to answer that question unless I could look at that kind of data.

COMMISSIONER BERRY. If you were told, hypothetically, that a situation existed where 100 percent of government contracts went to nonminority firms and that this situation was likely to persist for reasons that no one could even figure out, would you regard that as something that ought to be either looked into, ignored, or what would—

MR. SROKA. Such extreme statistical evidence would obviously lend one to say that there possibly could be a problem, of course.

COMMISSIONER BERRY. So you wouldn't think it would be tolerable to permit all or most of such business to go that way forever without anybody inquiring into it?

MR. SROKA. The use of the word "tolerable" implies a value judgment on my part.

COMMISSIONER BERRY. That's why I'm using it. I'm asking you the question.

MR. SROKA. Until I could make some sound inferences as to why that discrepancy may exist, I wouldn't be able to say whether it was tolerable or intolerable. Your extreme example may be countered by the fact that maybe there are no minority businesses who would like to have those contracts. That's an extreme, obviously, but so, too, would it be if 100 percent of all the work went to nonminority businesses.

COMMISSIONER BERRY. All I'm trying to ascertain—and I'm not trying to badger you—is whether you could contemplate any possible set of facts under which such a situation might exist without remedy—under any possible set of facts—or whether you would just rule out of hand anything in that field.

MR. SROKA. There would have to be some set of facts where I could say, "This is a problem and it should be corrected," of course.

COMMISSIONER BERRY. Mr. Bates, in the absence of set-asides, do you think that minority businesses would continue to receive about the same share of government contracts or more if there were no set-asides at all?

DR. BATES. In the absence of set-asides, the minority share of Federal procurement would decline.

COMMISSIONER BERRY. Mr. Kilgore and Mr. Sroka—both of you—is it the case that State and local government set-aside programs have increased and been insulated from being declared illegal or unconstitutional since 1980? Is that true or not true, that they have increased since then—either one of you.

MR. SROKA. Sure, they've increased.

MR. KILGORE. That the programs have increased?

COMMISSIONER BERRY. Right.

MR. KILGORE. Yes.

COMMISSIONER BERRY. And that they have been insulated from declarations of constitutional infirmity or illegality in courts?

MR. KILGORE. I think, generally, from a legal standpoint, most of the challenges in regard to set-asides have come down affirming the set-aside, not invalidating the set-aside.

COMMISSIONER BERRY. Mr. Kilgore, in the *Fullilove* case, you made a statement somewhere about the speciousness of the set-aside program, but you agree that the programs have been upheld in the courts, including the *Fullilove* case.

MR. KILGORE. Generally, that's true.

COMMISSIONER BERRY. You differ with the decision in the case; is that correct?

MR. KILGORE. Yes.

COMMISSIONER BERRY. You disagree with the majority?

MR. KILGORE. Yes.

COMMISSIONER BERRY. Do you agree with Mr. Justice Stevens' opinion in the case, generally?

MR. KILGORE. Mr. Justice Stevens dissented and felt that the set-aside should not have been validated, so in regard to the result, yes, I would agree with his conclusion. He, of course, addressed considerable issues which were not addressed by the majority, and those are separate and I would have to be asked a question regarding each of the specific issues. But certainly as to the result, yes, I would agree.

COMMISSIONER BERRY. I'm asking about one. As I recall Mr. Justice Stevens' opinion, he seemed to think that had the set-aside been restricted only to blacks, he could understand better why Congress could make a finding that there had been historical discrimination and that, in fact, such a set-aside was

necessary. Would you agree or disagree with that part of his opinion?

MR. KILGORE. I certainly would agree that if an evaluation had been made, my guess would be, that a justification—whether that justification should then have been put into a statute is a different question. But certainly in regard to whether a discriminatory harm had occurred in regard to a class of blacks, that that certainly would be easier established than it was in regard to some of the other classes which shared equally with blacks under the program—for example, the Spanish speaking. A question was raised in oral argument by then Justice Stewart as to why a person with a Spanish-speaking background should be given a preference. The statute provided simply that Spanish-speaking persons would also be considered a minority for purposes of the set-aside.

The question arises from that: Does a person who is of American parentage, who happens to be a college major with a Spanish-speaking background, share in the set-aside?

Certainly, your question concerns an issue that I have raised in my paper and briefly addressed in the topic I mentioned here today. That is, if, in fact, a set-aside is going to be established, we need to have an evaluation of the harm that is suffered by the various classes which are going to be considered as the beneficiaries, and then a decision must be made as to the inclusion or exclusion of certain groups. Then I also believe that if, in fact, the set-aside is going to be used, the benefits which are extolled to the beneficiaries, to the classes, that they should not necessarily be equal. And I would submit that blacks, at least in regard to our history, have suffered discrimination to a far greater degree than some of the other classes which are preferred equally under such programs. As to that allusion which Mr. Justice Stevens was addressing, I would certainly agree.

COMMISSIONER BERRY. Do you agree that the historical discrimination, which is in part the rationale for the various civil rights laws as well as the set-aside statutes that we have, proceeded against certain people because they were individuals or because they belonged to certain groups? Put more specifically, do you think, for example, that blacks were enslaved because their names happened to be Sambo or because they were black, or do you think that things happened to people because of who they were as an individual, or do you believe that that discrimination took place because they belonged to certain groups?

MR. KILGORE. Historically?

COMMISSIONER BERRY. Yes.

MR. KILGORE. Certainly the latter.

COMMISSIONER BERRY. Groups?

MR. KILGORE. Yes.

COMMISSIONER BERRY. Therefore, if that is the case, why, again, do you find it offensive that in fashioning a remedy one would take into account, as lawyers always do in every other kind of case—at least that's what they taught me at a Michigan law school—the harm done and how it proceeded and fashion a remedy that relates to the harm? Why is it that although we do it in every other kind of case, when it comes to discrimination we flinch?

MR. KILGORE. Because in regard to cases that are brought up in court, a particular harm as to an individual is established, and I have no problems in regard to fashioning some sort of remedy, including the consideration of a set-aside, if that would be appropriate, where a specific harm is identified with a specific contractor or with a specific person.

On the other hand, I have great difficulty, as did the dissenters in *Fullilove,* with the fact that a particular individual or a particular contractor should receive a benefit, not because that contractor or individual has suffered any identified and specific harm, but only because he or she happens to fall into a protected group under the statute which is based on the immutable factors of race, sex, or ethnic background.

COMMISSIONER BERRY. Do you think there were whites who historically were able to get contracts and business from the government solely because they were white or in part because they were white and that their race was a factor in the connections they made to get such contracts, or do you believe that that is absolutely ludicrous, never happened?

MR. KILGORE. I don't think that is the issue as to what perhaps did occur in regard to a specific incident in the past. I think what this Commission should be addressing is the situation as it exists now and what remedy is most appropriate. I'm sure that if one wanted to research historically, that type of situation may have existed. On the other hand, the question becomes whether that perceived type of example justifies benefits being given to persons or to contractors solely because of these immutable factors where there has been known such specific identifiable harm.

COMMISSIONER BERRY. But if that did indeed happen—and there is historical evidence that it did happen, and you may not want to accept it, but it did happen in cases. There are people who benefited from that historical situation and had certain benefits passed along to them, from the fact that people did benefit from having businesses and contracts passed along to their children generationally. Why can't the law take into account that benefit as a valid benefit?

MR. KILGORE. I think Justice Stewart, who was joined by Justice Rehnquist in the dissent, put it very appropriately, and that is that innocent third persons should not have to pay for the sins of our forefathers. If, in fact, a discriminatory act has occurred which identifies a particular entity as discriminating, and in fact, a victim can show that that discrimination has had some identifiable impact on him or her, depending on the situation, yes, I do believe that all types of remedies should be considered, including perhaps a set-aside.

COMMISSIONER BERRY. The last question is: Why are all these answers you have given me citing dissents? What happened to the majority opinions in all those cases?

MR. KILGORE. In my opinion, unfortunately, the state of the law, as I mentioned in my report, is not in accord either with the dissents in *Fullilove* or with the position that I am postulating to this Commission. Nevertheless, we have not been asked by the Commission to report what the law is; you can hire lawyers to tell you that. The question from the Commission's standpoint is what should the recommendation for the existence of those set-asides be?

COMMISSIONER BERRY. You're a lawyer. That's why I asked you the question.

MR. KILGORE. I may be a lawyer, but I, nevertheless, have my own opinions in regard to what the law should be rather than what it is.

COMMISSIONER BERRY. Precisely. Thank you.

CHAIRMAN PENDLETON. Mr. Kilgore, just to put the record straight—before I go on to my colleague, Mr. Destro—I heard you say that discrimination against blacks is disputable. Did you mean indisputable?

MR. KILGORE. If I did say that, I apologize. I certainly didn't mean to say that. It's indisputable in my opinion.

CHAIRMAN PENDLETON. I just wanted to make sure.

MR. KILGORE. Let me make sure there is no misunderstanding. Historically, Justice Marshall in his separate opinion in *Bakke,* I think, very articulately laid out the fact of historical discrimination against blacks. I certainly would have no dispute with what he wrote in regard to that historical perspective.

CHAIRMAN PENDLETON. I thought I heard that, and if you didn't say that, at least we've got it all squared away now.

Dr. Haworth, how do you define "fair share?"

DR. HAWORTH. Out of the context of any particular identity, I'd say fair share was some share that was representative of the contribution of each of the groups.

CHAIRMAN PENDLETON. Do you think that the 1 percent figure you mentioned about women in set-asides is a fair share?

DR. HAWORTH. Of all Federal contracts? I can't tell you, and that is one of my concerns, as I mentioned in the paper, that I can't tell. It sounds to me like it's unfair, but it might have an explanation. It might be that there are no women in business, for particular reasons that are not discriminatory—and that's an issue that also has to be addressed—but it may be there are no women in particular businesses where all the Federal contracts are going. I find that hard to believe, but it could be, in which case 1 percent might end up being a fair share. I question it at this point.

CHAIRMAN PENDLETON. Does anybody on the panel have a definition of "fair share"?

[No response.]

CHAIRMAN PENDLETON. Let me try something else. Sometimes "fair share" is referred to as a percentage of people's makeup in a population in a geographical area in some way.

MR. KILGORE. Mr. Chairman, if I might just address that separately, I think that somewhat concerns the issue that I have raised. That is, if in fact there is going to be a set-aside-type mechanism, a fair share should be not an equal sharing by all of the groups who are determined to be of the privileged classes, but there should be some type of examination prior to the actual implementation of the set-aside determining to what extent discrimination has occurred to each group. And then I believe there should be a determination as to what share should be attributable to each group, depending on the type of discrimination which has been suffered.

Certainly, as Mr. Bates points out, Asians, if we are using some type of criterion in regard to the

present effects of discrimination, should not share equally as blacks.

CHAIRMAN PENDLETON. I appreciate that statement. I was going to go someplace else with this one.

This morning we talked about the Georgetown basketball team and that was in response to some of my earlier comments.

Washington, D.C., is a 75 percent or 70-plus percent black-populated city. Is that about the right number? It's close enough. And if we talk about representation in the geographical area, the city of Washington, as I can understand, has an affirmative action program for blacks and Hispanics. It seems to me, if that were the case, we'd get better results about where a fair share is or how we would apportion our contracts if the affirmative action program were for white people, white males. It seems to me, in terms of the population, they are the ones that are in the smallest number. And I'm not trying to make a defense for white males as I have been accused of. I'm talking about the principle of fair share. Would you agree with that, anybody on the panel, or not agree with that?

DR. HAWORTH. I question one thing about that, and that is, the notion of fair share there is based solely on representation. It may be that other criteria need to be included, such as what's been happening in the past that still has an effect today. It may be that those 25 percent white males are doing right well and that there was nothing happening to them in the past that would have caused them to have any disadvantages at the present time.

MR. LOWRY. I think the other issue which we keep coming back to is: If your sole objective is fair share, it is an issue and you can deal. One way we deal with it in the private sector is to analyze total procurement, and block out what you think is reasonable over a period of time for minorities, and then establish a goal that would be deemed a fair share. I think a similar kind of thing could be done in the Federal Government as well, and at State and local levels, if that is your objective.

I think, in terms of your Washington issue, if your objective is not just fair share for individuals or class, but if it is an economic problem—and this is what I come back to—then it's an entirely different situation. There you are trying to develop a given number as fast, I hope, as possible in the Washington, D.C., area of economic units that could benefit not only D.C. but the entire Nation.

CHAIRMAN PENDLETON. I guess the point I'm trying to get to is that when we talk about these numbers and populations, I'm trying to find out: Is there ever a time when nonminorities have a fair share based on the population in a geographical region, and if so, do you know of any such cases? We have talked about set-asides being for minorities and women. I'm just asking whether or not you think there are some other cases occasionally when you need set-asides or other programs that would respond to the fair share premise.

MR. LOWRY. But you're making an assumption that they are not receiving a fair share or fair treatment in entering a business in the D.C. district or any other district—

CHAIRMAN PENDLETON. No more so than you're making the assumption that all minorities don't get a fair share.

MR. LOWRY. I make that statement.

CHAIRMAN PENDLETON. You believe it's prima facie that minorities don't get a fair share, and you believe that nonminorities always have a fair share?

MR. LOWRY. No, I'm saying that minorities historically have not and even presently—and this is where I disagree with you—are not getting a fair share. Therefore, you take remedial action, and you pass policies to effect that.

CHAIRMAN PENDLETON. The reason I'm fascinated, Mr. Lowry, is that you say they are not getting their fair share, and yet you don't answer the question about what a fair share is.

MR. LOWRY. The real issue shouldn't be fair share.

CHAIRMAN PENDLETON. Mr. Sroka, AGC has been accused in the past of discrimination against minorities, especially general apprenticeships, and they are not getting a fair share of the work, either Federal work or other work. That has been a very serious problem in the minds of many people.

On the other hand, I had a chance to read your voluntary compliance program last week, and it seems to me that you are trying, in a sense—or AGC is trying—to bury the hatchet and has for some time, and has put forth this voluntary compliance contract program. And apparently you cannot get the Federal Government, at least, to read it or acknowledge it or give you some feedback. Can you tell us some more about that program and what it is supposed to do?

MR. SROKA. Mr. Chairman, I don't have the details of that program. My area is the MBE set-

aside program. Unfortunately, I am not well-versed in the voluntary compliance program. I do know we have developed such a program, one that we believe would overcome the thrust that we presently see, which is goals and timetables.

CHAIRMAN PENDLETON. Mr. Bates, do you think that eliminating or repealing the Davis-Bacon Act would give more minorities a chance to get Federal contracts?

DR. BATES. Oh, absolutely. And if we look at that historically, you will see when legislation similar to Davis-Bacon was introduced, in the southeastern United States in particular, it was documented that minority-owned firms, which were common in construction in the South, did indeed receive less business. Their viability had often been rooted in the fact that they were low-cost producers based on the lower wage scales that they were paying.

CHAIRMAN PENDLETON. I have some more, but I'll pass to Mr. Destro.

COMMISSIONER DESTRO. Thank you, Mr. Chairman.

I have a series of questions that deal with what I at least assume to be somewhat of an unstated area of—I don't want to say disagreement, but certainly no clear concept that I have heard with respect to the goals that people are after. I have heard a lot of talk just now about fair share, but let me see if I can go through and pull together a few threads and get the panel to respond to them.

I think Mr. Lowry's testimony—and please correct me if I'm wrong—indicates your primary interest, in addition to equal opportunity, as I understand it, is assuring that there is an adequate base built in the minority community so that you can generate wealth in the community. Is that a fair statement?

MR. LOWRY. Yes.

COMMISSIONER DESTRO. And I understood Dr. Bates to say the same thing, that that is what is needed as a basis for future progress.

DR. BATES. Yes.

COMMISSIONER DESTRO. If that is the case, if the case is that there is a need for a viable economic base in the community, what role does the question of work force representation that we talked about in this morning's panel play in the same community? Are they related problems? They seem to me to be related, but are they different problems in your mind? Do the minority set-asides address a different problem than the underrepresentation questions that we dealt with this morning?

Let me start with Mr. Lowry on that.

MR. LOWRY. I think that's a good question. In looking at employment, Dr. Bates probably can come up with more data than I could.

CHAIRMAN PENDLETON. We can't hear.

MR. LOWRY. I said I'm sure Dr. Bates could come up with more empirical data than I could, but I think it's been proven that, by and large, the vast majority of employees of minority-owned firms are minorities, and that is one of the objectives of having not only a community base where you have physical structures, but also firms that will attract employees from that community.

I think the flip side of that, as we have seen in recent years, is that the jobs that were normally held by minorities in major Chicago corporations when I was growing up are no longer in those corporations—in Chicago, the Midwest, Northeast, etc.—and they are either going to the suburbs or they're going to the sun country. Therefore, the jobs that were available are no longer available. Something has to be done to rectify this situation.

I think, in terms of representation or underrepresentation in community-based companies, you will have no problem in terms of representation of blacks and females. That becomes a nonissue.

COMMISSIONER DESTRO. If I'm wrong, please correct me, but I didn't see any statistics in any of the papers with respect to the utilization of minorities in the minority set-aside firms. That, to me, is an intriguing question because the statutes define it as a 51-percent-owned minority firm. Some of the horror stories people hear are that you go out and get a partner who you assign 51 percent to, and then you have the same work force that you had otherwise, but you have a silent partner who's the 51 percent minority token. Why isn't that addressed in any of these papers? It seems to me essential to the question—not the horror story, but the utilization factor.

MR. SROKA. I guess because nobody is aware of any correlation whatsoever between whether a firm is minority or majority owned and whether the employees employed by those firms on the job site are minority or majority. We have not seen any evidence that, for example, a minority firm would employ on the job site more minorities than would a majority firm.

COMMISSIONER DESTRO. Dr. Haworth.

DR. HAWORTH. One of the things to keep in mind, and I think the point you're driving at, is that it may well be that the business set-aside program or any kind of an incentive program for economic development where the only criterion for obtaining that assistance is who owns the firm—it may be that minorities would not gain in certain instances because the white-owned firm might have an 80 percent employment rate of blacks, whereas the minority-owned firm may have only a 20 percent employment rate of blacks.

It is predominantly true—in general it is true—that minority-owned firms will employ more minorities than nonminority-owned firms. But you can find examples the other way. That is perhaps the fallacy of focusing simply on who owns it if you're thinking only in terms of employment.

But as we pointed out in these papers, this is a multidimensional problem. It's not just who owns a firm. It's what happens to the capital and profits that spin off from those economic entities. It's what happens to the people that they employ, how many they employ, where they locate, whether they locate in the urban ghetto or whether they locate out in some suburb. All of those questions are tied together, and focusing on what any of these programs do on one particular facet is bound to give you horror stories about the other facets of economic activity.

COMMISSIONER DESTRO. I'm not really that interested in the horror stories. What I am really interested in is if there is any strong sense of what the intentions of the programs are. It seems to me that there are a number of factors at work here. You could also talk about the fair share of government contracts available.

I wrote down a list here: Are we talking about fair share of the available community base of resources? Are we talking about the fair share of work force representation? Are we talking about the fair share of just the contracts available? Or are we just talking about fair treatment? It seems to me there's a whole range of factors here.

DR. HAWORTH. To give you an idea of how really bad it is, much of the analyses—not all of it by any means—on the data concerning how many minority-owned firms obtained contracts were not based on contracts but were based on contract actions, which means that if I obtain a contract and then come back and amend the contract six times, it counts as seven contracts.

If you believe that minority-owned firms were going to do more of that amending than nonminority-owned firms, we are overstating their participation when we use contract action. If you think the reverse, we're understating. It's silly to use that kind of poor data, but the better data is not readily available. In fact, it is not generally collected.

COMMISSIONER DESTRO. Can you assign any reason why it is not collected? This is one thing that is also intriguing to me in respect to Mr. Kilgore's comments about how data is collected and about whom. Why isn't the data collected—and that's also the question I'd like to address to Mr. Kilgore—why isn't the data collected with respect to the needs? Because in his comments I hear him talking not so much about minority status, but the assumption that because you're in one of these groups you are also disadvantaged.

DR. HAWORTH. Obviously, it's costly to collect data, so each agency that has the responsibility for some small portion will collect whatever data they need to cover what they perceive to be their responsibility, and that might have nothing to do and in fact, in many cases has little to do with how many minority-owned businesses are involved, what the size of the contracts are, how many people are employed by those minority-owned firms, what the racial composition of those minority-owned firms is, etc. So that is the basic reason. There is no overview, no agency charged with or taking on the responsibility of looking over what is happening to Federal contracts with respect to minorities and women.

Obviously, there is the agency that overlooks all Federal contracts and whether or not they are being awarded properly. But that is not the same issue as collecting data on the amounts and number of contracts going to minority-owned firms and then collecting information about those firms.

COMMISSIONER DESTRO. Mr. Kilgore, did you want to address the other question? I don't know whether you picked it up or not. Is your point basically that the categories within the EEO–1 form, the usual categories that we all talk about—is your problem with them that there is really no correlation between minority status and your need for assistance? Is that a fair way of putting it? That's the way I always read Justice Stevens' dissent.

MR. KILGORE. First of all, I think the EEO–1 categories are not necessarily synonymous with the particular type of affirmative action programs that

have been implemented. I would point to examples such as the MBE provision under the Public Works Employment Act of 1977, Executive Order 11246, which was amended since 1965. But the categories of groups which receive preferences under each are not identical nor necessarily interchangeable.

There have been studies made with regard to benefits or discrimination as to each of those categories. Essentially, as I pointed out before, with the exception of the very articulate opinion of Justice Marshall in the *Bakke* opinion, there really is very little I have ever seen in regard to discrimination, the scope of discrimination, in what particular fields, etc., which have been suffered by each of the various groups which, indeed, receive preferences under the various types of programs. I think that if, in fact, these types of programs are to be continued, one of the matters which should be looked into, certainly, should include this.

MR. LOWRY. Something that is still very difficult for me to accept is the whole issue of individual particular harm. How can you put the burden of proof on, for example, a professional service firm, one that evaluates 150 individuals a month and determines if they are going to be associates or accountants or consultants? How can you prove that they are discriminating?

And that is the whole issue. In my particular case, when I went to McKinsey, the only reason I went there was a Federal official who said, "You will be receiving a great number of Federal contracts and they don't have one black person in their firm."

They found me through executive search. It so happened I performed well and I lasted for 8 years, and it was a good marriage. If there had not been a Federal official to put the burden of proof on McKinsey, there would have been no blacks at McKinsey.

And if you look at what is happening now—and this is why this is a very serious concern—all the professional service firms, accountants, engineers, architects, etc., because of the perceived feelings of this Commission, are no longer asking minorities to even interview. And if you looked at the number of partners in these professional firms, which is a very subjective evaluation, how are you going to prove discrimination?

COMMISSIONER DESTRO. Sir, I am not suggesting that, rather more along the data-gathering line. I'm not arguing with anything you just said. I think that that's in no way how subjective things can be. Being an EEO lawyer myself, I know how subjective these kinds of decisions can be. My question goes more to the issue of studying the data out there to determine whether or not, in the point that Mr. Kilgore made, everybody who is Spanish speaking necessarily suffers the same, kind of discrimination. Or is it necessarily true, as we have been accused of studying Southern and Eastern European white guys, that in a city like Chicago the Poles never suffered any kind of underutilization or discrimination? I think those are the kinds of questions Mr. Kilgore was raising, unless I'm wrong.

MR. KILGORE. No.

CHAIRMAN PENDLETON. Commissioner Guess.

COMMISSIONER GUESS. First of all, Mr. Sroka, I never thought I would want to move to South Dakota, but if you can give me the name of the firm trying to sell itself for 30 cents on the dollar—

MR. SROKA. I sure will, sir.

COMMISSIONER GUESS. Will you tell me the name later?

[Laughter.]

COMMISSIONER GUESS. Mr. Sroka, do you think government has a responsibility to acquire goods and services in the most cost-effective manner?

MR. SROKA. Most assuredly.

COMMISSIONER GUESS. You indicate that our public purchasing laws, particularly those that contractors tend to operate under, assure competition and assure completion of the project. For the purposes of this question, I'd like to argue that this system is not the most cost effective, once you give the overhead attached to the operation of a government system under sealed bid, that this makes the system more expensive than one where you either go through a negotiated bid process by picking up the telephone or go to a cost-plus system. Do you agree?

MR. SROKA. No, sir.

COMMISSIONER GUESS. You do not agree.

MR. SROKA. No.

COMMISSIONER GUESS. Why not? What evidence do you have to suggest that this is the most cost-effective system for public purchasing?

MR. SROKA. Head-to-head open competition with selection based on nothing more than price, as well as an assurance that the offering bidder under sealed-bid conditions can perform the contract would, by definition, produce the lowest price available.

COMMISSIONER GUESS. Does that include the cost of operating the government system? Obviously, the

system of operating government to make these assurances—I'm talking about assurances within the public purchasing system. For example, I ran Tennessee's General Services, our public purchasing program. I maintained an entire staff to make those assurances. And I determined that it would have been more cost effective to the State of Tennessee if we were merely to pick up a phone and acquire our goods, services, and commodities.

MR. SROKA. I think you'd incur more costs the other way. You'd have to hire more experts to make more subjective decisions regarding procurement which does not have to be done under pure, open competition.

COMMISSIONER GUESS. We disagree on this point.

Dr. Bates, while I was out of the room—this is another thing that fascinates me personally—I heard our Chairman ask you if you feel that the Davis-Bacon system would provide more entry into this marketplace by minority entrepreneurs. Is that what I understood?

DR. BATES. That is correct.

COMMISSIONER GUESS. Here again, I operate Tennessee's Davis-Bacon program, and I don't quite see how that is. I understand the Davis-Bacon Act to provide a minimum wage under which an individual within a particular craft is paid—nothing but a minimum. So that becomes the cutoff point.

Now, would that suggest that there may be other factors, such as the performance bonding, which would tend to prevent entry into the marketplace, if you have the minimum, not a maximum but just the minimum, that everybody operates under? So I can't understand how repeal of the Davis-Bacon in and of itself would provide for more minority entrepreneurs coming into the system.

DR. BATES. Well, Tennessee would be an excellent example of what has happened historically because in the Southeastern United States blacks successfully ran construction companies in the late 19th and early 20th century. It was a highly nonunion area, and at the end of the Civil War the majority of all skilled craftsmen in the South were blacks.

Because of the open system and the fact that the black contractors were generally willing to place lower bids and pay their work forces lower wages, and because they were consistently—not always, but consistently—nonunion, they were able to work in a discriminatory environment decade after decade, through the period of Jim Crow, and maintain firms.

Now, later on when Davis-Bacon legislation started to come and a flat minimum was declared, at that point in time they lost much of their viability on the government contracts that they had been eligible for, and the reason being that they were losing their cost advantage. If they were required to pay the exact same wages as their competitors, given the fact that they had less access to things such as trade credit and so forth, when they lost that competitive advantage, their share of government work actually went down.

So, historically it is true that in the Southeastern United States, where this dual system had gone on and black-owned construction firms had been common for many decades, Davis-Bacon hurt, and it was the wage differential that was the cause.

COMMISSIONER GUESS. Perhaps the variables we are dealing with now are the variables that exist in the marketplace today.

DR. BATES. Yes.

COMMISSIONER GUESS. So you reject my contention that even with the repeal of the Davis-Bacon Act, those other factors that you identified would still not come into play and still prompt the successful operation of minority firms in the public performance field.

DR. BATES. We possibly disagree in that I assumed that the evolution of the Davis-Bacon would lead to a wage differential, that we wouldn't see a flat sort of minimum wage prevailing in construction.

COMMISSIONER GUESS. And you also assume, I suspect, that the other variables which prevent entry into that market would also not continue to have an impact, such as performance bonding, such as the things you mentioned.

DR. BATES. All those other variables, I believe, would continue to have an impact. But I was simply abstracting from those variables. If we hold that bundle of considerations constant, the wage differential would be such that I would assume that the minority contractors would benefit.

CHAIRMAN PENDLETON. Do you have any more questions?

COMMISSIONER GUESS. No.

CHAIRMAN PENDLETON. Ms. Chavez.

MS. CHAVEZ. Just a couple of questions.

Mr. Lowry, most of the business set-aside laws speak in terms of the socially and economically disadvantaged; following up on what Commissioner Destro asked, I'd like to know whether or not you

believe that such set-aside programs should be available to whites who come from socially and economically disadvantaged backgrounds.

MR. LOWRY. I think I would preface my remarks by saying I don't think the definition should be included of socially and economically disadvantaged. I think that the worst thing that's happened is that all of these programs with economic development objectives stipulate "socially" and "economically" disadvantaged. I think that is probably the root of all the problems affiliated with these programs. Basically—and some of the other panelists have said the same thing—what you enter into are relationships with people who in 1985, 1995, and the year 2000 will never be able to run viable businesses. You're throwing good money after bad money. And I think that's a mistake, a serious mistake. If you look at it only as an economic development program, you will try to support, in the best way possible, the best and the brightest and hope that over a 20- or 30-year period they will be able to do things like Ed Gardner in Chicago, and create viable firms that will expand and employ people.

I think it's a serious mistake to say socially and economically disadvantaged. I would say the same thing for whites.

MS. CHAVEZ. In terms of the underlying philosophy that guides such programs, do you believe their purpose should be to build capital among blacks, Hispanics, women, and others who participate in the programs, or should they be to provide jobs?

MR. LOWRY. I think it should be to develop capital, to accumulate capital. I say over and over—and I said it in this paper—I think the number one objective should be to create managers and potential leaders. And I think the mayor has a serious problem in Chicago right now—and I'm not going to get off on that problem itself—but the problem I'm bringing up is that every day three or four CEOs of major corporations want to talk to me about the problem. And the real problem that we are confronted with in Chicago is that you have two classes of people, and people don't understand Harold Washington and sometimes Harold Washington doesn't understand the CEO. And because of that, if you look at the numbers—we have an A.G. Becker guide that produces every year statistical analysis of all the major corporations in the city of Chicago. It's over 350 firms. And of those 350 firms, we had 6 black directors on the boards and we had 12 black VPs. Six of them were from utilities.

So what you have is the same CEOs who I know and drink with and all the rest will say, "Jim, gosh, they don't understand what we're trying to do. Why don't they have more qualified people to run the departments of X, Y, and Z?" Those same people deny the opportunities.

So, in Harold Washington's administration, you have only one person in the whole cabinet who has had any private sector experience.

That is a problem. And that's why I'm saying we have to take a longer perspective. But I think it should be capital, managers, and viable firms.

MS. CHAVEZ. To follow up on that with one question for Dr. Bates, do you have any empirical evidence that shows that these government set-aside programs do, in fact, create viable businesses which go on to be able to compete on their own without benefit of government set-asides, or are we creating government dependency among black and other minority entrepreneurs?

DR. BATES. I've done a lot of work on exactly that sort of question, and the two ways to approach it are, first of all, to go to SBA. And I've done a lot of work on SBA programs, initially, the loan programs. And their largest loan program in terms of number of loans to minorities was the economic opportunity loan program, which operated on assumption of entrepreneurs not being very capable and provided government assistance on highly preferential terms.

As a result of my scathing indictment of the economic opportunity loan program, SBA has been unwilling to provide me data for over 10 years now. In trying to get data on the 8(a) program, I do have a few pals within SBA and I'm given explanations such as, "We all know it's a terrible program. Why do you want to drag it out in the open and document it?"

Without doing the studies of the sort that I was able to do initially in the early 1970s, I can unequivocally state that programs such as 8(a) are creating a dependency; they are operating under the assumption of limited firm viability; they are not bringing firms up to some sort of a par. It is an approach that is creating firms that can only exist on the set-aside, and it's an approach that should be ended.

Now, to try to get away from SBA as a data source and look at a broader range of procurement programs that might be more promising, there is a study that I've been working on for 3 years with the

Department of Commerce. Now, in studying procurement with these Department of Commerce sources, we have not simply restricted ourselves to government programs such as the local public works set-aside, but also corporations in many instances have programs to try to funnel procurement business toward minorities.

We have included those corporations as well, trying to put together a group of firms that do business with Gulf, AT&T, the Defense Department, the State of California—anything but the SBA—with the feeling that that is the group of firms that will be more viable and competitive.

Now, we have a data base of over 1,300 such firms. These 1,300 such firms are the minority enterprises that do business with everybody from Gulf Oil to the State of Texas to the Defense Department. And it is within that group that you see viability. Yes, you do see fairly competitive rates of return, but you see one overwhelming problem. And that one overwhelming problem is that they are much too heavily leveraged, much too deeply in debt, specifically, long term debt.

So in terms of this more promising group, the larger scale firms that are approaching viability, viability is most severely restricted by this heavy leverage problem. If the leverage problem could be lessened, which is going to take time, all the other evidence points towards firms that are competitive in every other respect.

MS. CHAVEZ. Thank you.

CHAIRMAN PENDLETON. Dr. Bates, you listed in your paper the different kinds of minority businesses, those that tend to succeed, which are primarily service-oriented occupations in what is allegedly the black community. I say "allegedly" because blacks don't live in just this one geographical area. Do you have any explanation for why it is that in black communities the businesses you describe, like barbershops and so forth, tend to do fairly well—because white folks can't cut black hair sometimes.

On the other hand, what happens in Harlem when the Koreans come in and put in a restaurant on 125th Street? In my home town of San Diego, the Vietnamese have come in and have capitalized their businesses without the benefit of SBA, without the benefit of the leverage you're talking about, the type you mentioned with respect to savings. But still there is not the service business sector in the black community that one would imagine based upon the nonblacks who are in predominantly black communities. The point I'm getting at is that somebody has probably decided to save money—maybe I'm answering my own question—and decided that that is a service which is needed in that particular area.

Following up on Ms. Chavez' question on whether SBA is an impediment, is there some prescription you might have as to how it is you begin to do these things on a smaller basis?

DR. BATES. Oh yes, very definitely. In many of your most marginal sectors, such as the very small retail food store, you see a tremendous increase in Asians that are immigrants coming in. And the Asians that are immigrants will accept a lower rate of return, particularly if they have things like language difficulties or a limited education. One of the reasons they accept a lower rate of return in areas like small food stores is because they have very few alternatives.

Now, you take the small neighborhood food store or restaurant, which is increasingly in Asian hands, you find their willingness to work for a much lower rate of return than the black entrepreneur. At some point your black entrepreneur is going to say small business ownership is simply not worth it and opt for private employment. Now, the threshold at which the Asian immigrant will do that versus the established black entrepreneur is quite different. The black demands a higher rate of return to stay there in self-employment than the Asian immigrant.

So naturally in your marginal sector—barbershops, beauty parlors, but mainly the food store and the restaurant—it's what we call opportunity costs. Many Asian immigrants have few other opportunities and are willing to accept this lower rate of return.

CHAIRMAN PENDLETON. I guess my point is that government can't solve the problem if one desires to go into business. Either you want to go in and play the market game at a low rate of return, based on volume or whatever you have, as opposed to trying to go into a higher rate and leverage it out, and government gets in the way in some cases and you become a problem.

Commissioner Destro.

COMMISSIONER DESTRO. I just have one question and then I'll turn it back over to the Chairman.

Dr. Haworth, in your paper you indicated that minority small businesses are grouped most heavily in the "other services and construction" category. Can you give me any idea of why that is? Do you

have any data on why that is? Is it just because it's labor intensive or what?

DR. HAWORTH. Well, partly it's because in the other services contract category there's a lot of cleaning and custodial care, and a lot of minority-owned firms are in that particular area. If you look at occupational breakdowns, these functions are recorded under personal services.

We have already heard today some examples of how minorities have moved into construction. If they weren't in there anyway, there are incentive programs which are exclusively designed for minority-owned businesses. That should increase their participation in Federal contracts.

But remember that their extra participation in that area relative to the other categories is not necessarily representative of where they are in the Nation. That's where they are among the contract awards.

COMMISSIONER DESTRO. But then my question is: Why would there be, in terms of the personal capital involved—and one can understand why labor-intensive work is a natural for blue-collar people to get into—underrepresentation in the general buying and selling of goods? Is there any explanation for why they are not into the buying and selling of goods, which doesn't necessarily presuppose a college education; it just presupposes you like to be a salesman instead of a laborer.

DR. HAWORTH. There is probably a lot more to choosing an occupation. Consider buying and selling goods—first of all, you need some role models; you need to have an idea how to do this negotiating back and forth. Secondly, unless you are very clever, a business owner in this area has to learn how to handle inventories which require capital accumulation, which we know we are not working with.

So you, basically, are dealing with labor-intensive products when you go into the other services and construction. These include custodial work and a lot of food preparation and food service.

It is a question of capital accumulation and technical or role model knowledge. Who do you know that deals in this kind of work? If your Uncle Joe does it, you are more likely to get into that also. But there are not very many minority-owned firms in that kind of product manipulation relative to product sales, relative to doing things with your hands, and getting in there in a labor-intensive environment where there is a lot more experience and it's more easily transferred into self-employment.

COMMISSIONER DESTRO. Mr. Lowry.

MR. LOWRY. I think there's a combination of factors. One is just ease of entry. Limited capital to get into some of the businesses is another, so people can move in that direction.

I think the other half, which is probably more important, is that most minorities, at least from my experience, don't know what the opportunities are. And I really share your feelings about lack of information. One of the things we tried to do, I guess about 7 years ago, was to supply information to SBA. And this is one of the sad things. People do studies which evaporate and disappear.

This was over a quarter-million dollar study in which we developed a computer model to look at all defense spending and look at procurement of all major contractors with the Federal Government. We looked at it from a repetitive bid and nonrepetitive bid perspective. We did a computer model. There were about that many volumes [indicating], but 2 years later the whole thing disappeared. But the objective of that exercise was to find out what the Federal Government, particularly the Defense Department, buys year in and year out. Once you know what that is, that determines your opportunity for entry, and that's where you get your greatest return because that's going to be a repetitive kind of buy.

Nobody in SBA bought it. It has disappeared. Unfortunately, all that information just went down the drain.

DR. BATES. One comment on that. The data on retailing is a little bit tricky because if we go back to the late sixties and early seventies, there was one line of retailing that looked very promising and was growing very rapidly, and that was gasoline stations. That was, certainly in that period, the most rapidly growing line of black retailing until 1974. It was not the point in time, post-1974, to establish a major retail presence in gasoline service stations.

So this one area expands sharply and then goes right back down again and tends to pull down a lot of the overall statistics on retailing.

DR. HAWORTH. And it also discourages minorities or anyone from thinking of getting into business at all. Their friends went into an area where they thought they had a chance, they were doing well, and then it just dropped dead and it wasn't any fault of their own. So their next-door neighbors and friends and relatives are not going to be so inclined to take that kind of risk again.

MR. DISLER. I had a few questions. I wanted to ask Mr. Lowry and Mr. Sroka to respond to this and for each of them to comment on the other's answers. I was wondering whether you could give us policies, programs, strategies for assisting minority business enterprises that don't involve set-asides.

Now, I would understand in Mr. Lowry's case that might be in addition to some of these programs at least for the next 20 years and perhaps in Mr. Sroka's case it might be in lieu of. But are there some things that you might both agree on that might be done in addition to or in lieu of set-asides?

MR. SROKA. I think there is adequate evidence from the papers that were submitted here today—there was a real identification, if you will, of some of the problems that minority firms may face in the marketplace, things like access to credit, capital, and bonding in construction. It appears it would be relatively effective to develop programs aimed at those specific deficiencies.

Set-aside programs, however, go to the opposite end and provide a job, a contract, but with no assurance that the initial problems that the minority firm had will ever be resolved. It may not change his bonding capacity at all. He may still have no ready access to credit or to capital.

Additionally, there are some things that government itself can do. There seems to be a gross irony in the fact that we as a Nation are trying to adopt and establish policies to assist minority firms to get into the mainstream of government procurement, and yet at the same time the Federal Government and the State and local governments wind up holding back a major portion of construction work, not putting it out for open competitive bid, but instead keeping it to perform themselves. And these are jobs generally of the size that would lend themselves to a small business, a fledgling business, or a minority business firm.

MR. LOWRY. We agree on something.

No, I really agree with his last point. I think a lot of government functions could be given to the private sector, particularly to small businesses and women-owned businesses and minority-owned businesses.

In the report we did in 1978, I outlined about 15 different programs. I'm trying to go back in my memory. I think one of the things you have to do if you are going to deal with the whole issue of lack of capital is to facilitate the infusion of capital not only from the minority community, but from the majority community as well. And what I indicated in that report is that there should be tax credits given to anyone who would invest in fledgling minority firms. I think that there is a bill that might be presented by Travis Bell that deals with that whole question.

I thought that special tax credits should be given to what are deemed minority firms that would have ESOPs, and that has been effectively used. I see where National Can is using it to beat off a merger. And we recommend that it should be done.

I highly recommended a tax credit along the lines of free enterprise zones even before that came into being. I think there are geographical areas that have to get certain kinds of subsidies or tax credits, or else they will never get the right kind of assistance, because people will always go somewhere else.

I think, in terms of training, I recommend very highly that we should get out of the business of technical assistance because that's just money down the drain. Most of the technical assistance grants given either to private consultants or even to public officials are too little and too late and of little duration and little impact. So I would say consolidate your funds and focus on management training as opposed to technical training.

I think various models for bonding have been proven already. I think that is an issue that should be dealt with if we are going to deal with the whole question of construction.

In terms of access to the larger markets, I strongly advocate the use of joint ventures. I think the joint ventures, where you have an effective relationship, a viable relationship between the majority firm and a minority firm, has demonstrated that it can work. I advocate it because I think there are things that can be learned from both groups, but more importantly, dealing with the realities of the marketplace, when you walk in with Arthur Andersen or someone like that, you get instant acceptance. And I think that is very important.

CHAIRMAN PENDLETON. Mr. Bunzel.

COMMISSIONER BUNZEL. Mr. Chairman, I will forego any questions because I took more than my share of time this morning. But I do want to congratulate this panel.

Of all the panels that I have heard in a long time, on a very complicated subject, first, it isn't so much that it has been balanced, but it is to say very clearly that the points of view and the analytical power of the panelists has brought to bear—and everybody in

this room, I think, would agree—a very illuminating discussion.

This is a very difficult area. There are people in this room, on this Commission, on the panel, who don't agree on some fundamental principles. But I think it ought to be pointed out that nothing has stood in the way of putting together not only this morning's panel which was balanced, but also a panel this afternoon that has brought to bear contrasting and different points of view. And for those who have somehow determined that this Commission would not be willing to entertain all points of view of these very difficult subjects, I hope those of you here this afternoon will agree with me that this panel is positive proof that we have had a most illuminating and fair hearing. And I want to congratulate you and thank you.

CHAIRMAN PENDLETON. Thank you.

It's break time.

[Recess.]

CHAIRMAN PENDLETON. Mr, Fein, it's late in the day and some of us are still here, and we want to hear what you have to say.

I do want to say that the schedule for 6:30 remains, and as far as I know we will have at least two presenters at 6:30.

MR. DISLER. Why don't we have it at 6:45, since we're going to have a few less people?

CHAIRMAN PENDLETON. We'll have it at 6:45 tonight instead of 6:30. And if there is some way to get the people who are scheduled for 8:00 a little sooner than 8:00, we can get out of here before 9:30 tonight.

MR. DISLER. We can try.

CHAIRMAN PENDLETON. All right.

Mr. Fein is currently vice president of Gray and Company, as well as an adjunct constitutional scholar with the American Enterprise Institute and Supreme Court editor for *Benchmark* magazine, Center for Judicial Studies. He is the former General Counsel of the Federal Communications Commission and has also served with the U.S. Department of Justice. Mr. Fein has written and spoken extensively on a variety of constitutional law topics and has argued several cases before the U.S. courts of appeals.

Mr. Fein earned his law degree at Harvard Law School.

Mr. Fein, we've been taking about 20 minutes, give or take, to summarize what you have for us, and then the Commissioners will have an exchange with you about your paper.

Legal Perspectives: The Current State of Affirmative Action Law Regarding Business Set-Asides and Employment

STATEMENT OF BRUCE E. FEIN, VICE PRESIDENT, GRAY & CO.

MR. FEIN. Thank you, Mr. Chairman, members of the Commission.

We are founded as a Nation of immigrants, immigrants streaming from all corners of the globe, fleeing from persecution, from caste systems which judged persons under the law and in society not as individuals, but as members of groups. The Declaration of Independence gave expression to the then revolutionary idea that legal protection should be conferred on individuals, not groups, to avoid any return to degrading caste or feudal arrangements. That all persons are endowed equally with the right to pursue happiness was the Nation's creed and philosophical inspiration. The Constitution embraces this principle in enumerating rights of persons or citizens while generally eschewing group membership as a basis for legal preference or distinction. Titles of nobility are expressly prohibited.

But an exception to this constitutional ethos created an odious blot upon the Nation's discussion. It was the child of racism that could not hide behind the artful language of the Constitution that spoke euphemistically of the importation of persons, or three-fifths of persons not free. And, as Thomas Jefferson presaged, the war came. Slavery was overthrown, and the 14th amendment was ratified to safeguard individual rights under the law irrespective of race.

For generations this constitutional standard of color blindness was honored more in the breach than in the observance, but the aspiration would not die. The standard was restored and refurbished in *Brown* v. *Board of Education,* which set the face of the Nation's legal edifice against racial discrimination.

In recent years, however, the Nation's laws have sanctioned some types of racial discrimination, at least where the beneficiaries belonged to a minority group and the individual victims are white males. It is possible that racial group preferences or quotas of this type might elevate law and morality in some countries at some point in time. I personally think that history is against that conclusion if one exam-

ines the use of quotas for Jews in Europe, the United States, or elsewhere, quotas for untouchables in India, or quotas for the Chinese in Southeast Asia.

In any event, I believe that legal toleration of any form of official racial discrimination in the United States wounds the social fabric and the economic fabric of the country and mocks the standard of individualized justice that is the hallmark of our Constitution. As a rose by any other name would smell as sweet, racial discrimination based on group membership practiced under any banner or legal label remains equally reprehensible.

If there is any star amongst the constellation of constitutional protections that shines brightest of all, it is the guarantee that no person can be stripped of his individuality before the law and be collectivized with a faceless mask. The legality of affirmative action programs, the issues addressed in this session, will ultimately determine whether the ideal of individualized justice etched in the Nation's charter documents is vindicated or whether that aspiration will become no more than a munificent bequest in a pauper's will.

Now, I would like to emphasize a few special aspects to the legal paper that I submitted to you, which I understand you are all fully conversant with and I needn't repeat, for the most part.

I think that the Supreme Court's decision in the so-called *Bakke* case is essentially limited to areas where educational enrichment is at stake, not to areas where remedial purposes are invoked to justify a racial preference. I think that is important because it indicates that the preference for an educational purpose has no necessary ending point, for example, as contrasted with remedial measures which presumably should lapse once the remedy has vindicated any past harm.

Now, the *Weber* case, which, as you all know, permits under Title VII of the Civil Rights Act racial preferences for minorities by private employers acting voluntarily, I think is limited to situations where judicial notice can be taken that there has, in fact, been past illegal discrimination against a minority group. In any event, my own personal view is that the *Weber* decision incorrectly interpreted Title VII and will ultimately be overruled before the conclusion of this decade.

The *Fullilove* decision, I believe, stretches to the limit congressional power to grant certain racial preferences and set-asides for contracting. It does not, in my judgment, apply to situations where the State or local governments, not acting with the power conferred by section 5 of the 14th amendment, seek to enact set-asides in contracting; and, moreover, I think *Fullilove* is limited to situations where the amount of preference granted to the minority group is congruent to the harm that has been visited upon them because of past discrimination.

With regard to the recent decision in *Memphis Firefighters* v. *Stotts,* I think the reasoning of the Court there is unequivocal, that that conclusion in *Stotts* applies to all situations where a court orders a remedy under Title VII and seeks to accord a preference, whether it be in hiring, promotion, layoffs, or otherwise, based upon race, which is not accorded to an individual who has been a proven victim of past discrimination.

In conclusion, I would like to note the remark of Justice Benjamin Cardozo that the intellectual tides and currents that affect the rest of men do not pass the judges idly by. The national dialogue on affirmative action, stimulated by the Commission, I submit, will be every bit as pivotal in shaping the evolution of civil rights jurisprudence as are legal briefs submitted by attorneys.

Thank you, Mr. Chairman, and I would be delighted to amplify on any of these points or on the issues that I have addressed in my prepared paper.

CHAIRMAN PENDLETON. Mr. Fein, thank you.

Does the Commission have questions?

Bob.

COMMISSIONER DESTRO. Mr. Fein, what do you think are the absolute limits in Justice Powell's opinion? In reading your paper, the paradigm is color blindness, but Justice Powell seems to waffle a bit about when you can take it into account and when you can't. And I think what we have heard today is that there are all kinds of justifications for when you can and when you can't, and probably the primary justification for when you should be able to is when it's been used in the past.

That is not the way I read *Bakke,* what Justice Powell really had to say. So what would you say are the limits to the Powell reasoning—which, again, is not the same as the Brennan reasoning?

MR. FEIN. No, it isn't, and he was speaking for himself in *Bakke.* He wrote a concurring opinion in *Fullilove.*

I'd like to preface my remarks by observing that there is no rule on the Supreme Court that a Justice be consistent or follow his own vote. We all

observed just a few days ago Harry Blackmun deciding that a vote he cast some 9 years earlier was utterly wrong, and he voted the other way than in *National League of Cities.* And I think if you read Justice Powell's opinion in *Bakke,* some of the reasoning, it is at odds with some of the things he suggested in his *Fullilove* opinion, because there are statements—I always call them *dictum Bakke,* his separate opinion—that indicate that there can be racial preferences granted in theory to persons who have not been victimized by past discrimination, so long as there has been some finding that some people have been victimized by illegal discrimination.

On the other hand, Powell never needed to address that point fully in *Bakke* because his ultimate decision rested upon the educational enrichment that would accrue to students in higher education because of their exposure to a person of a particular race who brought to bear in that intellectual environment a particular orientation or perspective that couldn't be duplicated by particular white individuals. So I don't know whether one can make any reasonable deductions as to Powell's ultimate vote to insist that those who receive a racial preference actually have been demonstrated to have been harmed by past illegal discrimination.

I would underscore that, in this area of affirmative action where the Court has been so equivocal and so fragmented, I think it is probably unwise to think that you are ever going to get a clear extrapolation from all the opinions written, even by an individual Justice, as to what his view would be when confronted with a particular case. My own view is that in this area of the law what is more likely to forecast a Justice's vote in the vote of the Supreme Court is by noting the general societal and community ethos and acceptance of that kind of preference. As Justice Holmes said, the law is not an extrapolation of syllogisms, but it is more likely to be influenced by the tides and flow of current events and conventional wisdom. No more is this better said than with regard to this area of affirmative action.

It has been 11 years since the *DeFunis* case where affirmative action first confronted the Supreme Court, and we still have fragmentation, no clear statement of law until *Stotts,* where you had a definite six-member majority. And I think it is probably not productive to spend an excessive amount of time trying to focus on whether an individual Justice's opinion is consistent with another vote in another case.

COMMISSIONER DESTRO. The only reason I asked with respect to that particular Justice is that, of all the opinions, I thought that Justice Powell was trying to make a stab at a reasoned approach or a principled approach to when you might be able to take race into account. What you had, on the one side, is that you can always take it into account as long as it's beneficial. The other side is Title VI says you can't ever take it into account. And the rest of the decisions since that time waffle back and forth.

I am wondering whether or not you personally have any sense for whether it is possible to make a principled defense of when you might be able to take race into account, if ever.

MR. FEIN. No, I don't. It is important in my judgment that Powell ultimately in *Bakke* never reached that question because he went off on the educational enrichment dimension. And his vote in *Fullilove* indicates he has no greater certitude than the Chief Justice's majority opinion, which is all filled with caveats and questions.

And remember that in *Fullilove* there does seem to be some kind of inconsistency in the plurality opinion of the Chief Justice himself because he underscores that it is his reading of the statute and the regulations that the degree of preference in bidding procedure shall only be equal to the amount of economic discrimination that has handicapped the bid process. Now, if that is true, it seems difficult to say that *Fullilove* authorizes anything but victim-specific remedies because you would have to show a nexus between your inability or your inflated bid above what a competitor bid and some past illegal discrimination that caused you to incur some inflated cost that a firm not discriminated against avoided. That seems to me almost a standard impossible to administer.

COMMISSIONER DESTRO. It certainly is. Do you have any sense for how you would respond to individuals who claim that there has to be some way, consistent with the Constitution, to break the back of what is called institutional discrimination without violating the Constitution by taking color into account for some purposes? Is there some way consistent with your point of view that you can do that?

MR. FEIN. No, I think what I tried to convey in my opening remarks was the idea that our whole constitutional ethos of law is based upon individual-

ized treatment, based upon your conduct and what has happened to you, not on what has happened to somebody other than you. And if that is not adhered to, I think that violates the Constitution, and I don't see any other way around it. You can amend the Constitution and not have it speak in terms of persons and citizens, but as far as I know, persons and citizens are not groups for constitutional purposes.

COMMISSIONER DESTRO. Thank you.

CHAIRMAN PENDLETON. Mr. Guess.

COMMISSIONER GUESS. I have one short question. Am I to understand—and I did read your paper—as you correctly indicated at the beginning of your testimony, and I read it with care, and as such you may be somewhat surprised to determine that I am still unsure whether your concern on this matrix is with the law or the principles and philosophies behind the law, just as you indicated that one thing one could do if one wanted to move from victim-specific to group preferences is to alter the Constitution. From that perspective, philosophically where would you come down on the side of it? Do you think we should have a mechanism under law through which group preferences could be provided for?

MR. FEIN. My own view—and this is just a policy view—would be against undertaking such an endeavor. I do not see, from my examination of history where quotas or preferences have been employed elsewhere, that that kind of separation of segments of society, based upon race, is other than inflammatory to what I would hope would be the aspiration of all, where we treat everyone colorblindly under the law.

I think that once you begin to grant preferences on the basis of race under law you build up a constituency group, a special interest group, and those preferences don't lapse. They grow and they grow and they grow. And there would be, I think, a terrible debate in discussing such an amendment or statute, whether it ought to be limited to just blacks or to Hispanics or to Japanese or to Chinese or to South Koreans or to the Irish or to Jews, and all who, in my judgment, not to the benefit of the reputation of this country, suffered discrimination in the past, but claiming some kind of right to a group reparations sort of idea.

I think that is unproductive. I think we ought to try to move beyond racism, and let's move forward and give everyone an equal opportunity. I certainly believe that everyone, no matter what their race, color, or creed, is equally capable of competing with me or anyone else, with a different skin color or a different gender, and to prove their talents in any fair system that ensures against any preferences based upon race.

COMMISSIONER GUESS. Did I also understand you to say that the waffling on the part of the Supreme Court has primarily been the result of them responding to public opinion as opposed to responding to the intent of the framers of the Constitution?

MR. FEIN. Absolutely. Just take us back to *Plessy* v. *Ferguson,* where Jim Crow was running rampant in the South and throughout the country at that time. *Plessy* v. *Ferguson* was somewhat at odds with some of the very early decisions of the Supreme Court's interpreting the civil rights of minorities and blacks, right after the Reconstruction Congress. But *Plessy* v. *Ferguson*—you read it and it seems to me clear it's a response to the public opinion at that time, which endorsed racism.

COMMISSIONER GUESS. Is this waffling on the part of the Supreme Court limited to the area of civil rights, or do they also tend to exercise this same mechanism in looking at other functions of law?

MR. FEIN. Oh, I think by and large the Court waffles depending upon society in any area of the law. It happens that society is more divided now, I think, over civil rights than perhaps over other areas, like criminal law. On criminal law, the Court waffled a bit in the early seventies, but now when there seems to be a consensus that we ought to be much tougher against those who violate the laws—and one finds the ramifications not only in court decisions, but we're building more prisons; we have mandatory sentencing laws; we think we ought to reconsider parole and probation. Well, there, where there is a consensus, the Court comes out clear, with maybe one or two dissents.

So I don't suggest that civil rights is somehow unique in causing fragmentation on the Court when society is fragmented. It just happens that at this time and in this era, certainly the era from the early seventies until today really, I think society, on the whole, has been rather fragmented and uncertain as to what they view the propriety or wisdom or fairness of preferences based on race.

CHAIRMAN PENDLETON. Mr. Fein, I'm going to take advantage of your legal talents. How did we ever get to groups? There suddenly seems to be some transition from individuals to groups. Do you

have some memory as to how we got to groups, and do you believe groups are kind of a public policy reparation to people where money was not available at some point to move them ahead?

MR. FEIN. Well, I have given considerable thought to that question, Mr. Chairman, and I think we got to groups as a spinoff from desegregation remedies. A desegregation remedy was perceived as one in which a school child was entitled to a remedy that involved restructuring a school system, which had a certain proportion of other pupils in a classroom that satisfied what would have obtained in the absence of any past discrimination. So it was as though the individual student had a right to have a particular demographic makeup in his classroom.

I think that, without thinking too hard, we implicitly started to think of remedies in the employment area as remedies where we thought that an individual was entitled to a particular demographic makeup in the work force that produced the result that would have obtained in the absence of any past discrimination. So we stopped focusing on the victim and started to think in terms of, "Well, what kind of structure would have been there if we had never done anything bad in the past?"

You see, in the school desegregation cases, the severance of the remedy from the right became very pronounced when those who started the litigation were grown up, in college, and in some cases dead, when the remedy came down with a very strong decree ordering desegregation. So people stopped to think about these cases involving individuals. These were brought as class actions and class remedies, and class quickly got translated into groups.

And I attribute that aspect of the school desegregation cases, where you no longer had people who were involved in the lawsuit there to receive the remedy, and the class-action phenomena, as being the primary mechanism for vindicating civil rights, as causing rather sloppy thinking about what kind of remedy we were awarding to particular individuals. The individual got lost in the lawsuit. It was a battle between lawyers who were there and stand-ins.

CHAIRMAN PENDLETON. Just one more question with two parts. I asked the last panel could they define "fair share," and I didn't get an answer. And I'd like you, if you have an answer about what fair share is, if you could tell me what this means as a remedy for discrimination.

The other question is a definition of discrimination.

MR. FEIN. Fair share is what anyone can obtain being free to pursue his talents and abilities without any discrimination based on anything but what his output and his diligence can achieve. That's fair share. It can amount to the clouds, nirvana, or it can amount to nothing. And that is to be in the fate of the individual and what he can do with his God-given talents.

The second part of your question was related to what is discrimination. Well, discrimination by itself, I think, has neither a pejorative nor a positive connotation. We all make discriminations in everything we do, whether we choose to read a book or whether we choose friends in a particular kind of way.

Racial discrimination, I think, has a particular feature of odiousness to it because by that description we are casting aside the individual talents and dimensions of a person and substituting some irrelevant characteristic that has nothing to do with virtue.

I think discrimination in terms of the law, how discrimination ought to be defined, it is using as a decisionmaking criteria the color of a person's skin, his religious creed, his gender that is irrelevant to his own capabilities of performing on the job or demonstrating a capacity to achieve and to contribute to society.

CHAIRMAN PENDLETON. Just one last question. On the matter of set-asides, do you think that quotas for automobiles and steel are in a sense a set-aside provided to nonminorities in a sense?

MR. FEIN. Absolutely not. Quotas for autos or steel are not quotas distributed on the basis of anybody's race. You can be white and be a recipient or an indirect beneficiary of the quota, so to speak, or you can be a minority, a Chinese, or an Indian. They are not selected either overtly or as a pretext for the practice of any kind of discrimination of that sort.

CHAIRMAN PENDLETON. I guess what I'm trying to get to—and I probably asked the question poorly—it does seem to me that even though they are not distributed that way, something has given protections to bigger industries that are not given to small businesses. That is, if you limit the supply of, the competition, then it seems to me that someone might want to consider it some kind of set-aside.

MR. FEIN. Well, I think that's right if you think that there's some kind of a tilt in our trade relations toward big business. But, at least my understanding

is, we've got special protection for textile firms and shoe firms. They aren't big enormous enterprises. And to that extent, I don't see the kind of invidious discrimination that is selecting out one segment of society or one kind of a corporate or industry structure to benefit, and then all the small businesses go out the window. It seems to me our trade policy is equally protectionist whether you have small firms or large ones.

COMMISSIONER GUESS. Mr. Chairman, could I ask one followup question, please?

CHAIRMAN PENDLETON. Yes.

COMMISSIONER GUESS. Mr. Fein, I was fascinated by your very articulate definition of "fair share" as you saw it. I guess that one point that I would like to inquire of you is: In your opinion, do you feel that I could pursue, predicated upon your definition, the acquisition of my fair share, wherever that would take me, without any barriers because of the color of my skin in America today?

MR. FEIN. I can't guarantee that, Mr. Commissioner.

COMMISSIONER GUESS. What is your opinion?

MR. FEIN. I think you certainly have a remedy if someone discriminates against you. I think there is no one in America, black or white, red or yellow, that has a guarantee that no one will violate law. I am adamant in believing that if you were not entitled to pursue your fair share, the law would entitle you to a remedy.

COMMISSIONER GUESS. I agree, but that does not answer my question. My question is: In your opinion, do you think I am capable of pursuing the acquisition of my fair share regardless of the color of my skin in America today?

MR. FEIN. The reason why I would resist giving a definitive answer is because—well, I will say this. I don't want to evade your question. I would say this: Is there racism in America today practiced by some people? My answer is yes. Might you run into that racism? Yes.

But I don't know. I think there is more of America, far more of America, that does not practice racism, and where you would have a full opportunity, even without the law, to achieve your fair share than otherwise.

But might you run into a problem? Yes, you might; in my judgment there is racism practiced by people in this country today.

COMMISSIONER GUESS. But am I to understand that your determination of that problem for me, the probability is what? Ten percent? Twenty percent? Ninety percent? You don't know?

MR. FEIN. The probability, in my judgment—and I am really speculating here because I haven't taken polls and you'd have to travel throughout the country—I would say the probability is in the range of the 20 to 10 to 5 percent rather than on the other side.

But I would deplore even 1 percent, and I hope we can get rid of the 1 percent, and I think we need very strict enforcement to ensure that any who do pose a barrier are found culpable under the law and required to provide the appropriate remedy.

I hope I have been responsive. I didn't want to evade, but I don't want to opine on something of which I have no detailed facts.

CHAIRMAN PENDLETON. As we conclude, I'd like to say that Mr. Anthony W. Robinson, president of the Minority Business Enterprise Legal Defense and Education Fund, had agreed to testify today at this session, but in conversations with staff over the weekend he declined to testify. So the opportunity was provided for him to do that and he declined to testify.

Thank you very much. We'll adjourn until 6:45.

[Recess.]

Evening Session

CHAIRMAN PENDLETON. I ask that we assemble to start the first of two evening sessions.

Mr. Bookbinder, would you please have a seat at the table and give us your testimony.

MR. BOOKBINDER. I hadn't expected to be at the table.

CHAIRMAN PENDLETON. Please expect it.

COMMISSIONER BERRY. Mr. Chairman, I don't think you should do that.

CHAIRMAN PENDLETON. I just asked if he would like to. He asked about it earlier.

COMMISSIONER BERRY. Mr. Chairman, I don't think we should do that because there were numerous people who asked to testify, and you sent them letters, as I understand it, telling them that they couldn't. While I would perfectly love to hear Mr. Bookbinder's testimony, I think it would cause other people to cite yet another egregious violation of due process.

CHAIRMAN PENDLETON. Another one?

COMMISSIONER BERRY. Yes, in my opinion. But if you wish to do that, go right ahead.

CHAIRMAN PENDLETON. Mr. Bookbinder, in view of the fact—

MR. BOOKBINDER. I don't want to be a source of conflict. We have submitted a statement. I'd be glad to get up for a minute or two and summarize it for you, but in light of the concern, why don't we just let it go? On the other hand, if you want to draft me to be a witness, I'll be draftable.

CHAIRMAN PENDLETON. You're drafted.

COMMISSIONER BERRY. I don't feel strongly about it, Mr. Chairman. I just merely wanted to point out to you—

CHAIRMAN PENDLETON. Ms. Berry's comment is noted for the record. We'd like for you to join us at the table.

MR. BOOKBINDER. I guess the reason you're doing it is you know that I had sought room at the table, but until tonight I was told there was no room at the table.

CHAIRMAN PENDLETON. We have some people who are not going to appear, and therefore, we have room.

MR. BOOKBINDER. As long as it's clear it doesn't make me a scab by being here, I'll join the table.

CHAIRMAN PENDLETON. That is not our definition of tonight's activities.

We are going to have Mr. Perlmutter, Mr. Shanker, and Mr. Bookbinder at the table.

Is there anybody else who had asked to testify? There are a couple of more spaces here, and we'd be glad to have you join us.

The fourth panel is to discuss underrepresentation and underutilization with respect to affirmative action. The fourth panel begins these proceedings with the discussion of affirmative action other than set-asides. Our panelists include Nathan Perlmutter, national director of the Anti-Defamation League, and Albert Shanker, president of the American Federation of Teachers. And Mr. Bookbinder is now joining us at the table. And you may give us a brief biography when you give some words, sir, if you don't mind.

I do want to say that on the program we have listed testimony from the Women's Legal Defense Fund, which will be in the record. They did not want to testify this evening. We do have testimony from Ms. Goldsmith, who is president of the National Organization for Women. That testimony has been circulated and distributed. And as I understand, Mr. Glasgow agreed to come, but at the last minute the Urban League has issued a press statement that may or may not be available to all of you today but it can be available to you tomorrow, and they will not be testifying. So let us note for the record that we do have three people who agreed, and two copies of testimony available in your booklets and available also to the audience.

Mr. Perlmutter, we'll start with you, sir. We have been having about 20 minutes for summary of testimony, 20 minutes or less, or in some cases more, and then we have had a chance for you to interact with the Commissioners after your testimony is completed. Mr. Perlmutter, would you please begin.

Affirmative Action: Underrepresentation and Underutilization

STATEMENT OF NATHAN PERLMUTTER, NATIONAL DIRECTOR, ANTI-DEFAMATION LEAGUE

MR. PERLMUTTER. Thank you. And thank you for the opportunity to discuss some of my views on this subject with you.

CHAIRMAN PENDLETON. Excuse me, sir. I made an egregious error. I have been reading people's biographies into the record, and if you will allow me a minute to read yours, I would appreciate it, sir.

The Anti-Defamation League of B'nai B'rith (ADL) was founded in 1913 to stop the defamation of Jewish people and to secure justice and fair treatment for all citizens. Not a membership organization itself, it is the legal and human relations wing of B'nai B'rith International, which has 500,000 members. The ADL educates Americans about Israel, promotes better interfaith and intergroup relations, counteracts antidemocratic extremism, and strengthens democratic values and structures.

ADL National Director Nathan Perlmutter has been active in that organization since 1949. In addition to several positions with the ADL, he also served as a Marine infantry officer, as an associate national director of the American Jewish Committee, and as vice president for development at Brandeis University. Mr. Perlmutter has written and spoken widely on social issues and anti-Semitism. He received his law degree at New York University.

Thank you, Mr. Perlmutter.

MR. PERLMUTTER. Thank you, sir.

I suppose I might open with confessing to a problem that I have with the very title, "Underrepresentation and Underutilization." My problem is with the imprecision in the definition of these words.

There was a time, when confronted with underrepresentation or underutilization, say, of Jews in "executive suites," it was a signal to take a look, to probe further, to see whether or not underrepresentation and underutilization meant that there was discrimination, or whether it meant that the applicant pool wasn't proportionately representative of the Jewish community. It may have meant, too, that the competency level of those Jews who had applied wasn't up to snuff. It was a signal to investigate, to look and see why underrepresentation.

But I am afraid that today I don't get that message in the use of the terms underrepresentation and underutilization. I have the sense that when the words are used they are a charge, they are a conclusion, and the conclusion is that there is discrimination.

And beyond the problem with that too hasty conclusion, something there is in the way in which the terms are used accusingly that suggests that there is a "correct" level, an "appropriate" level, of, say, minority representation in a given shop, and that the correct level is not necessarily based on an analysis of the employee applicant pool, but rather on the demography of the community.

This notion that underrepresentation is socially per se wrong has, I believe, contributed to the prescription of quotas as a remedy. It is our feeling that the diagnosis is too often wrong and the prescription is always toxic.

The diagnosis is wrong because the disparity between demographic percentages and the composition of a work force, or of a freshman class, though it may be due to discrimination, may also be due to the numbers who applied for positions and to the level of their competency. For instance, to engage in *reductio ad absurdum,* but it's in the real world, I do not draw the conclusion that basketball teams are antiwhite, although some years ago it was prescribed for a Cleveland school that 20 percent of the basketball team should be white.

Quotas, I suggest, are a toxic prescription—a strong term—but the fact is that the inevitable side effect is discrimination, discrimination against somebody else. For quotas, by working definition, mean that somebody is arbitrarily being favored because of his or her race, color, creed, religion, sex. That means that somebody else is being arbitrarily punished because of race, color, creed, sex.

Yesteryear it was blacks; it was Jews; Catholics, especially those whose heritage could be traced to the Mediterranean. Today those being arbitrarily bumped by quotas are whites.

I remember some years ago I was visiting a university president in the Boston area. I came into the corridor and there was a sit-in of several dozen students blocking the entrance to his office. I recognized one of them and asked what was going on. He told me that the university had a set-aside of dollars, a financial set-aside, for those who were economically underprivileged. But the way in which the money was being given out, assumed as a definition of "underprivileged," black. And his response was, "We are all either Italian or we're Irish and we're all from Boston, and we're all from poor families and we want our share."

There is something else about this concept of underrepresentation that I think is socially mischievous, and I might say antithetical to the democratic principles that we grew up with. It causes us to think of ourselves in terms that are more Lebanese than they are American. I mean by that it causes us to focus attention on ourselves as members of a group rather than as individuals. Is it too stars-and-stripey to say that our rights as Americans inhere in us as individuals regardless of race, color, creed, sex, and so on, and not because of race, color, creed, and sex? For government to relate to us in terms of our group identity renders us as individuals less visible, less precious as humans.

You remember Ralph Ellison's classic, *The Invisible Man.* What was the black protagonist saying in that book? He was saying, "Look, I cry, I laugh, I aspire, but you don't see me, you don't hear me, you relate to me based on your perception of what my color means. You might not like blacks or you may be patronizing to blacks, but you are never really relating to me as an individual."

Well, I am suggesting, with some modifying of the imagery, that the individual who aspires to a job-training spot or aspires to admission to this or that college, or aspires to this or that profession, and who is bumped because there is no room for him because he's a male or no room for him because he's white, has been rendered somewhat less visible as a human being than he really is.

I want to proceed for just a few moments now beyond the wrongs that are arbitrarily inflicted on people whose guilt may be that they are just born of the wrong color. I'd like for a moment to talk about precedent, and to quote George Washington in his farewell address. It's a short sentence: "The prece-

dent must always overbalance in permanent evil any partial transient benefit which the use can at any time yield. The precedent must always overbalance in permanent evil any partial transient benefit."

Today, benignly intended quotas are meant to include given groups. I submit that once quotas are sanctioned either by law or by custom, they are a precedent. They are a precedent available to less benignly intended people. And that this is not an academic speculation was made evident just 2 weeks ago in the Nation's press. You remember reading of an evangelical talent bank formed by the American Coalition for Traditional Values, allegedly designed to secure positions for evangelicals and fundamentalists in the civil service. Listen to the director of the American Coalition for Traditional Values in explaining his efforts: "We feel we represent 25 percent of the work force. It would be nice if we could have that percentage in government."

Well, if other groups who identify themselves by race or by sex claim entitlement to group preference, why not groups who identify themselves by religious denomination? The precedent stands. And pretty soon, if that be the case, Episcopalians or Presbyterians. And we are en route to Lebanese factionalism.

These are the reasons we feel the quota system, an expression in some measure of the sense of "underrepresentation," is mischievous. In closing, I would refer back to the formal paper presented to you which reminds you that the ADL, while opposing racial quotas, while viewing underrepresentation and underutilization as no more than a reason to probe as to why this is the case, supports vigorously affirmative action programs such as remedial education, job training for disadvantaged regardless of their race, color, creed, or sex, and we support outreach to and recruitment from the minority community. And lastly, we, of course, vigorously support redress to identifiable victims of discrimination—individuals identifiable as distinguished from group preference.

Thank you, sir.

CHAIRMAN PENDLETON. Thank you very much, Mr. Perlmutter.

Mr. Shanker is the president of the 580-member American Federation of Teachers.

COMMISSIONER BUNZEL. More than that.

MR. SHANKER. That's the number we started with.

CHAIRMAN PENDLETON. Okay, 610,000. It's right here, Mr. Shanker; I just blew it. And I am reminded by all people on all sides that I gave the wrong number.

It was founded in 1916 to promote collective bargaining for teachers and other educational employees. It now conducts research on teacher stress, educating the handicapped, and other issues, and lobbies for the passage of legislation of importance to education and labor. The AFT presents an annual human rights award and bestows grants in education and labor fields.

AFT President Mr. Albert Shanker has been active in education and labor for a number of years. He has also served on advisory and board positions with the A. Phillip Randolph Institute, the United Fund of Greater New York, the International Rescue Committee, the Committee of the Free World, and the Committee for the Defense of Soviet Political Prisoners. He has been a member of the advisory council for Princeton University's Department of Sociology.

Mr. Shanker received his bachelor's degree at the University of Illinois and did postgraduate work at Columbia University. He now holds honorary doctorates at Rhode Island College and the City University of New York Graduate School.

Mr. Shanker.

STATEMENT OF ALBERT SHANKER, PRESIDENT, AMERICAN FEDERATION OF TEACHERS

MR. SHANKER. Thank you very much for this opportunity. I'd like also to say at the outset that I agree with the remarks of Mr. Perlmutter.

I'd also like to state for the record that the American Federation of Teachers has a unique history on the issues of concern to this Commission. In 1954 the American Federation of Teachers was the only group in the national scene in education that submitted an *amicus* brief in the historic *Brown* case which moved to end school segregation. As soon as the Supreme Court decided that case, our organization did not merely note it, nor did we ignore it; we proceeded to expel all locals within the organization that refused to integrate within a 2-year period of time. We were also there in Selma and Montgomery. We consider ourselves strong activists within the civil rights movement of this country.

It is from that perspective that we strongly oppose quotas. I know "quotas" isn't the title of the

discussion today. But when we talk about affirmative action, we are in an Orwellian world where the words don't really mean anything or they mean precisely what the speaker wants the words to mean at any given time. Affirmative action may be sold in one forum by saying, "It doesn't really mean quotas. What we really mean is something separate, meaning affirmative action." But as soon as the stamp of approval is there on affirmative action, the very same discussants may move on to the courts and say, "See that. They support affirmative action. Here's what it means here: quotas." What we have, then, is an Orwellian situation where the same terms are sold under totally different packages and different meanings with different consequences in different forums.

The concept of underrepresentation also can present an Orwellian situation. It's not an easy discussion. Anybody who looks at the statistics on where certain minorities are within our society in terms of income and membership in various desirable occupations must immediately sense, from those numbers, that we are facing the consequences and impact of previous racism and some current discrimination of various policies—no question about it.

So to question the concept of underrepresentation is not to question the fact that we have problems or not to say that the current state of affairs is desirable; it is not. One can even look at those figures and say, "Yes, I think that there is underrepresentation"—and I do.

But then I ask myself, "Well, if I say there is underrepresentation, what am I implying? Am I implying that there is a certain number which would mean that representation was proper."

I don't want to imply that, because I do not believe that in a free society every group of individuals will line up in proportionate percentages in terms of where they live in neighborhoods and how many are teachers and how many are doctors and how many are lawyers and how many are basketball players or how many are anything else.

So one can have a concept of unfairness in looking at certain statistics and wish that things were different and, indeed, that things were better, and want to work to make things better, without implying by that concept that there is some magic number at which representation will be proper.

Now, that is not an easy position to take. It is much easier to say, "Well, I'm going to solve this injustice by insisting that all we've got to do is reach a certain number of minorities in every field and everything will be all right."

I favor instead the concept of underrepresentation as a signal that something needs to be done. I don't like it if the next question is, "Mr. Shanker, if minorities are underrepresented, what number would lead you to say that they are not underrepresented?"

We have faced this issue with respect to various conflicts in different cities and different school districts, when the courts and various commissions come in and ask whether there is proper minority representation among teachers in a given city. What constitutes proper representation? We have had some judgments which have held that if 60, or 70, or 80 percent of the school children in the city come from minority groups, then obviously the proper representation for teachers would be to have the same percentage of teachers from those minority groups as there are students from those groups.

I don't know how anyone can arrive at such a ridiculous conclusion, but it happens. Obviously, we do not select the teachers from students. Moreover, the percentages of students in public schools from different ethnic and racial groups are quite different from the percentages of adults from different groups within those communities and cities, and even more different from the ethnic and racial makeup of the pool of college graduates from which teachers are selected within those cities, and even more different from the makeup of those of college graduates who have specifically trained to become teachers. Just listing those different ways of arriving at the proper representation figure indicates the pitfalls.

But even then you might say, "Well, how about basing it on the percentages in the pool of college graduates or of those trained to become teachers?" That doesn't give you a proper representation number either. It so happens that, in many places across the country, many minorities (and others) who have graduated college and taken the appropriate courses to become a teacher find that as soon as they graduate, or perhaps after they have been in teaching for 6 months or a year, they can get much better salaries in other fields. Are we going to stop them? If we believe that we should maintain a system of exact representation, should we have laws preventing people who become teachers from leaving the field if it would create some disparity in the numbers and upset proper representation?

I support special outreach efforts. I support special training programs and other efforts to increase the pool of minorities qualified to assume the desirable positions in which they are now underrepresented. I certainly oppose discrimination. And for all these reasons—and for the sake of a democratic society—I continue to oppose a concept of representation that entails set numbers: quotas.

I now would like to spend a few minutes talking about testing, because it has an important bearing on the issue of quotas. There are tests that have been used for the purpose of discrimination. I don't believe, for example, that a ditchdigger needs to be given an examination in calculus or even in geometry or algebra; there are certain cases where the discriminatory intent of testing is rather clear. But that isn't where we are right now.

It is very difficult to precisely define what kind of a test is exactly relevant in the performance of a particular job. Can anyone really prove that one needs to be a college graduate to be a teacher? Can anyone prove that it's good for an elementary school teacher in the first, second, or third grade to know something about Shakespeare or know something about algebra or geometry? I can't prove it, but that is the kind of teacher I'd want to send my children to. I would not want to send my children to a school where the elementary school teacher only knew what had to be taught to the children in that grade.

What I'm driving at is that one of the unfortunate consequences of a legal unraveling and enforcement of affirmative action programs as quotas has been to reduce standards, to call for the minimum possible; that is not what we should be calling for.

In considering the whole question of which examinations are biased; there is a confusion of two concepts of bias. Obviously, if we can show that there are questions on an examination which have to do with certain linguistic usages and which have nothing to do with the performance of a job, and which tend to exclude minorities, then those questions needn't be used. But that isn't the way in which the question of testing bias is frequently used. Instead, as I travel across the country as a strong supporter of giving teachers the same kinds of tests that are given to lawyers or to doctors or to actuaries and other professionals, what I'm told is, "The tests are biased because minorities do not pass them in the same proportion as the nonminorities do."

Well, that doesn't prove the tests are biased at all. It may just prove that, as a result of economics, lack of education, previous discrimination, and present discrimination, we still have problems to overcome. It doesn't prove there's anything wrong with the examination. It may mean that we have not yet done enough in other ways for minority groups so that they pass the tests in the same numbers.

But that is, indeed, one of the main obstacles today to promoting and accepting and embracing examinations in education and in other fields. It is not a question of whether it is a good test or a bad one or if it would be good for teachers to know more, but whether examinations would have a disparate impact on minorities.

Finally, I would like to deal with the question of goals and timetables, for I think that they too suffer from an Orwellian usage. If someone asks me now to speculate as to what percentage of minorities I would like to have in teaching in the future, I'm willing to sit and have a beer or another drink and talk about it. The question sounds very innocuous and very soft and deals with good-faith aspirations and hopes.

But clearly, that isn't what's meant, except when you're asked the question initially. Goals and timetables easily become questioned a few years later as to, "Why didn't you reach them? Why didn't you get rid of all the requirements and all the tests and all the obstacles so that you could reach them?" Goals and timetables are then clearly not meant strictly as goals and timetables.

Indeed, I'd like to question the very concept of goals and timetables because I think, once again, it reflects a particular Orwellian notion. If I'm asked what is my goal and timetable, I'm really being asked, "What percentage of people of this group or that group do you think is right by some sense of justice to have at a particular time?"

Well, I don't think there's a "right number" at any particular time. For example, I do not resent the fact that large numbers of minorities who are prepared to become teachers get much better jobs elsewhere. I'm sorry we can't keep people who are qualified because teaching does not pay enough or the conditions aren't good enough. But I will not resent it nor will I try to prevent it out of some sense of the right numbers at the right times.

I think that what we have here really is a conflict between an effort, which I think is good, to undo the effects of slavery and racism on the one hand, and on the other hand to try to impose a method which is

really antidemocratic and basically totalitarian to achieve that aim. I would not want to live in a country where we were all distributed in every job, or in every profession, or in every neighborhood according to their subgroup's proportion in the population. It could not happen in a free society.

I think then, that when we ask questions about underrepresentation, we ought to admit that some minorities are underrepresented in certain fields. There have been government policies and history in this country which have resulted in that situation. We should try to do something about it. But we shouldn't do those things which turn us into the kind of society that we don't want to be.

CHAIRMAN PENDLETON. Thank you very much, Mr. Shanker.

Mr. Bookbinder, who represents the American Jewish Committee, would you please give us your testimony in some summary form.

STATEMENT OF HYMAN BOOKBINDER, WASHINGTON, D.C., REPRESENTATIVE, AMERICAN JEWISH COMMITTEE

MR. BOOKBINDER. As I indicated earlier, this will be a spontaneous, extemporaneous, presentation.

COMMISSIONER BERRY. Could he tell us something about himself first, Mr. Chairman?

MR. BOOKBINDER. I'll do that. I have had a long association with the civil rights movement in this country. Let me just indicate a few examples because they are relevant to my testimony, and I'll only mention those.

Before joining the American Jewish Committee, and some years in government service, I was with the labor movement. In 1957—I look back with great joy and satisfaction and some pride that I was part of the intensive lobbying effort to get the first civil rights bill passed since Reconstruction. And I remember very well those hysterical hours and days of negotiations to rescue the bill and get something passed. You, the members of the Commission, probably know this history very well. We were thrown what we thought was a sop, window dressing, "We'll give you a Civil Rights Commission."

I remember with some skepticism why we accepted that. Even for us it was useful to have something we could point to. But the bill itself was symbolically very important. But the Civil Rights Commission turned out to be very, very important throughout the years. It's been a very, very important Commission. And despite recent differences over the current Commission and the way it was reformulated, I express great hope and confidence in the work of this Commission, and I regret very much that the absence of witnesses tonight is a reflection of the very sharp feelings that have developed over the Commission. I'll get back to that in a moment.

But I think this is a Commission that deserves to hear all points of view, and I regret that another point of view on this very important question tonight will not be heard, except to the extent that I will try to reflect that point of view in what I will say in just a moment.

I was in the Kennedy administration, in the first years of the Kennedy administration. And one of the things I look back to with some satisfaction is that I was a member of what we called, I believe, the Subcabinet Group on Civil Rights. I was representing the Secretary of Commerce at the time and served in that Subcabinet Group on Civil Rights.

I remember that very first meeting of the Subcabinet Group on Civil Rights. This is the first time I am talking publicly about it because, having read Harris Wofford's book recently, I see that he did put it in print, so I'm willing to relate the following important anecdotal reference to that first meeting of the Kennedy Subcabinet Committee on Civil Rights.

It was attended, among others, by some of the "best and the brightest"—Ted Sorensen, Lee White, Fred Dutton, Meyer Feldman. And one of them—I don't know which one it is, and maybe I'm glad I don't remember which one it is—but one of them I remember saying early in that meeting, "Ladies and gentlemen, you are going to be held accountable for civil rights progress in this Kennedy administration."

And then this, whoever it was, said, "We have taken inventory of this Congress. We do not expect any legislative help in this area. That is why we are going to have to do it administratively." He said, "One of the first things I want you to do is to go back and see whether there is proper employment, sufficient employment, of minorities"—we didn't talk about women in those day—"and if you feel in your gut that there isn't enough minority employment, I expect you to do something about it, and from month to month I expect reports and I expect improvement."

And then he added ominously—I remember I was shocked at the time, less shocked now looking back over it—"And if there isn't improvement from

month to month, there will be other people sitting in your place in these meetings."

I tell you this story because it was before we heard about "affirmative" action, before we heard about "preferential treatment," before we talked about "goals" or "quotas." What was being said was, "There is a way of knowing when things aren't right, and do something about it."

Well, some things were done about it. We had lots of "affirmative action."

One final personal reference. In 1963, I was asked to take a leave of absence from my government post to put together and direct the Eleanor Roosevelt Memorial Foundation, which was formed soon after the death of Eleanor Roosevelt. I had served on her Commission on the Status of Women. The only project in the 1 year that I served—the only project I look back to with joy again and with pleasure that I helped start—was a project on civil rights, the training of human rights-civil rights functionaries.

Now, let me go to the substance here. The absence of witnesses today is for me a very, very heart-breaking business. And although it may not be relevant to the subject of underrepresentation, we are underrepresented in this panel here—I see it's made up fully of "some of my best friends," if you know what I mean, who are overrepresented in a way.

MR. SHANKER. But we don't agree.

MR. BOOKBINDER. I think it's important—and you'll soon see that—I believe it's terribly important, and I don't know how I can make this as sincere and serious and strong as I possibly can: To the extent that you members of the Commission and the public generally don't understand why there is anger, then we are failing to do our job as public servants and as private citizens.

It doesn't have to mean agreement with those who are angry, and I am not in agreement on specific issues with most of those who are angry. But we need to understand the anger. The anger flows from a widespread feeling that this administration doesn't care about civil rights. It's not only the job of those who feel that way to do something about it, perhaps review their situation, but it's also important for everybody to try to understand that anger.

Now, we have heard some testimony already this evening. I agree with almost everything I have heard. And if I am going to shortcut my first statement here, it's not because I don't believe it strongly, but because it's been said, and I want to go on to the second part.

I believe, with my two friends here, that a quotaized society is wrong; it's obscene; it's contrary to everything we want. I do not want to go into a room and hear, like I hear very often, if there's a room of 30 or 40 people, "You know, there are only three blacks," or, "You know, there are only four women," or "You know, there are only two Jews." We don't need a Democratic Party or a Republican Party that thinks that its national committees or its conventions or its electors have to be a precise reflection of the mix in the population. I don't like that kind of society. So let me stipulate now that the issue of quotas, which means designated spots for people in designated groups, is wrong; it is absolutely wrong.

But from this point on I'm going to disagree with my two good friends, and I hope they will bear with me and understand the extent to which I disagree, and only to that extent.

We in the American Jewish Committee, and I believe in many other Jewish organizations and many other organizations, believe there is indeed a difference, and an important difference, between goals and quotas. The fact that goals programs can be, and too often have been, distorted *de facto* into quotas doesn't take away from the fact that there is a very important philosophic, a very important conceptual difference between goals and quotas, a difference which this Civil Rights Commission has recognized in eloquent ways until this year. The fact that there is that difference has to be understood, and it is the job of government, it's the job of management, to enforce that difference.

And what is the difference? The difference is that under a goal system that is properly enforced, professionally qualified people make a judgment that in this particular school, or this particular factory, or this particular whatever it is—and it has to be a large enough number for this to have meaning; you can't talk about a group of five people having a goal for its makeup—that in this particular case, a careful study of the labor force and of the available qualified people for that particular job, if there were absent discrimination, if there were no discrimination, then over the next year or two or three reasonable people would expect that there would be roughly 20 percent blacks or 40 percent women or something else, based upon a careful reading of the labor market, and that if at the end of the period it was not

approached, the only thing that happens in a goals programs is that there is a requirement to ask, "Why didn't it happen?" There is no automatic sanction; there is no automatic punishment. And then it means that the individuals and the parties involved have a responsibility to say, "Did we correctly evaluate the examination program? Did we do adequate advertising? Did we do a good recruiting job?" That's what a goals program is.

And I submit, Mr. Chairman and members of the Commission, if you went back and did the research job I have been pleading for for years—I testified before this Commission 4 years ago and pleaded with you—you could study the history and tell us whether my good friend Al Shanker is right or if I'm right. He believes that the great bulk of programs have turned into quotas. I don't believe that is so. I believe the case that goals become quotas is essentially an anecdotal kind of testimony. It shouldn't happen ever. Let's find out what the story is. I believe most programs in this country are operating as *legitimate* goals programs. If they are not, we ought to make them *legitimate* goals programs.

That's all I want to say about that, but I want to conclude by repeating what Nate Perlmutter has said. And in our testimony that we mailed to you, we spell it out. It is unfortunate that even I have had to spend all this time on the one issue of goals and quotas. There are many other important things in affirmative action that have to be done better than they have been done. Had we done these things effectively over the years, we wouldn't have to have all this bitterness, all of this anger, all of this attack and accusation over whether we are doing enough in the quotas, goals, and affirmative action area.

We have to do more about training, more about reviews of exams, more about adequate advertising. And above all—and this is not your business; it's not your job; it's not your responsibility—to the extent that our country—not our government alone, but our country—fails to provide sufficient jobs in our country, to that extent we will have this competition, this battle over the available jobs.

So on behalf of the American Jewish Committee, I repeat: We are against quotas for the reasons stated better by my colleagues than by myself tonight. I share their judgments about that. But there is another remedy. There is a remedy where the situation seems to require it that there be a system of goals and timetables properly enforced, clearly monitored, modified whenever necessary, in order that there shall be a way of measuring, a way of seeing whether the aspirations we have for greater equality of opportunity are a reality.

Thank you.

CHAIRMAN PENDLETON. Mr. Bookbinder, thank you very much.

There are a few minutes left for questions. I would ask that my colleagues try to ask one question in case there are many questions to be asked, and we can go back for a second round. I'll start with Mr. Bunzel and then move to the other side of the table.

COMMISSIONER BUNZEL. Only one question is going to be difficult, but I'll collapse several into one.

I was tempted to ask Mr. Shanker what he as doing on the advisory committee to the Department of Sociology at Princeton, since I was a graduate and don't know anything about why a department needs an advisory committee, but I'll leave that aside.

My question is for Mr. Bookbinder, whom I have known, and whose career I have followed with great admiration for years. I have read many of the things he has written about the distinction he draws between goals and quotas. Part of my difficulty here is that the discussion—and I'm guilty of this, too, very often—becomes quite abstract. I want to give you an anecdotal story, but it happens to be true, and I want to ask whether or not you think the position I took at the time is the position you believe would be correct and would fulfill your criteria.

When I was president of a university in California during the 1970s, one of the first things I did within a few months of taking the job was to send out a memorandum to all the department chairs and deans at the campus urging that affirmative action be put into practice so that there would be no doubt about the search procedures, that we would recruit broadly, and that there would be no more of the buddy-buddy system, that we had to reach out as broadly as possible—the whole litany that you are familiar with. And we had several meetings along these lines because I was very committed to this.

Several years later one of the administrators brought to my attention, in a meeting in my office one day, the following procedure that was taking place in a department. They had been given a budgeted position to hire a faculty member. In fact, I learned that that position had been given to them the year before. But they had not filled it. And upon investigation, I found out that the reason they had

not filled it was because they were setting it aside until they could find a black.

MR. BOOKBINDER. I disapprove of that. You don't have to finish your question. I disapprove of that.

COMMISSIONER BUNZEL. The argument they made was, "We have set certain goals and certain timetables, and if we are going to reach them we have to do this, because while they are not dealing with quotas we have set goals for ourselves. And if we are going to meet the goals, we simply can't go out and hire the best qualified person," which is what I was insisting upon.

So what I am really asking, Mr. Bookbinder, is this: In practice, would you concede that at least sometimes goals become the functional equivalent of quotas?

MR. BOOKBINDER. I thought I said that in my own statement. Yes, I did. I said that even though there are occasions—and more cases than should have been the case—where there have in fact become quotas, preferential treatment in this case, and a set-aside—

COMMISSIONER BUNZEL. Then if I understand your position, your definition of and your commitment to goals and timetables is based on a test that is not tied to results, but is tied to good-faith efforts.

MR. BOOKBINDER. Yes, I said that, that if at the end of the stipulated period there has not been a finding that the approximate goals have been reached, that all that triggers at that moment is a review of the practices, the recruiting, and so on, an explanation—and perhaps in many cases it would mean a change in the goal because it turned out to be unrealistic.

COMMISSIONER BUNZEL. The reason I asked that latter question is because during the years that I was on this campus, I discovered after 6 or 7 years that we had increased the number of women in the administration rather dramatically. This was also brought to my attention. And the women who were appointed to various administrative positions for the first time in the history of San Jose State were not filling a quota, were not filling a goal, were not filling a timetable. We were able to make progress because of the commitment to reach broadly and to hire the best qualified person, which now included pools of qualified women, and that all we needed to do was to broaden the search and make sure the applicant pool was as generous as it should be and as qualified; we didn't have a set goal or a set timetable. But we managed to increase the number of women in the administration rather dramatically.

Is it possible that one can make the strides that you and I want to see?

MR. BOOKBINDER. Without goals or quotas?

COMMISSIONER BUNZEL. Yes.

MR. BOOKBINDER. Yes, it is possible.

CHAIRMAN PENDLETON. Thank you, Mr. Bunzel. Mr. Guess.

COMMISSIONER GUESS. Mr. Chairman, since I can only ask one question, I have a observation and a question for Mr. Shanker.

CHAIRMAN PENDLETON. Is that by definition or by two questions?

COMMISSIONER GUESS. That's by definition, Mr. Chairman.

We have a number of ideas, Mr. Shanker, that have been presented to the Commission that are kind of converging at this point. Earlier today, Professor Walter Williams indicated a disproportionate number of blacks are going into postgraduate study in the field of education. Of the blacks receiving Ph.D.s, 55 percent, I recall he said, receive them in education. And I believe he implied that was because education tends to be an easier field of endeavor than other more rigorous courses of studies.

But following that course of thought, I want to be able to conclude from your comments that, if all things being equal and these things continue to develop, the other side of the record is that you would be comfortable if all teachers—at the elementary and secondary level in the United States—become black.

MR. SHANKER. I sure would. I have no problem with that at all.

COMMISSIONER GUESS. Thank you. Secondly, since the American Federation of Teachers tends to be creative and imaginative, unlike other education associations, in its approach to providing for teachers, another concept that we heard a great deal of today was the concept of the free and open marketplace.

Do you think that, with qualifications being in place, we can also extend this concept to the field of employment and particularly in the field of education? And would you see, as we approach a fairness of how we are going to obtain positions, that teaching slots could be bid on, that a potential applicant for a position would be allowed to bid, and all the qualifications being met, whoever was the

low, reasonable, responsible bidder would be afforded an opportunity to acquire the position?

MR. SHANKER. I would look at the other side of the coin, too. You've got it now, really. You don't even have a low bidder situation. What you have now is something where there are no bidders for these positions, so what school boards do is hire emergency teachers, temporary teachers, substitute teachers. Did you ever hear of an emergency surgeon? Have you ever heard of an emergency temporary lawyer? Did you ever hear of an uncertified dentist being able to work for a couple of years until they hire a certified one?

COMMISSIONER BUNZEL. Yes, I've got one now.

[Laughter.]

MR. SHANKER. You might have an incompetent one, but he is not uncertified. That's the difference.

COMMISSIONER GUESS. Mr. Shanker, you have to realize my colleague is from California.

[Laughter.]

MR. SHANKER. Oh, I do; I do.

Seriously, my problem is that education in this country has refused to operate in accordance with competitive marketplace principles. I think you ought to set a standard of what you need in the profession. It should not be a minimal standard that is rock bottom. That is ridiculous. It shouldn't be so impossibly high that you're asking for everyone to be a genius. You don't have that in any field. There ought to be a reasonable standard. And once you set that standard you ought to allow market forces to determine what you have to pay to bring people in. If you can get good people for less, that's fine. Maybe we will reach a time when you can pay less, but right now there is no question that the operation of market forces would bring salaries and working conditions in the field of elementary and secondary education higher than they are at the present time.

There are some strikes in Mississippi right now. If you want to know what the market is like, consider that Dallas and other Texas school districts that are not noted for being pro union are putting radio commercials on the airwaves in Mississippi trying to recruit the striking teachers there to work in Texas. Now, when you get school districts that basically don't like strikers and don't like unions and don't like illegal activities by teachers trying to whisk away the striking teachers to their districts, you can tell there is a shortage.

MR. BOOKBINDER. Mr. Chairman, would you give me 30 seconds to add to my earlier response to Mr. Bunzel?

CHAIRMAN PENDLETON. Certainly.

MR. BOOKBINDER. Mr. Bunzel, I said before, with due respect, that we get anecdotal arguments made against goals. Neither goals nor quotas are needed for the Bunzels of this world. I mean that most respectfully. They are not needed for the Perlmutters or the Shankers of the world. They are needed for a lot of employers and college presidents in this country who do not think and act the way you do.

This reminds me to tell you one other biographical part of my story. It was in 1972, as an AJC representative, we called upon Mr. Nixon to make it clear this government is against quotas, but for effective affirmative action. And I worked with a man—and he won't be happy about my bringing him into this record—Larry Silberman, a Republican. He and I worked very hard; the two of us probably did as much to develop and invent the idea of goals and timetables as anybody. He regrets it; I don't. That's just for the record.

But what was his point? Why did he agree then? Why did he think there was a need for another remedy other than quotas? Because he knew there are many people—I'll say it out loud—in the Interior Department, Agriculture Department, a lot of industries in this country where there aren't sensitive people like you who, without goals or quotas, were determined to take proper affirmative action. So the system is needed for a lot of people who need the prod, something to monitor their work, so they will then do what they should be willing to do without a formal system.

MR. PERLMUTTER. Mr. Chairman, my name having been mentioned, may I comment on that?

CHAIRMAN PENDLETON. I don't see why we don't spread it around.

MR. PERLMUTTER. I will be neither anecdotal nor perhaps anecdotage.

It isn't that the Perlmutters or the Bunzels don't need that special help. I can use all the help I can get. The point about quotas is that there is somebody out there who has been arbitrarily shunted aside. And it stacks the argument to talk only in terms of the benefit that somebody is going to get. That's fine. The compassion argument is relevant, and it should undergird our search for formulas that are helpful. But the quota system by definition means that somebody else is arbitrarily being punished.

And I submit that they may not be Bunzels and they may not be Bookbinders, but there are innocent people that you don't see who are being pushed aside.

MR. BOOKBINDER. That's why we are in agreement and we're against quotas. We are all against quotas.

MR. PERLMUTTER. And we are all compassionate.

COMMISSIONER BUNZEL. Mr. Bookbinder, I want to thank you for your very generous comments.

MR. BOOKBINDER. I meant them.

COMMISSIONER BUNZEL. I appreciate that even more.

CHAIRMAN PENDLETON. Commissioner Berry.

COMMISSIONER BERRY. Mr. Chairman, I can ask either one long question or three quick ones. It's up to you.

[Laughter.]

CHAIRMAN PENDLETON. Commissioner Berry, I must give you credit. You do ask questions without predicates. Why don't you ask your three?

COMMISSIONER BERRY. Mr. Bookbinder, I agree with everything that you said. In fact, when you defined quotas as designated spots for people and designated groups and you said that's wrong, I agree with that, even, absolutely. Everything you said was absolutely consistent with the policy of this Commission before December 1983, as reflected in its report on affirmative action. So I agree with all of that and I appreciate your testimony.

The only question I had was whether any member of the panel believes—I had two questions—whether any member of the panel believes that the history of black slavery and emancipation had anything at all to do with the adoption of the 14th amendment, and whether the history of Jim Crow segregation had anything at all to do with the enactment of the Civil Rights Act of 1964. Is there anyone on the panel who thinks that slavery had anything to do with the 14th amendment or did not? What is your position on those two points—anyone on the panel.

MR. SHANKER. Well, I think Newton may have gotten the idea of gravity when an apple hit him on the head, but the idea of gravity had applicability not only to apples, but to Newton's head.

COMMISSIONER BERRY. I didn't ask you that, Mr. Shanker. You don't have to answer the question. That's fine.

MR. SHANKER. I did answer the question.

COMMISSIONER BERRY. I asked whether you thought it had any relevance at all.

MR. SHANKER. I did answer the question. The origin of an idea has no relationship to its validity or its applicability. It merely relates to its origin.

COMMISSIONER BERRY. Did slavery relate to the origin?

MR. SHANKER. Of course.

COMMISSIONER BERRY. That's all I asked.

MR. SHANKER. I'm sure you didn't want just a yes or no answer.

COMMISSIONER BERRY. Does anyone disagree with that?

MR. BOOKBINDER. No, I don't disagree, but I think I know what you mean to say. If what you mean by that question is that because slavery and the plight of the blacks primarily explained the need for the 14th amendment, that therefore, from this point on we should be blind to the possible damage done to other groups, it shouldn't mean that and it doesn't mean that to me.

COMMISSIONER BERRY. I don't mean that, either. I don't mean that at all. I just wanted to know if there was any disagreement about that specific point.

If in the black community we were willing to forget all about the history of slavery and Jim Crow, as some panelists today have suggested—you have not, but others have—that we should forget all about that and start with the present, would you, who I understand believe in merit standards, be willing to have everyone who holds a job or business opportunity today be tested by whether they meet merit standards as validated and, if they do not, lose them, whether they're black or white or whatever, and go on a purely merit operation starting today, forget the whole history of slavery and Jim Crow and say, "Okay, we'll forget it; we won't talk about it anymore, and you guys don't have to hear it anymore."

MR. BOOKBINDER. I hope you would exempt representatives of national Jewish organizations from that review.

MR. SHANKER. Why?

MR. PERLMUTTER. Why?

MR. SHANKER. First of all, I don't accept the first part of it. I don't think anyone ought to forget the history of slavery or its effects on discrimination in our society, so I don't accept the first part of it.

On the second part, I think that if our society in general moves to look into the merit qualifications of all positions, I would certainly say the group we represent should not be exempt. I wouldn't want to be singled out. But I think it makes a lot of sense

when you take a look at the advances that have been made in medicine, for example. You can look at a doctor who graduated, let's say, 35 years ago and ask whether he has been so busy working in the field that he has really kept up. I think that if we accept, as a general standard, that qualifications ought to be current and ought to be kept up, and if that's applied to one group or some groups, then I think it ought to be applied to everybody.

COMMISSIONER BERRY. Thank you.

MR. BOOKBINDER. With all due respect, Ms. Berry, I have never understood why you and some of your colleagues and others in the civil rights community, why you even engage in putting down the merit argument. Why do you want to deride it and minimize it?

COMMISSIONER BERRY. When did I put it down? Mr. Bookbinder, when did I ever put it down?

CHAIRMAN PENDLETON. Mr. Bookbinder, if we could—

COMMISSIONER BERRY. May I respond? There is no one in the world who believes in merit more than I do.

CHAIRMAN PENDLETON. Even in basketball players.

COMMISSIONER BERRY. I believe in merit absolutely, merit standards. If I had had it in my power when I was chancellor at Colorado and provost at Maryland, I would have fired everybody who didn't meet the merit standard of that day. The problem was I couldn't fire them. I wish I could have.

MR. BOOKBINDER. Okay, I misunderstood you.

CHAIRMAN PENDLETON. We have just three more questions.

Mr. Perlmutter, I want to say the Cleveland basketball situation was in the public schools, not a professional team.

Commissioner Buckley.

COMMISSIONER BUCKLEY. If I may, I'd like to address Mr. Shanker.

You stated an ideal situation where more minorities, say more black teachers, stay in the teaching profession, and we did receive some statistics this morning that stated that 55 percent of the black doctoral degree candidates went into education. However, the reality of it is that teachers with a bachelor's and even undergraduate students preparing for teaching, when they take the preprofessional test, when they take the competency tests that are coming up in several States—and Texas is one that will be severely affected by it—the minorities are going to be weeded out.

How can we assure that we keep more of the minorities in the teaching profession so that they can be there to help some of the minority students, specifically as role models, to have them continue in their education and progress further in the mobilization of the minority groups? How can we have the reality become this—a high school with all black teachers when it's not an all-black student population?

MR. SHANKER. In the first place, insofar as the large number of blacks getting doctorates in education is concerned, you should know that there is a disproportionate number of Americans, white, black, and Hispanic, who get degrees in education. Unfortunately, they get those degrees in education because they are easier, as was stated before.

If the field of elementary and secondary school teaching could just have a small proportion of all those people who get advanced degrees in education, we wouldn't be facing a teacher shortage. But these people, whether they are white or black, are largely going to take other jobs.

Secondly, I would like to relay to you a study of what happened in Florida with examinations. Florida started these examinations earlier than most other States, both for students and for teachers. And their earlier experience was very, very devastatingly negative in that large numbers of students failed the examinations and, therefore, might not have been promoted or graduated, and very, very large numbers of blacks who took the teaching examination failed.

But if you look at what has happened over the last 5 years, you will see that as a result of special programs of help and as a result of allowing everyone to know that a standard existed which had to be met, the black students are now scoring at practically the same levels as the white students. And the number of black and Hispanic teachers passing has increased each year over the last 5 years.

Now, I submit to you that the standard used by Florida is not an exceptionally high standard for any teacher. That is, to be an elementary school teacher in Florida, one must pass a sixth grade arithmetic test with multiple choice questions. If I knew that you were going to ask me this question, I would have brought the test questions here because they are the type of warm-up questions we used to get for students in the sixth and seventh grades. That is,

they don't require pencil and paper. There are three obviously idiotic answers and one obviously right answer.

All we can say is that if different groups pass at different rates, those groups that are not passing had a poor education and we ought to do something about helping them pass the test. I think if you saw the test, you would ask whether the standard is high enough. But the assistance that has been given in Florida has resulted in improving the standards of both white and black students and teacher applicants.

I also have looked at a program which the Macy Foundation has to recruit blacks into premedicine. It is a fairly small program of reaching out and finding black youngsters entering high school who show some promise. They are not picking those kids who are going to make it anyway. They pick those who are just below those who would make it anyway and say, "They are the ones who have to be helped."

So far that program shows that, on the basis of a fairly modest assistance program, the number of blacks who will end up being certified as doctors in this country will double within a very short period of time, without lowering standards or without creating quotas, but by recognizing that there were great handicaps that these children had to overcome and that by reaching them early enough and giving them assistance, they could make it.

I might be convinced to go for a quota program if I believed in the inherent inferiority of some people and believed that quotas were the only way that differences could be overcome. I don't believe in the inferiority of different people. I believe there are differences in background and there are disadvantages—historic, economic, racial, and others—in terms of how certain groups are treated. Therefore, if we make those changes, we can get the results that we want.

CHAIRMAN PENDLETON. Thank you.

Mr. Destro.

COMMISSIONER DESTRO. Just one question. I would address this to anyone on the panel who would care to address it.

The comments that Mr. Bookbinder made about understanding the anger out there—they are comments which struck a real chord with me as I have gone out around the country and talked with people about the changes in the Commission and the Commission's positions and how they differ, if any, from past Commission positions. It seems to me that at the bottom of all of this is a real question in the minds of many civil rights advocates as to whether or not this Commission and the people who say they are opposed to quotas have a good faith commitment to solving problems that we all know in our gut are there. How do you propose that we can show that good faith without sliding down the slippery slope of this open-ended language of "underrepresentation" which raises all the subsidiary questions that somebody else is obviously overrepresented. How do we get this across as a Commission and as individuals?

MR. SHANKER. I think you ought to be attacking the administration for the reduction in various budget efforts that are precisely designed to help groups that are disadvantaged, to enable them to compete.

I think the anger should not be because people are against quotas. I think, in a democratic society, the anger shouldn't be expressed by refusing to come to a body whose composition is the result of a democratic process. I don't happen to like the people who occupy the White House or who sit in the Cabinet right now. But my side lost an election in a democratic society. I recognize that. That doesn't mean I refuse to go to hearings or I refuse to vote or refuse to participate in a democratic society. That is ridiculous.

I think the anger is directed, unfortunately, at the Commission and I think it's rather interesting. The anger shouldn't be directed at the fact that an election resulted in a Commission which has a majority opposed to quotas. I think that's fine. If you don't agree with it, come here and express your differences.

I think the real problem is that educational programs and programs that help poor people—these are essentially programs of outreach, programs of retraining—are being ripped to pieces by this administration. That is where the anger ought to be directed. You are going to need more quotas after this administration is finished cutting the programs, because the damage will be so great that the only way you're going to get minorities into positions is not through help and not through training and not through assistance and not through outreach. You're going to do have to it by numbers.

The administration has done precisely that because it has decided that the only people who are going to pay for its defense program are the poor people of this country. The rich can get tax

reductions and the poor get program reductions. I happen to be a strong advocate of defense, but I don't think the way to get a strong defense program is to make one group in society pay for it.

So I share that anger, and I think that this administration is dead wrong on a lot of these issues. It's not dead wrong on quotas. It's absolutely right. But if you're opposed to quotas, which I believe is absolutely correct, then you've got an obligation to show you're doing something else that makes quotas unnecessary. That I don't see from this administration.

CHAIRMAN PENDLETON. Well, as one who—

COMMISSIONER DESTRO. Mr. Chairman—

CHAIRMAN PENDLETON. We'll run out of time if you don't watch out.

COMMISSIONER DESTRO. I did ask anybody on the panel.

CHAIRMAN PENDLETON. That's right.

Mr. Perlmutter.

MR. PERLMUTTER. This attentiveness to anger—in the late sixties I had a good friend who was a radical, and when I expressed some displeasure with some violence that had taken place, he said to me, "Do you know what it is to be hungry? Do you know what it is to be uneducated, to know that your father and mother were uneducated? Do you know what it is to be locked into poverty and to know that your children, like your mother and father, are going to be poor?"

And inasmuch as we were talking about violence, I said, "Well, you can't go into all that sociology to rationalize what the Black Panthers are doing."

He said to me, "Who's talking about the Black Panthers? I'm talking about the boys in the North Carolina Ku Klux Klan."

Now, the subject of anger out there comes up in this room where we are a family discussing civil rights. The only anger we really mean when we are discussing it is the anger of those who have been attacking the Civil Rights Commission, the new Civil Rights Commission.

I submit to you, too, that there is an anger out there that may have manifested itself in some of the voting a few months ago. And it's an anger with the quota system. It's an anger with perceptions of racial preference, which is not a suggestion of prejudice because all the polls show there is less and less of it, but racial preference which is an expression of racial discrimination against persons who feel themselves set aside.

Now, as to what a Civil Rights Commission can do, I think a suggestion was made about further studies. But it would seem to me that the least that a Civil Rights Commission can do is stand firmly against civil wrongs. And racism is a civil wrong, whether its victim is black, white, male, female, whatever.

You're not going to solve all of the problems. You're only the Civil Rights Commission. But don't contribute to the problems; some studies are in order.

CHAIRMAN PENDLETON. Mr. Bookbinder.

MR. BOOKBINDER. I first made the reference to anger out there, so let me make a brief comment in the context of the question I was asked. I was referring to the anger of those people who didn't come to the session today for the reasons that they will have to explain, but since you asked the question as a member of the Commission, I will take advantage of it to say this. The answer is a reflection of a disappointment that many of them felt—and I joined them; I'm not going to say "they"; I can say "we" now. I thought—and Linda Chavez knows this well because we communicated with her and we wrote letters to every one of you Commissioners, when this Commission was reestablished. By the way, we had come and testified on behalf of Mr. Abram. We are proud of him. We may have some disagreements here and there, but we do consider this a Civil Rights Commission which deserves serious consideration.

We recommended to this new Commission that as it organizes its business, why don't you find areas of substantial agreement with the organized civil rights community, because you are the Civil Rights Commission. There are many things that you and we can work together on. Don't stress that which has divided the community, the quota question.

I believe, with all due respect—and I speak for my organization because we said this as an organization—you made a mistake in making quotas and affirmative action the front and center issue. And there is a feeling out there among those that I say are angry that that is about the only thing the Commission thinks about.

So I conclude by saying this—and the fact that I say many of these things tonight I hope doesn't dilute my strong antiquota feeling. But, for heaven's sake ladies and gentlemen, some perspective is needed. The country is not going to the dogs because there are some unfortunate quota things

going on. There are very important other issues, the ones Mr. Shanker mentioned, many things that we can point to and say, "We need more work to understand why there is this kind of discrimination or that kind of discrimination. Let's go to work on that."

But if the Commission continues to be seen as interested in that single issue of affirmative action quotas, then I think the anger will continue and will be justified.

MR. SHANKER. I don't agree with that position. I think that if you have a period of time in which the courts and the Commission and other groups within government take a position which is far out and way out, and which you disagree with and others disagree with, and then a new group committed to reversing it is elected and, you say, "Well, don't pick on this issue, stay with other issues," that is really to say that when the American people vote, the election doesn't mean anything. Your advice to any new administration is, "Now, be quiet; don't do anything to really change what the other group did."

I don't like a lot of the changes that are being made, but I think your advice is, nonetheless, very poor. I also think it's a very poor way to run a democratic society. In the long run—

MR. BOOKBINDER. I—

MR. SHANKER. I didn't interrupt you. I'm very angry about the administration's economic policies, which I don't think, by the way, reflect the views of the American people. But the American people—black, white, Hispanic—are overwhelmingly opposed to quotas. And there is absolutely nothing wrong with this Commission taking that as a very important mission.

I agree with what Mr. Perlmutter said: If you are going to support civil rights, you should not support civil wrongs. And in the view of the American people, quotas are civil wrongs, and there is absolutely no reason why this Commission should remain silent on that issue.

COMMISSIONER BERRY. Mr. Shanker, you do not speak for the black community. I don't either. But I must point out to you that all the polls that have been taken show that blacks say, when you define quotas as preferential treatment for unqualified people—and I have the polls here, and I have talked about them publicly and I'm very familiar with them. The question always is, "Do you believe that an employer should hire a certain percentage of blacks or Hispanics whether they are qualified or not?"

When that question is asked, a majority of the people, including blacks, say, "No." I say, "No." But when most of us talk about affirmative action, and when we talk about statistical remedies, we're not talking about hiring unqualified people.

Furthermore, while we're at it, Mr. Perlmutter talked about the Klan and people reacting to the jobs being taken away. I'd like to ask for the record if you know what percentage of jobs have been taken away from whites by blacks through the use of the quota systems since they've been in effect. Is this a major problem in our society?

MR. PERLMUTTER. The reference to the Klan was an anecdote that had to do with anger being related to lack of education. It was not a story that related to the quota system.

As to the percentages of whites who have been deprived, I have no statistics on it.

COMMISSIONER BERRY. It's a major problem?

MR. PERLMUTTER. I think it's a useful undertaking by the Commission. But there are many issues of a nature that go to moral judgments on which one doesn't take polls. I didn't take polls when we filed in a long string of civil rights cases as to how many minorities were barred from residential neighborhoods, how many minorities were barred from access to places of public accommodation. We understood that it was wrong to be barred on the grounds of race, and we filed suit accordingly.

Similarly here, I don't have figures—and perhaps you might look into it—but if a person is bumped because he's the wrong color or is the wrong sex, that there is no room at the inn, I think that's wrong. And I think it behooves the Civil Rights Commission to propagate the thought that people be hired regardless of race, color, creed, etc.

CHAIRMAN PENDLETON. If the Chair could, I want to ask a question about underrepresentation and underutilization. We have strayed a little bit from the topic. And as Mr. Destro, my colleague said, anyone on the panel can answer this question.

As we have an increasing number of groups that we deal with or the government deals with with respect to affirmative action or what have you, do any of you believe that underrepresentation and underutilization is a zero sum game, that in order to give something to *A* you've got to take it from *B?*

MR. PERLMUTTER. What does "zero sum game" mean?

CHAIRMAN PENDLETON. It means if you give something to *A* you must take if from *B,* or vice versa. Because there's an increasing number of groups—that's a question that's come up before, and I'm only asking you for your advice.

COMMISSIONER BUNZEL. It's a metaphor for a finite resource.

CHAIRMAN PENDLETON. I'm not so sure that's true, Mr. Bunzel.

MR. PERLMUTTER. I'm not so sure that was helpful.

COMMISSIONER BUNZEL. It was supposed to confuse the Chairman because I usually do.

CHAIRMAN PENDLETON. That is true.

[Laughter.]

MR. PERLMUTTER. The import of my comments on that subject tries to do the following, to suggest that so long as underrepresentation and underutilization is taken on its face to evidence discrimination, or taken on its face to conclude that discrimination has taken place, it leads inevitably to a formula that would somehow relate the task force's racial percentages to the demography of the community. And I think that's the wrong road down which to go.

However, it requires an examination: Is there a reason that does relate to discrimination involved in the underrepresentation in such case? It seems to me that the company or school so guilty has to be encouraged by whatever ways are available, in law and/or persuasion, to rectify their acts of discrimination. My central point is that it does not necessarily suggest discrimination. It may be discrimination.

CHAIRMAN PENDLETON. Thank you, gentlemen, for the lively testimony, and the Commissioners, too.

We'll take a short break and assemble the next panel.

[Recess.]

CHAIRMAN PENDLETON. We will convene panel no. 5 on minority and women's business set-asides. This last panel for the evening will address set-asides as a remedy from the perspective of various business organizations. The panelists are Kurt A.J. Monier, Associated Specialty Contractors, Inc.; Laura Henderson, chair of the Procurement Task Force of the National Association of Women Business Owners; G. Paul Jones, Jr., chairman of the National Construction Industry Council; Fernando Valenzuela, vice president of the Latin American Manufacturers Association, and accompanied by Mr. Celestino Archuleta, who is treasurer of the board of directors of the Latin American Manufacturers Association; and Mr. Dewey Thomas, Jr., executive director of the National Association of Minority Contractors.

Before we get into this, Mr. Jerry T. Jones, a member of the board of directors of the National Association of Manufacturers, will not be here this evening. I want to read a letter to Mr. William Howard, our staff attorney, from the association, received this evening. It says:

"Dear Mr. Howard: On behalf of the National Association of Manufacturers, I regret that we will have to withdraw the testimony submitted in the name of Mr. Jerry Jones, President of Sonograph, Inc., and a member of NAM Board of Directors. Upon closer view of NAM's policy, we discovered that NAM has no official statement regarding set-asides. However, withdrawal of Mr. Jones' testimony should be in no way construed to mean that NAM either supports or opposes set-asides. I hope you will accept our apology in withdrawing from the testimony at such a late date.

I would ask the panel to bear with us so that we can bear with you. It's been a long day. I would appreciate it if you can take about 10 minutes or so to summarize your testimony. I must say, as one of our staff members said, that this is one of the few times that the Commissioners have read all the papers that have been sent in.

So, if you will start off, Mr. Thomas, and give us a summary of your testimony, and then we'll move down the line, and then we'll have some exchange between the Commissioners and the panel.

MR. THOMAS. Did the other Commissioners promise to come back even though it's 8:30?

CHAIRMAN PENDLETON. I speak for my fellow brothers and sisters. I think all will be here except Mr. Bunzel, who has been sick all day and may not return.

Are there any hearing-impaired people here this evening?

[No response.]

CHAIRMAN PENDLETON. Some of the Commissioners might be impaired, but we are not able to read sign language.

Thank you.

Minority and Women's Business Set-Asides

STATEMENT OF DEWEY THOMAS, JR., EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

MR. THOMAS. On behalf of the National Association of Minority Contractors, our board of directors, and members, we want to thank the Commission for asking us to testify at this hearing.

NAMC was created in 1969 and now has approximately 2,500 to 3,500 members in 40 States, the District of Columbia, and the Virgin Islands.

We have submitted our formal testimony, Mr. Chairman, and would like to ask that that be made part of the record. So therefore, I would just like to highlight some of the comments that we made in our formal testimony.

CHAIRMAN PENDLETON. So ordered, Mr. Thomas.

MR. THOMAS. I guess the whole thing that we are basically talking about is one of the main reasons NAMC was created in 1969. NAMC was not created because minority contractors were not willing to work hard. NAMC was not created because minority contractors were not willing to take the risk. NAMC was not created because the contractors didn't qualify.

NAMC was created in 1969 because we were being closed out of the marketplace, both in the private and the public sector. Therefore, our only alternative was to create our own organization.

As we talk about business in the marketplace and the realities of business in the marketplace, we must say that a person and/or a company will do business with you because, number one, you qualify; number two, they know you; and number three, which in some light may seem intangible but is a very, very tangible aspect of business, is that they like you.

Minority contractors historically have qualified to a degree, relatively speaking, but they didn't know who the procurement officers were; they didn't know about the marketplace. So if you don't know somebody, you usually don't like them.

As I move around the country—and I'm so disappointed tonight that AGC is not part of this panel because I feel that they should have been up here with us. They got on this morning, and John Sroka did a very nice job this morning in articulating AGC's position. Their position is they are 100 and 99 percent against set-asides. I respect their position, since I have been the executive director of NAMC for the past 5 years, and they have been very, very consistent in their position. They collected all kinds of data, and they have stated all kinds of reasons why preference programs, which I believe is a misnomer, and/or set-asides don't work.

Let me just read from AGC's national newsletter from the spring of 1982:

> On three occasions AGC petitioned Congress to support preference programs for U.S. construction firms bidding on military construction overseas projects, pointing out that such preference programs are in the best interest of the United States Government, are in the best interest of the construction industry, and are in the best interests of the United States economy.

We agree with AGC totally. And since it is in the best interests of doing business overseas, what's wrong with it being in the best interest of doing business here in our own country?

I think the three things that they have pointed out are the reasons why set-asides are so important to the development of emerging firms.

One thing the government is responsible for—and I guess the antitrust law, monopoly, and other things point to that—is that when a population made up of various persons, and a business population, if government can identify that there is price rigging, monopoly, prejudice, or unfair business practices, then the government has a responsibility to step in and to take corrective action. And that is why the government must step in, continue to step in as relates to the marketplace for both the private and the public sector.

We are not talking about government stepping in without reason. I think the figures that are obtained and have been obtained and the data that is kept by the United States Department of Commerce points out very, very clearly that minorities have been shut out of the marketplace and have not had the same access to the marketplace as majority firms have.

There are several different set-asides now, public laws, on the Federal books, starting with Public Law 85-536, going to small business set-asides, labor surplus set-asides, the certificate of compliance program, the property sales assistance program, Public Law 95-507, and Public Law 97-424.

All of these were brought about because of inequities. All of these were brought about because we have been shut out of the marketplace.

To cite a few figures, during 1983 the Federal Government did $155 billion in prime contracts in construction; 81.4 percent of that went to majority firms, large majority firms. Twenty-nine percent went to smaller firms and minority firms. Of that 29 percent, minority firms, including women, only captured 3 percent of that. I think that points to a gross inequity as it relates to the Federal Government in its disbursing of its money to buy goods and services.

So again, we have not had the opportunity as relates to knowing the marketplace, to know that procurement officer. I am always amazed as I travel around the country—and recently I was in Oklahoma City and I saw DOT's building downtown, a typical-looking government building. About a half-mile down the road is the Road Builders Association, and about another half-mile down the road is AGC, well situated to where the action is, well situated to make sure they impact on the action, well situated to make sure they get every dollar that is going to go out as relates to the road construction in the State of Oklahoma.

As we surveyed some of our members who have been the benefactors of some of these preference and/or set-aside programs, one of our members, Aceves Construction, out of Norfolk, Virginia, said that he tried several times to knock on the door of the Tidewater area, which is basically a military area doing all kinds of things as relates to maintenance and new construction, but could not open the door. Not until he received his 8(a) certification were some doors opened to him. Not until he walked in the door with that piece of paper were the people willing to listen to him. Not until he was able to hire the necessary people and to create jobs in that area.

One of the things we are very, very upset about as an association is that we feel that there is a complete difference between civil rights as the employer and the employee. We feel that we are the employer and that if we have access to the marketplace, then we will create the necessary jobs to create the necessary civil rights for everybody, which is having money in your pocket. That's what it's all about.

Talking to one of our members up in the far west, Frances Construction, with a payroll of $250,000, prior to any type of set-aside, his payroll annually had never exceeded $50,000—a competent person, graduate engineer, masters degree in chemistry engineering—all the qualifications whatsoever, but did not know how to get along with and/or get that procurement officer, that GS–10, 11, 12, whoever does that kind of work, to like him and provide him with the kind of information he needed to make sure that he was in the marketplace. Because once he gets to the marketplace, he's going to qualify like anybody else. He has the same credentials as anybody else, but has not been able to get into the marketplace.

I have other examples here to show that set-asides and preference programs have been a tremendous help to the development of emerging firms in the minority business community. At the same time, America has got something back for it. They've got a decent tax structure for people who are working and paying taxes.

I think if we have any problem as it relates to any of the programs that have been discussed all day—and again, Mr. Chairman, with all due respect to you, I thought this morning was just absolutely atrocious with the touches that went on, with the walking out, with all the things that I think are just going to hurt the people that we are supposed to be empowered to assist with government money.

I think the intent and the implementation—the intent has been good; the intent is justified; the intent has been properly documented over the years. But I feel that where we fall short has been implementation. And I have some recommendations that I would like to point out to you as relates to implementation.

Number one, everything relating to civil rights, EEO—when somebody doesn't do something, you want to go after them for punitive damages. We feel that if more incentives are built into the set-aside program, including establishing a definitive value to the program's objective, that would be a great incentive to make people understand.

Today I had the opportunity of hearing AGC and I had to leave. The President was having a briefing on the budget as relates to the Defense Department and as relates to the Peacemaker. And as he gave his 5-minute talk this afternoon at 2 o'clock, he mentioned what a value the Peacemaker is to this country, what a value a strong defense is.

And after he departed, a few minutes later Weinberger got up and repeated that same word, "It's of a value to have a strong defense to deter any country from even thinking about crossing our borders."

And I still had my mind on the hearings here, and I said to myself, wouldn't it be a great thing when

people could stand up and say, "There's a true value to the development of minority firms; there's a true value to the development of small and emerging firms that is of benefit to our country"?

So until we can put a value on these programs, they will never be successful. And that's what we must work for, to put a value, to drop the word "disadvantaged," and tell everybody what a value it is to the country.

CHAIRMAN PENDLETON. Could you sort of wind up, Mr. Thomas?

MR. THOMAS. Yes, sir.

The second recommendation would be that the incentives of this program be tied into the increase of grades to the employees.

Third would be to encourage long term joint ventures with majority firms to ensure the continuity between MBEs, the private, and the public sectors.

Four, better utilization of technical assistance funds now being spent.

Five, expand the resources for technical assistance and training in all areas.

Six, centralizing all MBE programs and development of accurate data retrieval, so that when we get ready to go over and/or put a new piece of legislation in, we'll have the proper data to do that.

Seven, formally conduct impact studies on set-aside programs.

Those are the areas we think are very, very important. Those are the things that we feel are very, very important to make sure that the intent of all set-asides and/or preference programs are fully carried out.

CHAIRMAN PENDLETON. Thank you, Mr. Thomas.

If I could, I'd just like to read a note about the National Association of Minority Contractors, consistent with the opening statements about the organizations.

Founded in 1947, the National Association of Minority Contractors' (NAMC) membership comprises 1,000 minority construction contractors and firms wishing to do business with minority contractors. NAMC holds conferences, workshops, and seminars and offers technical assistance and consulting expertise. It also compiles statistics on minority contractors.

Dewey Thomas, Jr., has been executive director of the National Association of Minority Contractors since 1980. Prior to this position, he was treasurer-director of finance of the Minority Contractors Assistance Project, president of the Trenton Development Corporation, and an economic development and minority loan officer at the Small Business Administration's regional office in New York. He is a member of the National Black Republican Council and has been active in community affairs. He attended West Virginia State College and the City College of New York.

We move now to the Associated Specialty Contractors Association, which includes 25,000 members from eight contractors associations: mechanical, plumbing, heating and cooling, electrical, sheet metal, and air conditioning, mason, insulation, roofing, and painting and decorating. Founded in 1950, it serves as a liaison between specialty contractors and general contractors, architects, and engineers in such matters as codes, bidding, and contracting procedures. It also coordinates governmental affairs, labor relations activities, and research and education.

Kurt A.J. Monier is chairman of the board of A.J. Monier & Company, a mechanical contracting firm that does a gross volume of business of $6 to $8 million annually. A master plumber, Mr. Monier received his B.S. in mechanical engineering at Texas A&M University. He served with the Army Corps of Engineers and is retired with the rank of colonel.

Mr. Monier.

STATEMENT OF KURT A.J. MONIER, ASSOCIATED SPECIALTY CONTRACTORS, INC.

MR. MONIER. Thank you. Part of this will be a little repetitious of what you just said, but I'll repeat it a bit.

Thank you very much for allowing me to present these remarks.

As was stated, the ASC is an umbrella organization of eight national associations of construction specialty employer contractors, with a combined membership of 26,000 business firms. However, the segment of the industry represented by these associations consists of approximately 166,000 business establishments, with an annual sales volume of $80 billion and 1,459,000 employees, 95.5 percent or more being classified as small business.

I represent a firm that is a member of one of these associations, the Mechanical Contractors Association of America, to which I had the pleasure of serving as president in 1983. My firm is a family-owned corporation, established in 1908 by my

father, and now has my son as the present chief executive officer.

I received my degree in mechanical engineering in 1935 from Texas A&M University, and I am a registered professional engineer in the State of Texas.

My 50 years of mechanical contracting has been continuous, except for 4½ years of active duty service in World War II, 2 years of active duty in the Korean conflict as a commissioned officer in the Corps of Engineers.

Please note that the educational process and beginning of business involvement was during the period of the Great Depression, and I can assure you there were no small business loans or set-aside programs. Debt-ridden and economically distressed firms, mine included, survived on what was gleaned from the competitive marketplace.

The personal reference is made to emphasize a background laden with experiences that would hope to lend credence to what is perceived to be constructive criticism of the program being administered under section 8(a) of the Small Business Act.

Much criticism emanates from personal displeasure and/or disagreement with this program or any other program. However, the remarks that I make are as a result of tracking one case history that can be supported by facts and represent a very small tip of a very small "iceberg." From publications and other articles written on the subject, it is apparent that the facts related to this case are no different from those prevalent elsewhere, and that there is a multitude of "iceberg" evidence.

The facts surrounding this one minority disadvantaged contractor, who happens to be operating in my local trade area, are as follows. First, he apparently started on the program in 1971 with the award of noncompetitive negotiated contracts on an almost continuous basis, covering not only mechanical, but electrical, general, utilities, parking areas, medical gas systems, and so forth. Secondly, he was prevented from acquiring a noncompetitive negotiated contract in 1975 in the multimillion dollar category for installation of air conditioning in a large existing VA hospital in Kerrville, Texas, and later failed to win the bid on a competitive basis. Third, on contacting the local SBA officials in 1975 regarding the status of this contractor, the statement was made that this firm was about to be graduated.

From 1975 to the present, this firm has occasionally been bidding work in the private sector competitively, but has not been successful on many projects, and on one particular small county hospital job, on which he was successful, he had a difficult time correcting a large list of deficiencies for final acceptance, and the class of workmanship was subject to criticism by the reviewing authorities—this after 4 years in the program.

Fifth, in 1983, this firm was awarded a noncompetitive $3.58 million contract for an automatic sprinkler system in a VA hospital, a 700,000 square foot existing structure, this in spite of the fact that the firm had little or no experience in this specialized area of the mechanical industry. This represented a cost of $5 per square foot on a project for which an established sprinkler company had estimated $1 per square foot during the original construction of the hospital, and $1.50 per square foot as a budget figure for the owners in 1983.

The established sprinkler firm was disqualified from bidding because of the minority set-aside. However, our firm having been the original mechanical contractor for the complete mechanical installation made it possible to verify and to monitor the figures as mentioned above, and to state that the DBE contractor received half as much money for just the automatic sprinkler installation as the total mechanical installation cost in 1971 to 1973, which included in that contract the fire standpipes and the fire pumps. The above-mentioned sprinkler contractor was a subcontractor to our firm on the original contract.

It is difficult to understand where the $2.45 million excess over legitimate budget estimate could have been applied in the contract that was awarded.

And, sixth, apparently after 13 years of set-asides, noncompetitive negotiated work, this firm has still not qualified for graduation.

A review of most successful contracting operations would undoubtedly reveal the following: first, the need to have the desire and the determination to learn the basic principles and technology of the field of endeavor; secondly, the limitation of the field of activity to avoid dilution of technical skills and to constantly study to be abreast of the latest developments in techniques and methods; third, a gradual advancement from small to medium to large projects, or in other words, the will to learn to crawl before walking, before running. Expansion in the multimillion dollar yearly volumes requires many years of a gradual growth pattern targeted to definitive plans, not extreme and rapid growth over

short periods of time. Fourth, a continuing study of management methods, supervisory techniques, cost estimating, cost accounting, contract planning, scheduling, financing, personnel management, marketing, and many other programs and/or processes that affect productivity.

In view of the above and further when considering the time-tested educational systems in place, it is difficult to understand how many firms, minority or otherwise, can be legislated into a successful business from the top down with the sole judges of achievement being those administrators who for the most part could not possibly have the expertise and experience in all areas to judge when a graduation of a participant should occur.

It appears that there are no set standards against which to judge the attainment of competency nor time frames to establish achievement levels for the assessment of halting the participation process. This is contrary to the achievement standards required in our educational system, for the training periods required in our professional groups, to the apprenticeship programs in the building trades groups, to on-the-job training programs, and even to the progressive basic-advanced specialist and unit training in the military. All these have achievement levels geared to time. There is a need for a similar format in the training program in discussion.

Apparently from correspondence received, the district office personnel of SBA believed that the participant progress determinations were being made in Washington, D.C. And in Washington, D.C., SBA and government officials think the action is being taken at the district or regional office. With this confusion over responsibility, it is understandable that only 166 out of 4,598 participants have been graduated from the program, indicating further apparent deficiencies in guidelines and operating procedures.

If preferential procurement programs are eliminated, together with the reverse discrimination that is being implanted, the government and the contractor associations, using a fraction of the money now being wasted, could act as peer groups to qualify, train, and educate minority-owned businesses to compete on equal terms in the construction market. This should be done at the grassroots level, working from the bottom up instead of the top down, with willing, sincere, and dedicated participants. Then, and only then, could there be expected to be lasting qualified graduates after reasonable periods of participation. By so doing, the process of freedom of choice and equal opportunity for all in a free market will prevail as it has prevailed in the past and should prevail in the future, thus saving the waste of large sums of money and returning to the basic principles that form the basis for the free enterprise system.

I am reminded of a remark made by one of our local Congressmen several years ago when he stated that many well-intentioned laws passed by the Congress are turned over to bureaus for administration without any obligation to provide feedback information to determine whether the intent of the law was being fulfilled. He stated it was impossible to penetrate into the bureau operations to obtain feedback or progress reports to ascertain the results. It appears to a degree that section 8(a) provisions of the Small Business Act fall into that category.

Thank you.

CHAIRMAN PENDLETON. Thank you, sir.

Ms. Henderson.

The 1,500-member National Association of Women Business Owners was founded in 1974 by women who own and operate their own businesses in order to identify and bring together such women in mutual support, to communicate and share experience and talents with others, and to use collective influence to broaden opportunities for women in business. The organization holds workshops and seminars and operates an information clearinghouse and a referral service.

Laura Henderson, chair of the Procurement Task Force of NAWBO, worked for health-care consulting firms before founding her own biomedical consulting firm, Prospect Associates, Ltd., in 1979. The firm, which offers multidisciplinary services primarily to health groups affiliated with the National Institutes of Health, did $1.2 million worth of business during its first 10 months of operation. During its first year, Prospect submitted 13 proposals for government contracts and won every contract. In its first 10 months the number of employees rose from 15 to 45. During the current fiscal year, business volume will be $2.6 million, with a growing staff of 60. Ms. Henderson received a degree in business at Kings College in North Carolina.

STATEMENT OF LAURA HENDERSON, CHAIR, PROCUREMENT TASK FORCE, NATIONAL ASSOCIATION OF WOMEN BUSINESS OWNERS

Ms. HENDERSON. The National Association of Women Business Owners (NAWBO) is pleased to have the opportunity to testify before the Civil Rights Commission on the issue of set-aside programs for women-owned and women-operated businesses.

As discussed, I am the founder, president, chief executive officer, and sole shareholder of Prospect Associates. Over the past 6 years Prospect has been awarded more than 90 Federal contracts, ranging in value from $1,500 to $2.1 million. We anticipate ourselves for FY 1986 to be $3.5 million and a staff of 60.

The National Association of Women Business Owners is the only dues-paying national organization whose sole purpose is to work full time nationwide on behalf of women business owners. One of NAWBO's major focuses is to lobby in the national and State capitals to facilitate the movement of women business centers into the mainstream of the economy. NAWBO represents thousands of business owners, constituting 25 chapters. NAWBO is also working on the international front. We have recently established affiliation with an organization of women business centers in 17 countries, and in May NAWBO is sponsoring its first trade mission to Europe.

The importance of women to our economy has been the subject of much discussion. The January 28 *Business Week* cover story states that the influx of women into the job market may be the major reason that the U.S. has emerged so much healthier than other countries from the economic shock of the 1970s. Economist Nobel Laureate Paul Samuelson of MIT said in this article, "To the degree that women are getting an opportunity that they didn't have in the past, the economy is tapping an important and previously wasted resource."

In her book on *Women in the Business Game,* Charlotte Taylor said, "The spirit of Horatio Alger is alive and well in America. Few people realize, however, that this spirit has been reincarnated in the body of a woman. A basic American dream, once primarily a male dream, has also become a female dream. The dream is owning your own business and reaping the economic and psychological benefits of hard work, determination, and perseverance."

Women-owned businesses are the fastest growing segment of the entrepreneurial community. Today, women own at least 3 million firms, 25 percent of all small businesses in the country, and are going into business at a rate four times faster than men. In 1980 women-owned sole proprietorships accounted for $40.1 billion in sales. This figure understates, we believe dramatically, the contribution of women-owned businesses to the economy because it does not include corporations. A recent survey by NAWBO indicates that 60 percent of our member enterprises are corporations.

In a 1984 survey that NAWBO did of 766 women business centers, it was revealed that 25 percent had gross annual sales of over $800,000. Seventy-five percent had gross annual sales of over $80,000. They had combined total revenues of more than $0.5 billion, had an average annual revenue of $425,000, and average 11 full-time employees with an additional 14 part-time or contract employees.

Like all small businesses, women-owned business are labor intensive. Sixty-six percent of all new jobs are provided by businesses with less than 20 employees. Seventy-five percent of all new jobs are provided by companies that are less than 5 years old. About half of women business owners are in the service sector, which in 1982 accounted for 74 percent of all occupations in the United States.

Women go into business for the same reasons that men do: to make money and to have direct control over their career lives.

As women continue to establish businesses at a rapid rate, the impact that they have in the small business sector will grow. Women-owned businesses are spreading into all areas of the economy. The report of *The State of Small Business* stated that government contractual awards were made to women-owned businesses in the areas of operation of government facilities, management and professional services, training, construction, and provision of such goods as ammunition and explosives, vehicular equipment, components, furniture, communication equipment.

Statistics on women business owners are very limited and sadly understate the importance of women-owned businesses to the economy. The causes for these data deficiencies are discussed in some detail in our written testimony. Despite almost a decade of efforts to focus attention on women-owned businesses, their characteristics, their value, and their needs, government agencies have not

provided a reliable count of the number of businesses in the United States.

The Federal Government is the largest purchaser of goods and services in the United States. In 1982 the U.S. Government purchases amounted to more than $159 billion. The Federal Government market remains virtually closed to women-owned businesses. The limited access to women-owned businesses represents a loss of excellent resources to the government and a severe impediment to the viability of female entrepreneurs and business owners.

Only $584 million, or 0.4 of 1 percent, of the 1982 value of Federal prime contracts of over $10,000 were awarded to women-owned businesses. For over 10 years the Federal Government has verbally encouraged full participation of women-owned businesses in the procurement process. For the most part, this encouragement has remained at the level of lipservice.

In reading the testimony presented during the day, one might conclude that women as a group are included in governmentwide set-aside programs. This is not true. No preferential programs have been established for women-owned businesses, and all initiatives to date have been largely ineffective.

Our study in preparation for our testimony today indicates that women business owners who are seeking to increase their participation in Federal procurements face three significant barriers.

The first barrier is that most are small businesses in the early stages of doing business with the government. These barriers include the lack of easily accessible pertinent information, lack of financial stability to withstand extended procurement cycles, and the nonrecoverable financing costs required to meet cash flow obligations.

Women-owned businesses also face sociological barriers in the form of persistent misconceptions and biases. These barriers have been verified time and again by every study examining the role of women-owned businesses in government procurement and are detailed in our written testimony.

Both the subtle biases and the more open forms of discrimination that women-owned businesses in the government face are substantial barriers to full access by these businesses to the Federal procurement market. The misconceptions that persist are due in part to the lack of accurate and complete data about women-owned businesses that have been proven untrue through NAWBO's study. There are assertions that women-owned businesses are too small, that they are cottage industries. There are assertions that women-owned businesses do not produce the goods and services that the government needs. This is not true.

The third barrier faced by women is unequal access to credit. In spite of the actions that have been taken, we here at NAWBO and through other organizations feel that access to credit is still a serious problem. This serves as a major barrier to a beginning business, since most small businesses have to borrow money during the early stages of development.

NAWBO believes in and supports government procurement policies that foster competition. However, procurement history indicates that, left unconstrained, the Federal Government would procure the vast majority of its goods and services from large established businesses, in spite of the documented efficiencies and cost savings of small businesses.

NAWBO knows that women-owned businesses can compete successfully in the government market if barriers are removed.

We looked at set-aside programs and came up with some categories that we believe should be considered in the establishment and management of set-asides. We believe that for them to be truly beneficial to both the government and the private sector, they should be designed to: facilitate the development of small business capability and enhance the probability of success of the firm; use competition as a driving force; provide an environment that enhances initial growth and allows for fair and equitable competition; reward excellence in growth rather than penalize the successful firms by excluding them from the established client base when it exceeds a size standard; prepare companies to compete in open procurement competition; and provide incentives for program and contracting officers for use of the set-aside mechanism.

For the growing enterprise, it is especially important to have access to the largest purchaser of goods and services in the U.S., the Federal Government. Set-aside programs help to provide this necessary access, access which NAWBO is convinced would not otherwise exist if it were not for these programs.

NAWBO is, however, concerned that set-aside programs have not been applied evenly across all procurement areas. Set-asides should facilitate entry into all procurement areas and should not result in

adversarial relationships between large-small, majority-minority, and female-male-owned firms.

Women-owned businesses, as I said before, have no governmentwide set-aside programs. However, women-owned businesses do qualify for small business set-aside programs, small business innovation research programs, and for minority women, the 8(a) program. These are discussed in our written testimony with the pros and cons, so I will move on.

In our study for preparing our testimony, our goal was to develop some recommendations that are pragmatic, attainable, and manageable in a real business world, and in keeping with the competitive spirit of free enterprise. NAWBO proposes the implementation of a two-phase program to assist women-owned businesses in gaining access to Federal procurement and overcoming the barriers we currently face.

Phase one would last 2 years and would involve administrative and procurement actions that we believe would increase the share of Federal procurements going to women-owned businesses. These are detailed in our written testimony.

A failure of these actions recommended in phase one to achieve a steady, significant increase in the share of Federal contract dollars awarded to women-owned businesses within 2 years of implementation, we believe, would demonstrate that the barriers facing women-owned businesses in trying to do business with the Federal Government are too great to overcome with action short of the set-aside program.

NAWBO recommends that if these actions fail, the Federal Government should establish a set-aside program for women-owned businesses modeled after the current small business set-aside program. The set-aside program should not draw on any funds targeted to the small business set-aside, SBIR, or 8(a) set-aside programs. Further, the set-aside program for women-owned businesses should involve both technical and cost competition that duplicates current procurement competition procedures, should offer technical assistance, and should provide incentives for growth, innovation, and job creation.

Thank you.

CHAIRMAN PENDLETON. Thank you.

With 400 members, the Latin American Manufacturers Association's purpose is to assist corporations owned by Hispanic Americans to participate more fully in the free enterprise system. The association was founded in 1973. Its current goal is to secure $100 million in government-related contracts for member companies.

Fernando Valenzuela is vice president of the Latin American Manufacturers Association. Prior to his 4½ years with the association, he worked in the loan department at Hemisphere National Bank in Washington, D.C. He has traveled extensively throughout Central and South America and has been active in community activities. He earned a B.A. degree in Latin American studies at the University of California at Berkeley and has also studied in Mexico.

As I mentioned before, he is accompanied by the treasurer of the board, Mr. Celestino Archuleta.

Mr. Valenzuela.

STATEMENT OF FERNANDO VALENZUELA, VICE PRESIDENT, LATIN AMERICAN MANUFACTURERS ASSOCIATION; AND CELESTINO ARCHULETA, TREASURER

MR. VALENZUELA. Thank you, Commissioner. On behalf of the Latin American Manufacturers Association's board of directors and its membership nationwide, it is a pleasure to express our appreciation for your invitation to allow me to address the United States Commission on Civil Rights on minority business set-asides.

I should tell you, Commissioner, that Mr. Art Lopez, our chairman, was unable to make these hearings because of a pressing problem, but Mr. Celestino Archuleta, our treasurer, has offered his presence here for us. He is here to present Mr. Lopez' testimony. Mr. Archuleta is the president of National Systems and Research, located in Colorado Springs, Colorado, which is a computer software design company. Mr. Archuleta's firm is an 8(a)-certified firm, and he will provide some insight as to his experiences as an 8(a) company later on during this presentation.

You gave a short background of our organization. I'd like to give a little more. LAMA is a national industrial association representing over 500 Hispanic manufacturing and high-technology firms located throughout the United States and Puerto Rico. Our membership also includes numerous other areas, companies with experience capabilities in engineering and industrial supply and technical consulting.

Your invitation requested that LAMA present its views on minority business set-asides. This testimony, therefore, will focus on the effects of the Small Business Administration's 8(a) set-aside program. In the written testimony, we give several specific

examples of companies participating in the set-aside program to illustrate the positive impact the program can have on individual companies. I would, of course, like the full text of the testimony to be presented for the record, but I will just highlight a few of the items here for purposes of discussion.

Through the examples we have drawn, we hope to demonstrate to the Commission that certification as an 8(a) minority contractor has resulted in significantly improved business posture for these companies, particularly in three areas. We see an increase in overall sales of the company, an increase in the magnitude of the individual contracts that each company is performing and negotiating, and of course, in addition, these firms are developing as prime contractors to the Federal Government.

What I'd like to do is have Mr. Archuleta give you a little insight as to his experience as an 8(a) company before continuing.

MR. ARCHULETA. Mr. Chairman and members of the Commission, my purpose here tonight is to address the SBA program and the process of acquiring 8(a) contracts on a set-aside basis.

I have been in the program for several years. Therefore, I feel that I am qualified to speak about the program. My presentation will be very brief. I merely want to highlight and emphasize some of the points about the 8(a) program.

Section 8(a) of the Small Business Act authorizes the Small Business Administration to identify procurement requirements and set them aside for negotiations with 8(a) companies. The contracts are awarded on a negotiated basis.

It is important to point out to the Commission that the 8(a) program is not a give-away or welfare program. Many people are under the impression that the government is forced to pay noncompetitive prices for purchase of inferior products as a result of the 8(a) program.

In actuality, the 8(a) program is simply a certificate to secure contracts on a negotiated basis—and I emphasize "negotiated." Once a requirement is identified for the 8(a) program, the next step is the negotiation of acceptable terms and conditions. The procuring agency dictates all aspects of the contractual agreement, including price, quantities, and quality assurance. It adheres to Federal military specifications and delivery schedules. If these terms and conditions cannot be met, an agency is not compelled to contract with a particular 8(a) firm.

The 8(a) program provides a means by which a minority-owned company can negotiate—and again I emphasize "negotiate"—a contract with a given Federal agency. Nothing is given—and I emphasize "given"—to the 8(a) firm. They will not receive a contract at all unless they can successfully negotiate terms and conditions with the buying agency.

The 8(a) firms are treated just like any other firm. If a proposed price is too high, they won't get the contract. If the agency feels their quality control program is unsatisfactory, they will not get the contract. If they cannot deliver in the time frames dictated by the agency, they will not get the contract.

Once a contract is successfully negotiated, the 8(a) firm must perform according to the terms of the contract or the contract will be terminated by the government. In short, 8(a) contracts are awarded based on terms and conditions established by the government agency, not by SBA or the 8(a) firm. The government secures a service or product as it does from any other supplier.

In conclusion, as an owner of an 8(a)-certified company, I want to emphasize that the 8(a) program is not a give-away program. I assure you that my firm would not be in business if I could not deliver a quality service and quality products.

What the 8(a) program does provide is the opportunity to compete in a small circle of business. By having this opportunity, the 8(a) firms have a higher probability of being successful than in open competition. Now, I see the 8(a) program as a mitigator of risk so that minorities are willing to risk participation in the competitive arena that has previously precluded their participation.

Mr. Valenzuela will present the rest of our testimony.

MR. VALENZUELA. What I will be presenting are short profiles. I will select three out of the testimony for the purpose of this hearing.

The first one I draw upon is Wedtech in the South Bronx, New York. Wedtech is a high-tech manufacturing company located in one of the most blighted areas of the United States, the South Bronx. When LAMA discovered Wedtech 10 years ago, the company had eight employees, 1,500 square feet of manufacturing space, and annual sales of less than $200,000. The firm had no prime contracts, and its subcontracts from major aerospace companies averaged around $25,000.

Today, 5 years after being 8(a) certified, Wedtech has almost $40 million in sales, over 300,000 square feet of manufacturing space, and some 700 employees, most of whom are from the ranks of the hardcore unemployables in the South Bronx. The firm is making tank components for the Army and powered causeways for the Navy. Their largest single contract to date was for $27 million to manufacture a 6 horsepower engine for the Army.

There is simply no manner in which a small job shop in the South Bronx would have been able to secure prime contracts for highly technical items were it not for the 8(a) program. This is one of the most outstanding examples of what can be accomplished by the careful use of negotiated contracts set aside for qualified minority companies.

The next example I draw upon is R&E Electronics out of Wilmington, North Carolina. This company was 10 years old prior to becoming 8(a) certified. Sales averaged around $120,000 a year. Its largest contract never exceeded $40,000. R&E had received no prime government contract work.

This picture, of course, has changed significantly since entering the 8(a) program. Sales over the last 2 years have averaged around $3.5 million. The largest single contract to date totaled $3.2 million for the installation and maintenance of a 10,000-line phone system for the Marine Corps. R&E would never have been able to secure a contract to install this 10,000-line phone system without the 8(a) program. Generally, solicitations for telephone systems require previous experience in at least three similar systems just to qualify to bid.

Here we have another example of a company whose sales are substantially increased, the size and scope of its single contracts have increased markedly, and the company is now a prime contractor to the government.

The last example that I would like to point out is Roselm Industries in South El Monte, California. Roselm has been in business for 18 years manufacturing electronic cables, electronic assemblies, circuit cards, radar components, and other electronic items. Before entering the 8(a) program, the company had never been a prime contractor to the Federal Government. During that time, sales averaged around $250,000, and its largest contract never exceeded $100,000.

Sales since 8(a) certification show a different company entirely. In 1985 sales are estimated at $1.8 million. Roselm's largest single contract is a multi-year $1.5 million award as a prime supplier to the Coast Guard for radar components. The company currently employs 35 skilled and technical workers in an area of high unemployment, with a projected increase to 60 employees by year's end.

Again, we have another example here of a company that has essentially been able to develop into a prime contractor to the government, whose sales have increased sevenfold prior to 8(a) certification, and the size of the firm's contracts have also increased significantly.

The key that we are actually pointing to here is that these firms—and there are hundreds of others like them—have the requisite technical capability to become prime contractors to the Federal Government, but have no effective means to penetrate that market without the 8(a) program.

I would also like to take this opportunity to address an issue of importance to the association. Our concern is the significant underrepresentation of Hispanics in the SBA's minority set-aside program. For the past decade, Hispanics have represented approximately 20 percent of SBA's portfolio. In California, for instance, where Hispanics constitute around 64 percent of the minority population, they represent only about 31 percent of the 8(a) portfolio there. For the past decade, Hispanics have received approximately 15 percent of the dollar value of all 8(a) contracts. The program now awards over $2.6 million annually in contracts to its portfolio members. The shortfall to Hispanics, because of their underrepresentation in the 8(a) program, is in the hundreds of millions of dollars.

Pursuant to management initiatives by the current SBA Administrator, Jim Sanders, we are beginning to see an improvement in the ratio of Hispanic participation in the 8(a) program. Figures for 1984, for instance, show the dollar value of awards to Hispanic 8(a) firms moving up to about 25 percent. We are concerned that these gains be consolidated and improved. We therefore ask that the Commission support SBA management initiatives in requiring SBA to conduct the 8(a) program in a manner that is more fully representative of Hispanics and other minorities which have not fully shared in the program.

This concludes our testimony to the Commission. Thank you for providing LAMA with the opportunity to present its views on minority business set-asides.

CHAIRMAN PENDLETON. Thank you.

The National Construction Industry Council, comprised of 30 construction associations, was established in 1974 to unite professional societies and trade associations to improve the capability and productivity of the construction industry. The council conducts policymaking and legislative activities and sponsors workshops.

G. Paul Jones, Jr., is chairman of the board of the National Construction Industry Council and chairman of the Macon Prestressed Concrete Company, a company he helped to found in 1956. His company designs, manufactures, and installs prestressed concrete in buildings, bridges, and other structures. Mr. Jones has also served with the U.S. Army in Korea and worked as a general contractor on bridge projects. A registered professional civil engineer, he received his bachelor's degree in mechanical engineering at Georgia Tech.

Mr. Jones.

STATEMENT OF G. PAUL JONES, JR., CHAIRMAN, NATIONAL CONSTRUCTION INDUSTRY COUNCIL

MR. JONES. Thank you, Mr. Chairman. It's been a long day, I'm sure, for you and just about everybody here, and I will be very brief.

You have indicated activities of NCIC and I will not go into that. But the construction industry is one of the most important contributors to overall U.S. economic strength. Many economists now concede that construction activities led the Nation out of the recent recession and that the present recovery and healthy economy was generated and is currently maintained by a vibrant, strong, recovering construction industry. And I think this is the case in about six of the last eight economic recoveries similarly started by renewed construction strength.

At the outset, I must observe that while the council has developed consensus policies on set-asides to involve minorities, industry members continue to disagree as to what specific actions should be taken to remedy the present problems in this area. However, it is clear that members of NCIC are in unanimous agreement that existing programs must be modified and that any continuation of the present status quo will serve only to increase resentment and to further polarize members of the construction community. A more practical consideration in this time of deficit reductions at the Federal level would suggest that failure to change existing programs may add 10 to 20 percent to the cost of Federal construction contracts. These savings would amount to several billions of dollars annually.

I would also like to define, for the purposes of my testimony here today, the use of the term "quota." The last panel dealt with that quite a bit. Many euphemisms have been applied to the statutory language developed by Congress over the years for increasing minority business utilization in connection with Federal and Federal-aid work: objectives, guidelines, goals, quotas are all terms which have been used in this context.

A goal, which in my mind is a target to strive towards, would permit the best or good-faith efforts of the contractor to be taken into account if the goal is not reached. To those of us in the construction industry who must adhere to these rules, many times applied inflexibly and without concern to the hardships created even to those who are arguably to be favored, this is, indeed, a decree and, in practical application, it is clearly a quota. It is an ironclad requirement in many cases, rigidly enforced. It has been responsible for throwing out the low bid on hundreds of contracts and awarding the contract to the second or third bidder at an increase in price of literally billions of dollars over the life of these programs.

The contract may be awarded to the second or third bidder who was considered to have more fully complied with the DBE quotas. I'd like to point out that DBE quotas can be, and many times are, in direct conflict with the requirements in most States that construction contracts shall be awarded to the low bidder in open competition. Many times, if there is only one bidder, the State is prohibited from awarding the contract or even from opening the sealed bid. But if there are two bidders and the low bidder was deemed to be nonresponsive because of failure to meet the DBE quotas, the contract could be awarded at a higher price to the second bidder who might have met the DBE quotas.

Even though provisions have been made to waive the DBE quotas in certain cases where it was shown that insufficient minority firms existed to fulfill the requirement, the difficulty of locating qualified minority firms, of reaching an acceptable price for work to be performed by such firms, and of apportioning work to be performed under a contract have led many construction firms to call for either the termination of such programs or for their substantive revision.

Many times when there is a single DBE firm available, he or she has a monopoly created for them and they are priced monopolistically. And this is a monopoly that is unregulated by anyone.

As a result of these problems, NCIC adopted two position papers on the subject in 1977. In summary, these policies generally opposed the use of preferential treatment for legislatively favored racial classes and, more to the point, the use of quotas to achieve higher DBE utilization in the construction industry. Both of these NCIC position papers are appended to this testimony.

Since the adoption of these policies, the council has continued to grapple with this issue while government programs have become more inflexible and pervasive regarding the use of DBEs. As the Department of Transportation, the Environmental Protection Agency, the Small Business Administration, and other Federal agencies adopt quota requirements, more and more construction firms are drawn into the arena of contention and the backlash against the perceived unfairness, as well as the significant increase in cost, of such programs has continued to grow.

Mr. Chairman, that racial discrimination is a part of this country's history is an undeniable fact. That it continues to linger is an ugly truth. That minorities of every kind have suffered at the hand of such discrimination, and not merely suffered in a business or economic sense, is incapable of question. But there is another legacy contained in our development. It is a deep and abiding respect for the rights of the individual, and it can be found in the Constitution upon which the legitimacy of all of our laws are predicated. The rights and benefits afforded under the Constitution are guaranteed to the individual. They are, by their very nature, personal rights and not group rights.

Under our system of justice, no one is accorded any special treatment or is obliged to suffer any detriment because of ethnic origin, race, or religious preference. Yet, the objective of these set-aside programs is precisely that: to accord a benefit, in the form of an exclusive and protected market, to a class of individuals denominated solely by their racial characteristics or their sexual bias. At the same time, these laws and regulations create a bar to others in our society denying them the opportunity to receive a governmental benefit because they fail to have the racial or ethnic or sexual ancestry or characteristics.

Nowhere in the language creating these programs can be discerned any attempt to either measure the recovery by the extent of the wrong complained of or to distribute that recovery equally and fairly among those comprising the injured class. Equally absent is any attempt to limit participation in these programs to those who have actually suffered the effects of discrimination or to seek recovery from those firms who have actually occasioned the discriminatory practices in the past. Neither the innocent nor the guilty, the victim or the victimized, are accorded any different treatment under these programs. Nonminority firms and grantees who have an established history of actively seeking to place contracts and subcontracts with minority firms are afforded no better treatment than firms with a history of discriminatory practices. Good-faith efforts seem to be irrelevant. Similarly, minority firms, which may have long suffered the effects of discrimination, are accorded no more preferential treatment than firms newly created which may have never been harmed by such conduct.

The only criteria set forth according entitlement is membership in a legislatively defined racial or ethnic or sexual class. The only criteria set forth excluding entitlement is race or ethnic background. The concepts of individual accountability, of individual compensation and reward, of individual rights are totally abandoned. In an industry characterized by fierce, heated, open competition, another criterion has been established: Award the job because of racial or ethnic or sexual characteristics.

We cannot agree with this approach, no matter how temporary, no matter how well intended. The national government, by resurrecting race as a relevant criterion for the disposition of benefits in our society, as opposed to individual merit and ability, sends a clear message to all its citizens: Any ethnic, religious, or racial or sexual group which possesses the political power to negotiate a settlement in the legislative branch of government can take all it can as fast as it can for as long as it can.

To correct or eliminate some of these problems, established contractors could be encouraged and given incentives to subcontract to DBE firms. This could be in the form of training to DBE firms, counseling with them, tax incentives for the successful completion of projects by DBE firms, and so forth.

Those DBE firms that succeed in the marketplace will find many contractors clamoring for their

services. The shams and front organizations that are set up to take advantage of this mismanaged and misdirected program of monopolistic practices will no longer be able to exploit the well-intentioned effort to bring more minorities into the construction industry.

Arbitrary quotas and subsidies to firms, some of whom are unqualified and would not be allowed to bid if they were not minority firms, should cease, and qualified firms, not needing the quota or subsidy to compete, should not be counted toward DBE quotas. The low bid in open competition should be the criterion for awarding of construction contracts. Incentives to established contractors can help train and develop minority firms who will be able to provide the low bid effectively in the rebuilding of America.

The following came from a newspaper column that I read this morning. It dealt with civil rights and the physically handicapped, but it would be equally applicable, I think, to the subject at hand:

> We overlook the fact that justice in the matter of the economics of the marketplace is not necessarily achieved by the same measures as justice in the matter of race. To achieve justice we need to separate these items. Racial discrimination was a socially created thing which could be modified through changes in society's laws. But no matter how sensitive a society tries to be, it cannot by law wipe away all the unpleasant consequences of economic success to one individual and lack of economic success or even economic failure to another.

Humane legislation is one thing. Civil rights are another. Strange as it may seem, Mr. Chairman, activist zeal is no substitute for clear thinking if one really hopes to achieve justice.

Thank you, Mr. Chairman and members of the Commission.

CHAIRMAN PENDLETON. Thank you, Mr. Jones.

As I listened to the testimony—I'm taking the prerogative of the Chair because of the late hour—I must say it was balanced with different opinions.

Mr. Thomas, I assume you do not agree with Mr. Jones nor Mr. Monier. I'm only assuming, but to set that up as an absolute hypothetical, what is it that the three of you could talk about that would get rid of set-asides that would make you comfortable, and probably Ms. Henderson and Mr. Valenzuela and Mr. Archuleta comfortable, that they could compete in the marketplace. Each of you has stated your position, but I'm not sure I understand what a remedy might be. What do you think that remedy might be, Mr. Thomas? And other panelists may answer.

MR. THOMAS. Well, I think there are some alternatives and there are some remedies. For one thing, NCIC, it appears by what Mr. Jones says, takes a very strong position against all set-asides. If I remember correctly, it was at the September meeting of '84—and I was a part of that meeting, being at that time part of that coalition—he championed a resolution to be passed by NCIC to do away with all set-asides. If I remember correctly, that was voted down by the body.

So I'm kind of twixt on this firm stand now and take into consideration that perhaps something happened in between that I don't know about. But that was tried by that coalition, and again I state that it was voted down at that time.

I think the main reason it was voted down was that some of the smaller associations within that body said it was too firm a position to take. It was too much of a negative position to take, that set-asides and preference programs are a reality. They are public law. And I think this renders room for compromise and to crystalize what we disagree on and also crystalize what we agree on and come up with something that we all can live with, and also to make sure that minority contractors in no way, shape, or form are closed out of the market for various and sundry reasons other than if they don't qualify, which, again, I feel if you don't qualify, you should be closed out of the marketplace.

I just feel that digging our heels in left and right is not going to help anybody in this room or anybody that we represent. It is time for compromise. It is time for alternatives. It is time to stop talking to each other and start listening to each other.

CHAIRMAN PENDLETON. Mr. Monier or Mr. Jones?

MR. JONES. I must say, Mr. Chairman, that the programs do exist and they are set aside for preferential treatment. I think the question to be asked is: When do they cease?

There have been some statistics that the average cost or the premium cost for the set-aside programs is in the range of 10 percent. I think that is several years old, and I think it may be as much as 20 percent now in some cases. Yet, there are also statistics that show that the average profit margin of the construction industry is less than 5 percent.

At what point in time do we say that a firm has to graduate and compete on its own without the benefit of preferential treatment or subsidies?

There are alternatives, though, I believe. I mentioned some about creating incentives. There have been two general areas of alternative programs. The program is to have experienced firms to try to deal in a training or counseling position with the minority firm or the disadvantaged firm and to bring them along. On the one hand, they say you can do this through government agencies, to counsel with the firm. On the other hand, they say you can do it in the marketplace with contractors.

I would certainly favor the latter. I think the marketplace can do it more economically and more efficiently and more successfully. And I believe through joint ventures, partnerships, training, giving some kind of incentive to the general contractors to bring themselves along and to give them training so they can compete in the open marketplace without the benefit of additional subsidies would be the way to go. But no one has ever come up with a concept or a timetable as to how long one of the minority firms has to be in the program before it can graduate.

In addition to that, there are experienced qualified firms that have been doing business for 10 or 20 years that also get the benefit of the disadvantaged firms strictly because of their ancestry.

CHAIRMAN PENDLETON. Mr. Monier.

MR. MONIER. I think he just mentioned the same thing I would mention on joint ventures, to be able to transmit to the disadvantaged contractor or the minority contractor the ability to establish himself in an ongoing position. The thing that is rankling is the fact that there is an ongoing situation with no terminal point. There is no graduation situation in many of these respects.

In addition to that, there are many offensive practices that are created, not only by the minority but by the majority contractors, that are completely shams in the way these quotas are met. I don't think you have to go into detail on that except to say that it circumvents the intent of the program itself.

The other thing I would like to emphasize again is that it certainly is hard for me to reconcile why contractors who have been successful in their practice, both by experience and economically because of their minority position, are suddenly put in as a quota-acceptable minority contractor just because of their minority situation.

CHAIRMAN PENDLETON. I hate to say this, but I really don't have an answer to the question. I've heard the problems, I guess, and I see some semblance of something. But it does seem to me at some point there's got to be some way that this is discussed.

Mr. Thomas is saying—and I happen to agree—that minority contactors feel as though they are qualified. I hear Mr. Jones saying that he's still got to be trained by an experienced contractor before you can come in. Is that what I understood?

MR. JONES. No, Mr. Chairman, you misunderstood me if I said that. There are qualified contractors that I don't think need to have the program, nor do I think they should be counted toward participation in the program. There are other contractors that have been described here today that are trying to compete and either training by a Federal agency or by other contractors or by some other program can earn a place or can achieve those positions so they can compete in the marketplace.

I'm saying two things: Number one, the contractors that are not qualified could go into joint ventures or partnerships and by experience in finance and technical training and expertise come to a position where they can compete in the marketplace. And I'm saying that other firms that are established should not be allowed to count toward DBE participation. They are already successful. Why give them a premium of 10 percent or 20 percent when they don't need it to compete?

CHAIRMAN PENDLETON. Just one more question. Do you feel as though these set-aside programs tend to socialize business and increase the bottom line, or do they just bring people in in a way that makes them eligible for the marketplace, and it is good for the country to have increased costs, and therefore, you have more taxes. Is that what I'm hearing people say here?

MR. JONES. It's not good for the country to have increased costs because the taxpayers have to pay for the Federal financing.

CHAIRMAN PENDLETON. Somebody here said it would increase costs. I think you, Mr. Monier, said some companies have increased costs and you have a higher award. Is that what you said earlier?

MR. MONIER. That's right.

CHAIRMAN PENDLETON. Does that mean it would be a cheaper way of doing business if you didn't have these programs, or are you saying because we

have the programs, the costs are higher to the government?

MR. MONIER. I'm saying that the way the programs are being administered the costs are higher.

MR. JONES. The last issue of *Engineering News Record* said it was the general consensus that the premium is in the neighborhood of 10 percent. One person said 9; another said 10. It's approaching 20 percent in certain areas in the South.

CHAIRMAN PENDLETON. Ms. Henderson, how do you feel about that?

MS. HENDERSON. First of all, I think we are painting a lot of set-aside programs with one brush, which is the 8(a) program, and I would like to be sure that, as we talk about set-asides, we differentiate the 8(a) program from the other programs. I think, for instance, the small business set-aside program has resulted in cost savings. When small businesses have been brought in and then allowed to compete through the set-aside programs, the costs have gone down. So I want to make that point very clear, that they do not always end in an increased cost.

I find myself, perhaps rightly so, in the middle of this table, halfway between Mr. Thomas and Mr. Jones.

CHAIRMAN PENDLETON. I think you have company.

MS. HENDERSON. And I believe that there is a responsibility that the Federal Government has, as the largest purchaser of goods and services, to be fair in access to who can enter that. Because if you are taking that much of the economy and putting it in the hands of the Federal Government, we have to be sure that viable companies are not stopped by barriers.

I don't think open access exists. I do not believe that small businesses as a whole would have the opportunity to compete and win without small business set-asides.

I think it's more complicated when you go to women-owned businesses and minority-owned businesses, and those are issues that have to be dealt with if they are viable parts of our economy.

CHAIRMAN PENDLETON. Commissioner Guess.

COMMISSIONER GUESS. I yield to—

CHAIRMAN PENDLETON. —somebody.

MR. THOMAS. Can I just say something on the price impact?

CHAIRMAN PENDLETON. Yes.

MR. THOMAS. I don't think that's quite accurate. I have heard a lot of figures thrown around. I've heard millions thrown around.

In a recent study that we did at the tail end of last year, just taking the State of Colorado alone, the price rigging in that State alone cost the taxpayers more than any increase of any type of set-aside within the State. If my memory serves me correctly, out of $50 million in road construction, repairs, and what not, the price was escalated somewhere around 25 percent just because of the bid-rigging factor. And of all the contractors in that State that did road construction, about 50 percent of them participated in this bid rigging. So I think that that has had a bigger dollar impact on the American taxpayer than any increase in costs, which is questionable, by small minority businesses.

MR. MONIER. I would like to object to that because that implies that the contracting in general is bid rigging, and I absolutely would not agree to anybody making that remark about our association as far as that is concerned.

COMMISSIONER GUESS. Mr. Monier, let me see if I can redirect the thrust of the question. Did I understand you to say that your father started the firm with which you are associated?

MR. MONIER. Yes.

COMMISSIONER GUESS. Did I also understand you to say that it's in the State of Texas?

MR. MONIER. Yes.

COMMISSIONER GUESS. Did I also understand you to say that he passed this firm on to you, or did you buy it from him?

MR. MONIER. No, I took it over after I got out of college and after a brief period in field operations.

COMMISSIONER GUESS. You did inherit the firm, then, from your father?

MR. MONIER. Inherited what was there in 1935, if you want to call it that.

COMMISSIONER GUESS. Would it be correct for me to assume that you are over 40 years old?

MR. MONIER. Yes, indeed.

COMMISSIONER GUESS. Say for purposes of discussion that in the State of Texas at a point in time there was a similarly situated black. Would he have had the same opportunities to enter the marketplace in the State of Texas then?

MR. MONIER. Absolutely.

COMMISSIONER GUESS. Would he have had the opportunity to pass on to his children a firm similar to yours?

MR. MONIER. As far as I'm concerned, I don't see any reason why he would not have.

COMMISSIONER GUESS. No, that was not my question. My question was: Would he have had an opportunity to pass on to his son a firm such as your father passed on to you?

MR. MONIER. I see no reason why not.

COMMISSIONER GUESS. At that point in time would he have had that opportunity?

MR. MONIER. Yes.

COMMISSIONER BERRY. Mr. Guess, may I interrupt you.

Mr. Monier, you say in your written testimony that until 1964 most construction, including plumbers, did not permit blacks to become apprentices. I was reading your testimony, and you talk about how they changed over time, and that the work was passed on from father to son, and it was not racism; it was nepotism. Is that in your testimony?

MR. MONIER. That's correct.

COMMISSIONER BERRY. If that is the case, how could a black in the State of Texas, or wherever he was, have the same opportunity at that time to even become qualified?

MR. MONIER. It's not in there, but I know of some that are there that did that. It's because of the reality of doing business and wanting to do business or get in business and having the wherewithal and the tenacity to do it.

COMMISSIONER BERRY. In other words, what you're saying in your written testimony is not accurate. You say the people couldn't—I read it. It's right here somewhere.

MR. MONIER. I'm saying in general, in the organized labor sector, there have been cases where there was a problem; I was able to get them in apprentice programs, yes.

COMMISSIONER BERRY. You said, "In some parts of the country it was accepted practice until 1964 to exclude as an apprentice anyone who was not the son of a journeyman member of the sponsoring union or of one of the sponsoring employers participating in the apprenticeship training program. This practice was not founded on racism or prejudice, but on nepotism." And you go on and describe—

MR. MONIER. That was in the union.

COMMISSIONER BERRY. But you're saying that in Texas blacks could become plumbers.

MR. MONIER. Well, they were and they did.

CHAIRMAN PENDLETON. Commissioner Guess, were you preempted?

COMMISSIONER BERRY. I preempted him because I was surprised by the answer because I had just read something.

CHAIRMAN PENDLETON. All right, you can be unpreempted then.

COMMISSIONER GUESS. If Mr. Monier contends that a similarly situated black would have had the same opportunity, which I would be surprised to hear, in the State of Texas to acquire a firm and participate in the competitive, open, and free marketplace without constraints as he was, then I guess I have no other questions, Mr. Chairman.

CHAIRMAN PENDLETON. I just want to make one point, if I may. Is there a certain percentage of minority contractors that anybody knows of who are active in the various crafts and trades who do not look for governmental work because it's a problem?

MR. THOMAS. I asked Mr. Argrette, a member of my board, to accompany me today, and he can address that very well for you.

CHAIRMAN PENDLETON. How many minorities avoid this whole situation, who have an entrepreneurial alternative so they do not have to get into this situation of Federal contracts? Is there a number?

MR. ARGRETTE. Mr. Chairman, I wouldn't know the statistics. I wouldn't know the exact number. But if I could just add a highlight in that same area, within my business, I'm not an 8(a) contractor. I have not had any governmental loans. I am told that I have done something in the industry and have reached some level of minimum success in the construction industry.

I use the phrase, "as a minority business enterprise." I am on the board of the National Association of Minority Contractors. And I am a financial and a very loyal member along with these two gentlemen on the AGC because, from a business standpoint, I said I couldn't throw stones at the AGC and their opposition to the quotas and set-asides unless I was on the board. There are other minority contractors out there who went into business, as I did, with an attempt to penetrate the industry, because I wanted to be a good subcontractor to the industry.

Mr. Chairman and other Commissioners, the only way that I could have gotten to this level now in the city of New York—and I'm 100 percent union—was because of the rules and regulations around quotas. As a good businessman, I am attempting to be so that I will have a business from a minority stand-

point as Mr. Monier—and I am ready to go to Texas now. I don't have a son, but I could pass it over to my daughter who, because of going into the construction industry and running the business, by business objectives and good business tactics, learning from the majority contractor—and I like many other minority contractors take offense. I'm very competitive. I have never put another penny on top of a bid to win it.

Now, that may have been why my track record has been so good. But the majority contractors I work with in the framework of New York, within the Big Eight or the Big Ten—I'm not on Long Island; a lot of major contractors have been indicted in my fair city out on the island. But in the other boroughs where I work, I am as competitive as any other majority contractor.

But I know, in the real sense of the word, Mr. Chairman, I am only here because of the quotas and the rules and the regulations, which I would support because it would help other minority businesses and women's businesses to get into the mainstream. And I'm not asking for anything. I'm only asking to learn to do the business as well as you, your father, your grandfather, and that your sons will follow.

You keep talking—and you didn't use the word; I will use it—that is why the majority contractor now is grasping at the new guidelines that are out on the [inaudible]. That gives the majority contractor something that he can financially put his hands around to say, "I want to work within the framework of the rules and regulations." AGC is against quotas, but those majority contractors who say, "I am here to do business and to make business" are working within that framework, and they're using that.

CHAIRMAN PENDLETON. Is there any other comment from anybody?

COMMISSIONER BERRY. I have a few questions.

MR. ARCHULETA. Yes.

CHAIRMAN PENDLETON. Where did the "yes" come from?

MR. ARCHULETA. Right here. I would like to address another point Mr. Jones made. For example, he suggested that subcontracting would be a more economic approach. I myself have entered into some subcontracting arrangements, and I know that the prime contractor will add the cost of his general administration in addition to his fee. I can't see how that can be more economical. I think the statement is self-serving. What he is saying is that the firms he represents should get the additional cost rather than the government agencies.

CHAIRMAN PENDLETON. Commissioner Berry.

COMMISSIONER BERRY. Today we had some questioning as to whether minority firms—and I guess women-owned firms—hired more minorities and women than firms that were not minority owned or women owned. Can any of you tell me the answer to that in the case of the firms you are familiar with?

MS. HENDERSON. I can tell you as relates to women-owned businesses. Many women-owned businesses have almost 100 percent women employees. They also have a very good record in hiring minorities. My company has 45 women, 15 men, and about 13 minorities.

MR. VALENZUELA. In the Bronx we have Wedtech. The bulk of that 700 figure that I quoted comes from people who live in the Bronx, essentially does a lot of the training there at its own costs. The black and Hispanic and Puerto Rican employees that he has as laborers come from there.

The same situation with Roselm. Probably around 60 percent of his employees are from the Hispanic community of Los Angeles.

We don't have any empirical data, of course, on all of our members. Amertex, which is another company that we cite in the testimony, hires directly from essentially some very high unemployment areas in Puerto Rico itself.

MR. THOMAS. The same is generally true. Most of the companies we represent are in the inner cities around the country, and I would say a good educated guess is about 80 percent of their employees are ethnic minorities.

COMMISSIONER BERRY. Mr. Jones, you were talking about the Congress—I think you said the Congress had resurrected the idea of race to deny benefits to some people by enacting these set-aside programs, or some statement similar to that. When you say resurrect something, that means it was dead, and you invigorate it, if I understand the term correctly. Was race used to deny benefits to some people before the Congress started the set-aside programs? Was there an historic denial of benefits to some people?

MR. JONES. Not to my knowledge.

COMMISSIONER BERRY. In other words, blacks were never denied the opportunity to participate in certain kinds of activities because of their race? Is that what you said?

MR. JONES. I think it is obviously a fact that there has been discrimination in this country, and it is obviously a fact that there were relatively few black contracting firms in my area of the country. But there were some, and there have been some for years, and they are successful firms that have been passed down from father to son, as was asked earlier.

The point I was trying to make is that if you say that this percentage of work is going to be set aside or is going to be allocated to minority firms, they are doing it strictly because of the race.

COMMISSIONER BERRY. My question was about the word "resurrection." It was as if it never existed before. I was only concerned about that.

But the last thing I'd ask is: Do you have any idea why, in view of your analysis, the Congress and some of the States and cities would enact set-aside programs? Did they have any basis at all for doing it, or was it just some irrational act on their part because they wanted to violate the Constitution?

MR. JONES. No, I think it was because of political pressure.

COMMISSIONER BERRY. All right.

CHAIRMAN PENDLETON. I think it would be appropriate if the record shows that the hardest working person here today was the recorder. We appreciate that.

[Applause.]

CHAIRMAN PENDLETON. Let the record show that.

These proceedings are adjourned until tomorrow morning at 8:30. Thank you all for coming.

PROCEEDINGS

March 7, 1985

CHAIRMAN PENDLETON. Could we assemble, please. We had considerable discussion about basketball yesterday, and I would like to enter into the record the article from the morning *Washington Post*'s sports section, "Talent and Hard Work Made Maryland Junior ACC's Top Offensive Force." I want to welcome you to the second day of the Commission's consultation/hearing on Selected Affirmative Action Topics and Business Set-Asides.

During yesterday's proceedings, the participants addressed underrepresentation, underutilization, and whether or not they reflect discrimination. Business set-asides as an appropriate remedy for discrimination were discussed, as well as the current state of the law with regard to affirmative action and set-asides. We heard remarks from one member of Congress. We also heard the views of a number of business organizations and interest groups. The first panel today, which will address affirmative action strategies for the future, concludes the consultation segment of these proceedings. Following the consultation segment of these proceedings, we will have public witnesses who will be testifying with regard to their knowledge and experience about set-asides.

I do want to add to my opening statement and say, contrary to Commissioner Berry's comments yesterday, we will have witnesses and will have a hearing section where the public may tell us their experiences with set-asides. It is just important to note that we could not open up the hearing any longer than the afternoon, and there was a very long list of witnesses and persons who wanted to testify.

On behalf of the staff and my fellow Commissioners, we regret that we couldn't do that, but I will announce later that we will keep the record open for about 30 days and those who want to submit testimony or statements, please feel free to do so.

Is there anyone here who is hearing-impaired?

[No response.]

CHAIRMAN PENDLETON. Seeing none, you can rest.

Thank you very much.

This morning we start with panel 6. Gentlemen, we had a long day yesterday, and we are fresh and ready to go today. Things are working better for us today, I think.

Panel 6 is "Affirmative Action as a Remedy for Discrimination in Employment and Business Contracting: Strategies for the Future." The last panel of this consultation component of these proceedings will assess the results of both preferential and nonpreferential affirmative action in employment and business contracting. What remedies are appropriate for discrimination in employment and business contracting will be addressed.

The panelists include Dr. Finis R. Welch, professor of economics at the University of California at Los Angeles; Dr. Nathan Glazer, professor of education and sociology at Harvard University; Larry M. Lavinsky, partner with the New York law firm of Proskauer, Rose, Goetz & Mendelsohn; and Dr. Jonathan S. Leonard, assistant professor of industrial relations at the University of California at Berkeley. Welcome, gentlemen.

We will start with Dr. Leonard, who is currently assistant professor at the Organizational Behavior and Industrial Relations Group, School of Business Administration, and research associate, Institute of Industrial Relations, at the University of California at Berkeley. He has written on affirmative action

and reverse discrimination, on unionization, and on economic issues involving the black community. He has held research positions with the Ford Foundation, the National Bureau of Economic Research, and the Massachusetts Institute of Technology.

Dr. Leonard received his Ph.D. in economics at Harvard University.

Is there some kind of bias going on?

COMMISSIONER BUNZEL. What?

CHAIRMAN PENDLETON. Bias toward Harvard. We have a lot of people who went to Harvard.

Dr. Leonard, go right ahead.

Affirmative Action as a Remedy for Discrimination in Employment and Business Contracting: Strategies for the Future

STATEMENT OF JONATHAN S. LEONARD, ASSISTANT PROFESSOR OF INDUSTRIAL RELATIONS, UNIVERSITY OF CALIFORNIA, BERKELEY

DR. LEONARD. Thank you.

In the past few years, I think there have been at least two major lines of criticism of affirmative action. The first is that affirmative action doesn't work; therefore, we should get rid of it. The second is that affirmative action does work; therefore, we should get rid of it.

I would like to address myself to just the first of those two lines of argument and not at all to the second. In other words, what I am going to be concerned with is the question: What impact has affirmative action had?

I was fortunate enough to gain the cooperation of the Department of Labor to do an evaluation of affirmative action between 1974 and 1980. That study involved looking at more than 70,000 establishments with more than 16 million employees, based on their EEO–1 forms. Let me briefly summarize the results of that study.

The most important one, I think, is that black employment share grew faster at the establishments that were under the affirmative action obligation because they were government contractors than at noncontractor establishments in similar industries and regions, controlling for growth rates and other characteristics of the establishments. I take that as saying that affirmative action under the contract compliance program has been an effective program for blacks. This seems to reflect changed establishment behavior rather than the selection of black-intensive establishments into the contract program.

Another question that arises is whether affirmative action has worked across the board or whether blacks are only getting low-skill jobs. My evidence is that, indeed, the demand shifts are higher in the high-skill occupations. In other words, affirmative action also seems to help in terms of helping blacks get the higher level jobs.

A third question deals with the efficacy of compliance reviews. My evidence is that compliance reviews seem to be effective. The establishments that have undergone compliance reviews have higher growth rates for blacks than the nonreviewed contractors. It seems to be more than just an exercise in paper pushing.

So far most of my discussion has been about blacks. What has happened to Hispanics, other nonblack minorities, and females? There the evidence is more mixed. In particular, white females' growth, at times, seems to be hindered by compliance reviews, and it also seems to be hindered where their initial share is large, although the evidence is not conclusive on that.

For nonblack minorities, affirmative action seems to be more effective in large establishments.

There is a famous story out of Philadelphia about bicycling. A construction contractor hired a set of blacks and put them on bicycles and rode them around from one construction project to another in front of the inspectors. That leads you to the question of whether the gains engendered by affirmative action are transient.

My evidence, looking at a subsample of the establishments that have been reviewed, is that blacks, minorities, and females have lower turnover rates than do white males in such establishments. I don't believe that the gains engendered by affirmative action have been transient.

At the same time, I would argue that economic growth itself is surely one of the more effective means for increasing employment of minorities and females: members of protected groups. That is because the establishments that are growing can better accommodate the pressures of affirmative action.

My finding, and the findings of others, that affirmative action has been effective then raises what I believe to be the most controversial question: Has this reduced discrimination or has it gone beyond that and started to induce reverse discrimination?

My findings still are more tentative because they are based on more aggregated data, but they also give me a chance to look at Title VII. There are two subresults.

The first is that establishments that have had class-action suits under Title VII increased their black employment tremendously, and Title VII has a much larger impact on given establishments than does affirmative action.

The second finding is that the relative productivity of minorities and females has not significantly declined as their employment shares increased. I think one of the most important arguments against affirmative action is that it's forcing the firms to pick less qualified minorities and females, that it's forcing establishments to pick from the bottom of the barrel. If that were the case in a substantial fashion, then we would expect productivity to go down where the pressure had been greatest.

The tentative evidence is that I have not yet found significant evidence of such a productivity decline. I interpret that as saying that some of the large efficiency costs that have been attributed to affirmative action and Title VII are overstated.

That leaves me with two more questions. One is: How could enforcement be improved? I looked at the targeting of affirmative action and tried to infer whether it was targeted as you might expect an antidiscrimination program to be, or whether it was targeted as you might expect an earnings redistribution program to be.

My evidence suggests that it has not been targeted against discrimination. By that I mean that the establishments with the lowest proportion of minorities or females do not have a significantly higher probability of coming under a compliance review by the OFCCP or its predecessors. Again, that refers to the period between '74 and '80. I think that could be improved.

I also looked at goals and timetables. These have been criticized on two mutually inconsistent grounds. The first is that "goals and timetables" are just a polite euphemism for quota. The second is that the goals and timetables aren't worth the paper they're written on. They are just an exercise in paper pushing.

I think the truth lies somewhere in the middle. Goals are vastly inflated. Firms that promise to hire 10 minorities usually end up hiring 1. On the other hand, firms that promise to hire more do actually hire more. I take that as saying that if these are quotas, they are not being rigidly enforced, but neither are these goals and timetables as vacuous as some other critics have suggested.

Based on my empirical work and on that of the four or five other economists, including Professor Welch, who have now looked at this, I think the evidence is now pretty clear that affirmative action does work. It has been successful in promoting employment in the contractor sector of blacks. There is also some evidence it has also helped nonblack minorities and women.

In conclusion, I would say that while this is certainly a controversial program, the argument that it should be disbanded because it's ineffective doesn't strike me as one that has a strong empirical foundation.

Thank you.

CHAIRMAN PENDLETON. Thank you, sir.

Dr. Nathan Glazer is currently professor of education and sociology at Harvard University and coeditor of the journal *Public Interest.* In the past he has served as professor of sociology at the University of California at Berkeley and on the staff of *Commentary* magazine. He has also taught at Smith College and was a Fulbright lecturer in Australia and India. He has served on a number of Presidential task forces on urban affairs and education. His books and major monographs include *The Lonely Crowd, Beyond the Melting Pot,* and *Ethnic Pluralism and Public Policy.*

Dr. Glazer received his doctorate in sociology at Columbia University.

STATEMENT OF NATHAN GLAZER, PROFESSOR OF EDUCATION AND SOCIOLOLOGY, HARVARD UNIVERSITY

DR. GLAZER. Thank you, Mr. Pendleton.

I was very taken with Mr. Leonard's first lines on criticism of affirmative action. He does seem to have a point. Some people have said it doesn't work; get rid of it. Some people have said it does work; therefore, get rid of it. And I was pondering what I was saying. I'm saying, in measure, both. It has worked in some measure, and it's a question of whether we still need what is an expensive, intrusive, and complicated operation. Mr. Leonard's work has shown just how expensive affirmative action is.

Let me say that I do take seriously the Commission's request that we discuss preferential affirmative action. I do think we have a problem in that all of us

supporters and opponents of the goals and timetables, the statistical targets approach, tend to fall into the language of just saying "affirmative action." I think we are talking about preferential affirmative action, which is controversial, and specifically the requirement on contractors to reach certain levels of employment of minorities and women within certain given periods of time. I do think that this does involve preference, and that has become the issue.

Very often when we are looking at statistics, we are being told in general what has happened in the sixties and seventies, and that in general includes, clearly, more than preferential affirmative action. I think the two fine economists up here with us have done very good work in trying to distinguish, by the study of contractor versus noncontractor firms, the specific impact of goals and timetables as against everything else that happened.

But we do have to keep in mind the "everything else," and we have to ask ourselves whether, in the case of a change or abandonment of the more statistically targeted approaches, everything else changes and to what extent everything else changes. That is one of the themes I concentrate on in the brief paper I have written for the Commission.

Thus, one of the things that would continue, one of the policies that would continue, would undoubtedly be the prohibition against discrimination, the Civil Rights Act, which no one challenges. And what would also continue would be the very substantial agency, the Equal Employment Opportunity Commission, with its budget of three or four times that of the Office of Federal Contract Compliance Programs, which oversees the prohibition against discrimination in employment.

I assume the Justice Department will still be at work. I see it still at work. I assume that various State requirements would still exist. I assume that various local requirements would still exist.

Much of the news dealing with what we call affirmative action, or could call affirmative action, in the newspapers today actually deals with State action and with local action, local actions that may require 10 percent of contracts in set-asides or State requirements that involve oversight of employment in State agencies, and so on.

So I do want to narrow my presentation literally to the goals and timetables approach, that part of affirmative action overseen by the Office of Federal Contract Compliance Programs. Now, perhaps I have narrowed it too much. It is true opponents of preferential affirmative action often want to move against this policy generally and eliminate it in State and local action as well as Federal action, and in private and nonpublic institutions where it exists in very large sectors voluntarily, as well as in contractor firms now required to have such policies.

But I think it does make sense to think of policies in the packets in which they come in reality. A change in Federal affirmative action regulations seems, in view of the attitudes of the present administration and the relative ease, legally, of changing these regulations, to be the most likely change. So it is most reasonable to think of that change, and consider potential effects of a limitation of preferential affirmative action on the prospects of minority groups and women.

I realize I have left aside an issue which I know is not addressed to this panel, but which has been much discussed, and discussed yesterday, and I should say a word on that. That is the degree to which those gaps in employment income, promotion, between the target groups and the white males can be attributed to discrimination. I have written a good deal about it, and I think there is no way of changing anyone's mind on this.

I do feel that the issue has become almost impossible to analyze. I am impressed by the fact that a sociologist of great skill and competence, Christopher Jencks, who some of you may recall strongly criticized Thomas Sowell's books in an article in the *New York Review of Books,* has recently written an article to be published shortly where he somewhat reverses position—I should not attribute that to him; let him reverse his own position—in which he just sort of throws up his hands on the problem of: Are we dealing with discrimination in these gaps?

He says the figures have too many anomalies. He asks, as others have asked: Why is it that groups that we believe were subjected to some or a great deal of discrimination in the past—Jews, Irish, Catholics, Italians—do better economically than other groups, like Scandinavians, who it is generally believed faced no or very little discrimination?

He points out that, overall, these days Catholics do better than Protestants. I know he has looked at some controls for that, like who lives in the country and who in the city, and so on. He points out that if we were to use relative income as a measure of discrimination, we would have to explain why black West Indian women with 9 to 12 years of education

were making 122 percent of the average for equivalent white women in 1969—before affirmative action was very general.

On this issue I have given up analytically. I think the issue is really one of what kind of differences among groups politically can we live with, or what differences from the point of view of their social consequences shall we live with. So I will say no more about the question of justice in this area, though I think it is an area that inevitably we cannot escape.

So now the question is an exercise in considering the effects of a policy different from preferential affirmative action. And it does require us to keep in place the other elements that determine occupational choice and income. It would be an act of demagogy to assume that if we do away with Federal preferential affirmative action everything else changes, that the civil rights law is no longer in effect, that the EEOC is no longer funded or operative, that the courts shift 180 degrees in their interpretation of the Constitution and the laws and other Federal regulations, that State and local antidiscrimination commissions, laws, regulations become inoperative, that all the internal rules and regulations that create a degree of affirmative action within employing agencies—public, private, and voluntary—would become ineffective, that the organizations of minorities and women that now press for fairness or preference would fall dumb and powerless. Perhaps a political philosopher can assume all this, or an econometrician. A policy analyst must deal with more realistic alternatives, and that is what I have chosen to do.

I come to the position, then, that because of the forces that keep in place a system of employment and promotion that, on the whole, does not discriminate against minorities or women—and introduce many elements of preference—that not much would change. The fact is that the procedures that require fairness have in large measure been institutionalized. I would not deny the role of preferential affirmative action in institutionalizing these procedures, along with all the other elements I have listed. And if someone now wants to attack me for inconsistency, they would be quite right in saying I attacked affirmative action quite early, but now I'm taking the position that these institutionalized measures in existence will stay in existence. My own experience suggests that.

I recall the first time I was contacted by an industry group which was terribly worried about affirmative action. I was contacted as a critic and a sociologist who might assist them in various cases. The group was then small. The next time was very large. I addressed their audience—it consisted almost entirely of affirmative action officers. The third time they didn't ask me. It was clear that industry had found a way to live with this and is perfectly happy to live with it, and I don't know if its living with it would change if certain rules changed.

I agree with Robert J. Samuelson, who analyzed what the effect of a reduction in strong enforcement would be—and I quote him:

> These pressures [the aggressive use of antidiscrimination laws, including affirmative action] have changed the way labor markets work. Many firms have overhauled personnel policies. Recruitment has been broadened. Tests unrelated to qualifications have been abandoned. Promotions are less informal. When positions come up, they are posted publicly so anyone (not just the boss' favorite) can apply. Formal evaluations have been strengthened so that, when a manager selects one candidate over another (say, a white man over a woman), there are objective criteria.

> Equally important, women and blacks increasingly are plugged into the informal information and lobbying networks that remain critical in hiring and promotion decisions.

I believe as important—and here is a suggestion possibly for the Commission in terms of the future research, in answer to your question as to valuable research of the effect of affirmative action in the late seventies—would be some effort to find out what has happened to these institutionalized procedures that were brought into existence in response to antidiscrimination law and affirmative action procedures in the eighties. It would be revealing to consider what the effects of 4 years of, I assume, somewhat slackened enforcement, and more than that, the expectation of slackened enforcement, has been.

The reality of looser enforcement and expectation of looser enforcement has, I assume, not been without effect, but I think it has been of much less effect than the supporters of strong enforcement believe.

Let me refer again to extremely modest and, you might argue, not relevant experience of what has happened to affirmative action in the universities in the context of what we assume is looser enforcement since the Reagan administration came in. By the way, I don't know if that assumption is true. That is

part of what we have to find out. Do the field officers operate differently now?

But let me just say that whereas I read less in the papers and hear less about pressures from government agencies on universities to prepare affirmative action plans, and we see less conflict, nothing has changed in the way universities actually proceed on affirmative action.

All the posts must still be advertised. That is institutionalized. The *Chronicle of Higher Education* is fatter with advertising, which initially was expanded for affirmative action, than ever before. In my institution, and in many others I know about, a special effort to find minority and female applicants for all posts is still required and that has not changed. Deans and other administrative officers still look more favorably on a proposed female or minority appointment than a white male appointment. That hasn't changed.

The pressure that helps maintain these policies, from women and black faculty, graduate students and undergraduates, and from minority groups, has not changed.

So, it's an open question. I wonder whether anything has changed in industry. I think one would find out a great deal if one were simply to examine the various kinds of advice which go to industry on how to behave regarding employing blacks and women.

I am very impressed with a column in the *Wall Street Journal,* one of their advice columns, on the left-hand side of the first page of the second section, which I'm sure you all know is advice to business. This is advice to small business of February 4th of this year, and they say:

> What's wrong with asking a woman job applicant these questions: Who takes care of your children when you're at work? What if they get sick? How does your husband feel about your taking business trips? What would he say if a male employee went, too?
>
> These may seem like reasonable questions, but, in fact, they could be construed as biased against women and could embroil the employer in charges of discriminating against female job applicants in violation of Federal or state laws because male applicants aren't asked such questions.

"Employment laws," this column continues, "contain many traps for the unwary."

And you have to realize they are not arguing against employment laws. This practical column just tells you how to live in the environment.

"More are being created in court decisions"—that is, more employment laws. "An employer—big or small—can find itself charged with employment discrimination because of its hiring or firing practices," and so on.

> Restrictive job requirements can get a company in trouble. It may be discriminatory to have an educational barrier to a position (like only high school graduates need apply) if it can't be justified as necessary to doing the job. If warehouse workers lug 100-pound loads, requiring an applicant to show such strength is justified. But if workers usually lift only 25-pound loads, then requiring an ability to lift 100 pounds could be ruled discriminatory against women.

In other words, all those kinds of rules that we in this audience know very well.

In February 1984, after 4 years of the Reagan administration, small employers who are presumably ignorant about this and don't have as many lawyers guiding them are being warned, "Watch out."

I relate this only in terms of the question: "What else would change if we were to give up the goals and timetables approach?"

Now, I would say a second thing has not changed, and this refers to the nature of the American political system. Much of the change we have seen has not been—and this is a bias we are all subject to—a result of a change in the law as such—Title VII, 1964 affirmative action requirements, and so on. Women are different from what they've been; blacks are different from what they've been. Women are changed in what they expect to get and what they aim at. Blacks and perhaps, as some have said, other minorities have also changed in terms of what they expect and what they get, what they will fight for, and so on.

We ignore how much of the changes we have seen are a result of the changes in the groups themselves and a change in American society. I might say not only women and blacks are different, whites are different, too, and employers are different. Again, you may say they are different because of all these laws; they are not only different because of all these laws. Those laws themselves reflect a change in opinion that occurred. I would point out that one of the biggest changes we have seen in women has nothing to do, in my judgment, with law, and that is the enormous increase in women in

law and medical schools. There have been very few cases in this area. That enormous increase has occurred, I would say almost entirely, 90 percent, as a result of the change in women's own desires as to what occupations they wish to pursue.

So let us not ignore the changes we are looking at, changes that result not from law, not of regulation, but of changes on the side of desires, abilities, and expectations of the target groups.

CHAIRMAN PENDLETON. Could you take about 5 more minutes?

DR. GLAZER. I will be finished in less than 5 minutes. Thank you.

I think, finally, we must take a variable position in regard to these requirements. I think, in part, that is happening. I don't know what is happening to Asians in the case of affirmative action, but I think in a word these requirements are silly. We already have a group that, if you want to use the language of representation and utilization, is overrepresented—I won't say overutilized. Here, by the way, Mr. Pendleton, I will give the answer to the question you raised yesterday—my answer. You said, "What is a fair share?" I would say a fair share is what results from a fair process. The fact that there are three times as many Asians at Harvard as their proportion in the population does not mean they have an unfair share. It means they have operated through a process that has given them a share. Everyone agrees that process is fair, or most people agree that process is fair. I think a fair share is what results from a fair process.

Well, we can certainly begin to restrict the reach of affirmative action. We can certainly agree—though now we get into the politics of how you drop one group—that for Asians all this is a mistake. Even though Asian groups will come back and say, "Yes, the Japanese are doing well, but look at the Filipinos," and so on. But people can play that game endlessly. The Asian students at Harvard said, "Yes, we are well represented, but what about the poor Chinese in the ghettos?" But, "What about the poor anybodys in the ghettos at Harvard?"

I would think for Hispanic Americans we can consider a substantial limitation. I give the reasons in my paper.

For the black group in particular—and here is my last point—the consequences of a departure from preferential affirmative action could be quite serious. And this is, I would say, largely because of tests. Tests play such an important role in employment and promotion, and in certain kinds of tests blacks do poorly. And our efforts to revise those tests so they do better have not been very successful.

I could well see the restriction of affirmative action to the groups that need it most or the group that needs it most. I could also well see—and I would urge—that we set a time limit on how long such policies operate.

We are well aware that time limits can be extended almost indefinitely, as in the case of the Voting Rights Act. Nevertheless, the idea that preferential affirmative action is a policy for a limited time is a reasonable one to put into the public arena. It would protect blacks from the most radical effects of a cold-turkey abandonment. I have given reasons why I don't expect such effects to occur even in the case of abandonment of preferential affirmative action required by the Federal Government. Cautious limitations of these policies would signal to all that we expect this to be a society in which a strict enforcement of fairness and nondiscrimination will satisfy all groups.

The benefits of preferential affirmative action even for the black group are sufficiently ambiguous, particularly when we take into account the fact that it is not at all effective in reaching the most disadvantaged and problem-ridden strata of that population, that such a policy could be justified, even if it is perhaps utopian to expect that it will attain wide acceptance.

Fears of what it might produce could be moderated if it were combined with vigorous attention to those elements in the education of blacks that lead to those test scores of all types that are at present a substantial barrier to black achievement in the absence of preferential affirmative action.

I do say that in the present budgetary climate, I suppose more vigorous action on the education front is not to be expected, but I agree with my colleague, Mr. Lavinsky, here on my left, whose paper I have had the opportunity to read, that this is the area in which we ought to work for this serious problem of the black group.

Thank you.

CHAIRMAN PENDLETON. Thank you, Dr. Glazer.

Mr. Lavinsky is currently a partner in the New York law firm of Proskauer, Rose, Goetz and Mendelsohn. Active with the Anti-Defamation League of B'nai B'rith for over 17 years, he has spoken, written, and litigated extensively on civil rights issues. He has coauthored briefs to the U.S.

Supreme Court in such major affirmative action cases as *DeFunis* v. *Odegaard, Regents of the University of California* v. *Bakke,* and *Kaiser Aluminum and Chemical Corporation* v. *Weber.*

Mr. Lavinsky earned his law degree at the New York University School of Law.

STATEMENT OF LARRY M. LAVINSKY, PROSKAUER, ROSE, GOETZ & MENDELSOHN, NEW YORK, NEW YORK

MR. LAVINSKY. Thank you, Mr. Chairman.

I am grateful for the opportunity to participate in this affirmative action consultation because I consider the unfinished business of bringing minorities into the mainstream of American life and the means by which that is accomplished to be one of the most important problems confronting our society.

At the outset, I would like to repeat the definition of preferential affirmative action set forth in my paper, namely, any approach through which an individual is given a job, educational, or other opportunity which would not have been forthcoming but for his or her race. Special efforts to recruit qualified minority-group members for a job, educational, or other opportunity would not, under that definition, be preferential.

In my paper, I have summarized the development of preferential affirmative action under Executive Order 11246. I have also discussed the cases in which a bitterly divided Supreme Court has given limited approval to the preferential approach in various contexts.

The Court may be in the early stages of reconsidering how to reconcile the dual goals of affirmative action and nondiscrimination. Whatever its future course, however, it is important to bear in mind that, at least with respect to voluntary affirmative action, the Court's function is merely to define what is legally permissible. Within the limits defined by the Court, our concern should be to encourage affirmative action programs that are both effective and appropriate for a free and open democratic society.

For reasons discussed in my paper, preferential affirmative action is often neither effective nor appropriate. While emphasis on numbers may be statistically impressive, it pays only lipservice to education recruitment and training, the crucial qualitative component of affirmative action. It frequently lacks a methodology for systematically attracting good long term employees.

Furthermore, because of the extensive educational disadvantage encountered in minority communities, meeting the numbers can mean employing less qualified minority applicants over more qualified white applicants. Such preferential programs are perceived as being unfair and effective only in the sense of deflecting government pressure.

The substantial progress made by minorities in the workplace and elsewhere is the result of many factors. However, even if one were to assume that such progress has been the direct result of preferential affirmative action, the results have been too costly. For minorities, the preferential approach has diverted attention from the need for better education and training and created stereotypes that stigmatize qualified individuals. For nonminorities, it has rendered the concept of equal opportunity illusory. For society as a whole, the result has been increased divisiveness and a loss of confidence in laws that treat some people as more equal than others.

I believe that OFCCP still has an important role to play in encouraging government contractors to continue and to improve their affirmative action efforts. That role, however, after almost two decades of numerically oriented affirmative action, should be fundamentally changed. Government-required goals and timetables should be eliminated, with a corresponding shift in emphasis to qualitatively oriented programs that focus on providing a solid foundation for the future.

For companies that already have good substantive programs, government-required goals and timetables are unnecessary. For those that do not, government-required goals and timetables virtually ensure a preferential result.

All individuals hired should be required to meet the same basic standards, thereby maximizing the likelihood of success both for entry-level positions and in terms of upward mobility.

Nonpreferential affirmative action would not require a return to rank-order listing on standardized written tests or preclude the use of flexible hiring or admissions criteria. Broader, more flexible criteria designed to consider the entire person can be of value to all groups so long as the flexibility does not become an instrument for racial preference.

The problem of educational disadvantage of minorities must be squarely addressed and overcome. Affirmative action recruitment should begin far earlier than college or even high school. It should begin in elementary school so that talented minority

youngsters are motivated to fulfill their potential and to not drop out along the way. The business community should be made aware of the financial need of many of these youngsters for part-time and summer employment. Likewise, government contractors should be encouraged to participate in special educational programs in public schools within a local minority community.

This approach is not utopian. It is a practical way of enlisting the assistance of the private sector to help accomplish what overburdened local school systems cannot achieve for their students. OFCCP would continue to monitor affirmative action plans of government contractors. However, instead of the present emphasis on utilization analysis and negotiation over numbers, their review would involve an evaluation of the nature and quality of the program sponsored by the contractors and whether progress is being made.

Good-faith efforts would be the essential factor in determining compliance and not merely a code word for numbers as at present. As noted in my paper, many elements of nonpreferential affirmative action have already been used effectively. For example, we know that clear commitment of top management to affirmative action is essential. Likewise, those in charge of the program should be held accountable for its effectiveness, qualitatively and in terms of good-faith efforts.

An effective plan might include, among other things, recruitment at colleges with high concentrations of minorities, summer employment programs which can serve as a recruitment device for young people, in-service training opportunities for employees, sensitivity training for managers and supervisors, open and responsive internal complaint procedures, and sponsorship of special educational programs in high schools within the local minority community.

Such an affirmative action plan deals both with seeking out qualified minority candidates for present employment and planting the seeds for increasing the pool of qualified minority applicants for the future. At the same time, it avoids the handicaps of preferential programs. It does not create a perception of unfairness. It does not stigmatize its beneficiaries; it does not result in a dilution of standards.

Most importantly, such nonpreferential programs, coupled with continued enforcement of the antidiscrimination laws, will eventually make possible the realization of the ultimate aim of affirmative action, the achievement of a level of education training and competence that will permit minorities to compete on an equal basis in the labor market without artificial support or other government intervention.

Thank you.

CHAIRMAN PENDLETON. Thank you, Mr. Lavinsky.

We now move to Dr. Welch who is currently professor of economics at the University of California at Los Angeles, as well as the chairman of Unicon Research Corporation and president of Welch Associates. He has formerly held positions at UCLA's Institute for Social Science Research, the Rand Corporation, the City University of New York, Yale University, the National Bureau of Economic Research, Southern Methodist University, and the University of Chicago. He has sat on the editorial boards of a number of economics journals and has written extensively on many topics.

Dr. Welch received his doctorate in economics at the University of Chicago.

Dr. Welch.

STATEMENT OF FINIS WELCH, CHAIRMAN OF THE BOARD, UNICON RESEARCH CORPORATION

DR. WELCH. Thank you.

There are a few definitions of affirmative action floating around. I am going to be speaking in fairly general terms about the nexus of laws that have been associated with nondiscrimination. And when I speak about Federal contractors, you can think of that as affirmative action—preferential affirmative action, I suppose.

There are a few exceptions to the general rule, which is that over the past quarter-century earnings of black men have increased in comparison to the earnings of white men. In the 1960s the census showed that on average black men earned 59 percent as much as white men. You may be familiar with the 59 percent number in another context.

The number from the 1980 census is 74 percent. One-third of the wage gap vanished in two decades.

To get an idea of the kind of change that we saw over this two-decade period between 1960 and 1980, consider college graduates in their early fifties in 1960. Relative earnings of blacks as a percentage of white men were about 55 percent. If you move to the 1980 census and look at young college graduates—so that I'm taking advantage of calendar time as well as age to look at a broader view—if you look

at young college graduates, say during the first 5 years out of school, relative earnings of black men were 92 percent as high as earnings of white men, moving from 55 to 92 percent.

That is the most extreme change that you can find in the data. If you want to find a case where you do not see much change, look at less educated workers.

Take people, for example, who have not attended high school. If we compare the same people in their early fifties in 1960, we see relative earnings of 70 percent—blacks earning 70 percent as much as whites. If we move to the youngest in 1980, relative earnings of 73 percent, a .03 change versus roughly a .40 change in the two contrasts.

There is, indeed, a general pattern of gain, but the largest gains have gone to the most educated. Ideally, we would like to know the role of affirmative action in all this, but my work at this time is inconclusive. The pattern that existed in 1960 was one where younger blacks generally compared more favorably to whites than did older blacks, and the work I have reported elsewhere suggests that the relative status of blacks would have improved without affirmative action. The question is whether it would have improved as much, and in some isolated cases perhaps even more.

In an attempt to understand changes in wages, I have turned to two additional sources of data. One describes budgets and caseloads of monitoring agencies, together with filings under Title VII in Federal court. The other looks at private sector employment. In the second, I exclude employment by governments and educational institutions—even Harvard—and look at the changing distribution of remaining employment between three types of firms: those that do not file EEO–1 reports, those who file with EEOC who are not Federal contractors, and Federal contractors.

The first type of data suggests three relevant periods to EEO enforcement: a consolidation period lasting until 1970 when firms began filing EEO–1 reports and affirmative action plans. There was a trickle of cases during this period that made important case law, but the numbers weren't what they were going to be.

By and large, my interpretation is that during this period firms and monitoring agencies were simply trying to figure out what all this was about.

Then, between 1970 and 1975, there was real acceleration, a tenfold increase in filings in Federal courts, EEOC's budget tripled, case resolutions increased by a multiple of eight, and cases brought before EEOC grew from 15,000 to 50,000 per year. OFCCP at this time was spread through 11 government agencies, but the central office budget and funded positions in the central office multiplied seven to eight times. All of this happened in 5 years.

The period since 1975 has seen continued growth, evidenced both by charges brought before EEOC and cases filed in Federal court. But the rate of growth has been reduced.

Consider case filings in Federal court under Title VII. Separate counts were not made before 1970. In 1970, 340 cases were filed. In 1975, 3,900 cases were filed. The figure for 1982 is 7,700.

Beginning in 1966, private sector employers with 100 or more employees and Federal contractors with 50 or more employees and $50,000 or more in contracts were required to report annually on their employment in each of nine occupational categories. The reporting forms are EEO–1s. Summaries of these forms show that since 1966 about half of private sector employment has been in firms that report. Three-quarters of that employment is among Federal contractors.

In 1966, black men, black women, and white women were 90 percent as likely as white men to work for reporting firms—slightly underrepresented. Since then, representation has increased, but most notably for blacks. For black men, the pattern of employment shifts from nonreporting to reporting firms continued until 1974. After that there's been no appreciable change. Two-thirds of the 1966 to 1974 change had occurred by 1970.

In 1966, black men were 10 percent less likely than white men to work for firms reporting to EEOC. By 1975 they were 25 percent more likely than white men.

The pattern for black women is more extreme, but is similar in many respects. Most of the change had occurred by 1974, and most of that came before 1970. Unlike black men, representation of black women continued after 1974, but not by much.

We have the anomaly that the employment response led enforcement activity. I don't know why this happened, but let me offer some suggestions. The most obvious is that firms took the law seriously and brought their hiring into line. Once there, continued growth was unnecessary. Another is that as enforcement activity grew, firms decided to fight rather than to continue to switch.

My own favorite hypothesis is that increased litigation taught firms that body counts are not enough. Vulnerability to charges of discrimination in pay and promotion remains.

As a practical matter, it is simply much harder to define norms for hiring than it is to detect differences in pay and promotion between protected and nonprotected groups.

Whatever the explanation, the data are clear that emphasis changed after 1974.

Now return to the wage data. The clearest picture between 1960 and 1970 is that young black men gained the most, and within the young, the greatest gains went to the most educated. Between 1970 and 1980, the greatest gains occurred for older men and erased the lead earlier achieved by the young. Overall, between 1960 and 1980, there is no pattern showing differences in changes by age group, but there is a very clear pattern showing that the largest gains went to the most educated.

What has been the role of affirmative action in this? It is anybody's guess. Mine is that there has been a strong pro-skill bias which is reflected in the largest gains of the most educated. There surely is more to the education story than affirmative action, but I do think affirmative action has played a role. In fact, Professor Leonard commented that his research shows greater demand increases at higher skilled positions. That, at least, is my suspicion.

Why do I suspect this? There are two reasons. First, the information flowing to EEOC and OFCCP makes representation by occupation easy to compute. A natural result is to emphasize places where representation of minorities is least, and that is in skilled positions.

A second point is that the litigation threat produces conservative behavior. A firm that hires protected workers and then either terminates them or does not promote them at similar rates to white men is at risk. If you are going to gamble, why not hedge and select those who have at least been able to stay in school? In this sense the program is not egalitarian. Among minorities, it helps those who would have done best in any case.

Is the skill bias objectionable? Is it something you'd like to see in an employment program? The advantage is that it creates incentives for acquiring increased skills. The disadvantage is that it penalizes firms for taking risks.

I conclude with an example. Consider a single occupation and assume that in the relevant market blacks account for 20 percent of the workers available to hire. A firm is considering two policies, a conservative one and an affirmative one. The conservative one involves hiring and promoting at a 20 percent rate. The affirmative policy involves hiring at a 25 percent rate by taking some who otherwise would have been seen as marginal. The average promotion rates of marginal workers are lower. So let's assume that under the affirmative policy 22 percent of the promotions would go to blacks. The affirmative policy hires and promotes more blacks, but with it, blacks are less likely than whites to be promoted.

My understanding of current law is that a firm following this policy would be liable to be found guilty of discrimination in promotion against blacks. A firm following the conservative policy would not.

Thank you.

CHAIRMAN PENDLETON. Thank you very much. We will open the questions with Professor Bunzel.

COMMISSIONER BUNZEL. Thank you, Mr. Chairman.

Professor Glazer, let me ask you a question that intrigues me, perhaps because one of your several comments teased me. Before I concede that you have reversed your position on a number of issues on affirmative action, let me ask you a broad question, and then let me put a more specific one to you.

The broad question is this: How much of your writing and thinking on affirmative action has been reversed by the finding that preferential affirmative action has worked?

Your previous arguments, it seems to me, in all of the writings that I have read, have been on a different level of analysis. Would I be right in concluding that in your book, *Affirmative Discrimination,* for example, that you addressed different kinds of concerns? And what I want to ask is: Have you abandoned these concerns?

DR. GLAZER. Well, I probably was too brief in suggesting reversal. I think that everyone's views change a bit over time. I appreciate the fact that you are a reader of my earlier views, and it is true they were on a different level of analysis. They were of a more political and social kind in terms of: What are the consequences of setting up categories by race and ethnicity and operating on the basis of them?

Insofar as there are arguments as to whether it works, economic arguments and so on, it's true I did not go into them in any particular depth, but I suppose I also felt they were not decisive for me.

You're right, I was dealing with a different kind of issue. I was dealing with the effects of these policies on the self-conceptions of minorities as to their worth and value, motivations that they would have toward advancement and so on, and effects on the overall social and political fabric.

I do think, in the past, I was a little more negative as to what those effects have been. On the whole, I don't like preferential affirmative action. On the whole, I think we have not done too badly in confining its spread. That has been in part a result of political struggle. As you know, there have been implications that this kind of categorization would go beyond the four original groups, and in a small measure it has. I thought, on the whole, this was a bad way to go. I still think it's a bad way to go. It hasn't been as bad as I thought it would be; the conflict has not been as severe.

I also suggested this, in earlier writing, that one can make somewhat differential arguments as to the different target groups, as I suggested here. I do think on a political level, on a moral level, on a legal level, and on a constitutional level, the claims of blacks, I think, are the greatest. The 14th amendment was written for them and so on. I won't go into the legal analysis.

But I do think one can see arguments in a variety of ways which suggest that this would have been better for all of us had we not tried to make a general analysis of all the groups in American society and decide that some are in and some are out. That was a mistake.

COMMISSIONER BUNZEL. Let me follow this up with an attempt to flesh out something else that I know you have been concerned with.

You have written elsewhere, quite eloquently, that there is a tension between efforts to raise educational standards in this country today and the disturbing and disquieting performance of blacks on various tests, and that if standards are raised in the search for excellence in the name of more rigorous curricular requirements and so on, that this performance gap is likely to widen. Is this an argument, with respect to blacks, for a continuing preferential affirmative action?

DR. GLAZER. It is an argument primarily for greater efforts in the educational sphere. But I know that those efforts, first, may not be as extensive as they should be, and secondly, even if they are as extensive as they should be, there is no reason to think that they result in equal achievement.

This may well be misunderstood, but the fact is that there are so many complex historical and other elements which affect some overall average for a group that to take the position that if we work harder we will end up with equal percentages at each level is unrealistic. It never has, and I don't doubt that it ever will.

I think a second element must be brought in. If we raise standards it means that we will have a problem of a larger rate of black failure. The question then is, What are the political and social consequences? For example, we now have a situation of about 6 or 7 percent blacks—a little less than that—in law and medical schools. That is a result of a number of elements. One is the increased number of blacks applying, though that has dropped off recently, but another is the preferential action of the schools.

I think one must develop a kind of balance here. I would not like to see preferential action increase. I think it would have terrible consequences if we were simply to say, "And now we are going back to law school aptitude tests, medical school admission tests as the sole criteria." It would mean, perhaps, a reduction by two-thirds or one-half, and it would be of such a dimension that I think, from the point of view of social peace, we have to make some modification there.

Just one more word—I know these answers are too long. When you refer to different criteria then and now, one of the criteria I've always used is the criterion of a kind of peace and harmony among the different groups in this country. I think initially much of my criticism of affirmative action is, I think, that it disrupted a degree that could exist. I think now a too radical abandonment would disrupt also. In other words, one has to move cautiously in this area owing to the institutionalization of these measures and the expectations created by them.

COMMISSIONER BUNZEL. Does this bring it closer to home in terms of Harvard University? Is their preferential admission policy with respect to blacks the kind of policy you would like to see continued? Or do you have some problems in terms of a theory of limits, or in terms of cut-off scores, or how they do this? I mean, there is preferential admissions and there is preferential admissions. And I'd be interested in knowing whether or not Harvard's policy here with respect to the preferential treatment it gives to black candidates fits with your sense that we ought not to go cold-turkey, but that that particular policy should continue—or do you have some problems?

DR. GLAZER. I have some problems with it, and it raises another kind of issue in that Harvard may have a better pool to pick from and, if its policies were to become more general, other schools might run into great difficulty.

From the point of view of Harvard, which is obviously not a national interest point of view, its policy sort of works. It has a decent representation of different groups, and it maintains a mix between academic and other kinds of standards nonracially related.

The second point I would raise is that I do believe that we must give scope to voluntary action. I think there is a lot of good will in this country—excuse me for that Pollyannaish comment, but I will say that. As I point out, a lot of what has happened is the result of people thinking, "We want to do more for minorities; we want to do more for women; we want to change our policies."

I would hesitate to see a rigorous application of law, which is possible, in which any kind of preference becomes impossible.

Governmental preferences, to my mind, are more dangerous than private preferences. Private preferences are variable. Governmental preferences are universal. Governmental preferences mean you throw the argument into a public arena where all kinds of conflicts become more intense.

So one part of my answer to your question is that insofar as it is a system of private preference, based on what the institution feels it can do or should do to the degree it's pushed and to what extent it's hurt, I do not oppose it.

COMMISSIONER BUNZEL. One more question?

CHAIRMAN PENDLETON. Fine.

COMMISSIONER BUNZEL. Mr. Leonard, if I can ask you just a simple kind of question.

At first I wrote down here I wanted to be certain I understood what your definition of affirmative action was because you claim that it has worked. And as I listened to your paper, I think in large respect your comments defined itself or defined the term generally speaking.

But I want to ask you this. There has been considerable talk this morning from the panel that preferential affirmative action has worked. Quotas also work. Is it your argument that because quotas work or preferential affirmative action works, that this is desirable and sound public policy?

DR. LEONARD. No. My argument was that you cannot reach a conclusion that you should get rid of it because it doesn't work. That was the force of my argument.

COMMISSIONER BUNZEL. Do you have any particular comment to make as to whether or not the policies which undergird preferential affirmative action goals and timetables, the quota mentality, or whatever you wish to call it—is this the kind of policy position—do you have any feelings that this ought to continue, or do you not address that question? As an econometrician, do you try to avoid those questions?

DR. LEONARD. As an econometrician, I do try to avoid those questions. What I have tried to do is give you an appraisal of what this program has done that will withstand the judgment of my peers.

COMMISSIONER BUNZEL. I'm trying to see whether or not, built into your analysis of what works, one should be able to infer some policy implications?

DR. LEONARD. Of course, there are people who would be glad to take a much stronger policy position. A lot of those people aren't here today and I wouldn't presume to take their position.

COMMISSIONER BUNZEL. I wouldn't either.

DR. LEONARD. Let me just say this. What I thought was the most controversial question here was: Given that it has worked, that the contract compliance program has helped more blacks get jobs in the contractor sector, has that reduced productivity? Has that induced reverse discrimination?

I think that is still a question that deserves a lot more research than has been focused on it. The evidence I have been able to get to date is tentative evidence, but it is that there has been no significant reduction of productivity in sectors that have increased their hiring of minorities and females the most.

That is very tentative evidence, and there is more work to be done. But on that basis, I would say that these programs—by these programs, I mean affirmative action under the contract compliance program and Title VII—have helped to reduce discrimination. And as long as they are helping to reduce discrimination, I think those are good programs.

CHAIRMAN PENDLETON. Are you finished, Mr. Bunzel?

COMMISSIONER BUNZEL. Apparently.

COMMISSIONER DESTRO. Can I just follow up on that question?

CHAIRMAN PENDLETON. Certainly. We all want a piece of this conversation.

COMMISSIONER DESTRO. This is a question that I had for Dr. Leonard with respect to the statistics that you have been using with respect to decline in productivity. Why is it that you are focusing on decline in productivity? It seems like the operative assumption of that focus would be that the blacks who are being hired are unqualified and that businesses would allow those individuals to stay on the payroll and thus affect productivity. Wouldn't the more relevant statistic be the retention rate in that context?

DR. LEONARD. Well, if you're addressing the retention rate, I can tell you that black and female turnover is actually lower than that of white males in the subsample of firms that have been reviewed. The reason I looked at productivity, however, is that I thought one of the major criticisms of affirmative action preferential treatment was that it was forcing firms to hire the less qualified, that instead of hiring or promoting the best person when the best person happened to be a white male, they would be forced to go to second best.

That argument implies that second best is less productive. And with a fine enough measure—and I don't claim to have one—that should show up in terms of reduced productivity overall.

COMMISSIONER DESTRO. While I agree with you as to the genesis of the basic argument, I would question whether or not a business would allow people to stick around long enough if they found that they were nonproductive and would just have a legitimate business reason for firing them, and it would show up in the retention rates. But what you're telling me is that the retention rates don't reflect the legitimacy of that argument any more than the productivity rates do.

DR. LEONARD. That's right. I don't see a higher turnover rate for minorities and females. I also I think Professor Welch has given you some idea also of the problems with firing, because the kinds of pressures we are talking about apply across the board to personnel decisions.

COMMISSIONER DESTRO. Mr. Chairman, I will defer back. I just wanted to follow up Commissioner Bunzel's question.

CHAIRMAN PENDLETON. Why don't you ask one or two more?

COMMISSIONER DESTRO. No, I'll follow with other questions.

CHAIRMAN PENDLETON. What I've heard in the exchange between Dr. Glazer and Dr. Bunzel is that I'm always going to be an underachiever unless I get something preferential. And that disturbs me. I'm trying to find out from the panel, now that I've heard that: Who is the majority population in America from whom I, as a qualified black, need to be preferentially protected and also stigmatized? Who is it that I'm being compared against? With this large universe of minority populations in this country, and as my colleague, Mr. Destro, has so ably fought for the inclusion of Euro-ethnics—I'm trying to find out who it is that I need to be protected from. I want to compete against that person. It seems to me I'm competing against other minorities in the process of college admission or in the process of a job.

To be frank with you, I didn't know I was disadvantaged until I was 35 years old when they passed this War on Poverty program, and they said, "They've got some programs over there for you because you're black." And I was always taught a little differently. Now, maybe something is wrong with me.

But who is it from whom I need to be protected? We're talking about all the minorities and predominantly black minorities. Who is it? It's got to be somebody. These are special protections and preferential treatment, and I want to know from whom do I need to be protected?

DR. GLAZER. Yourself.

COMMISSIONER GUESS. Yourself, Mr. Chairman. [Laughter.]

CHAIRMAN PENDLETON. I'll take that from both of my colleagues, but that's no answer. I can take care of me. But from whom is it? I'm looking at the Federal budget now, and—Mr. Horowitz has written a good special analysis for the past several years—there's almost 13,000 Federal employees and a half-billion dollar budget, and the budget grows every year and minority groups increase every year, and there is some phantom out there from whom we all need to be protected. Who is it?

DR. GLAZER. Well, I don't know if that's a rhetorical question. The basis of my argument is there is less to be protected against than one thinks. I think there is a lot of fairness in this society. But I also think that there are historical factors which have affected groups and which are going to make things come out very bad if something special isn't done. And I don't think that is true generally in areas of employment. I think there are a few special areas,

particularly test-based areas or certain kinds of test-based areas, where we do have a problem.

CHAIRMAN PENDLETON. Now, Dr. Glazer, are you familiar with the New York City policemen's examination from patrolman to sergeant?

DR. GLAZER. Yes.

CHAIRMAN PENDLETON. That was the case where the NAACP and I think the Mexican American Legal Defense Fund, if I'm not mistaken, got together with the New York City Personnel Department and said, "Now we're going to have a new test that is not a biased test, and everybody should be able to pass the test." It was a television tape, and you were supposed to record how you would treat the incident if you were a sergeant.

The results were almost the same. And people are still saying "discrimination."

Do we say that we continue to do testing until we have lowered the standards for the test until we have more mediocrity in public employment, and is that good public policy?

DR. GLAZER. No, I don't think we should. I do think we have been able to examine these tests more closely than we have in the past. We know there is always a lot of nonsense in tests. I don't think it was a mistake to look at these tests so closely that we got rid of all the nonsense and made them as honest and fair as we could, and we saw there was still a problem—well, that should lead us to think even further about just what the problem is. And I don't know what it is.

CHAIRMAN PENDLETON. I think the first group of people that were admitted for the examination were admitted because of the consent decree; and they were put in because of a sense of a correction to racism and some to evidence a sense of racial-ethnic proportionality. And then when we get people in, now it's important to promote them, and we find we don't have the talent we thought we had when we took them in.

This conversation is about blacks primarily, which also bothers me a little bit. There are other minorities in this country that probably have some of the same problems. But we are the ones who get stigmatized whether we pass or don't pass the tests. And someone says, "If you do pass, I'm not so sure you really passed it." If we don't pass it, "You shouldn't have passed it in the first place."

So the expectation level or perception is underachievement, and I'm wondering if underachievement doesn't wind up being a discriminatory tactic. I'll pass it on to my friend on the right.

COMMISSIONER GUESS. Mr. Chairman, you frighten me.

CHAIRMAN PENDLETON. I always do.

COMMISSIONER GUESS. First, I'd like to see if I can respond to your question. I don't think the protections or the preferences or the programs that we are discussing today and that we discussed yesterday are necessarily designed for the Clarence Pendleton, Jrs., or the Francis Guesses of the world. However, I do think there are a vast number of black Americans and other minorities who have not been as fortunate, who have not been as privileged to move into the mainstream of American society as a result of their status, as you and I. And I think the term has been thrown around by Professor Glazer, among others, that we may be anomalies in this whole system that we're talking about. And I'm quite sure in any casual review—if you walk along 14th Street, you'll find black men who are standing huddled on the corner around a fire and you may get a better view of the people we're talking about. That is my unexpert opinion, Mr. Chairman.

Professor Glazer, you also appeared to play fast and loose in your presentation. You used terms like, "It is impossible to determine; inconclusive and indeterminate; skepticism as to our ability to make any determination; simply too many anomalies; the figures don't support any good theory; my accounting itself is incomplete; I speak only from very partial experience and knowledge."

However, you go on to support your conclusions by relying on the scientific method of investigation which measures, quote, "advertising," and "what you hear," end quote.

Then you point out, "The fact is that, in fact, some affirmative action hasn't worked," and I assume you get that as a matter of fact. Then, as a matter of fact, you also go on to point out it is not needed any longer, only to come back and assert, "I don't know, but I think."

Professor Glazer, I guess my question would be: First of all, would you suggest from the presentation you have made to this Commission that it meets, since we have looked at your affiliation with Harvard, the rigorous standards of scholarship that one should expect from someone from that university?

DR. GLAZER. Well, that is a hard question. Let me give you my answer. You are dealing with a complicated question of policy. You have here on

this panel two people who have told you what the economic analysis can say to you, and one person has told you what legal analysis can say to you. The fact is, you add this all up and you don't really have—and this is no criticism of anyone—an answer to the policy question.

When you ask a question, "What would happen in the absence of?"—and you're talking about a program of goals and timetables which was developed in the late sixties, early seventies, has been in existence more or less in various ways until now—one has to estimate from very loose kinds of things. And I have suggested one thing which I hope the Commission will take up—a study of the practices that exist in corporations.

I have not referred to earlier work of mine, but I have looked at these practices. And these practices, whatever their origins, are somewhat institutionalized. There are rules, rules as to what tests you can use, as to what questions you can ask, what things you can take into account, what things you can't, and so on.

I was assuming that much of this was common knowledge in this informed group. And operating on the basis of this common knowledge I said, "If you get rid of goals and timetables, not much is going to change." I can't guarantee it to you. But as you know, for example, much of the change that we are talking about took place before goals and timetables or before goals and timetables were very heavily in use. The economic material is filled with anomalies, if I may use that word, for more change occurred under Nixon than under Carter. Well, the economist can explain that. Maybe times were better under Nixon than under Carter.

What I'm saying is that I am taking into account research that exists. I have to deal with that to consider what would be the effect of a change in policy. Information that might be relevant to it does not exist, and I'm giving you a judgment, and of course, you can dismiss that judgment.

COMMISSIONER GUESS. In your judgment, Professor Glazer, since you indicated the data may be incomplete in some instances, if you don't know, what do you feel? Do you feel that blacks still encounter barriers to employment in this country as a result of them being black?

DR. GLAZER. Yes, I feel they encounter barriers to employment.

COMMISSIONER GUESS. Ten percent of the time? Twenty percent of the time?

DR. GLAZER. I think it is impossible to say. Too many things are going on simultaneously. And I think that a kind of across-the-board policy on the assumption that it is massive and general is wrong.

COMMISSIONER GUESS. So are you concluding that it is not massive and general?

DR. GLAZER. I'm concluding today that it is not massive and general, yes.

COMMISSIONER GUESS. And it's just casual in its application? That is what you feel? We have already concluded that it is impossible to ascertain the facts. What do you feel, Professor?

DR. GLAZER. I feel it is variable. I also feel that it has to be itself disaggregated to other kinds of elements, elements of employer experience, employer expectation, and so on.

I have given my judgment. It is my judgment that one problem with the preferences we have is the kind of unrest and political conflict that would occur in their absence is such that, at least for blacks, I would think that they should be maintained for some period of time.

COMMISSIONER GUESS. Mr. Chairman, since Professor Glazer has concluded what I feel, I'll pass.

COMMISSIONER BUNZEL. Mr. Chairman, may I make one quick comment? Is it possible, just to borrow an idiom, Professor Glazer, and a shorthand idiom, that rather than being a simplifier you just happen to be a complexifier?

DR. GLAZER. Well, I know that to be the case. My answers are always too long. They always go, "On the other hand."

COMMISSIONER BUNZEL. I didn't mean that invidiously. I meant you just happen to see problems in their more complex nature and that they are not easily reduced to simplified answers.

DR. GLAZER. I accept that. That is true.

CHAIRMAN PENDLETON. More protection.

Commissioner Buckley.

COMMISSIONER BUCKLEY. Dr. Glazer, in your paper on page 12 you talk about what is happening now, and you talk about how 4 years after Reagan came to office, you have a lot more people saying, "Watch out." You also make the statement: "Four more years of Reagan and 4 more years of conservative judicial appointees may wear down this structure more in the next 4 years than in the last."

I would like to be real clear as to whether this means that if we remove the emphasis on preferential affirmative action, retaining affirmative action programs, as otherwise understood in that area, that

we might see that instead of making more progress toward the entry of all groups, not just blacks, as I kept hearing all day today and yesterday, but of all people having an equal access to whatever they want, that we will not be reverting rather than going forward. I want to be sure I understand what you mean.

DR. GLAZER. We all know that there is an elaborate structure that we are talking about to prevent discrimination and to encourage affirmative action. I have indicated the elements of that structure, and that may be a way of saying that were one to look at every element, one needs a book. And the book isn't even there. We don't even know, although I have seen some surveys, how many States have preferential requirements, how many cities have preferential requirements, what they specify, how many firms have it, and so on.

Now, what I'm saying is that 4 years, I think, has not changed this structure much. There's been an awful lot of talk, but very little action. The regulations are in place. I think there has been an expectation that you can probably get away with more. I don't know if any statistics show that, and I don't know if it has any consequences, in view of everything else in place, in view of the fact that you can be sued under Title VII even if EEOC is not being as tough as it used to be.

So when I'm saying that things may change in 4 more years, I was really thinking specifically of the preferential affirmative action area. We have seen the Supreme Court case, the *Stotts* case, and we will see some more, and we may have some new appointments and things may change.

Let me just say what are my expectations. I do not expect that any discrimination law which operates on the basis of the statute will be as affected by this further 4 years as affirmative action requirements which have a weaker legal base.

I hope that's an answer to your question. If not, I'll pursue it.

CHAIRMAN PENDLETON. Mr. Lavinsky, just in response to Mr. Glazer—if you don't mind, Mr. Destro. EEOC has now said that they are going after individual victims of discrimination. They are going to litigate only these cases. Does that come more in line to what you're thinking about in your paper, that is, they are going after individuals; they're not going to group remedies. And one question that was asked of Chairman Thomas, "What about the nonvictims?" And, of course, his response was the question, "What about the nonvictims? And we're only going after those victims and put them in their rightful place so they will be made whole."

How do you feel about that?

MR. LAVINSKY. First of all, I think that we want to see vigorous enforcement of the antidiscrimination laws, and that is as true of the individual victim as it is of the big class actions of 5 years ago or 10 years ago. The question of what you do about the nonvictim, where you have a pattern and practice of discrimination, is something that the Supreme Court has begun to address—*Stotts* is some indication of it—but I have a feeling that we're going to see a lot more of that kind of questioning within the Court as to what you do do when you find a pattern and practice of discrimination. My own feeling is that, certainly, I want to see vigorous enforcement by the EEOC of individual cases. I want to see that in class-action cases that the victims of discrimination, those who were actually turned away, those as to whom there was a chilling effect and they didn't apply because they felt it was useless to apply—people that are actual victims receive the full remedies provided by law.

The question of the nonvictim, where you get, in effect, a quota or ratio hiring on the basis of race, with the platform being the class action and the finding of a pattern and practice of discrimination, I think can be handled much better without using ratios, by appointing a master to oversee fair hiring, and good-faith affirmative action efforts.

In other words, what I'm saying is that when you find a pattern and practice of discrimination, the actual victims, the specific victims of discrimination, ought to be made whole.

Beyond that, since the firm or the company that has been found to be guilty of a pattern and practice of discrimination may not be able, at least at the outset, to get rid of the discriminatory bars, I would appoint a master who would see to it that the discriminatory bars are dropped and that good-faith affirmative action efforts are made. I would not impose a quota. I would not impose goals and timetables by government or by court, because as I have tried to say in my remarks and in my paper, I think that the numbers obscure what really has to be done. Much more important than the numbers in the long run is the actual outreach, the actual efforts in terms of training and recruitment, the actual efforts in terms of education.

And I might say that Professor Glazer was sort of the eye of the questioning. The question was asked in various different ways. The question of, "Is there rampant discrimination today? Why are we sitting here concerned about minorities and particularly blacks? What is preventing their full entrance into the mainstream of American life at this time?"

My own feeling is that the problem is not so much discrimination. I think that industry, that schools, that American society has learned a great deal over the last 20 years, and that the problem is not rampant discrimination anymore by any means.

I think that the problem of the effects of past discrimination essentially relates to educational and financial disadvantage. But it is the educational part that is particularly the problem. There always have been highly qualified blacks and other minorities, but the question is whether there are enough of them to be able to fill the increasing demand that we want to see, the increasing employment of minorities, not only in lower level positions, but to the highest level of positions, as lawyers, professors, and so forth. It is when you are talking about increasing the numbers of minorities in these positions that you have to look to see: Do you have a sufficiently large pool of qualified minorities—not merely marginally qualified, but good, solid minority applicants—that can provide the base for the future? It is there that the need occurs for further education, for further training. And that's where I think affirmative action ought to be directed, and that's where I feel it is not directed today because of our preoccupation with numbers.

CHAIRMAN PENDLETON. Thank you, sir.

Ms. Buckley, do you have another question?

COMMISSIONER BUCKLEY. No.

CHAIRMAN PENDLETON. Mr. Destro.

COMMISSIONER DESTRO. I have a number of questions.

I'd like to address the first question to Dr. Welch. On page 25 of your paper you indicate that affirmative action enforcement, in your view, is essentially more favorable to the most skilled protected workers.

What I heard in Commissioner Guess' question was the overriding concern, I think, of most affirmative action advocates for, as he put it, the people on 14th Street, the unskilled workers who by all measures are being left out of all this. How do you reach them? Do your numbers suggest any revisions in affirmative action policy that would reach out to them?

DR. WELCH. Well, that's what I was referring to at the end of my talk. I think the way litigation occurs today and the way monitoring occurs, firms are really penalized for taking risks. And the people on 14th Street are risky employees. If your attrition rates are too high as a firm, you come under closer scrutiny. You can be taken to court and the prima facie case is made. It's up to you to then show objectively—you can show anything objectively—that there is a bona fide business justification for the lack of retention.

But the obvious response by an employer is to fuzz the issue, to show a bona fide recruiting effort and not hire employees at risk. And it is that aspect, that side of affirmative action, that concerns me most. That's the reason that I pointed out earlier when I said to look at the people with the least education, and over this two-decade period you don't see much by way of improving the relative status of blacks. Where you see it is among college graduates, and less so for college dropouts, and on down the line.

It's clearly a strong pro-skill bias, whether it's operated absolutely to the disadvantage of less skills. Whether they are worse off today than they otherwise would have been is an open issue, and I don't think we can answer it.

COMMISSIONER DESTRO. So you actually led into another question that I'd like to address to anyone on the panel who would care to address it.

One of the arguments that was made in Dr. Swinton's paper yesterday related to the question of the current prognosis for the black community as a whole and whether or not it is better or worse. He seemed to indicate that the numbers are now on a downward trend, that the prognosis is actually worse now than it was 10 years ago. Is there any data that would support that? He didn't have any in his paper.

DR. WELCH. Yes, there's always data that will support anything.

[Laughter.]

DR. WELCH. I'll come back to that point.

CHAIRMAN PENDLETON. We are so advised reading other papers.

DR. WELCH. Actually, I'd like to come back to that because I'd like to speak to the productivity issue that's been on the floor today.

You know, I've been working black-white income data for a little over 20 years now, and it had been very, very clear since the midsixties on that things are not what they once were. Every situation I have ever been in, in which you present this kind of evidence, the response is, "No, they're getting worse." Yes, they are getting worse under the kind of general push that we've seen, moving from 0.6 to 0.75 in a two-decade period. In the broad sweep of history, that is incredible.

COMMISSIONER DESTRO. Does anybody else want to address that question? Dr. Leonard, do you have any thoughts on that, the general proposition that things are getting worse in the black community? Sometimes it's attributed to lack of enforcement; other times it's attributed to the economy. Is there anything in your work that would indicate whether or not (a) it is getting worse and (b) what it would be attributable to?

DR. LEONARD. Let me first add that I have the greatest respect for Professor Welch's work and I find it quite convincing.

One question that has been raised is whether affirmative action has contributed to that. Professor Welch has already said that's an open question.

The evidence that I've seen is that where you have the strongest affirmative action—cities or industries where you have a high proportion of contractors—even the low-skilled blacks are helped. Even those with less than a high school education are helped, although the effect does seem to be stronger for those with greater skills, and I think Professor Welch's arguments about that are probably valid.

COMMISSIONER DESTRO. Okay.

MR. LAVINSKY. I'd like to make a comment on this as well. I think that the problem faced by minorities is a problem that is faced by various groups where you have a lot of poor people within a community. You're getting a technological society where education has a great deal of significance and where the number of jobs and the kinds of jobs available for the uneducated are dropping.

The result is that if we are going to be able to avoid an even sharper cleavage between those that are moving upward and the subsociety which really remains moribund and perhaps even has a deteriorating condition, the key again is education. You've got to be able to take the young and train them. Otherwise, even if there is great success in moving many minorities into skilled positions, you are going to get a greater and greater cleavage between them and the poverty stricken that are going nowhere.

But the key to it is education. And if affirmative action is going to really have the social benefits we all want for it, we have to address the educational problem in the public schools. It's got to begin early on because I think once you get to the high school level, it's too late. You've got to take youngsters from the very beginning and work with them.

And I think that up until now affirmative action concerns have not gone back that far. They've got to. We've got to begin earlier. Otherwise, you are going to see some benefiting greatly and an awful lot of people going nowhere.

COMMISSIONER DESTRO. Thank you.

COMMISSIONER GUESS. Mr. Chairman, could I follow up with a question to Mr. Lavinsky?

CHAIRMAN PENDLETON. If you make it short.

COMMISSIONER GUESS. Thank you, Mr. Chairman.

On your last point when you were speaking of education, and in speaking of the necessity, which I wholeheartedly concur, of our enhancing the educational opportunities made available to all our children, do you think, as it has been suggested in these hearings previously, that institution of a tuition tax credit will lead toward that improvement?

MR. LAVINSKY. I don't think that a tuition tax credit will have all that much of a difference. Tuition tax credit, I gather generally, applies when you are talking about going into college, going into more advanced education.

My concern—I think it's a help, but I think that there are enough scholarships around and enough financial assistance around so that good students can get by. My concern is with those that are lost so early in the educational ladder, lost in public school, so that they never could make use of the tax credits. I think that we must see to it that our elementary school education is good enough so that people can make use of the tax credit. I'm afraid that they alone come too late.

COMMISSIONER GUESS. Attorney Lavinsky, on that same point, do you feel that the institution of a voucher system at the elementary and secondary level, which would provide parents the choice of having their children attend either public or private, parochial schools, would be of value to the enhancement of this educational system you think is so crucial?

MR. LAVINSKY. Let me say that there is an institution right here in Washington which has been very effective in placing minority youngsters into private schools. They raise funds, and from everything I've seen in terms of the literature and in terms of the results, they have been very good. They have gotten their youngsters into all sorts of fine schools, even Harvard, and they have taken them out of poor public school systems. I think that is very important. I'd like to see that increased.

If we are talking about money available at the public school level, the elementary school level, to be able to take youngsters out of poor school systems and put them into a good private school, yes, I think it can make all the difference in the world. The long range need, however, is to upgrade public education.

CHAIRMAN PENDLETON. Commissioner Destro.

COMMISSIONER DESTRO. I'd like to ask Mr. Leonard two questions. I think that they are somewhat related.

On page 30 of your paper, the first paragraph, you indicate that the most important and controversial question about affirmative action is, and I quote:

> Has this reduced discrimination, or has it gone beyond and induced reverse discrimination against white males? This is also the question on which our evidence is least conclusive. The finding of decreased employment growth for white males is not sufficient to answer the question since it is consistent with other possibilities.

That's the end of your quote.

My question to you is: Isn't the assumption in that quotation that a finding of decreased employment growth for white males—isn't it the assumption that the question of reverse discrimination is one that you answered in the aggregate rather than with respect to its impact on the individual?

DR. LEONARD. That turns out for me to be a question of the data I have. I would like to know what happens to individuals. The only kind of information I had access to was more aggregated information.

I think any of us could think of individual cases of discrimination or of reverse discrimination. I think, from a public policy point of view, you really want to know what the most prevalent type of case is. And that is not something you can answer by citing an individual case on one side or the other.

COMMISSIONER DESTRO. All right.

My last question is for Mr. Lavinsky. I'm going to ask you, if I can—I know this might not be fair and, if it is not, please tell me. But really, as one lawyer to another, if I can ask you to step outside the area of employment discrimination law for a moment, could you address the general question of the law of employment relationships and the developments in the law with respect to such things as employment at will or employment contracts? Because that was lurking in the background of the *Hishon* case. As I recall, there was a contract claim based on the reasonable expectation that she would be considered fairly, and a claim that was part of the contract.

So isn't there somewhat of a confluence in the operation of employment contract law and civil rights law: generally, that you have to have a good reason to fire somebody or a good reason not to promote, and aren't both moving in the direction of better protection of minorities and all workers generally?

MR. LAVINSKY. This is an area that's in the process of evolution. I come from New York where the old rule that employment at will can be terminated at any time and for any reason began changing a couple of years ago, but has not really changed very much.

Yes, there is, under New York law, an exception to the rule that you can fire for any reason in "at will" employment, where there have been promises made or where there is a company manual that says that you can't be fired except for cause, but New York hasn't gone much further than that type of situation.

California is much more liberal and has an abusive discharge kind of concept. Other courts have implied a requirement that discharge be for cause.

Actually, the problem isn't as difficult for many, many workers as what I have just described, because many of them are unionized or under collective-bargaining agreements, and there you do have a requirement of discharge for cause.

I think there is going to be a lot more gyration on that subject before we come to any ultimate conclusions.

But for our purposes, trying to bring it into the affirmative action area, in a certain sense the more protection you have for existing workers, while that certainly helps the minority existing workers, the less turnover you may have and the more difficult it is to be able to achieve substantial changes.

Also, the whole question of the seniority system has been—well, the Supreme Court was trying to deal with it in *Stotts.* They tried to deal with it earlier.

In a certain sense, it is fascinating to see the trade-off that occurred at the time Title VII was passed. There were two basic trade-offs, as I recall the debate and the history. One of them was the protection of the seniority systems, bona fide seniority systems, and the Supreme Court, by and large, has honored that.

The other was a provision that there will not be proportionality, a requirement of proportionality. That, in *Weber,* was largely abrogated in terms of voluntary affirmative action.

COMMISSIONER DESTRO. Thank you.

CHAIRMAN PENDLETON. Ms. Chavez.

MS. CHAVEZ. At the risk of simplifying things again, I'd like to ask Professor Glazer—not based on your feelings, but based on the work that you have done in affirmative action over a long and illustrious career—do you believe that discrimination on the basis of race and gender today in employment is the exception or the rule?

DR. GLAZER. I believe it is the exception. I will simplify it that way.

MS. CHAVEZ. And do you believe this is a marked change from conditions, let's say, 30 years ago?

DR. GLAZER. I think it's an enormous change, yes.

MS. CHAVEZ. One question for Dr. Leonard.

As I recall, last year you did a study of the Office of Federal Contract Compliance Programs, and my recollection is that in your analysis you referred to affirmative action programs as operated by the OFCCP as a tax on white males. First of all, is that correct, that that statement was made in your study; and secondly, if so, could you explain it?

DR. LEONARD. I should point out first that I'm an economist. I don't have to apologize for that.

[Laughter.]

DR. LEONARD. When I started thinking about affirmative action, I tried to model it as an economist would. One way of modeling affirmative action is as changing the relative prices, wages, of these protected group members or of white males. You can think of that as either a tax or a subsidy. You could alternatively have thought of it as a subsidy for the employment of protected members.

I think part of the argument is one raised by Professor James Heckman of Chicago, which is: If you think affirmative action under the contract compliance program is costly—and it might be costly just in terms of paperwork, you don't have to be a Federal contractor if you're selling paper clips. If you're selling F-15s, I then don't think you have a choice, but if you're selling paper clips, you don't have to be a contractor. Then the argument is, if it's really that costly and what you are doing is selling paper clips, which you could sell easily to the private sector, you can opt out. I think Sears is one example of a company that did opt out.

So I modeled it as a tax. That doesn't mean that white males are necessarily paying for affirmative action. It could be the case that either the costs are negligible, because you can easily find qualified minorities or females, or if there are costs, they could be borne by other parties, in particular by the taxpayer.

COMMISSIONER GUESS. Ms. Chavez, could we get the other members of the panel to respond to the first question you asked Professor Glazer? Is discrimination in employment today, which Professor Glazer previously indicated is impossible to determine, the exception or the rule, where he claims it is now the exception? Dr. Welch?

DR. WELCH. My impression is it is the exception, and it was not 30 years ago.

COMMISSIONER GUESS. Mr. Lavinsky.

MR. LAVINSKY. I said it before in one of the responses and I'll say it again. I think there is a vast—a vast—difference in the climate today than was true 10 years ago or 20 years ago. And you have to understand that the problem of what we call discrimination has changed drastically. The malevolent type went out long ago. The residue—and I think even that is fast disappearing—was attitude, an attitude that was so subtle one didn't even know one had it.

I mean, for example, the rubric, "Oh, that's a man's job." And in a sense one of the wonderful things—and I think it was unintentional, but one of the wonderful things about the way the law is set up is that defense counsel teaches the client.

For example, I saw a situation where there were no women in a particular type of job. It was a heavy-duty job. But I noticed there were about three 200-pound women that had applied, and they probably could have moved those carts better than I could. And I asked how come none of them had been hired, and the answer I got was, "Oh, this is a man's job."

And I said to this fellow, "There is no such thing as a man's job anymore."

So attitudes have changed. The overt discrimination, I think, is largely gone. The attitudes, I think, have substantially changed. And I think today we are really largely dealing with the effects of past discrimination, with the disadvantaged, rather than any sort of virulent discrimination.

COMMISSIONER GUESS. Professor Leonard.

DR. LEONARD. I would agree with my copanelists that we have made tremendous progress certainly since the passage of the Civil Rights Act of 1964. If you looked at the current wages of blacks compared to the wages of whites, controlling for education, background, and ability as best you could, I think you'd still find some differences.

COMMISSIONER GUESS. Excuse me, Professor. The question is: In your expert opinion, in the employment process, in making the selection, making decisions predicated upon the employment process, does discrimination on the basis of race enter as a variable as an exception or as a rule?

We can understand the progress. We are talking about what happens in the marketplace right now. Does this exception occur 6 times out of 10 or 9 times out of 10?

DR. LEONARD. I don't know the answer to that.

MS. CHAVEZ. My question is: Is employment discrimination on the basis of race or gender today the exception or the rule?

DR. LEONARD. As I was saying, I think if you examined a wage equation, you would still find some unexplained differences between blacks and whites.

MS. CHAVEZ. I'm not asking about wages. I'm asking about whether decisions on who to hire, who to promote, and other employment decisions—is it an exception today or the rule as it relates to race in general?

DR. LEONARD. I don't know the answer to that question.

CHAIRMAN PENDLETON. Mr. Disler.

MR. DISLER. I wanted to ask a couple of questions of Professor Leonard if I could, and I think one or two of the other panelists might want to comment.

CHAIRMAN PENDLETON. They can't hear you in the back, I don't think, Mark.

MR. DISLER. I was struck, Professor Leonard, by your comment that it is not necessarily the case that white males are paying a price under the affirmative action program that you were looking at. I think you made that comment on page 30 of your paper.

But I wanted to ask you, in connection with the tax description that you used earlier, or even the subsidy, however you want to describe it, about a couple of remarks in your paper. I want to quote a couple of them to you. I don't want to take them out of context. On page 8 you say:

> Between 1974 and 1980 black male and female and white female employment shares increased significantly faster in contractor establishments than in noncontractor establishments. The other side of this coin is that white males' employment share declined significantly more among contractors.

And on page 22—let me read the whole paragraph because again I'm concerned not to take it out of context—you said the following in reference to your table 3:

> The major finding in table 3 is that neither absolute minority nor female employment increased, but that both minority and female employment shares did increase. This is because the contraction in employment that did occur was almost lily-white and predominantly male. Most of the average employment decline of 27 was accounted for by white males, whose employment fell by 21. Put another way, while white males averaged 57–63 percent of initial employment, they accounted for 78 percent of the employment decline. Since females and minorities typically have lower seniority, they are usually found to suffer disproportionately more during a downturn.

And then this sentence:

> In this perspective, the finding here that white males accounted for most of the employment decline is itself striking evidence of the impact of affirmative action.

My question is: I am not confused by those remarks, but your unwillingness to attribute it to the goals program. And I wanted to invite your explanation.

DR. LEONARD. I think the first thing you have to recognize is that when you have a pie you can have at most 100 percent of that pie. If you are talking about shares, proportions of that pie, if one share is going up, somebody else's share has to be going down. You can't have 110 percent of the pie.

Now, you can either say that affirmative action has helped increase protected group shares, or you can say it has helped decrease white male shares. Those are two sides of exactly the same coin. They may have different connotations, but they are the same fact.

As far as the tax question, if you look at the sectors where affirmative action is most predominant, if you look at the cities and the industries where the proportion of contractors is highest, you will find that white males and black males both have

relatively high pay. Now, that might have something to do with the predominance of defense contractors, I don't know. It does seem to be the case that even white males in the contractor sector have relatively higher pay.

The evidence on page 22 that you referred to shows, I think, some striking evidence that white males' employment share has declined. I think that is true, in general, for contractors. It is particularly true for the reviewed contractors. The evidence on page 22 is looking at a subsample of contractors who have undergone multiple compliance reviews. Those are the largest.

The evidence on page 22 doesn't mean that any individual white male was laid off because he was a white male. What it does mean is there is a change over time in the employment shares of the white male, and it is going down.

MR. DISLER. I take the thrust from your paper to be that the overall program has caused an increase in black male employment. You seem to shy away from saying that the flip side of the coin is due to the very same program.

DR. LEONARD. No, I do say that.

MR. DISLER. Why are you not willing to say that that is a price that those white males are paying as a result of the program?

DR. LEONARD. There is also some evidence that white males' wages are higher in the contractor sector.

MR. DISLER. Not for the ones who have been laid off.

DR. LEONARD. Well, it's not clear that anyone has been laid off because of this program.

MR. DISLER. Let me ask you something else. Your research indicates that the employment of black males has increased more rapidly in the government contractor firms. Is there any evidence—and, indeed, is this a legitimate question to ask?—that affirmative action has increased net employment opportunities overall, including noncontractor groups, for black males or other particular groups for whom the regulations are aimed at increasing employment? In other words, is the OFCCP program shifting black males from one set of employers to another? Is that hard to say?

DR. LEONARD. No, Professor Welch has, in fact, produced some of the best evidence on that. I'll leave that to him. But let me say this before I do. If you look at the noncontractors, their black and minority shares are also increasing. Now, the question is: Where are all these blacks coming from? I think that is something that Finis has a better answer to.

MR. DISLER. Did you want to comment, Professor Welch?

DR. WELCH. I'm waiting to hear what my answer is.

[Laughter.]

MR. DISLER. So are we.

DR. WELCH. The question is too big. We don't know. We know that employment is shifting toward the monitored sector. Where are they coming from? I think the presumption is obvious. We also know that firm size is declining, and white men are moving toward smaller firms.

MR. DISLER. Professor Welch, you indicated earlier that you wanted to comment on some of the productivity discussion, either among the other papers or in reaction to questions.

DR. WELCH. Well, I wanted to comment on Jonathan's comments about productivity, simply because I don't think the numbers support your interpretation of them.

The comment that you are making—and it's one that you have made before in print—is that there really is no evidence to suggest that there have been efficiency losses on the part of the firms who have responded most vigorously to affirmative action pressures. I think that's right; there is no evidence—and I say that having read your paper. But, Jonathan, I simply think you misinterpret your own numbers. You could as easily argue exactly the opposite conclusion from your data.

The only interpretation that you have is that the productivity of the firm depends upon what its skill mix is now, what the race and sex composition of its workers is now, and not what it once was. In the numbers that you report, you do argue that, on average, output per unit of labor input is lower for a firm the higher the fraction of employees in that firm are female and the higher the fraction of employees in that firm are black. Now, that presumably is an adjustment for the differences in average educational levels, in the case of blacks versus whites, to differences in average years of work experience possibly for women—or for whatever.

I would agree that that observation does not speak to the productivity issue. But I would disagree that a historical race-sex composition of employment says anything about efficiency now. And that is the

interpretation that you are trying to give the data, and I don't think it withstands it.

CHAIRMAN PENDLETON. We have time for just one more question. I'm sorry; are you finished?

MR. DISLER. I wanted to let Dr. Leonard respond.

CHAIRMAN PENDLETON. All right. You have a little thing going there.

DR. LEONARD. I took some pains when I presented that to say I thought there was a lot more work to be done in this area. I think it's the most controversial area. It's something I hope, with the cooperation of the government, to do some more work on.

I do think that the argument depends on who the burden of proof is on. If the argument was that affirmative action and Title VII have imposed significant and substantial productivity losses, then I would say that case hasn't been made convincingly yet. By the same token, I would have to agree with Finis that the converse case has also not been made convincingly enough.

CHAIRMAN PENDLETON. No more questions?

MR. DISLER. No.

CHAIRMAN PENDLETON. Mr. Bunzel, you may have the first and the last word.

COMMISSIONER BUNZEL. Thank you.

CHAIRMAN PENDLETON. Equal opportunity.

COMMISSIONER BUNZEL. Someone has said someplace that there are two types of people in the world: those who try to divide the world up into two groups and those who do not. Or in another variation, I remember hearing someplace that an optimist is a person who believes that this is the best of all possible worlds, and a pessimist is someone who believes the optimist is right.

[Laughter.]

COMMISSIONER BUNZEL. One of the things I am impressed by, and have been for the last 15 or 20 years of my life, and is reconfirmed here today, is that there are, in fact, for certain purposes, two kinds of people—people who do not disdain the humble fact and, therefore, find their opinions very often in flux, subject to change, and in many respects, therefore, are often able to question their own views, are skeptical of lots of opinions, and are constantly looking for evidence to support what it is they believe. On the other hand, there are people who have strong opinions and very rarely let the facts get in the way of those opinions. In fact, if they do, they tend to disregard them.

I am impressed by the kinds of arguments that have been exchanged here today and the points that have been made. When Ms. Chavez asked if discrimination was more the exception than the rule today, I think I heard virtually everybody except Mr. Leonard answer the question that it was the exception.

When I have asked this question, I have been told that the problem is that that kind of discrimination has perhaps been reduced, but what we have today is much more subtle, and it is institutional discrimination, for example.

Now, I have worked in various institutions—no, I've worked in various universities as one form of institution. I have never understood entirely what institutional discrimination is and what it is not. And I think perhaps my last question is to Professor Glazer, first, and to the rest of the panel: Can you help me understand, in fact and in practice, what institutional discrimination really means and what it does?

DR. GLAZER. I think institutional discrimination is a misnomer. If it refers to such things as tests or procedures which have the inadvertent effect of discriminating, we can name it more directly and we can deal with it, and we have dealt with it.

It very often tends to refer to something else, which is that legitimate institutional procedures and needs run into a problem of the fact that different groups qualify in different ways for the functions it needs. I don't think that is institutional discrimination. That is a problem of examining that institution's assessment of its needs.

If one says there is institutional discrimination in the police forces because they used to hire only men, and despite being hit over the head a good deal, they still think they need more men than they need women, I don't think it's institutional discrimination. It's a question of what is a policeman or a policewoman for.

MR. LAVINSKY. I think I can give you an example. There are many others, but one that came to my mind as I heard Professor Glazer speak is the attitudes about women. And I will take it in the law and what things were like 20 years ago, when a woman would routinely be subjected to such questions as, "Are you married? Do you plan to have children? Are you pregnant?" and so forth. The obvious institutional assumption was that the female lawyer would not be as dependable, would stay for a short time and leave, and so forth.

That is gone. It's gone because women have proved themselves in the legal profession. Women have had their children—and I've seen them in our office with their children running around on the carpet while they're doing their work. They are fine associates. They are fine partners. And we learned that. But 20 years ago, yes, there was institutional discrimination. Law firms had an erroneous assumption about women. That's gone.

I think that I could probably come up with 10 other examples of other minority groups where those types of things are gone.

That's the subtle kind of problem that was very prevalent. I think it is much less prevalent today and hopefully will be gone tomorrow.

COMMISSIONER BUNZEL. Mr. Lavinsky, I can share part of what you're saying because I was with a university 20 years ago as an assistant professor and was arguing at the time that there weren't many women in the department, and I thought it was necessary to find out why. And there were all kinds of norms that were part of the sixties and late fifties. Some of them today no longer exist at all, part of the consciousness-raising of today. Lots of things which women themselves didn't think they could aspire to, they now take for granted. Thus, they have moved into law schools, medical schools, and all the rest.

What I am confused about is why that is institutional discrimination. It seemed to me to be simple prejudice on the part of men, and some women but mostly men, in the institution or the university itself—the men who were in a position to make decisions about whom to hire, whom to consider. Why isn't that individual discrimination? It seems to me that institutions are run by people.

MR. LAVINSKY. Well, that is true. In that sense almost every institutional decision is made by people, probably made by one or two individuals.

It's really a matter of changing attitude. And I think the reason we use the expression "institutional discrimination" is that attitudes are contagious. You don't have to be a bigot, you don't have to intentionally dislike anybody to have misconceptions and stereotypes.

Those are the kinds of attitudes you want to change, and where an institution acts on them through its hiring arm—I have heard it called systemic discrimination, discrimination so subtle you don't even know you have it. It is an educational problem, and it has to be dealt with. But I think it is far less today. And I think that the more exposure business and professions have with capable minorities and women, the more they see successful performance, the more you break down these institutional prejudices.

CHAIRMAN PENDLETON. We thank you all for coming to this session.

We will now take a break until about 11:10 a.m.

[Recess.]

HEARING

CHAIRMAN PENDLETON. Before we begin this session, I would like to enter into the record the correspondence between our staff and the groups that did not appear, as well as to make certain that the groups who did submit testimony, that their testimony is made part of the record. Is that agreeable to the Commissioners—the letters exchanged between our staff and the people who are not here?

I'd also like to say I have another letter from an organization, International Personnel Management Association, that has given us a resolution with respect to affirmative action goals, which I will turn over to you to make as part of the record. I forgot to do that earlier.

We now move to the hearing part of this combination consultation/hearing. The witnesses will be testifying with regard to their knowledge and experience of set-asides for minority- and women-owned businesses. The witnesses reflect a wide-ranging view with respect to these important affirmative action issues.

We received a large number of requests from organizations and individuals wishing to be heard at these proceedings. Time and scheduling, however, permitted us to hear from only a few of these parties. We do not have a separate portion of the proceedings for members of the general public to testify.

Staff was asked to put together a streamlined version of a combined event. In putting together this event, we invited a number of advocacy organizations, individual experts, and business people. The hearing component which we are now beginning includes the business people.

The hearing record, however, will be left open for 30 days following the conclusion of this session today, and all interested persons may submit any written statement or comment regarding these issues.

I will turn to Commissioner Buckley who will read the rules.

COMMISSIONER BUCKLEY. At the outset, I should emphasize that the observations I am about to make on the Commission's rules constitute nothing more than brief summaries of the significant provisions of the Commission's statute. The rules themselves should be consulted for a fuller understanding. Staff members will be available to answer questions which arise during the course of the hearing.

In outlining the procedures which will govern the hearing, I think it is important to explain briefly the special procedure for testimony or evidence which may tend to defame, degrade, or incriminate any person. Section 3(e) of our statute provides, and I quote:

> If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall receive such evidence or testimony in executive session. The Commission shall afford any person defamed, degraded, or incriminated by such evidence or testimony an opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before deciding to use that evidence or testimony.

When we use the term executive session, we mean a session in which only the Commissioners are present, in contrast with sessions such as this one in which the public is invited and present. In providing for an executive or closed session where testimony may tend to defame, degrade, or incriminate any person, Congress clearly intended to give the fullest protection to individuals by affording them an opportunity to show why any testimony which might be damaging to them should not be presented in public. Congress also wished to minimize damage to reputations as much as possible and to provide the person an opportunity to rebut unfounded charges before they were well publicized. Therefore, the Commission, when appropriate, convenes in executive session prior to the receipt of anticipated defamatory testimony.

Following the presentation of the testimony in executive session and any statement in opposition to it, the Commissioners review the significance of the testimony and the merit of the opposition to it. In the event we find the testimony to be of insufficient credibility or the opposition to it to be of sufficient merit, we may refuse to hear certain witnesses, even though these witnesses have been asked to testify in public session. Testimony which may tend to defame, degrade, or incriminate another person is not permitted by witnesses in an open session. An executive session is the only portion of any hearing which is not open to the public.

The hearing which begins now is open to the public and the public is invited to attend all of the open session. All testimony at the public session will be under oath and will be transcribed verbatim by the official reporter. Everyone who testifies or submits evidence or data is entitled to obtain a copy of the transcript. In addition, within 60 days after the close of the hearing, a person may ask to correct errors in the transcript of the hearing of his or her testimony. Such request will be granted only to make the transcript conform to testimony as presented at the hearing.

All witnesses are entitled to be accompanied and advised by counsel. After the witness has been questioned by the Commission, counsel may subject his or her client to reasonable examination within the scope of the questions asked by the Commission. He or she also may make objections on the record and argue briefly the basis for such objections.

Should any witness fail or refuse to follow any order made by the Chairman or the Commissioner presiding in his absence, his or her behavior will be considered disorderly and the matter will be referred to the U.S. attorney for enforcement pursuant to the Commission's statutory powers.

If the Commission determines that any witness' testimony tends to defame, degrade, or incriminate any person, that person or his counsel may submit written questions which, in the discretion of the Commission, may be put to the witnesses. Such person also has a right to request that witnesses be asked to appear on his or her behalf.

All witnesses have the right to submit statements prepared by themselves or others for inclusion in the record, provided they are submitted within the time required by the rules. Any person who has not been asked to participate in the hearing may be permitted, in the discretion of the Commission, to submit a written statement in this public hearing. Such a statement will be reviewed by members of the Commission and made a part of the record.

Witnesses, including those in any open session, at Commission hearings are protected by the provision of Title 18, U.S. Code, section 1505, which makes it a crime to threaten, intimidate, or injure witnesses on account of their attendance at government proceedings. The Commission should be immediately informed of any allegations relating to possible intimidation of witnesses. Let me emphasize that we

consider this to be a very serious matter, and we will do all in our power to protect witnesses who appear at the hearing.

Copies of the rules which govern this hearing may be secured from a member of the Commission's staff.

Finally, I should point out that these rules were drafted with the intent of ensuring that Commission hearings be conducted in a fair and impartial manner. In many cases the Commission has gone significantly beyond congressional requirements in providing safeguards for witnesses and other persons. We have done that in the belief that useful facts can be developed best in an atmosphere of calm objectivity.

We hope that such an atmosphere will prevail at this hearing. With respect to the conduct of persons in this hearing room, the Commission wants to make clear that all orders by the Chairman or Commissioner presiding must be obeyed. Failure to obey will result in the exclusion of the individual from this hearing room and criminal prosecution by the U.S. attorney when required. The security officers stationed in and around this hearing room have been thoroughly instructed by the Commission on hearing procedures, and their orders are also to be obeyed.

CHAIRMAN PENDLETON. It is now my duty to swear in the clerks.

[Neal Devins and Susan Lee were sworn.]

CHAIRMAN PENDLETON. Now I'll swear in the witnesses.

[Donald Leslie, Thomas C. Stewart, and Ralph D. Stout, Jr., were sworn.]

CHAIRMAN PENDLETON. Is there anyone here who is hearing-impaired?

[No response.]

CHAIRMAN PENDLETON. Panel 1:

Donald Leslie is president of Johnson Electrical Corporation, Hauppauge, New York, and a master electrician. The firm serves as general contractor on public highway jobs involving electrical retrofitting of existing highways and as electrical subcontractor on new highway construction and expansion. The firm employs 10 to 50 persons and grossed about $4 million in 1984.

Tom Stewart is president of Frank Gurney, Inc., Spokane, Washington, and holds a B.S. degree in civil engineering from Gonzaga University. The firm serves as a subcontractor on public highway jobs, installing fences, guardrails, medians, road stripes, and traffic signs. The firm employs 15 persons and grossed about $2.5 million in 1984.

Ralph D. Stout, Jr., is president of Southern Seeding Services, Inc., Greensboro, North Carolina, and holds a B.S. in civil engineering from North Carolina State University. The firm serves as an erosion control subcontractor on public highway jobs, employs 20 persons, and grossed about $1 million in 1984.

TESTIMONY OF DONALD LESLIE, PRESIDENT, JOHNSON ELECTRICAL CORPORATION, HAUPPAUGE, NEW YORK; TOM STEWART, PRESIDENT, FRANK GURNEY, INC., SPOKANE, WASHINGTON; AND RALPH D. STOUT, JR., PRESIDENT, SOUTHERN SEEDING SERVICES, INC., GREENSBORO, NORTH CAROLINA

MR. HOULE. Mr. Leslie, before we start questioning, I understand you have a written statement for the record.

MR. LESLIE. Yes, I do.

MR. HOULE. Would the clerk please pick up copies of the written statement.

Mr. Leslie, would you please state your full name, address, and occupation or affiliation for the record.

MR. LESLIE. Yes. My name is Donald Leslie. I reside at Spring Hollow Road, St. James, New York. I am president of the Johnson Electrical Corporation in New York.

MR. HOULE. Thank you.

Again for the record, Mr. Stewart, would you please state your full name, address, and occupation or affiliation.

MR. STEWART. My name is Thomas C. Stewart. I reside in Spokane, Washington. I am a civil engineer and a licensed civil engineer in the State of Washington and am president of Frank Gurney, Inc.

MR. HOULE. Mr. Stout, would you please state your full name, address, and occupation or affiliation for the record.

MR. STOUT. My name is Ralph D. Stout, Jr. I live on Currycut Place, Greensboro, North Carolina, and I'm president of Southern Seeding Services, Inc.

MR. HOULE. Mr. Leslie, would you briefly describe your firm's problems with set-aside programs?

MR. LESLIE. Well, to do that, sir, I would have to start in the beginning and have you understand exactly what it is we do in the Long Island area. We are a specialty contractor in the basic electrical construction industry, in addition to doing highway traffic signals and highway lighting work.

When the program was first developed, it didn't seem to be much of a problem because the rules seemed to be pretty lax. But in the past few years they have been developing into something that is becoming extremely unworkable.

They are unworkable in the situation that the area that I work in represents an area that is suburban in nature and has approximately 2.7 million people, of which approximately 6 percent of that represents minority persons.

The industry is a very technical one. It is one that you just cannot legislate into existence contractors who are qualified to do the work. At the same time, we are a public works contractor. We are under bond to perform. We are in a hard-money bidding process where we bid a firm contract price for a particular project, and we must perform within the guidelines of the specifications.

The State of New York in most of its building type of work has a separate bid law which requires that there be four separate bids for every building-type project, which immediately eliminates a lot of scope of the work in the construction industry from a particular contract.

For instance, when I bid on a public works project, I would bid for the electrical work and that work that is shown under the electrical sections of the specifications. That is done mostly, if not all, by inhouse personnel. We very seldom subcontract anything. We are basically purchasing anything from the outside, such as supplies, equipment, specified lighting fixtures, and such.

The same holds true for our work on the highways. As a prime contractor we would bid for work that is basically reconstruction of traffic signals and/or street lighting. We also have some minor general construction work in our contracts.

In the confines of our specifications, we are very limited as to what we can do. In addition to that, we have to deal with the fact that we have a labor agreement with obvious referral procedures that have been standing for some 25 or 30 years with my firm.

When the program came out, as I said earlier, it wasn't too difficult on certain highway jobs to adhere to it, because we could, on the highway work, find contractors that were in the general construction field that were doing curb type of replacement and asphalt work and so forth.

Short of that, the minority firms are nonexistent in the technical ends of the industry. When I say nonexistent, not totally nonexistent, but for the terms of this program, they certainly are. We find it very difficult to find anyone even willing to bid on the work. In addition to that, we have various State agencies that have different compliance officers with all sorts of different rules and regulations and all sorts of different criteria as to who is and who is not a minority.

So you can see now it is getting a little complicated in that we really have a lot of difficulty just sorting out what the rules of the game are, just by what agency we happen to be working for at the time. I might point out that we work for all municipal agencies, including school districts, fire districts, the department of transportation, and so forth.

The State department of transportation happens to have the most stringent rules with regard to minority business enterprises that exist in the area. They insist that you only utilize minority business firms that are shown on their particular list, which is practically nonexistent in my field. In fact, in my district which is the regional district for the highway department, there are no minority electrical contractors that are approved by the department of transportation. There are some general-type contractors, some landscape-type contractors, and some consultants.

MR. HOULE. Mr. Leslie, due to time considerations, we do have the record of our interviews with you and your written statement. Let me ask you to briefly describe the loss that your firm has suffered from set-aside programs.

MR. LESLIE. I'm sorry if I went into a long-winded explanation, but I felt it was important so you would understand where we're coming from.

The losses occur, sir, when we are unable to attain the goal for the various agencies and are unable to bid the project because we know we would be held responsible for meeting those goals or quotas. Just recently, in 1985, my firm has been unable to bid two projects—one was for a traffic signal reconstruction job for $1.8 million, and the other was a highway lighting job for $2.7 million—because we were unable to obtain any response whatsoever from qualified minority contractors to do any subcontract-type work.

That is where my firm is being hurt, sir. It is being denied the right to bid the work unless we utilize some devious method of getting around the regulations, which we have been very reluctant to do.

MR. HOULE. Let me ask you this, Mr. Leslie: In your opinion, has the set-aside program truly assisted women and minorities that are in the construction trade in your area to become qualified?

MR. LESLIE. I really don't believe so. The set-aside program as it exists today is really a crutch. It is being handed out in the form of dollars, and we talk with numbers and we talk with projects of millions of dollars worth of work being given out, and so much of that has to be given to minority firms. Whether that firm is qualified or not, we are going to have to give that work out to them because that's what the people running the compliance offices want. They will not accept, for the most part, good-faith efforts. That is almost an impossibility to get a waiver on. And we are now forced to deal with all sorts of different situations to meet those goals and quotas.

And you have to understand that the only way I get a job is by being low bidder. And it would not be in my best interest or my firm's best interest to discriminate against anyone except those that do not have the low price. We are looking for qualified people that can do the job at the best possible cost and develop those people into subcontractors that we can work with.

MR. HOULE. You indicated, Mr. Leslie, that you had problems with the good-faith waiver process. Could you briefly describe your experience in that regard?

MR. LESLIE. I had one particular instance where the minority firm that I had bid the job with was disqualified after the bid for a legal reason, and the State of New York Department of Transportation would not allow me to use them. At this point in time, I had to go back out onto the street and publicly look for additional minority participation, and at that point in time, there wasn't any available because of the workload in the area. It doesn't take much of a workload to fill up the capacity of those firms that are working in the minority business enterprise program.

So by the time all of this came about and developed into all the good-faith efforts that I had to go to to prove to somebody that was 300 miles away that there was no one else to take the place of that previously disqualified minority subcontract, some 7 or 8 months went by. This was on a highway project that had approximately a 12-month completion date.

By the time I got a waiver, we were into December. The project was delayed up until that time, and we could not resume work until spring. My completion date was in March.

I am now working into the March-April-May area, completing the work with another subcontractor, along with my field forces, and I have been at this point subjected to liquidated damages for engineering charges on that additional time overrun, and no appeal was even heard of that issue. They just deducted it from my payment and sent me my final payment. That was it, take it or leave it.

MR. HOULE. To get back to your earlier statement on whether or not the set-aside program is truly assisting women and minorities in succeeding to qualify in the trade, you indicated in testimony that the use of corporate shells was becoming widespread. Would you describe your experience with that, Mr. Leslie?

MR. LESLIE. Yes, that is the common practice in areas other than the department of transportation because the department of transportation's rules are so strict as to who in fact they will or will not accept. But other State agencies and villages and counties and towns will allow you to utilize minorities that are off the general Commerce Department list, and basically, the minority does not have to show that they are an ongoing viable firm in the business that they choose to bid for work in. Those areas have been the areas where the 5 percenters come into play, where you cover whatever minority goal there is just by contracting with whoever it is that you have in mind at the time to develop that goal for you, and you pay them 5 percent of that program for the right to utilize their name as a minority.

MR. HOULE. Mr. Leslie, what is your recommendation on methods that could be used to help women and minorities enter and succeed in the construction trade?

MR. LESLIE. Well, sir, I think the important thing here is what we heard a little earlier. It's education, especially in my field which is very technical in nature. It takes some 8 or 9 years to develop into a contractor in my field that is viable in the industry, and that has the expertise to know what to bid, how to bid it, how to proceed with the project, how to conduct their business, and so forth—how to perform for the bonding companies and secure the bonds, how to get the financing.

There are all sorts of areas that you just can't take somebody off the street and say, "You are now an electrical contractor," no more than you could do it

in the law field or the medical profession or anywhere else.

MR. HOULE. One last question, Mr. Leslie. Do you believe there is a buddy or an old boy system among contractors in your area that works to the disadvantage of women and minorities?

MR. LESLIE. That, I feel, is absolutely outrageous. That doesn't exist. As I said earlier, a contractor is looking for an experienced contractor with the expertise to do the job at the low price because he has to be the low bidder. The only way he will get to be the low bidder is if he uses the low bidders, so to speak. The contractor doesn't care what color his subcontractors are. We are basically colorblind. I know it's going to be hard for some people to believe that, but that's the fact.

MR. HOULE. I appreciate that, Mr. Leslie. Thank you very much.

Mr. Stewart, would you briefly describe your firm's problems with set-aside programs?

MR. STEWART. To go back not too far, just a little bit to where we come from, we are a subcontractor. We do highway guardrails, signing, and striping. We have been in business for 25 years. In September of 1980 we received a letter from the Washington Department of Transportation—incidentally, our work area is Washington, the northern Idaho panhandle, and all of the State of Montana.

We received a letter from the State of Washington in September of 1980, and they indicated in that letter that forthcoming would be mandatory goals for minority business enterprises, and those goals were at that time going to be dollar amounts. We began to notice that shortly after that when the contracts began advertising with minority business enterprising dollar amounts, those dollar amounts did, indeed, fit about what the amount of work would be in the contracts that would be subcontracting. In other words, if it were approximately a million dollar paving overlay job and there was $100,000 of guardrail and signing and items there that were normally specialty items, then that was the dollar amount that was put on that contract for a minority goal.

Therefore, in 1981 we began to really feel the impact of these minority goals because prime contractors were rejecting our low bid in favor of minority bids that would fill the goal.

I would like to bring forth at this time—I do have testimony. Included in my testimony is documentation of exactly what was happening in 1980, 1981. And recently we did receive letters from a lot of prime contractors who did relate what the cost comparisons were on the jobs we were low bidder on. Some would not.

MR. HOULE. Those are in your written statement?

MR. STEWART. Yes, they are.

MR. HOULE. Would the clerk please pick up those statements.

Mr. Stewart, specifically how has your firm been harmed by the set-aside program?

MR. STEWART. Any business is regulated by its own economic demands. When your work volume is up to where you have enough volume of work to sustain the overhead and so on, your prices go up. When you don't have work and you have overhead and insurance that goes on, your prices go down.

Our prices went down to where we are estimating better than 50 percent of the time we were low bidder on jobs, and we couldn't get the work. Our bids were rejected. That is the harm when you have this insurmountable obstacle that you don't have any control over.

MR. HOULE. During the last 2 years, Mr. Stewart, has your firm found it necessary to accept work that was sub-subcontracted from apparent women- or minority-owned corporate shells on set-aside jobs as a means of maintaining its percentage of public works sales?

MR. STEWART. Indeed, in the latter part of September, we felt that we had exhausted every plea for help that we could think of. We wrote our Congressmen, our State legislators, prime contractors, our own AGC. In the latter part of September, we just felt, out of fear for our own survival, that we had better commence a business work activity with minority companies. We did so in the latter part of 1983, and in 1984 we did work with minorities.

On December 20, 1984, one of the minorities that we had worked with had a compliance review with the State of Washington Contract Compliance Bureau. The contract compliance officer expressed a verbal disfavor with his association with our company, and at this time there hadn't been a formal written compliance status of that particular minority company. However, after deliberating the outcome of that and taking notice of the more stringent rules regarding working with minorities, as of January 1, 1985, we halted any work or bidding activity with minority companies. Since then we have been on our own.

In the Montana bid-letting of January 1985, we were low bidder on three jobs. We did not receive award of a single contract. Instead, one of our competitors in Montana was awarded one of the larger jobs—it was a $200,000 job. One of our competitors who is a certified minority was awarded the job at a price $34,000 higher than ours.

MR. HOULE. Do you believe it's a widespread practice of women- and minority-owned subcontractors that they subcontract all or substantially all of their work to minority firms that actually do the work on public works jobs?

MR. STEWART. In our own experience, we have found that there are varying levels of bona fideness in minority companies. Some are really great. They don't need any help from anybody. They beat us at the bidding table. They don't need any help from anybody to complete their work. They are good; they are efficient. And others bid on smaller jobs. They take care of their smaller jobs.

There are others—in general, we have knowledge of those that perform basically no useful function at all.

MR. HOULE. Do you believe, Mr. Stewart, that there is a buddy or old boy system among contractors that works to the disadvantage of women and minorities in your area?

MR. STEWART. I do not. The discrimination that I am aware of going on in our area is against subcontractors like myself. The Spokane area has an approximate 10 percent minority population. I believe I have heard that number somewhere. We have an elected black mayor. One of the most prominent, sought after lawyers in the Northwest is a black man. There hasn't been a discrimination history in our area as such, as has been explained in other areas that I have heard of in the United States.

I would like to say that, getting right to contractors, for contractors to discriminate is just about completely unacceptable. For us to do a favor or reciprocate a favor or for a minority firm even to reciprocate a favor with one particular contractor—when you're a sub like we are, it would.

MR. HOULE. Mr. Stewart, some observers claim that some women- and minority-owned enterprises, relying on a perceived share of the construction market through set-asides, do not take all available steps to become more competitive. Would you please comment on that statement?

MR. STEWART. I would say, in general, there are probably minority businesses that we have encountered of two types.

To go back just a little bit further, in the State of Washington, I believe there are about 15 contractors in the DBE Directory listed as doing guardrail work. In Montana, I believe there are four or five. It's in that range somewhere.

Of those, there are varying degrees of the ones that we are familiar with, that we have observed in one way or another. It ranges from the ones that are competent who don't need any help, to others who prime contractors have, as in my documentation there, called us in to finish their work.

MR. HOULE. Thank you.

Mr. Stout, before we begin your questioning, I believe you have a written statement you'd like to submit for the record.

MR. STOUT. Yes, I do.

MR. HOULE. Would the clerk please pick up the statement? Thank you.

Mr. Stout, would you briefly describe your firm's problems with set-aside programs?

MR. STOUT. Yes, I appreciate this opportunity. Our company, as introduced, is Southern Seeding Service, and we are a specialty subcontractor performing erosion control or grassing work, primarily on the highways in the State of North Carolina.

I do make the point that we are basically a subcontractor. That puts us in a very unique position.

Prior to the 1982 Surface Transportation Act, we had experienced some negative impact from the various Executive orders that related to the set-aside program and the setting of goals in the highway contracting industry. However, with the 1982 Surface Transportation Act, we found ourselves basically legislated away from our primary business market.

For example, our fiscal year ends January 31. For fiscal years ending 1979 through 1984, our highway volume averaged approximately 45 percent of our total business volume. During that 6-year period, for 3 years it averaged 54 percent, 55 percent, and 58 percent.

For the year just ended, January 31, 1985, our volume of highway work was less than 10 percent. The last highway job of any size—and I point out we are a small business with 20 employees—the last highway job that we received was March 22, 1983. And that job was somewhat less than $63,000.

Along with the Surface Transportation Act, we are now finding that municipal governments, the cities, the counties, and so forth, are also setting up various goals which are contrary to our best interests.

I have here a weekly bulletin from the Carolinas branch, AGC, which says, "Durham adopts M/WBE program." That's the city of Durham, North Carolina. The program as adopted established the following goals: any contract $50,000 to $249,999, 25 percent; $250,000 to $499,999, 30 percent; and any contract over $500,000, a goal of 35 percent.

I would point out that in the past we have done a lot of work in and around and for the city of Durham. We have since December 1984 bid on a number of jobs in the city of Durham. However, to this date we have received no contracts from them.

MR. HOULE. Mr. Stout, in your opinion has the set-aside program in your area helped women and minorities enter and succeed in the construction trade?

MR. STOUT. I don't think it has, and I'll answer that this way: I see two types of contractors. I see a minority disadvantaged or woman contractor who is going to be in business, period.

MR. HOULE. Mr. Stout, do you have any specific examples of that that you could give us?

MR. STOUT. Well, let me finish. You're getting me off track here.

MR. HOULE. All right.

MR. STOUT. As I say, two types of contractors. There is one who is going to be in business whether there's a goal program, set-aside program, or not. Then I see contractors who are in business because of the goal program. It has been my experience—I have seen that in both instances.

I do want to point out one other thing that I think is very, very important as the total goal program represents to us. In the State of North Carolina most of the highway contractors have historically done most of the work that they bid on. For example, you'll have a general contractor who is in the grading and paving business. And he will do with his own forces, his own equipment, most of the work that he bids on. He has historically subcontracted certain specialty items—guardrail, fencing, seeding and mulching, the business we're in.

So what happens is that these general contractors, to meet their goal, are still wanting to subcontract the specialty items they have historically subcontracted, and that makes folks like us bear the brunt of the whole set-aside program as it relates to given projects.

MR. HOULE. Mr. Stout, could you please give us some specifics of where and when your firm had either lost jobs or on which it was the lowest bidder or which you believe it was the lowest bidder or simply not bid jobs due to set-aside requirements?

MR. STOUT. We know we've lost jobs. At one time we tried to create a relationship with what I call a legitimate minority contractor, a contractor who had been in business prior to the days of set-asides and goal programs, and who was in an allied business—he was a grading contractor. And through a discussion with our attorney and their research, we were encouraged to believe that we might effect a relationship where we could, in turn, get some work through these people.

We bid some jobs with the understanding to the primes that if this worked out we would in fact be doing the work as a sub-sub.

As it turned out, after meeting with the highway people, going over the contract that we had put together where we guaranteed to bond the job; we guaranteed to finance them; we guaranteed to pay this party a fee in order to help them in that way—it came to be that it was just not something that was going to work.

We ended up losing about four jobs in this particular instance, one of which the general contractor subsequently subcontracted to a minority firm from Virginia, who called me on two different occasions and asked me to subcontract the work from him, and I told him, "We can't legally do this." He asked me to put my people on his payroll and to lease the equipment to him, and I told him no, we weren't interested in doing business that way, so we didn't get the job. We bid it and were supposed to have gotten the job and we didn't, and we were just going to stay away from it.

MR. HOULE. Any other specifics, Mr. Stout, where either your firm lost bids or just didn't bid?

MR. STOUT. Well, there is another one where there was a general contractor who had a job that he had subcontracted to a minority firm, and the minority firm was not experienced in highway work. They were having a tough time, and they finally gave the job up, and this firm, in turn, subcontracted it to us.

He later bid another job, which was quite a bit larger, and it came at a time when we were quite

desperate for work, and we had a tremendously low price on it. When I gave him our bid the night before the letting, he said, "Well, these numbers sure look good. You did such a good job for us on that other job and got us out of that hole, we sure hope to use you on this job."

When I looked at the tabulations, which are public figures that show the unit prices, this contractor had used our numbers right down to the penny on each item we bid on.

After the contract was awarded to him and I went to see him—I really went to see him to collect the money he owed me for the last job—I started talking to him about this job, and he said, "Well, we're going to have to give that to so and so."

I said, "What do you mean?"

He said, "Well, we had these minority goals to meet and one thing and another, and they're going to get the work."

Now, I don't know if he gave that job to the other party at a lesser price or a higher price, but it really doesn't make any difference to the taxpayers because they're going to pay the price that the general contractor bid. But we lost that job for that reason.

MR. HOULE. Thank you, Mr. Stout.

Mr. Chairman, I have no further questions.

CHAIRMAN PENDLETON. Mr. Guess, do you have any questions?

COMMISSIONER GUESS. Mr. Chairman, I would like to start by expressing appreciation to the panelists who have come to this public hearing.

Mr. Leslie, if you don't mind, you indicated when the question was asked as to whether you believe there is a buddy system among contractors that works to the disadvantage of women and minorities, that that proposition was, and I quote, "outrageous," end quote.

Do you have in the State of New York an association of contractors, a road builders association, or some other professional group, which bands together for the purposes of advancing your profession?

MR. LESLIE. We have many, sir.

COMMISSIONER GUESS. In your opinion, do these types of associations constitute a buddy system? Are relationships established through these associations which could act to advance the members of the association?

MR. LESLIE. The only association that I can speak for, sir, is the one that I belong to, and I can say without question that it does not. It is merely an educational association. And, frankly, I think what you're asking there may violate some antitrust laws. We are, in fact, going out of our way to avoid those types of situations.

COMMISSIONER GUESS. Does your association have a reasonable number of minority and/or women members?

MR. LESLIE. I can't quote the exact number, but I know we have some of both, and I think they are probably more representative in our association than in the general industry. What I mean by that is that we go out of our way to encourage the minority contractors that are legitimate to become educated and join our association. When I say "educated," educated in the pitfalls of our particular business, technically and businesswise.

COMMISSIONER GUESS. Earlier Mr. Stout indicated that he had participated in a bid on a job where numbers were released prior to the bid being submitted, and that he subsequently did not receive the award after the successful bidder had used his numbers verbatim on that bid.

Do you think this tends to also constitute—what I'm trying to get at is your definition of the antitrust relationship vis-a-vis the old buddy system. I see a difference between the two.

MR. LESLIE. When I referred to an antitrust—our association is one of electrical contractors, sir. Any time we would divulge prices to one another, that would be a violation of the antitrust laws as I understand it. The prior reference that you were making was one where the subcontractor bid to a general contractor. And let me tell you, sir, that goes on every day in the week. They shop us from pillar to post, and they'll use us whether we're green, purple, or black.

COMMISSIONER GUESS. Is there a buddy system there?

MR. LESLIE. A buddy system? The only buddy system there is, sir, is one of dollars. Whoever is low bidder is going to get that work.

COMMISSIONER GUESS. I understand.

Mr. Stout, you also indicated—and I thoroughly enjoyed hearing someone speak in a tone and tenor as someone from the South that I could understand after the last 2 days. You're the only person I've been able to understand. They tell me they don't want me to talk too often because I talk kind of funny.

[Laughter.]

COMMISSIONER GUESS. Do you think that the receipt of a government contract is a right or a privilege?

MR. STOUT. Give me that again, please.

COMMISSIONER GUESS. Do you think the receipt of a government contract to perform public service is a right or a privilege?

MR. STOUT. I think any person should have a right to seek a government contract if they so desire.

COMMISSIONER GUESS. And the award of that contract then becomes a privilege?

MR. STOUT. Well—

COMMISSIONER GUESS. Well, my next question would be: Do you also feel that the use of public funds to expand the base of entrepreneurship among those whom historically have been denied the opportunities, the inner markets in some area, is an appropriate use of government power?

MR. STOUT. I do not think it's the appropriate use.

COMMISSIONER GUESS. Do you feel, particularly in looking at North Carolina—do you think that historically during the time that you first entered this market that blacks and other minorities and women had an equal opportunity to enter that marketplace as you did?

MR. STOUT. I was not walking in their shoes. I have seen other people come into the business, the same business I am in. I have seen people come into the business who had no one to push them along but their own efforts, their own desires. I don't know of any reason why any person could not have done that if they had wanted to.

COMMISSIONER GUESS. Mr. Chairman, I have one final question for Mr. Stewart, and I'm just also trying to expand my understanding of this area.

In looking at possible approaches to what has become the subject of a good deal of debate lately, and recognizing that it has been the testimony brought before this Commission that the approach government has taken on set-aside programs is fraught with error, would you consider an approach for the acquisition in whole or in part of existing contracting firms on the part of minorities or other disadvantaged citizens a viable mechanism to move us toward where we're trying to get?

MR. STEWART. Indeed, to answer your question, like where we come from, we spent 20 years building and growing a business. There were insurmountable objects, doors slammed in our face. It was the old, "Go for it and keep trying and keep working," and it started from nothing.

And where we're at today, I can look at anybody, minorities, whites, anyone. If there is a possible chance that they can receive help in any way, we feel that that's just great. If the government wants to help anyone in various programs, we know that that help would have been very welcome to us in days where we were starting out, or even in days when we were going along in our business trying to grow.

The thing we see at this time is that the mandatory goals in the present programs are discriminating against companies such as ours. All we would ask is that there be in the bid document, where the prime contractor has to show what the minority prices are and which minority companies he used, we ask why can't there be a document made part of that bid, a page, that says, "These are the nonminority bids," and therefore the government and everyone concerned can at least view the comparisons.

So, then, to get on to answer your question, we feel the good faith efforts and affirmative action are definitely—they are probably even necessary. That part would go into the philosophical and the abstract of others who believe that these are the directions to take.

The part we feel is that the good faith effort and the affirmative action probably are necessary, that the only thing we would like to see is that contractors—for instance, to give a quick example, contractors *A, B,* and *C* all bid a job. contractors *A, B,* and *C* all use a nonminority low bid for their subcontracting.

Contractor *A* had two minority bids, contractor *B* had two minority bids, and contractor *C* had six minority bids.

Possibly contractor *C* has performed a better good faith effort than contractors *A* or *B,* and possibly *A* and *B* were lower bidders than bidder *C,* but at least in that way there was a contract requirement there to fill.

The way it is now, the prime contractor is forced to flat out discriminate against subcontractors such as ours and fill the mandatory goals, or his bid is deemed unresponsive by the DOTs. There is no waiver. He either fills the goal or he risks losing the job.

COMMISSIONER GUESS. Mr. Chairman, for the record, let me indicate that I think Mr. Stewart's answer to my question was enough. And I would also beg the indulgence of the Commission by asking one final question of Mr. Stout.

Mr. Stout, in your testimony you indicated that, "These programs are contrary to our best interest." Can you give me a definition of "our?"

MR. STOUT. To every American.

COMMISSIONER GUESS. Thank you.

CHAIRMAN PENDLETON. I have several questions.

Mr. Stewart, who is the minority population in your area for which the goals are set? Who comprises that minority population?

MR. STEWART. The minorities in the Spokane area are mainly black. I believe the minorities in the Seattle area are mainly black. I don't have exact statistics on that.

CHAIRMAN PENDLETON. Do you know of anybody else that is included that might be a subcontractor or business person, that may be included as a minority in any one of your areas other than black? All three of you.

MR. STEWART. The Indians in the State of Montana and the rest of our area.

MR. STOUT. We have Indians also.

CHAIRMAN PENDLETON. Are women also included?

MR. STEWART. Yes, sir.

MR. LESLIE. We have a different set of goals for women business enterprises, sir, other than minority business enterprises.

CHAIRMAN PENDLETON. Mr. Stout, what does affirmative action mean to you?

MR. STOUT. Affirmative action to me, Mr. Chairman, means that any person should have a right to seek that goal that he wishes to obtain.

CHAIRMAN PENDLETON. You think there should be some white goals in this process?

MR. STOUT. If we are going to say Indians, black—white, yes, there ought to be some white goals.

CHAIRMAN PENDLETON. Mr. Stewart, what does affirmative action mean to you? I'm asking you the same kind of question.

MR. STEWART. I've been the head of our EEO program since 1974, and affirmative action is to me definitely dedicating a part of my time to promote, upgrade, hire, etc., the blacks and minorities and women for work in our company. It's doing something.

CHAIRMAN PENDLETON. Mr. Leslie, what does affirmative action mean to you?

MR. LESLIE. I can answer what we're doing about it, sir.

CHAIRMAN PENDLETON. No, no, that's not what I want to know. I want to know what it means to you. I want to know what you've got to do something about. It's got to mean something before you can do something with it.

MR. LESLIE. My affirmative action, sir, is to go out and seek those minorities that are qualified to achieve the goals of the program and to include them in my work force, and we do so, sir, in our minority business enterprise program.

CHAIRMAN PENDLETON. We heard testimony from the last panel; I think it was Mr. Glazer or Mr. Welch who indicated that he thought the affirmative action process was institutionalized. Do you happen to think that that's the case so we could drop it now that it is institutionalized and that there would be a good-faith effort made by contractors to other people?

MR. LESLIE. Are you asking me, sir?

CHAIRMAN PENDLETON. Yes.

MR. LESLIE. Oh, absolutely. Again, I revert back to my original testimony where I said that I, as a business person, am looking to do business with people that are qualified in their trade or business to perform and produce at a reasonable level or at a low price so we can get the job together. Now, I don't care what color they are, sir.

MR. STOUT. I would like to respond to that, if I may, Mr. Chairman.

CHAIRMAN PENDLETON. Fine.

MR. STOUT. This goes along with another question that was asked about a buddy network.

Shortly after I got involved in this business and got into the highway field, it became apparent to me that the general contractors that were receiving bids from firms like ours were looking for one thing and one thing only, and that was the low bid.

I had made a statement that I could get a blank piece of paper and create a fictitious company on that piece of paper and walk out on the streets of Raleigh and find somebody off the street and fill in some numbers and have him take it in, and these guys would accept that as the low bid no matter how much lower than what it should have been that it might be.

That has been proven to me by a number of different firms that have come into the State of North Carolina from time to time, and they're coming from another area; they're used to doing work one way, and their costs are one thing, and they come into the State of North Carolina and they

bid ridiculously low prices and they get all the work. We had one outfit from Georgia one time who came in and took about three lettings in a row. They just got all the erosion control work and all those lettings, and they subsequently went bankrupt.

COMMISSIONER GUESS. Mr. Chairman, could I follow up with Mr. Stout on something that he said to you?

CHAIRMAN PENDLETON. Go ahead.

COMMISSIONER GUESS. This is on something Mr. Stout responded to you.

Mr. Stout, you opened up a very interesting concept in your response to the Chairman's question on the definition of affirmative action. This is what I understood you to say, that maybe we have reached the point where we need a goal or a set-aside or a fixed number for white contractors.

Would you be comfortable if, in the distribution of public funds, and at the same time maintaining the integrity of the public purchase system, you had the distribution of contracts awarded by a fixed number where only white men could bid on a percentage and only other groups could bid on a percentage, and only other people could bid on another percentage, based on your definition of affirmative action?

MR. STOUT. I don't think that's proper. I don't think that's the way to do it. I don't think in today's time we need a goal, period.

The way I understood the Chairman's question, if there are going to be goals, shouldn't there also be white goals. I don't think there should be goals, period.

COMMISSIONER GUESS. Okay, I understand.

Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. Mr. Destro.

COMMISSIONER DESTRO. I have a couple of questions for Mr. Stewart, if I may. I am intrigued by one of the comments in your written testimony about the MBE in Spokane getting all the work. Is the designation of that MBE dependent upon a Federal program, or is this the State of Washington's program in operation?

MR. STEWART. This is the State of Washington's program in operation. The State of Washington is somewhat of a leader in the Northwest for setting up standards for certifying minorities.

COMMISSIONER DESTRO. Assuming this is the State of Washington's program, is there any indication, to your knowledge, of how long this contractor is going to be the preferred contractor, or is it just stretching out into the indefinite future? Is there any sense of graduation or some indication made by the State that this person is now a viable contractor and can compete on an equal basis with everybody else?

MR. STEWART. I don't know that I am referring to any one particular MBE contractor in my statement, other than one that possibly—I did refer to a job in Montana that I was low bid on. Is that what you're referring to?

COMMISSIONER DESTRO. No, what I'm referring to is on page 2 of your statement you say, "Due to set-asides, the city of Spokane's only curb and gutter MBE contractor has received virtually all the city's contracts for that type of street work."

MR. STEWART. That possibly is a letter that I received in response to inquiries on feelings from prime contractors as to where we would stand in their bidding process were we to be the low bidder. Is that part of my testimony?

COMMISSIONER DESTRO. I'm pretty sure it is. This is in the interview with you.

MR. STEWART. Oh, I see. Okay.

COMMISSIONER DESTRO. You were responding to questions about it being ludicrous to consider local MBEs disadvantaged. You refer to—apparently there are three curb and gutter contractors in the city of Spokane, that one of them is on the ropes, one of them gets all the contracts, and the other one seems to get some of them. Is that the situation in Spokane?

MR. STEWART. It definitely is the way that I am told by the one that is hurting real bad. He has indicated that. I do have knowledge of the others. I have knowledge of the concrete company that supplies concrete to all these companies, and I know that it probably—I say probably—is pretty much true of what is happening. There is a tremendous imbalance there of the curb and gutter business because the city of Spokane does paving, and with their paving does curb and gutter work. And the curb and gutter work, with the 10 percent mandatory goals, definitely unbalances the way the work goes for the curb and gutter people.

COMMISSIONER DESTRO. Well, how does it work, then, with respect to the bidding on this curb and gutter work? Does the MBE come in lower sometimes, or does it work out to a mix, or do the other two contractors generally come in lower than the MBE? How does it work by way of mix?

MR. STEWART. I know how it works when our company is involved. We do not bid curb and gutter work. I think what I had done was mentioned there

a case that I was aware of. Like any other subcontractor, I have an awareness of what goes on within my area with bids that I am familiar with, so to speak, and of course, I am aware of the people in our area and what goes on, and that is probably what I was referring to there.

COMMISSIONER DESTRO. I'll tell you the reason I asked the question, because you had in here the situation of a local MBE that was getting a lot of work. Yesterday's testimony indicated that one of the reasons for the existence of MBE programs is to create a viable base in the minority community of qualified contractors. What I was wondering is if there are any indications in the State of Washington's program as to when that process is completed as to an individual contractor. And then does the business have to shift over to another MBE, or does the same one keep getting it?

Do you understand the thrust of my question?

MR. STEWART. I do understand your question completely, and it is a very simple answer. No, there is no time frame. There is no time frame that I am aware of where an MBE has graduated, so to speak, and is no longer—

CHAIRMAN PENDLETON. It's in perpetuity, Bob.

COMMISSIONER DESTRO. No dollar amount, either?

MR. STEWART. No dollar amount, either.

COMMISSIONER DESTRO. And that assumes—Commissioner Guess is asking—my questions all assume that the individual is not the low bidder. You wouldn't have any problem if the MBE is getting it because it's the low bidder, would you?

MR. STEWART. I'd have no problem with that at all. I think any contractor would see that competition is a necessary thing. That is part of the free enterprise system. And the whole point with our company, with our area, with our business community is, it just doesn't make any difference what color that man is.

CHAIRMAN PENDLETON. Mr. Stewart, I'm surprised at your answer. Mr. Stout said that anybody can bid low and do the job. I think one of the problems I've heard some of you say is you keep going back to the same person if they do the job right or not, which is a part of Mr. Destro's question—do you keep going back to the same person because that's the MBE, irrespective of performance? Does performance ever enter into this program at all from those who monitor it?

MR. STEWART. Performance—and that is a real good question. Performance is preferred by prime contractors. Performance is preferred. But when they have mandatory goals to fill, then performance has to be set aside so that minority goals can be filled.

CHAIRMAN PENDLETON. Bob.

COMMISSIONER DESTRO. I have one other question I'd like to ask. Mr. Stout raised it in his testimony. Mr. Leslie, I think, alluded to it, and in this interview that Mr. Stewart has, he mentions it specifically. And that is the question of the phenomenon of the inhouse MBE.

Now, I understand from Mr. Leslie's testimony that the State of New York is not willing to put up with that. Apparently the State of Washington is, and apparently the State of North Carolina—if it's really true that you can put that on a form and fill in names and fill in numbers, the State of North Carolina doesn't really hawk it that much, either. Is that the case in Washington and North Carolina?

MR. STOUT. In the North Carolina area, it is much, much stricter than it was a few years ago. And in all candor, it is something that we have looked at. But it is something that we decided that we're going to stay away from.

CHAIRMAN PENDLETON. Thank you very much, gentlemen.

MR. LESLIE. I'd like to clarify something I think was attributed to me. I think if you look at the State of New York, there are probably hundreds of varying agencies. The one agency that does not put up with it is the Department of Transportation, State of New York.

COMMISSIONER GUESS. The others do?

MR. LESLIE. The others you just fill those papers out and do what you have to do to get the job done, because otherwise you're not going to get it done, sir.

CHAIRMAN PENDLETON. Thank you very much. We will adjourn until 1:30 promptly.

[Recess.]

AFTERNOON SESSION

CHAIRMAN PENDLETON. Gentlemen, I'd like to swear you in.

[Ted F. Brown, Joel L. Burt, Donald L. King, and Patrick R. O'Brien were sworn.]

CHAIRMAN PENDLETON. Ted F. Brown is president of T. Brown Construction, Inc., Albuquerque, New Mexico. It's too bad Ms. Chavez is not here.

She knows something about Albuquerque. He holds a B.B.A. from Hardin-Simmons University in Abeline, Texas. The firm serves as general contractor on public highway construction, employs 60 persons, and grossed about $14 million in 1984.

Joel L. Burt is equal opportunity officer and safety and loss control manager of Copenhagen Utilities and Construction, Inc., Clackamas, Oregon, and holds an A.A. degree from Mount Hood Community College. The firm serves as a prime underground contractor on utility, water, and sewer system construction, employs 60 to 250 persons, and grossed about $7 million in 1984.

Donald King is secretary of King Construction Company, Hesston, Kansas, and holds a B.A. in philosophy and theology from Wheaton College. The firm serves as a general contractor on public highway construction, employs 85 to 125 persons, and grossed about $10 million in 1984.

Patrick R. O'Brien is vice president and general manager of OTKM Construction, Inc., of Portland, Oregon, and holds a B.S. in construction engineering from Oregon State University. The firm serves as general contractor on commercial, industrial, and public works construction, employs about 35 persons, and grossed about $3.7 million in 1984.

Counsel.

MR. HOULE. Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. Excuse me. When you see me walk out, I have to go up and find out where the money is up on Capitol Hill.

TESTIMONY OF TED F. BROWN, PRESIDENT, T. BROWN CONSTRUCTION, INC., ALBUQUERQUE, NEW MEXICO; JOEL L. BURT, EQUAL OPPORTUNITY OFFICER AND SAFETY AND LOSS CONTROL MANAGER, COPENHAGEN UTILITIES AND CONSTRUCTION, INC., CLACKAMAS, OREGON; DONALD L. KING, SECRETARY, KING CONSTRUCTION COMPANY, HESSTON, KANSAS; AND PATRICK R. O'BRIEN, VICE PRESIDENT AND GENERAL MANAGER, OTKM CONSTRUCTION, INC., PORTLAND, OREGON

MR. HOULE. Mr. Brown, would you please state your full name, address, and occupation or affiliation for the record?

MR. BROWN. My name is Ted F. Brown, general contractor from Albuquerque, New Mexico.

MR. HOULE. Mr. O'Brien, would you please state your full name, address, and occupation or affiliation for the record?

MR. O'BRIEN. My name is Patrick R. O'Brien. I'm a general building contractor from Portland, Oregon. Would you like my address?

MR. HOULE. Yes.

MR. O'BRIEN. 1236 14th Street, West Linn, Oregon.

MR. HOULE. Mr. Burt, would you please state your full name, address, and occupation or affiliation for the record.

MR. BURT. My name is Joel Burt. I live at 9005 Northwest Anna Court, Portland, Oregon. I represent Copenhagen Utility and Construction.

MR. HOULE. And, Mr. King, would you please state your full name, address, and occupation or affiliation for the record?

MR. KING. My name is Donald L. King. I reside at 154 Terrabury Lane in Wichita, Kansas. I am secretary of King Construction Company out of Hesston, Kansas. We are bridge contractors.

COMMISSIONER BUCKLEY. Before we continue, is there anyone in the room that is hearing-impaired or requires any kind of assistance for this session? Hearing none, thank you.

You may continue.

MR. HOULE. Mr. Brown, before we begin the questioning, I believe that you have a written statement that you would like to submit.

MR. BROWN. Yes.

MR. HOULE. Commissioner Buckley, I would move that Mr. Brown's written statement be admitted into evidence.

COMMISSIONER BUCKLEY. So ordered.

MR. HOULE. Thank you.

Mr. Brown, would you please briefly state your firm's problems with set-aside programs?

MR. BROWN. The worst problem I have with the agencies—

MR. DISLER. Excuse me. We are going to have to wait until a Democratic Commissioner appears, according to our rules. Will you hold on a minute while we round them up. We lack a quorum. I'm sorry for the delay, but we will have to wait until Mr. Destro arrives.

[Recess.]

COMMISSIONER BUCKLEY. If we can reconvene at this time, Mr. Destro is present.

COMMISSIONER GUESS. Madam Chairman, I would like to note for the record that once again the Democrats are a day late and a dollar short.

[Laughter.]

COMMISSIONER BUCKLEY. We will resume and, again, our apologies to the panel.

COMMISSIONER DESTRO. And I would like to note my apologies formally for the record as well for being late.

MR. HOULE. Mr. Brown, would you please briefly state your firm's problems with the set-aside programs?

MR. BROWN. Well, the agencies have made it quite clear to us that they will not award any contracts to us if we do not meet their goals. They have essentially told us, "Meet the goals at any cost." This often means that we have to go find DBE firms, and they don't really want to bid or they're trying to hold out. You have to go beg some of these people to give you subcontract bids.

Sometimes it's just difficult to find a sufficient number of people to meet the goals that have been set up. We have even had subcontractors come to us and say, "Write down whatever number you want, and add 15 percent to it, and we'll do the work for that." And they'll take care of it that way. Well, that's just essentially a sham deal.

But in the end, what we end up doing, is we must add a premium to our bid in order to use some of the quotations that are low. We must reject some bids that are low from nonminority firms, which is really not fair. And we have noticed that some of the better firms over the years who have done good work can't get work anymore because we have to meet our quotas. And they're just pulling out of the work. They are not around anymore. So we are actually losing good people.

So many of these percentages, I think, are just a statistical thing with inaccurate statistics. And if we go to the agencies and we are short on a goal, or if we protest their program, they just treat us like bigots.

MR. HOULE. Could you give us some specific examples as to how your firm has either lost jobs to higher bidding firms or just failed to bid jobs because of set-asides?

MR. BROWN. Well, we have actually been harmed in that there are jobs that the Bureau of Indian Affairs let, that are Indian set-aside jobs, 100 percent set-asides for total Indian firms. And there are no real Indian highway contractors in New Mexico. Most of the time we can't even get a set of plans on these jobs.

The other day there was a $4 million job. A set-aside job went for over $400,000 over the engineer's estimate. I think this is just bad for the taxpayers.

In addition, to meet some of these goals we have to idle some of our equipment. We have actually just gotten out of some specialties because we can't do this work anymore because we have to turn this part of our work over to a minority firm.

MR. HOULE. Prior to implementation of set-asides in the Albuquerque area, Mr. Brown, was it your experience that there were large numbers of established minority construction firms there in the local trade?

MR. BROWN. There was a reasonable number of minority firms already established.

MR. HOULE. Do you believe, Mr. Brown, that there is a buddy or an old boy system among contractors that works to the disadvantage of women and minorities?

MR. BROWN. Not in our area. It absolutely is not. A businessman just can't afford to discriminate in this kind of work. What we look for is the best bid. That is not necessarily the lowest bid but the best bid, the one that gives a good price plus good delivery and has a past history of good quality work.

MR. HOULE. Some observers claim that some women- and minority-owned firms relying on a perceived share of the construction market do not take all steps available to be more competitive. Would you please comment on that statement?

MR. BROWN. I think a few people have tried to take advantage of the fact that they have to have you, or that we have to have them. We have had instances where, in finally obtaining a quote, we asked the subcontractor if he would furnish us a performance bond, and he says, "No, I'm saving my bonding capacity for some real work."

MR. HOULE. Briefly, Mr. Brown, how would you suggest assisting women and minorities entering and succeeding in the construction trade?

MR. BROWN. Well, I think one thing, just generally speaking for minorities in general—not necessarily subcontractors, but all of them—in our educational system if we just do one thing and teach them impeccable English, I think this would do a lot to help the self-image these people have to present to people. I think this would do a lot to promote the cause.

Generally speaking, I think the elimination of this program is really what is needed and just let the free enterprise system work. Anybody can draw up a set

of plans and anybody can bid a job. There's nothing to lock them out.

MR. HOULE. Thank you.

Mr. O'Brien, do you have a written statement that you'd like to submit?

MR. O'BRIEN. Yes, I do.

MR. HOULE. Commissioner Buckley, I would move that Mr. O'Brien's written statement be admitted into evidence.

COMMISSIONER BUCKLEY. So ordered, and the clerk will please pick it up.

MR. HOULE. Thank you.

Mr. O'Brien, would you please state your firm's experience and problems with set-aside programs.

MR. O'BRIEN. Our major problem is with the way the MBE programs are administered by local bodies. Being a building contractor, we don't normally deal with the Federal Highway Administration. Most of the public money that is spent on our projects is administered and handled locally with some Federal assistance. So the MBE set-aside programs are passed down from Federal to State to local. And by the time they get down to our level, I'm sure you may find some of those plans unrecognizable. And they suffer in interpretation. They end up quite a few times being settled in court. We ourselves have lost two projects by what we feel was misinterpretation of the MBE plans.

MR. HOULE. Would you very briefly categorize the problems that your firm has had, the type problems?

MR. O'BRIEN. Well, the first example I have, of course, is a project we did, about a $3 million project. The plan was very specific. Any contractor that attains a 10 percent MBE goal and has a low bid will, of course, receive the project. If the low bidder does not attain 10 percent MBE participation, then they will go to the next bidder, and if that bidder has 10 percent MBE participation, he will be awarded the contract.

As it turned out, we were the only contractor to have 10 percent MBE participation. The contracting agency allowed the low contractor to go back after bid time and secure his MBE participation, which effectively meant that subcontractors that were low at bid time were bumped, and new subcontractors were brought in to bid the work. This in itself is a real circumvention of the bidding process. This contractor came up with 8.5 percent after the bid and was then awarded the contract, contrary to the MBE we were working with.

MR. HOULE. Were there other jobs that your firm failed to bid in the last 2 years?

MR. O'BRIEN. In my testimony you will find my example B. After those two projects, we completely left the public bidding market. We just felt that as difficult as it was to secure work in Oregon at the time on a public basis, being low was a rare occurrence. And when you were low and then did not get the work, it just wasn't worth the effort. It's a very expensive process to prepare a bid. We spend, on a million dollar contract, anywhere from $3,000 to $4,000 or more. And you do that three or four times a week for any given number of weeks, and after a while it just becomes a futile effort.

MR. HOULE. In your opinion, Mr. O'Brien, has the set-aside program helped women and minorities in Oregon to enter and succeed in the construction trade?

MR. O'BRIEN. No.

MR. HOULE. Why?

MR. O'BRIEN. What has happened is we have a lot of regulation now, of course, and through the natural process of regulations, people have determined ways to circumvent the regulations. So right now in Oregon, and it sounds like most of the other States, we have minority companies started up with a minority head and a white Anglo-Saxon work force and management force. And essentially you have one minority that is being benefited by the tremendous amount of money that the Federal Government is spending to go to the second bidder or the third bidder who happens to have the 10 percent MBE participation. And the impact on the local minority community is maybe one or two people.

Again, in Oregon we're talking about millions of dollars that are just being wasted.

MR. HOULE. So in your line of construction, it is really only a couple of minority firms that seem to be substantially benefiting from the set-aside program?

MR. O'BRIEN. There are a couple of firms that I'm sure are benefiting. On the other hand, I know quite a few minority firms in our area that don't even bother to participate in the MBE program. They just feel they don't need it.

MR. HOULE. Mr. O'Brien, do you believe that there is a buddy or a good old boy system among contractors that works to the disadvantage of women and minorities?

MR. O'BRIEN. Absolutely not. I feel there is no doubt that the general contractor is looking for the low responsible bidder to do the work. If he uses any other practice, especially on public work, to acquire his subcontractors, he is not going to get the job. And it doesn't matter what color you are or what sex you are.

MR. HOULE. Some observers claim that there are women- and minority-owned businesses that rely on a perceived guaranteed share of the construction market due to set-asides and, as a result, do not take all the steps available to become more competitive. Would you please comment on that?

MR. O'BRIEN. We do see that, primarily—well, I feel in our area we have some minority contractors that could be determined to be opportunists. They see an opportunity to get work to make some money, and so they enter the construction field for that very purpose. They have an advantage over their competition, and they are using that advantage to benefit them.

An example would be a project that we bid several years ago. We received painting bids. The painting bids ranged anywhere from $10,000 to $20,000. The MBE bids started at $50,000 for this very same project.

Again, I know this particular subcontractor involved on the MBE side, and he has made a practice of going around and, "I'm an MBE contractor and here's my bid."

MR. HOULE. You are referring to so-called corporate shells?

MR. O'BRIEN. I wouldn't say this guy is a corporate shell. I think he has a legitimate independent business and doesn't appear to be connected with anyone, but he certainly is taking advantage of the process.

MR. HOULE. Would you say that problem is fairly widespread in your area?

MR. O'BRIEN. I wouldn't say it's widespread. I'd say it's common.

MR. HOULE. One last question, Mr. O'Brien. What changes, if any, to the set-aside program would you recommend to make it more efficient?

MR. O'BRIEN. Well, I don't know if we could make changes for the current set-aside program to make it more efficient. What I would suggest is that we need to determine how much money is being wasted with the current set-aside program, and if we are to be able to use even a fraction of that money to set up educational programs at the community college level, maybe even in the high schools, both remedial and higher education type programs, and give these people some tools to work with, and let them get into the major construction markets and start out at the bottom and work their way through the construction industry. I think the opportunity is there, but we need to give them some basics. We can't start them out at the top and expect them to succeed.

MR. HOULE. Thank you, Mr. O'Brien.

Mr. Burt, I believe you have a written statement you'd like to submit.

MR. BURT. Yes, I do.

MR. HOULE. Commissioner Buckley, I move that the statement be admitted into evidence.

COMMISSIONER BUCKLEY. So ordered, and will the clerk please pick it up.

MR. HOULE. Thank you.

Mr. Burt, would you please state what your firm's problems have been with set-aside programs.

MR. BURT. Yes. We have not always been a prime contractor, naturally. We were a subcontractor for many years, but most of our work now is prime contracting. So we know the experiences, and we have been hurt on both sides of the fence, you might say.

One of the ways that we have been hurt, to give you a specific example, is that we were low on a job, $8.2 million light rail project, and we were low, incidentally, by $747,000, which is a considerable amount.

Due to some mitigating circumstances we were unable to obtain the 15 percent required goal. We only obtained 11 percent. And I suppose we were naive enough to think that all of our efforts prior to that to obtain the MBE goals would suffice, and I'm referring to the good faith efforts.

Two months later, $20,000 in attorney fees, they said, "Well, your efforts just weren't good enough. You didn't get the goals."

So that is one specific way, and that happens quite frequently in our part of the country, and apparently all over now, from what I understand today.

Another way it's hurting us, it forces contractors to make decisions that literally affect the survival of their company. They would make decisions that ordinarily they wouldn't make, but due to the present program they are forcing the contractor to do things they ordinarily wouldn't do.

MR. HOULE. Such as?

MR. BURT. Well, one particular example would be, because one has to obtain the goals now, there is no question that you would need to get your 10 percent, or whatever the goal may be. If you cannot find a subcontractor, that's part of your problem, but if you can find one and, for instance, he can't be bonded, then you have to make a decision whether to accept this subcontractor without bonding. And bonding, incidentally, just for the record, is not a type of insurance. It is a guarantee that if you cannot perform the work, you will pay for the damages incurred. So it's not an insurance policy at all. It's based on your assets.

The point I'm trying to make here is, even if we wanted to bond someone, it is not our decision. Bonding companies are allowed to make prudent business practice decisions, and they often say they won't bond this subcontractor.

So the contractor has to decide: Does he assume all the risk? And often, to get the job you have to. And we have been damaged a couple of times because of MBEs defaulting, and we had to go in and pick up the pieces, and they weren't bonded.

MR. HOULE. Specifically, Mr. Burt, you had earlier mentioned the effect of bonding and good faith efforts and also your firm's experience with a couple of urban mass transit jobs. Would you briefly describe your experiences there?

MR. BURT. With the good faith efforts?

MR. HOULE. Yes, and with those UMTA jobs.

MR. BURT. Well, just a real brief background. We are a specialty contractor, specializing in underground construction. On this particular project, there was a large portion of the underground involved for this project, and we were going to sub out the other portions for our MBE portion.

Prior to bid, it was quite obvious that we just couldn't find anyone to quote on these jobs. We almost went out there and dragged them in and begged them to bid, but it was either too big for them or too sophisticated a project.

So it was obvious that we weren't going to be able to make our full 15 percent, and we knew that. So we went out of our way to try and exceed those eight steps that the Federal Government has laid out for good faith efforts. One of the problems was the second bidder did achieve his goal, but he did it because he subbed out our type of work; incidentally there happen to be three other minority underground contractors in the State of Oregon. So he made the entire MBE goal with just our portion of the work, if you will.

So that put us at an unfair disadvantage. He could immediately fill his entire quota with just one portion of the job that he wouldn't do anyway, whereas it was just the opposite with us.

We went through the steps, and UMTA finally said, "Well, you apparently didn't make the goal, so therefore, your efforts weren't good enough. We'll deny you any relief."

So from that day on we have resigned ourselves that this will never happen again. We will obtain our goals, and if we have to, either we'll pass the job up—

MR. HOULE. Mr. Burt, briefly, because of time, would you also relate your firm's experience with the $10.5 million UMTA job, the default of your subs?

MR. BURT. Right. Bonding is a particularly sore issue with contractors because you must recognize that the Federal Government does not acknowledge subcontractors. The prime is held totally responsible. If your subcontractors don't perform, that's your problem.

So we make it an across the board policy always to get bonding. If we cannot get bonding, then we have to go in and pick up the pieces.

We had a $10.2 million irrigation project for the Bureau of Reclamation, and because we were prudent enough to get bonding—these were nonminorities, incidentally—and we had an 80 percent failure rate of subcontractors. Fortunately, they were all bonded, so the bonding company stepped in and they picked up the tab to complete the project.

MR. HOULE. Thank you, Mr. Burt. I realize you do have other testimony, but I believe it's included in your written statement, which we will certainly be reading.

Mr. King, would you briefly state your firm's problems and experience with set-aside programs?

MR. KING. First of all, I do have some testimony to submit. Would it be possible to do so at this time?

MR. HOULE. Certainly. Commissioner Buckley, I move that Mr. King's written statement be admitted into evidence.

COMMISSIONER BUCKLEY. So ordered, and will the clerk please pick it up.

MR. HOULE. Thank you.

MR. KING. Yes, I can certainly tell you about our experience. Most of our work is done for the Kansas DOT, and the set-aside work in that State is

basically a two-pronged requirement. We have the WBE or women's business enterprise, and we have the DB or disadvantaged business, meaning minority-owned businesses. We fully understand the intent of this requirement, but in plain and simple terms it just is not working.

To briefly summarize some of the problems we have had, after the expensive and extensive bid solicitation letter sequence that we follow, we often find that the response rate is extremely low, somewhere in the 10 to 15 percent range. The responses that we do receive are quite a bit higher for minority contractors than from nonminorities. But this places us in almost a Catch-22 situation, because if we use the higher subcontract price, we may not get the project because we are not low bidder. But by the same token, if we do not use that price, we may not fulfill our minority quota.

MR. HOULE. Do you have any specifics, Mr. King?

MR. KING. Yes, I sure do.

As far as one particular—well, two jobs. One was in August of 1983. We were low bidders on a KDOT bridge project. Our total bid was $177,000, but because we did not meet our quota, it was given to a second bidder who was $10,000 higher.

In April of 1980 we were low bidders on a Federal Aviation bridge project. Our price was $490,000, and again it was awarded to the second bidder because we had been unable, even through a good faith effort, to meet our minority quota.

We have also had the unpleasant experience of having two minority subcontractors default on us. In both cases they were very costly. One cost us in excess of $35,000, and the other was in excess of $12,000.

MR. HOULE. These were costs that your firm had to bear?

MR. KING. That is correct. These are cold cash figures. They do not include time delays, transferring of crews, and other administrative nightmares.

MR. HOULE. Do you believe, Mr. King, that the set-aside program as you observe it out in Kansas is significantly assisting women and minorities to enter and succeed in the construction trade?

MR. KING. You know, it depends on how you choose to define success. By success, if you mean playing by the same rules as most who have established themselves, namely, hard work, sound business practices, and open competitive bidding, yes. They are going to receive sufficient help, and they will succeed. But on the other hand, I think if by success you mean continued unfair bidding practices, instant gratification through government quotas, and the false sense of security that goes with it, then I really question whether they are going to be helped.

In my opinion, the greatest way to help women and minorities succeed is not by encouraging them to go into their own business in a premature or untimely fashion. It really is quite a cruel joke to lead them along and allow them to think that this is going to be an easy road.

MR. HOULE. Do you believe there is a buddy or an old boy system or network among contractors in your area that works to the disadvantage of women and minorities?

MR. KING. No, I do not. I think if such a system existed it would be counterproductive to the goals that have been established for the 1980s.

MR. HOULE. One last question, Mr. King.

MR. KING. Yes.

MR. HOULE. How would you suggest that the set-aside program be amended, if at all, to make it more efficient and fair, in your opinion?

MR. KING. First of all, I would place some sort of graduation or sunset clause. By that I mean once a minority contractor has been operating under this program for 2, 3, or 4 years—you name it—then they would have to either graduate or move on in some fashion. I think more rigorous qualification tests should be given.

Also, prime contractors should not be held responsible for the incurred debts of the subcontractors.

I would also add if a firm is inactive or dormant for an extended period of time, they should be withdrawn, because it's not helping them to be on the rolls if they are not truly going to be a legitimate contractor.

MR. HOULE. Commissioner Buckley, I have no further questions.

COMMISSIONER BUCKLEY. Thank you very much. Commissioner Guess.

COMMISSIONER GUESS. Thank you, Commissioner Buckley.

I just have a couple of questions, members of the subcommittee.

Mr. Brown, first of all, you indicated in your presentation before the Commission that agencies in the State of New Mexico, I presume, indicated that

you should meet your MBE goals—and I quote—"at any cost," end quote.

Now, are you willing to assert, as I think I heard you say, that you were advised by public officials in the State of New Mexico that in pursuit of this program you should never take cost into consideration regardless of it, that you should meet these goals at, quote, "any cost."

MR. BROWN. What they told us is, "Price is no object. Meet the goal."

COMMISSIONER GUESS. And you want this contained in this public record?

MR. BROWN. That's what they said.

COMMISSIONER GUESS. Would you be willing, for any further review of this matter, to state who those public officials are?

MR. BROWN. Yes, I would.

COMMISSIONER GUESS. Mr. O'Brien, you pointed out that one of the prime considerations is that this program has not assisted minorities and that millions of dollars are being wasted. First of all, I'd like to ask you: Do you have any farmers in Oregon?

MR. O'BRIEN. We have quite a few farmers in Oregon.

COMMISSIONER GUESS. So you support the farm price support subsidy program?

MR. O'BRIEN. Not as I understand it right now, but I have to be honest with you, I've been too tied up in this testimony to really pay attention to it.

COMMISSIONER GUESS. Do you support any activity to aid and assist farmers in Oregon, that is, operating out of the Federal Government?

MR. O'BRIEN. If you're talking about assistance in the form of low-interest loans as an example or perhaps, if I could put it into terms of the construction industry—let's say we have minority subcontractors and the government were to guarantee performance and payment bonds for these subcontractors and take the risk of their financial responsibility off the backs of the general contractors, then I would certainly support something like that.

COMMISSIONER GUESS. Well, would you support a cash payment to minority contractors—some differential, say?

MR. O'BRIEN. No, I would not. Personally, I don't think anybody benefits by having money handed to them without earning it.

COMMISSIONER GUESS. Okay. I agree. However, if that program was made available, regardless of the process through which it was made available, would you encourage farmers in the State of Oregon to take advantage of it?

MR. O'BRIEN. If the program involved some type of low-interest loans with a repayment schedule and that type of thing, I'd certainly—

COMMISSIONER GUESS. Let's say that the program involved a program by the Department of Agriculture to make cash subsidies available to farmers. Would you encourage farmers in the State of Oregon to take advantage of it?

MR. O'BRIEN. Well, again, I'm not in favor of subsidies at all, to be honest with you.

COMMISSIONER GUESS. In all due respect, Mr. O'Brien, you haven't answered my question. Would you encourage—

MR. O'BRIEN. It's a difficult question for me to answer. I'm not a farmer.

COMMISSIONER GUESS. No, but you're a citizen of the State of Oregon. Would you encourage your fellow citizens in the State of Oregon who happen to be eligible for a farm subsidy program to take advantage of it?

MR. O'BRIEN. I would certainly encourage them to take advantage of available government programs.

COMMISSIONER GUESS. So in that instance, as you point out, all the minority and MBE participants were doing was taking advantage of the process. Would you also encourage them to take advantage of the system?

MR. O'BRIEN. Well, again, I think the system could be set up quite differently to allow minorities to take advantage of the system. Right now, the way the system is set up, very few minorities are actually taking advantage of the system or benefiting by it, at great expense to the Federal and local governments.

COMMISSIONER GUESS. Okay.

Mr. King, you indicated in your testimony before the Commission that you have had a couple of minority subcontractors default. You had two. I believe you gave specific examples.

MR. KING. Yes, we had two. They were both grading contractors.

COMMISSIONER GUESS. And they defaulted on the project.

MR. KING. That is correct.

COMMISSIONER GUESS. Have you ever had a subcontractor of majority status default on a project?

MR. KING. No, not in the 35 years of our company.

COMMISSIONER GUESS. Is there any evidence that majority contractors default on projects other than in the State of Kansas?

MR. KING. I'm sure that would exist, that possibility, yes.

COMMISSIONER GUESS. You indicated emphatically, as did other members who have appeared before the Commission, that no buddy system tends to exist in the construction industry; is that correct?

MR. KING. That is from my viewpoint, yes.

COMMISSIONER GUESS. Let me assure you that everyone else who has testified on that question has also indicated in vigorous terms that no buddy system exists in the construction industry. Could you venture a guess as to why there seems to be such widespread belief that a buddy system does exist in the construction industry?

MR. KING. I think the construction industry as a whole has had a bad image in the past. And we have perhaps been the last frontier of the major businesses to become more sophisticated, if you will. We now have computers in our offices just like everyone else.

I'm sure that a buddy-buddy system existed in the past. I think we are ridding ourselves of that problem, and due to the current Federal regulations that we are having to deal with, a contractor would be an absolute idiot to proceed with a buddy-buddy system.

COMMISSIONER GUESS. So what I understand you to say for the record is that no buddy system exists today, but it possibly could have existed in the past.

MR. KING. That's quite possible.

COMMISSIONER GUESS. I have one final question, Mr. King, which is a follow up to the question I asked Mr. O'Brien, and I will assert in this instance that there are farmers in the State of Kansas.

MR. KING. That is correct.

COMMISSIONER GUESS. Would you encourage farmers in the State of Kansas to take advantage of those programs that are made available to enhance and provide artificial stimulus into the market?

MR. KING. I would encourage them to, if they felt it was the best thing to do in the long run.

COMMISSIONER GUESS. So do you support or do you take issue with the President's veto of the farm aid bill?

MR. KING. I cannot speak to that issue. Like Mr. O'Brien, I have been tied up with this and I'm not going to touch that.

COMMISSIONER GUESS. But you do support Federal entry into the agricultural market?

MR. KING. I refuse to answer that question.

COMMISSIONER GUESS. Okay. Thank you.

COMMISSIONER BUCKLEY. Mr. Disler.

MR. DISLER. I just wanted to follow up a line of questioning with both Mr. O'Brien and Mr. King, notwithstanding the fact they are not farmers.

Mr. O'Brien, when Commissioner Guess put to you the question as to whether or not you could support a farm support program for the farmers of Oregon, did you not assume, implicit in Mr. Guess' question, that that program was open to farmers of both races?

MR. O'BRIEN. I definitely assume that.

MR. DISLER. And do you sense as a citizen of this country that there is a distinction of some significance between a set-aside program that is based on, let's say, farmers, older people who get social security, poor people who might get welfare payments—those kinds of subsidies open to people of both races, those kinds of programs on the one hand, and a program that sets aside on the basis of race? Do you sense some kind of distinction along those lines, I wonder?

MR. O'BRIEN. I sense a loaded question.

MR. DISLER. It's a leading question, not a loaded one.

COMMISSIONER GUESS. That's right, Mr. O'Brien. I have another one for you.

[Laughter.]

MR. O'BRIEN. Again, when it comes to just flat subsidies for people that have particular problems, I certainly think that if they have a distinct disadvantage in matters of survival or education or handicaps of some type, or age, they definitely should be addressed. But on the other hand, I think if we are talking about able-bodied people that have the ability to succeed, whether it's in the normal course of business or what have you, then I don't think that subsidies should be permitted.

Did I get around that all right?

MR. DISLER. Whatever your answer is, is valid as far as I'm concerned. I was just wanting your opinion.

Mr. King, when the question was put to you, did you assume that subsidy was open to farmers of both races?

MR. KING. That is correct.

MR. DISLER. Do you see a difference between programs that set aside on the basis of size of business, occupation, that are open to people of both

races, as opposed to programs that are open to only—

MR. KING. Yes, I do. There is a difference.

COMMISSIONER GUESS. May I, Commissioner—

COMMISSIONER BUCKLEY. Are you through?

MR. DISLER. I am.

COMMISSIONER GUESS. Mr. O'Brien, let's go back, following up on the General Counsel Mark Disler's question. What's his job now?

[Laughter.]

COMMISSIONER GUESS. I just read somewhere he got a promotion so I didn't know if they made him super General Counsel or General Counsel to the third power or something.

MR. DISLER. With a greater subsidy.

COMMISSIONER GUESS. A greater subsidy to the General Counsel.

[Laughter.]

COMMISSIONER GUESS. Mr. O'Brien, implicit also in my question, did you presume that the basis of these programs was the fact that minorities and women have historically been denied entry into the marketplace?

MR. O'BRIEN. Well, again—

COMMISSIONER GUESS. And were they historically denied entry into the marketplace by virtue of their race?

MR. O'BRIEN. I certainly cannot deny that.

COMMISSIONER GUESS. Mr. King, did you make the same presumption?

MR. KING. No, I did not.

COMMISSIONER GUESS. So do you feel that minorities and women have historically been denied entry into this marketplace?

MR. KING. Not within my frame of reference, no.

COMMISSIONER GUESS. Not within your frame of reference.

Okay. I looked with care and Mr. King's nose did not grow, so I take his word for it.

[Laughter.]

COMMISSIONER BUCKLEY. Are you finished?

COMMISSIONER GUESS. For the time being, Commissioner.

COMMISSIONER BUCKLEY. Commissioner Destro.

COMMISSIONER DESTRO. The first question is for Mr. O'Brien. You said, as I recall, that you have now moved out of the realm of bidding on some of these government contracts because it's such a hassle; is that correct?

MR. O'BRIEN. Hassle, I think, is an understatement.

COMMISSIONER DESTRO. All right. I'm just getting the thought across.

In terms of bidding on nongovernment contracts, what is your experience over time since you have opted out of the government contract bidding process with minority contractors bidding with you on these nongovernment contracts? Do you find that the percentages are the same or not the same, that you're getting a different range of responses in your bids?

MR. O'BRIEN. As I mentioned earlier, we do deal with minority contractors without government insistence that we do. In our private work we have minority subcontractors working for us at this time. We also have subcontractors that, as far as I'm concerned, would definitely qualify as minority contractors, but they don't fit the government definition and so they are not allowed to be minority subcontractors.

COMMISSIONER DESTRO. Would you explain that for the record? What do you mean by that?

MR. O'BRIEN. I'll be more specific, yes.

I have a painting subcontractor in particular that is an Egyptian. He is now a citizen of the United States. He looks Egyptian, he sounds Egyptian, but he paints very well. He is a Coptic Christian. In his own country he is a minority—a very disadvantaged minority in Egypt—and yet in this country he does not qualify as a minority contractor. And he has managed to succeed in this country as a painting contractor without any assistance from the government.

COMMISSIONER DESTRO. Some of the defined minorities under the EEO characteristics or the MBE characteristics—when you work with them, do you have any companies that would fit your definition of a minority company that may not be 51 percent owned by a minority?

MR. O'BRIEN. Well, the companies that we deal with on a private basis, of course, that's irrelevant as to who owns them. But I would say the minority companies that we deal with are solely owned by that minority, and there are no outside influences, other than the standard banker, bonding agent routine.

COMMISSIONER DESTRO. You said your primary problem, as I recall, was with the administration of the MBE programs.

MR. O'BRIEN. That is correct.

COMMISSIONER DESTRO. Does the State of Oregon have different standards than the Federal standards for its projects, or are they the same?

MR. O'BRIEN. No, the State of Oregon is not the only government in Oregon, of course. We have all levels of government, all the way down to the smallest school districts. In fact, we have even compounded our problem by adding another level of government we don't have in other areas, and that's a tricounty service district. So the end result is all of these governments, if there is any Federal money involved at all, have adopted some form of Federal guidelines for MBE programs. And every single one of them suffer to different interpretation. In our area, we must have 10 or 12 different certified minority business enterprise price lists. Some government bodies you can bid for that project—you have to be on their list in order to use that MBE in the project for your MBE participation, and in other government bodies they are not qualified because they are not on their list.

COMMISSIONER DESTRO. Okay; thank you.

Mr. Brown, there is a question I wanted to ask you based on your testimony. As I recall, you said that there were no Indian contractors in New Mexico; is that correct?

MR. BROWN. Well, what I said was there is no real Indian highway contractors. There are some Indian contractors. Typical of what has been happening is perhaps an Indian house contractor, house building contractor, will bid a highway job, an Indian set-aside highway job. What he'll do is he will go to a nonminority firm and say, "I want to bid this job. I don't want to fool with it. You just give me the price; you do the work. I'll mark it up and turn it in, but I don't want to have anything to do with this. You do all the work."

That's the kind of thing we see.

COMMISSIONER DESTRO. Are you a New Mexico native?

MR. BROWN. Yes.

COMMISSIONER DESTRO. Why in your experience would you say there aren't any native New Mexican Indian contractors? Doesn't that say something to you about access to the market?

MR. BROWN. I don't know there have not been any. Perhaps it's been—well, I think that we have made addicts of the Indians. We have addicted them to the government. And they don't know how to get along without the government doing things for them. And there is not really much Indian enterprise of any kind.

COMMISSIONER DESTRO. What about the experience with respect to access of those same Indians to the majority contracting firms, working in them as laborers and being promoted up through the ranks? Has there been any problem in your recollection that the Indians have faced with that?

MR. BROWN. No, the construction work forces—I'm speaking for our work forces—when we are working in an Indian area, we hire a large percentage of Indians. We have a job right now in Arizona that I think about 90 percent of our work force is Indian labor of all types, including supervisors.

COMMISSIONER DESTRO. How many of those supervisors are you going to take with you when you leave the Indian area?

MR. BROWN. We'd love to take some of them, but they won't leave the area.

COMMISSIONER DESTRO. What about in New Mexico? You mentioned Arizona. I'm looking at the question that I think that a number of people have raised in terms of an old buddy system, but I'm not looking at it in terms of a buddy-buddy system but the natural progression of people through the work force and then kind of out on their own. It just surprises me that you're telling me that there are no big contractors after all these years. What explains that? How many Indian supervisors do you have in your New Mexico work force?

MR. BROWN. It depends on where we are in the State. I'd say New Mexico is similar to Arizona. If we are in an Indian area, we have quite a few of them. When we move away, they generally do not want to move off the reservation and wish to stay there.

COMMISSIONER DESTRO. One other question for Mr. Burt.

You talked, I think, at the greatest length about the process of bonding, and I need to understand a little bit more about the process of bonding. And you indicated that even if you wanted to help them get a bond, you might not be able to. At least in my own mind, where the fuzziness, where an antidiscrimination lawyer would look for discrimination, is in the term "responsible bidder," and that it's possible to turn somebody down as a responsible bidder if they can't get a bond. If they can't get a bond because they have never done any work before, then it becomes a Catch-22 for them. How do you get around that kind of a problem?

MR. BURT. That's an excellent question. I'm glad you brought that up. The bonding process, as I mentioned, is one of the touchiest subjects with the contractor because the bond is not automatic. One has to have assets. But it is no different with a minority contractor than with anyone starting out. You just don't buy a pick-up truck, put your name on the side of it, and say, "Now I'm a contractor." You can do that as long as you don't have any equipment or anything else, but as soon as you go to buy equipment, which you need to do the contracting, just like any banker is going to say, "Where are your assets? Can you pay for it?" when you bond a project you may be able to be bonded to, for instance, a $50,000 limit, but you may be bidding on that portion of the job that may be $200,000. So you have to have something to show the bonding agent that if you default or you cannot do the job, what can he sell to make up the difference?

Again, everyone experiences the same thing, whether you're a minority or a majority contractor. It's really irrelevant when it comes to bonding.

Another important point I would like to make is that if a prime contractor cannot be bonded, then he is rejected, as you mentioned, as a nonresponsive bidder. But this was one of the problems we had trying to get across to the Federal Government, that as soon as we reject a subcontractor, whether it be minority or majority—we do the same thing with everybody—then we suddenly are discriminating or we don't meet the good faith effort goals.

COMMISSIONER DESTRO. Let me go back to Mr. O'Brien—and this will be my last question. You were asked the question about subsidizing farmers. If the program for minority business enterprises were not tied to the percentage goals but were aimed at helping people to get started, like providing almost a guaranteed bond for the minority business enterprise, would you have as much problem with it as the process we have now?

MR. O'BRIEN. Well, as Joel was trying to tell you, the biggest thing that a contractor takes on when he assumes a contract is the risk, whether it be your laborers or subcontractors leaving you with financial responsibility for their unpaid bills, whatever you have. I would say you would be eliminating one government would guarantee the performance and payment bonds for these subcontractors.
payment bonds for these subcontractors.

COMMISSIONER DESTRO. Would you think that would help their entry into the market more than the present? Because you have been talking about how these things aren't working. Would that kind of a system work better in your mind than the present system?

MR. O'BRIEN. It certainly would work better than the present system, but we'd have to keep in mind that we are still talking about ability to perform also; and in the private bonding industry, the sureties try to determine the ability of the particular contractor that's making the request, find out if he is competent to make these types of requests for the projects he is trying to undertake. And I think the government would have to make that effort, too. And if they find a minority contractor that is deficient and is trying to request bonds for projects that they cannot handle, then I suggest it might be the government's responsibility to try to upgrade that person.

COMMISSIONER DESTRO. Thank you.

COMMISSIONER BUCKLEY. If I may, what I'd like to do is kind of establish a frame of reference, for my benefit anyway. I apologize for taking you through this.

Mr. O'Brien has already told us that he does use minority subcontractors in both private and public bidding in his contracts both with government entities, and all the varieties of government entities, and private bids.

May I get a response to that question from the other witnesses. Do you use minority subcontractors in both private and public and, if not in both, why not?

MR. KING. Yes, we do use minority subcontractors in nonfederal types of jobs, yes.

MR. BROWN. We do also.

MR. BURT. Yes, indeed, we do.

COMMISSIONER BUCKLEY. Again a frame of reference question for you. When you use these minority subcontractors or MBEs or whatever you choose to identify them as, do you find, say, as an example—and I don't know what your particular situation would be—if you use, say, subcontractors in five different areas for a particular project, do you find that most of your minority subcontractors will lie in only one area, or do they generally cover the whole scope, if I may ask the question of all four.

MR. O'BRIEN. Being a building contractor, we find we have a broader range of minorities participating in different trades. What we do not find, of course, is a preponderance of minority contractors in the mechanical and electrical trades, which I consider to be a big problem. I think we need to

encourage more participation in those more technical trades.

COMMISSIONER BUCKLEY. How do you propose to do that?

MR. O'BRIEN. Well, again, we can't continue with this top-down education we are giving people. We can't interject them at the management level, assume that they are contractors, and then teach them how to be one by giving them work and letting them fail. It just doesn't work that way.

With the electrical and mechanical trade, do just like I think the majority contractors have learned their business—start at the bottom, help them with their education at the very basics, getting them into trade schools or mechanical or electrical engineering schools, and let them be hired by the majority companies and work up the ladder if they have the ability to do so. And I can guarantee you, sooner or later if they start climbing that ladder, they're going to get a little itchy and they'll probably spin off and form their own companies, or if they're happy they'll stay right where they're at and they will be gainfully employed.

COMMISSIONER BUCKLEY. Mr. King, if we can go back to the question of the variety of subcontractors first.

MR. KING. Yes. In our experience, most of the subcontracting we have done to minorities has been in the area of seeding, fencing, and small cement contracting. I wish there were more legitimate and qualified grading contractors, but unfortunately in our area there do not seem to be.

COMMISSIONER BUCKLEY. That was the area where they defaulted?

MR. KING. That is correct.

COMMISSIONER BUCKLEY. Mr. Brown.

MR. BROWN. We found minority subcontractors in a number of different trades. We don't seem to find quite as many—in fact we don't find any—in the areas where it's very capital intensive, such as grading or crushing, which requires a large spread of crushing machinery, or asphalt production—that type of thing.

COMMISSIONER BUCKLEY. Mr. Burt.

MR. BURT. Yes, I have a similar experience with Mr. Brown. We can find no paving contractors in Oregon that I know of, at least that can do a large project. I think the point that needs to be made is that it is very capital intensive. You may have $10 million worth of equipment just to do a project. So that is probably one of the reasons.

COMMISSIONER BUCKLEY. What I'm hearing you say is either they do not have the proper education or they do not have the right money, but it's not racial; it's not a race situation that is limiting them to that category; is that correct? Is that accurate?

MR. O'BRIEN. Yes.

MR. BROWN. That's right from my standpoint, but I'd like to add I was referring mainly to subcontractors because there are some general contractors that do work in that area. I think what has happened is they have graduated from being a subcontractor into being a general contractor. And these types of things where we don't find people—it really doesn't lend itself too well to subcontracting because that's the job, and that's what our business is. What we try to subcontract out is the items that we don't specialize in.

COMMISSIONER BUCKLEY. We are running short of time, but I have one question for Mr. King.

You equated—and I hope I didn't misunderstand—disadvantaged with minority. You said DBE equal to MBE. Can you tell me how you can graduate from being a DBE if you are a minority? That's what I heard you say. If I was wrong—

MR. KING. The reason I equated the two is because that's what the State of Kansas has done.

COMMISSIONER BUCKLEY. How do you graduate in that system? As I understood it, you would always be a minority.

MR. KING. That's precisely why I think they should change the regulations and move them out from this stigma, if you will.

COMMISSIONER BUCKLEY. Yes, Mr. Guess.

COMMISSIONER GUESS. One final question for Mr. O'Brien. Mr. O'Brien, in the summary of your testimony it indicates—and I quote—"The set-aside program has adversely affected race relations." Were you suggesting by that that you or other contractors in your area have become racists or bigots as a result of this program?

MR. O'BRIEN. No. What I am inferring there is that there have been great strides made in civil rights, as we all understand, over the last few years. You know, let's face it, our past is not pure. Our industry has gone through some major transitions, and I think definitely in civil rights.

What is happening is we have people in Oregon whose livelihoods are being threatened right now as a result of the MBE programs the way they now exist. Their businesses that they have worked at for many, many years are disappearing. Their markets

are gone. And these people, unfortunately, are developing a very negative attitude about minority participation in construction. And if your own livelihood is threatened, I'm sure you can understand their position.

COMMISSIONER GUESS. Thank you very much, Mr. O'Brien.

COMMISSIONER BUCKLEY. Thank you very much, gentlemen. We certainly appreciate the time you have taken to come here before us. On behalf of all of the other members of the Commission, we appreciate your being here today.

We'll take a 5 minute break, but be back in 5 minutes, everybody, please, so we can continue.

[Recess.]

COMMISSIONER BUCKLEY. The third panel for this afternoon includes—if I can please have the three witnesses who are present here right now stand up, please.

[Theodore A. Adams, Jr., Susan Hager, and Elaine Jenkins were sworn.]

COMMISSIONER BUCKLEY. This third panel includes Susan Hager, who is a partner in Hager, Sharp and Abramson, Washington, D.C.'s, largest woman-owned public relations firm. The firm was founded in 1973 and had revenues of $1.4 million last year.

Ms. Hager is a member of the board of directors of the National Association of Women Business Owners and chaired its national convention in June of 1984.

Her firm works predominantly for clients in the nonprofit sector. Clients include the League of Women Voters and the National Federation of Business and Professional Women. In the Federal sector, Ms. Hager has done work for ACTION, the volunteer agency.

Elaine Jenkins is founder and president of One America, Inc., a management consulting firm in Washington, D.C. Ms. Jenkins is president of the Council of 100, an organization of black Republicans. She holds a masters degree in philosophy of education from Ohio State University.

One America, founded in 1970, is engaged in minority and small business development, management information systems, and manpower development. The firm has been listed in *Black Enterprise* magazine's top 100 black businesses. The firm entered the 8(a) program in 1973 and is scheduled to graduate in March 1986. Approximately 85 percent of its volume is 8(a) work.

Theodore A. Adams, Jr., is president of Unified Industries, Inc., a systems design firm. The firm, headquartered in Springfield, Virginia, has offices in 10 cities and did $16 million in business last year. Unified Industries was in the 8(a) program from 1974 to 1982.

Mr. Adams served 22 years in the U.S. Army, retiring as a lieutenant colonel. He is the former head of both the National Association of Black Manufacturers and the Minority Business Legal Defense and Education Fund.

MR. DISLER. I'd just like to note that we had two other members for the panel, Frederick Williams, who was actually here today, but there was an emergency and he had to leave. If he is able to get back before the end of the day, we can add him to the last panel. And Larry Wardlaw, from my home town of New Haven, Connecticut, became ill and was unable to come down.

We are disappointed they couldn't join us, but perhaps we could solicit written statements from them to be submitted within the next 30 days.

COMMISSIONER BUCKLEY. That's fine.

Are you ready?

TESTIMONY OF THEODORE A. ADAMS, JR., PRESIDENT, UNIFIED INDUSTRIES, INC., SPRINGFIELD, VIRGINIA; SUSAN HAGER, HAGER, SHARP, AND ABRAMSON, WASHINGTON, D.C.; AND ELAINE JENKINS, PRESIDENT, ONE AMERICA, INC., WASHINGTON, D.C.

MR. SCHULTZ. I'll ask each of you, beginning with Ms. Hager, to please state your name and address for the record, and also the name of your business and its principal activity.

MS. HAGER. Name and business address? Home address?

MR. SCHULTZ. Your personal address.

MS. HAGER. Susan Hager, 3633 Everett Street, N.W., Washington, D.C. The name of my firm is Hager, Sharp and Abramson, Inc. It's a public relations firm.

MR. SCHULTZ. Thank you. Ms. Jenkins.

COMMISSIONER BUCKLEY. May I ask that you speak into the microphone, please, so that everybody can hear you.

MS. JENKINS. I'm Elaine Jenkins, and I live at 3333 University Boulevard West, Kensington, Maryland. I'm president of One America, Inc. It's a management consulting firm.

MR. ADAMS. I'm Theodore A. Adams, Jr. I live at 5902 Mount Eagle Drive, Alexandria, Virginia. Unified Industries is an engineering support company.

MR. SCHULTZ. Ms. Jenkins and Mr. Adams, first, will both of you describe, please, briefly your experience with set-asides and how set-asides have helped your firms.

MR. ADAMS. Do you want to go first?

MS. JENKINS. If it were not for the 8(a) program, One America would not have survived, because women business owners in 1970 were just coming into the picture in reality. There was neither the sentiment in the country nor the opportunity. There was the will on the part of the best of those of us who formed the firms. There was the need for what we did. But there was not the opportunity of recognition at the level of support that helped us along the way.

The technical assistance that was given—I came out of the teaching field and just decided that I had some skills, and my husband was going to stay with the Federal Government, and I ought to have the opportunity to not only invite other members of my family but people, other women—we now have many men—but when we first started we tried to encourage women to join us.

The technical assistance that was given to us, the opportunity to demonstrate that we could perform in an area that really is very difficult—we don't make widgets; we do evaluations and studies and operational programs in the human service area. People ask, "What does One America do?" We have to say that we got into the international field, particularly in African countries.

I think there is no question about—as a woman business owner I can tell you I've joined every organization that's come along with women. We tried to get in as organizations to attract prime contractors, to say, "Hey, let us in." There was a lot of money spent by women organizations; there was a lot of yelling and screaming to say, "Hey, let us in." And if it hadn't been for the SBA program, I don't think it would have come about.

MR. SCHULTZ. Thank you.

Mr. Adams.

MR. ADAMS. I furnished you this document earlier. Was a copy of it made available to each member of the Commission?

MR. SCHULTZ. Is that the one you gave me when we talked?

MR. ADAMS. This is the Small Business Administration 8(a) program, "A Program Under Attack." And it has a preface, "Lies, Half-Truths, and Misconceptions" on one side, and on the other side it has "Truths."

Was this document made available to the members?

MR. SCHULTZ. No. We can make that a part of the record now, if you like.

MR. ADAMS. Would you make it a part of the record, please.

COMMISSIONER BUCKLEY. So ordered.

MR. ADAMS. The staff attorney earlier stated to me that we didn't have to have written testimony and that we would be required to answer questions.

However, in sitting and listening to the last panel, I feel before I answer questions that I should at least make a statement so that everybody will understand exactly where I come from and what participation I've had in drafting the laws that you are discussing today.

Do you have any objection to that?

MR. DISLER. No.

COMMISSIONER BUCKLEY. No.

MR. ADAMS. First, I came here today from a meeting with the Senatorial Trust. The Senatorial Trust is a group of Republicans. I'm a staunch black Republican. I was very disturbed to read in the paper that Congressman Mitchell had refused to testify before this Commission. The reason I was disturbed was because I felt that he probably is the most qualified or was the most qualified to state why the program has been under attack since its inception and why it was created. So I'd like to take the liberty to mention a few of those facts.

Insofar as my personal background, I think I'd have to start there. I was born in 1929 so I'm not as young as a lot of people think I am. I have four grandchildren—five grandchildren. I forgot the latest.

I was raised, like your Chairman, in an area of deep, well-entrenched segregation.

In 1947, being a very poor boy, I joined the Army. In those days there was a quota. And the quota that was in effect was zero blacks in the United States Army, as it was known. That was the quota. In other words, you had all blacks in one army, and then everybody else was in this other army.

In fact, the quota was so pervasive, even though having been trained as an infantry combat soldier, I was not allowed to join a combat division, but

instead was made a stevedore and then placed in the engineers, the same outfit that the earlier fellows were testifying about.

The next quota I ran across was in applying for engineer officers candidate school. And the quota there was well announced and well understood. The quota was one, one black per class. I was lucky enough to make that quota. In doing that, we also changed the system because even though they had a quota of one, I wound up number one in my class. I was the only black who had ever graduated number one in this class. And we broke another quota because the quota for being on the faculty at the engineer officers candidate school at Fort Belvoir was zero, zero blacks. That was the quota. I broke that quota because I joined the faculty. This, of course, was in the Corps of Engineers.

After spending 22 years—the last year of my service in the military was in Vietnam, and a strange thing happened in Vietnam. We had captured a North Vietnamese lieutenant right after the Tet campaign in 1968. We were questioning this lieutenant, and in perfect English he asked me why I was in Vietnam. And, of course, the only thing I could ask him was, "Where did you learn to speak English?" It seems that he had gone to school in the United States and was fighting for the North Vietnamese Army.

After returning from Vietnam, I decided at 39 to retire—I was very young—because I felt I had to get involved in the plight of blacks in this country. I looked around and I was intrigued by what Richard Nixon was saying about black capitalism and how the Republican Party had an alternative to solving the plight of blacks in the United States by getting them involved in the capitalistic system.

I worked for a year, managed and ran an all-black manufacturing plant, and was asked by Leon Sullivan to help form and organize the National Association of Black Manufacturers, with a mission of designing legislation that helped make up for past discrimination that had been suffered by blacks and women, but at that time primarily blacks.

My Republican credentials, I think, are immaculate. I'm a member of the Senatorial Trust, the Republican Leadership Council. I helped John Warner get elected in Virginia. I am currently a member of the Council of 100. And I am very disturbed that there are certain Republicans, certain black Republicans, who have taken the liberty of saying they speak for all black leaders and all blacks in the Republican Party, and they are against quotas, set-asides, and what have you. This one helped frame them.

Insofar as Unified Industries is concerned, the reason we passed the 8(a) program, or Public Law 95-507, and the reason President Nixon wrote Executive Order 11625 was because of past discrimination.

And let me explain to you why these rules were written and the efforts were necessary. And I will make it very simple so that everybody understands. It's like two fellows were playing poker, a white guy and a black guy, and the poker game was 300 years long. It was a long poker game. Naturally, the white guy had all of these chips, piles of chips. You can call it Las Vegas, you can call it General Dynamics, you can call it Chrysler—all these other chips that he had piled up all around the country. Then all of a sudden somebody passed a law and said, "You can't play with a marked deck anymore."

So the white guy said, "Okay, great. Everything is equal. There is no more segregation, there is no more bigotry, there is no more racism in the country, and everybody operates off the same set of rules."

Well, that sounds good. He started dealing the cards and the black guy said, "Hey, wait a minute. When are you going to give me back some of my chips?" And that is really what this session is about, giving back chips.

I also note, and I brought with me, the press articles where the Supreme Court has said, "Hey, goals, timetables, set-asides are legal." And we won that case against some of the same contractors that were testifying earlier.

I also have with me a piece of paper that was signed by Ronald Reagan that says, "Goals and set-asides are necessary to right past wrongs." And frankly, as a Republican, I'm sick and tired of him taking that bad rap. But here is a piece of paper, and I offer this for the record. You will notice, gentlemen, on this piece of paper it was sent to every head of every agency in the United States Government.

MR. DISLER. It will be so accepted.

COMMISSIONER BUCKLEY. So ordered.

MR. ADAMS. Thank you very much. I find it very difficult to testify at this council mainly because we have Mr. Pendleton as the Chairman, and I read his article last week where he called all black leaders racists who believe in set-asides or any special treatment. And based on that, I find it very difficult

because, in so doing, by inference he's calling the President a racist, and I resent it.

Now, as to Unified Industries and what we are all about, Unified started out as a three-man operation. After I had probably teed off everybody in Washington in getting this legislation passed, I felt I had outlived my usefulness.

We started out on the 8(a) program because we realized that 90 percent of the government market was handled through negotiated bids, and that only 10 percent were formally advertised bids based on low price.

We also understood that unless you had some program that would force government contractors that had been raised and educated in an atmosphere of bigotry and prejudice, that no one would ever break that cycle.

We also recognized that if you look at the top DOD contractors, the 100 top DOD contractors and the 100 top DOD research and development contractors, you will see the list is exactly the same, that the only way to get into the government or DOD defense area is to go through the R&D route, which takes hundreds of millions of dollars. So, hence, we used the 8(a) program.

And in listening to everybody, when we designed the program, we heard testimony where white manufacturers and white businessmen said, "Hey, we really want to help minorities, but it's expensive. It costs us money."

So in the legislation—and anytime anybody testifies to that fact, I refer him back to the law, because in the law we wrote—and I'll quote: "Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities from small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by paragraph 3 of this subsection, is hereby authorized to provide such incentives"—and OMB defines those incentives as dollar incentives—"as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with efficient and economical performance of the contract."

So every time somebody testifies that it's costing the government money to do business with minorities, they are testifying out of ignorance because they don't understand the law or the regulations.

Unified grew from 3, as I said, to a little over 300 individuals in a period of 10 years. And, of course, I could not do anything with the ownership of that company until I graduated from the 8(a) program. Immediately upon graduation, I formed an employee stock option company, so at the present time all my employees have ownership in Unified Industries.

MR. SCHULTZ. Thank you.

MR. ADAMS. I thank you.

MR. SCHULTZ. Let me direct this one to you, Mr. Adams: How could the 8(a) program be improved?

MR. ADAMS. Very easily. You could probably remove a lot of the regulations that have currently been written that inhibit the performance of a contractor to perform in a marketplace. Let me give you an example. The first one is graduation.

Two years ago, the Small Business Administration held hearings, and they traveled to at least three or four major cities. They heard 200 presidents testify as to certain changes that had to be made in the regulations. These changes were proposed by the Small Business Administration.

Out of the 200, there was only 1 person that agreed with the changes that were put into effect. That question has been asked, and the answer has been ignored.

The other thing I'd like to refer you to—and this was also given to your staff attorney—is the "Casey" study. Casey, the current head of the CIA, did a study when he was working in New York, and the question was: Using empirical data, how long would it take to reach viability? Using empirical data—and here's the chart [indicating]—this data has not been disputed. It was further upheld by the Wharton School of Business. They said it would take 20 years and you should be doing at least $40 million.

There are very few 8(a) companies that are doing $40 million a year, but yet they are being told to graduate and compete with the big boys, mainly because such outfits as Associated General Contractors have tried to convince the American public how unlawful the 8(a) program is.

MR. SCHULTZ. One more follow up, and then we'll move along. Mr. Adams, what barriers in the market have you faced and do you continue to face?

MR. ADAMS. The primary barrier that we face is what I call the trickle-down barrier. It is a barrier that has been set up, as I said, over a period of 200 or 300 years. This barrier says that people tend to do business with their friends.

Now, it was very fashionable 12 years ago to have black friends and black acquaintances. Since that fashion has changed, and you notice it at clubs and

what have you—and, in fact, the organizations I belong to, there are very few blacks who are members of these clubs. And most of the deals are in this social environment. And believe it or not, ladies and gentlemen, that's where deals are done. That's where joint ventures are created. That's where tips are given and passed out.

The question I thought you would ask is why I chose not to go into the construction business. The reason I didn't is because I knew, from being on the other side, that it was the most corrupt of most of the industries in the country today. The old boy network one of the counselors alluded to is alive and well, believe me. And unless you know somebody, there is very little you can do. In fact, in some cases there were some companies that had five and six companies under different names. They would submit different bids on these contracts to perform certain work.

So if you are a black company and you wanted to bid, where did you fall? You'd lose every time you bid.

The other trick that was used, and is still being used: A minority company will go in and they will inundate them with bids—inundate them, paper after paper. When you get ready to prepare a bid or a proposal on a contract, it can cost you $4,000 to $50,000 to $100,000 to do the proposal, just to write the proposal.

Restate your question. I think I went astray.

MR. SCHULTZ. I think you answered it. I was asking you about the barriers you faced.

MR. ADAMS. Those barriers are still there.

Another thing that most minorities find when they try to go into a new area, there is such a thing as buying in. And minorities always face the buying-in situation.

We have a company in Watts called Univox, Univox of California. Univox started out as a small electronics company, and today they are a multimillion dollar company, probably one of the only companies I know that is making a major item for the United States Government. By that I mean an item that's on wheels that a black soldier can reach over and put his hands on and say, "Hey, this was made by black folks in the inner city or in the ghetto." It works better than any other machine that's ever been produced. It was produced cheaper. The costs kept going down every year ahead of schedule, and it exceeds all the quality standards that were set for it by the Federal Government.

Now, the fear this company has is that the major competitors will buy the contract or buy the business away from them.

For example, say in the case of Univox, they are in a new industry, and the potential in that industry is, say, $100 million—let's say a billion dollars. Well, if I'm General Dynamics or if I'm Brunswick or if I'm any other major company and I look at that business, I can say, "Hey, I'll buy it."

So you put out a contract and put out a bid. You take the first one at a loss. You make it up on the changes or you make it up on the follow-on.

Now, another white business can lose that contract and go over and sit on the side and say, "I'll get it the next time." But you get a minority company in that situation, you buy one contract and he's dead.

Now, those situations exist. There's another welfare program—

MR. SCHULTZ. Can we move along, Mr. Adams, and share the panel. I'd appreciate that.

Did you want that SBA report marked?

CHAIRMAN PENDLETON. Can we copy the "Casey" chart and give you the report back?

MR. ADAMS. I'll give you the whole report.

CHAIRMAN PENDLETON. Thank you.

MR. ADAMS. The name of the report is "A Case for Government Support of Minority Enterprise."

MR. SCHULTZ. Ms. Hager, you have never applied for 8(a) certification. Why is that?

MS. HAGER. Basically because the 8(a) program was established for minority men and women and not for majority women. Women as a class are not included in the 8(a) program, so therefore, I did not apply.

MR. SCHULTZ. Do you feel there ought to be set-asides for women-owned businesses and, if so, why?

MS. HAGER. I think that set-asides would make an enormous difference. I guess I don't think they are politically feasible right now, so it's not something that I'm pushing. But I do think that set-asides have made a difference for minorities, for example, that, in fact, prior to the set-aside program, prior to the 8(a) program, there were very few minorities doing business with the government. And now people may talk about whether or not it's a very high number or whatever, but there certainly has been a change. And I do think that if it, in fact, works for the group and it works for the government that it makes sense.

I also think that for those companies like Mr. Adams' company who have graduated from the program and the pool of competitors has been

enlarged that the government can do business with, that is obviously to the advantage of the government and the taxpayer.

MR. SCHULTZ. Let me ask you this, and then, Ms. Jenkins, I will ask you also. We have heard a lot of talk today about a buddy system. Is there, in your opinion, a buddy system among Federal contractors as your primary sector, and between Federal contractors and subcontractors, that works to the disadvantage of your firm?

MS. HAGER. Yes. There is definitely an old boy's network. Somebody called it friends. I mean, come on, we all know that. People like to do business with people that they know and people they feel comfortable with. I think that is partially human nature. I think some of the contracts I have with all these women's organizations, that some of the men in this room would have a tough time getting away from me, because they feel comfortable with me and because I understand the way they do business.

Well, that is one tiny little place where that works to my advantage. Most of the time it works to my disadvantage because, in fact, as we all know in the government contracting, women may own 25 percent of all small businesses, but when we're getting less than half of 1 percent, there is an enormous discrepancy.

I have personally been in a best and final situation in a negotiating session with a contracts officer, and I know I lost the contract because I was a woman. His main question was, was I married and who took care of my children. And he really wasn't interested in how I had my finances lined up and the fact that I got the highest number of technical points and the lowest bid.

MR. SCHULTZ. Ms. Jenkins.

MS. JENKINS. Could I go back to the question you asked Ted a few minutes ago: How could the 8(a) program be improved?

MR. SCHULTZ. Certainly.

MS. JENKINS. I think that there should be an opportunity to prepare for graduation. If the Federal Government has invested some money and time and effort in helping certain firms and does believe that now they are ready to come off the program, I think that as you go into the turn of that there should be some concentration to be sure that the specialties that have been developed are well known in the fields where the firm is therefore going. For example, if it's in an international field, then I think we should have an opportunity in the next year to increase our business so that when we come away from the program we will be able not only to help other firms, but we can compete. So I think better preparation for the graduation should be done.

I think there should be some matching that goes on. I listened to the previous testimony this afternoon, and it didn't seem to me that there was an effort or an interest or a concern of those people who were talking to say that they would on their own try to match up with those businesses, minority businesses, which they thought could work with them and stick with them.

I think certain agencies in the Federal Government in the last 4 or 5 years have slipped, have not responded to the Executive order, have been very haphazard in their interest to support the program. And there, again, the prime contractors and some of the agencies would be responsive, I think, if they knew what businesses related to that particular agency.

Since the SBA is planning to do less about its loan program, I think they should start now to work with the banks that are interested in cooperating with the program, and there are those banks that are interested. And I think that loans can be made, and I don't necessarily feel that loans have to be made from the Federal Government.

Now, about the buddy system. I think persons should be rotated away from their positions for responsibility of helping this program succeed if they have become too smug in recognizing only some certain companies. They will tell you in certain agencies today to walk the halls—that's what it's called. "Go here and see this project person—and I'm sure if you go over there you will be well received," and so forth.

Well, that is simply not true because certain program officers are accustomed—it's less work to have to suggest any new businesses.

So I think we have to look at some very smug—perhaps we might call them bureaucrats, but we don't want to offend the bureaucrats, but some rotation, not firing, but some rotation out.

The peace that this country needs is an economic understanding of how this country works. This country works on economics and on the private sector and the entrepreneur business. I would guarantee, no question, that if those people who are going to build the MX started now looking for minority firms and women-owned firms—and they can find them—you would not have the fight against

the MX because those people will get to the Congressmen.

Now, women do talk to their preacher and their Congressman. We are very good at that. So it seems to me that it's some kind of foolishness on the part of the huge contractors to not realize that they could be a part of the lack of division in the country if we were to do that.

Another thing that I think could happen is the retired persons or the persons who are being let out of government positions could be encouraged to look for 8(a) companies to give their high-level technical expertise to. We are gradually getting some resumes that are voluntary to us. They have heard about this. And we are looking at those very closely. We don't always find that what they are offering we can use. But that's what I would suggest, that there be more of a marriage, a match, within the Federal Government to try to have things work.

I guarantee you—and Commissioners, please—if the 8(a) program is abruptly abolished, if you think you have heard an outcry, you haven't begun to hear it because there are so many businesses in the various States. All you have to do is look at the directory that is put out by regions of 8(a) companies. If you haven't, you should get it. It's all over this country. And that means that there are many, many, many successful businesses beginning within their States and their counties to serve the country.

Have you ever wondered what it is like to be a majority of a minority in a city and see how much money goes into changing the traffic signs and wonder who puts those out, and wonder whether there are any minorities, and certainly very few women. Have you looked at this city and realized, for example, how much horticultural business there is here? Women know how to water plants and to care for plants and to do things for plants. But I don't think very many women business owners are in the horticultural business in a city like this. I wouldn't know, but I have asked.

But there are certain service industries that we would know are almost natural. The care of the elderly right now, for example. It would be smart to encourage women to go in that business. An 8(a) firm could come along and get the technical assistance, because the elderly are always going to be here—I hope so. We had for a long time the nursery care of children, but now it's the elderly as a new business. And that's what SBA does. It's supposed to look at the forecasts and see where the country is going and encourage businesses to go in that direction.

MR. SCHULTZ. One more question before we turn to the Commissioners.

Ms. Jenkins, joint ventures, a topic you and I talked about. You have had some experience in that area. Tell me, what is your opinion of joint ventures between majority and minority firms as a method of bringing more minority businesses into the procurement arena?

MS. JENKINS. It's an excellent way to do it, and we are hoping to venture more with the white firms, as well as with the black firms. The advantage with the black firms or the Hispanic firms—and we are both—whoever has the higher expertise in one area sort of matches that. The problem with the joint venture is the turfdom. And that's the biggest hangup that you have: Who's going to get the overhead or who's not going to get the overhead? Who's going to handle the biggest bulk of the service that you're using and who's qualified to do it or not?

But I think that joint venturing—I wish I had been in the construction business because I'd like to take one of these guys on here and ask him if I couldn't joint venture with one of them.

MR. SCHULTZ. Mr. Chairman, I yield.

COMMISSIONER GUESS. Thank you, Mr. Chairman. Who's in charge now?

CHAIRMAN PENDLETON. Mrs. Buckley.

COMMISSIONER BUCKLEY. Mr. Guess, you may continue.

COMMISSIONER GUESS. Thank you, Ms. Buckley.

Mr. Chairman, in your absence we discovered that my rejection of authority was not limited to you. I also rebelled against Commissioner Buckley while you were gone. So we have concluded that it's nothing personal. It's my overall objection to the board.

CHAIRMAN PENDLETON. You just don't like minorities, Mr. Guess.

COMMISSIONER GUESS. Welcome back, Mr. Chairman.

CHAIRMAN PENDLETON. Thank you, sir. The budget hearing went well.

COMMISSIONER GUESS. Thank you.

Mr. Adams, I want to start by concurring with your observations pertaining to the history of the use of the various programs that we are discussing today. I would also concur, though not as thorough-

ly, in establishing similar political affiliations and identifications, and would concur with the history as relates to simultaneous service in Vietnam and a recognition of what occurred during the Nixon administration, and applaud your resentment of those who take issue with the generally accepted view of what President Reagan has indicated in terms of the thrust this administration should take in these programs.

However, the previous panels were given a point of view from this Commission pertaining to other various programs designed to assist a group of people, though not necessarily by race, and that is the farm price support subsidies. From your perspective, in the State of Virginia, do you support the use of farm price support subsidies?

MR. ADAMS. Mr. Commissioner, I'm against all subsidies. I'm against all set-aside programs. All right? And I answer that question because everybody says that, and when you think about it, everybody is for that, to be against these programs. If everything were started from zero today, I would say we wouldn't need any of these programs. All right? But I understand that without these so-called set-aside programs that we have in being, that great segments of our society will be damaged or hurt.

Therefore, I am not so ignorant to understand that if you didn't have a subsidy program for the garment manufacturers, that we would lose thousands and thousands of jobs in the South that are currently making garments; that if you did not have the subsidies for the automotive industry or the subsidies for those industries that are subsidized via protective tariffs, that certain damage would be done.

So for me to say, "Hey, I'm not for it," I can't speak for the farmers. I'm saying that if those subsidies are necessary to promote the overall good of the country, then it is up to Congress to examine the goods and the bads of those subsidies, to pass laws to stop or start those subsidies, and it's up to the President of the United States to implement programs that enforce the laws that are passed by Congress.

COMMISSIONER GUESS. So what I understand you to say, Mr. Adams, is that the free, open, and competitive marketplace sometimes is not free, open, and competitive, that government in order to make this system work, feels compelled to tamper with it; and that the occasional tampering with the system, regardless of how offensive we as a people who embrace the free enterprise system may find it, it's still appropriate to do so.

MR. ADAMS. That's correct, sir. In fact, the Supreme Court said that.

COMMISSIONER GUESS. And so simultaneously could we conclude that the occasional tampering with the system, because of race, could also be appropriate?

MR. ADAMS. That's 100 percent. If it wasn't for that, we really wouldn't need a government, would we?

COMMISSIONER GUESS. And can we also conclude from what you are saying, Mr. Adams, that the reason that we can't embrace this appropriateness is because the industry that you identified may find barriers to competition in that marketplace.

MR. ADAMS. That's correct.

COMMISSIONER GUESS. Madam Chair.

COMMISSIONER BUCKLEY. Thank you.

Commissioner Destro.

COMMISSIONER DESTRO. A couple of questions.

Following along the line of Commissioner Guess' question, Mr. Adams, I noticed in your interview material you indicated that, assuming that all set-aside and subsidy programs would be abolished, you'd be willing to go along with it. I guess that means the same as going back to zero; correct?

MR. ADAMS. That's correct.

COMMISSIONER DESTRO. But you said absent that, you feel minority set-aside programs are appropriate, and I can understand that too. But the rest of your comments seem to talk about the problems that emerging companies have getting on their feet and staying on their feet.

We had a series of questions earlier in the afternoon about racially neutral or ethnically neutral set-aside programs. Would you be just as satisfied with the 8(a) program if it were redefined in terms of emerging businesses that need help getting on their feet in dealing with the government?

MR. ADAMS. No.

COMMISSIONER DESTRO. Why not?

MR. ADAMS. Because that's not what the 8(a) program was supposed to do. You have a small business program that was designed for that purpose. The 8(a) program, as it was originally envisaged—and if you go back and look at all the testimony that was given to pass 95–507, the basis of the program was not a program to start companies as such, but a program to get a fair and equitable share of the market.

And, sir, if you permit, I'll quote from the law. It says: "That the opportunity for full participation in a free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy."

It further goes on to say: "Many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control."

So what I'm saying, sir, is that, in order for the pendulum to stop, it first must go to the other side. And that's what these programs were designed for. They were designed to give minorities an opportunity, only on Federal programs, those programs supported by tax dollars, to sit down and negotiate—not be given—a share of the market.

I guess the thing that bothers me and disturbs me so greatly is those organizations that are condemning these programs now have a 90 percent market share. And they are quibbling over the 10 percent for women and minorities. I don't understand that. If as a businessman I had a 90 percent market share, why would I try to steal or take away or block those less fortunate than I from at least participating in the marketplace?

COMMISSIONER DESTRO. I don't quarrel with anything that you have said so far. I guess what I'm trying to do is get a sense for what you understand by the meaning of the statutory phrase "socially and economically disadvantaged." Does that by definition mean a minority firm, or would you be willing to expand that to include firms like Ms. Hager is talking about, which are disadvantaged in other ways due to sex. They may not be economically disadvantaged as such, and they may not be socially disadvantaged in the same way, but there certainly is a sex-related disadvantage.

MR. ADAMS. If I had to rewrite all the laws and the programs, I would create special programs only for those who have been discriminated against institutionally; i.e., if women had been discriminated against—and they have, white women, black women, brown women, all women; they couldn't even vote—that should be taken into consideration.

On the last panel there was a gentleman who said he knew a minority, a fellow from Egypt who was a minority. One, nobody asked him to come to the United States; two, through legislation he was never segregated against; and three, if he had come here in 1947 when I joined the Army, he'd have been classified as white.

COMMISSIONER DESTRO. All right. Now, let me turn to Ms. Jenkins for a minute, if I can. I have two questions.

One is that in your firm's summary it says that 85 percent of the work you do now is 8(a) work, and I know you talked about the graduation requirements. Is there any concern of assistance being given to your firm in obtaining non-8(a) contracts?

MS. JENKINS. There's the encouragement to do it, but that is one of the areas I said I thought SBA could be improved in. And I was over there recently to talk with them about this, and I think they are looking at the picture.

We would like them to help us know—for example, take DOT; we have done some work for them, too, and in the international field there are some biggies—we would like them to say, "This firm has done very well in your particular area. Why don't you take a look at One America and see whether you could use them."

We have neither the kind of money nor the kind of marketing that does that—I don't care how much money you make; you're always staying aboveboard in this kind of situation. The more contracts you get, the more money you're going to put out, etc., etc. So in getting ready for it, we do want to have that kind of assistance, and I am talking to them about that.

MR. ADAMS. Could I add something to what she said?

COMMISSIONER DESTRO. Sure, go ahead.

MR. ADAMS. It was a very interesting question you asked, and it really is proof beyond any reasonable shadow of doubt how prejudice and discrimination really exist today in 1985.

I tried to tell you earlier that the Federal Government said, "Big contractors, we will pay you to do business with minorities, up to 10 percent additional profit you can make if you do business with minorities."

If you just take the top 100 DOD contractors, they could employ every 8(a) contractor you have and the 8(a) program could go away if they would be willing to sit down and negotiate with very able firms and give them business.

Now, the reason we put that paragraph in the statute is because when we were testifying to get this law passed, every majority businessman came in and said, "Hey, I'd love to do business with minorities. I

can find them, good ones, but it costs too much money." That excuse can no longer be used because the statute will pay them a premium to do business with minorities. But there's nobody beating down Elaine's door, and to this date I haven't had anybody beat down my door except when a government agency says, "Hey, unless you go out and find some minorities, you can't have the contract." But on their own they just don't do it, sir.

COMMISSIONER DESTRO. That was going to be my next question to Ms. Jenkins. On page 3 of your interview notes you talked about how the Catch-22 is created, and when you try and go out and get some additional work, then the government contracting agents apparently ask you, "How many word processors do you have? How many computers do you have?"

I understand the problem you are describing is obviously a chicken or the egg kind of situation, but is the problem in your judgment that they perceive you as a, quote, "minority" or 8(a) firm, and therefore, they ask you those kinds of questions? Or is it that they perceive you as an emerging firm and, therefore, ask you the questions, whereas if you had been an established firm, they'd just assume you could get the work done and that you would find the extra word processors, etc.?

MS. JENKINS. I think it's the latter. First of all, we are perceived as, "You've gotten your share." That's the worst part of it. "You've gotten your share and you ought to be thinking to graduate."

COMMISSIONER DESTRO. Let me stop you for a minute. You've gotten your share of what?

MS. JENKINS. "You've gotten your share of contracts and you ought to be able to do thus and so and thus and so."

Now, when they say, for example, "You have got a $3.5 million contract"—that is not $3.5 million a year. That is strung out over a period of years. And you have the travel and all the costs that go with it. We do work internationally and we're proud of what we do in Africa, in the health-support services—in the Sudan, by the way. We are very proud of that, and we're going to piggyback on that, and we're going to increase that. But every time we begin to do that, the program looks over your shoulder and says, "Well, wait a minute. Is it One America's turn again?"

The position we're put in there is the Catch-22 thing. Now, what we're going to hammer at is, "You ought to be very glad in the next 2 years"—and I'm sure Ted said that as he was getting ready—"for us to have all the business we can." And we will go out and get—and we are doing it now. We are inviting in some white firms, incidentally. We are One America, and we believe this country can only thrive on being one country. But do you know how much legwork and money it takes to market?

COMMISSIONER DESTRO. Yes, I understand that. I guess my question really goes to the disadvantaged. Part of it you have described as being an 8(a) firm, and people say you've got your share, and it's not your turn now. But the other part is the way that these contracting officers perceive you.

MS. JENKINS. I don't believe that's true, sir, right at this moment. I really don't, right at this moment. We are competent; okay? So they are not hammering at "can we do it" any longer.

The disadvantaged will always be there, certainly in my lifetime, and maybe in yours and you are much younger. There is no way possible that a black person, an Hispanic person, a woman in business, can catch up in this country very soon.

COMMISSIONER DESTRO. I think you've answered my question. Thank you.

COMMISSIONER BUCKLEY. Mr. Pendleton.

CHAIRMAN PENDLETON. Ms. Hager, how did you capitalize your business?

MS. HAGER. Retirement. I started with my last paycheck and I took my pension out, and with another woman, Marsha Sharp of the firm, we put together $1,300 of cash and opened an office on Connecticut and K Street.

CHAIRMAN PENDLETON. What were your gross numbers last year?

MS. HAGER. Last year it was $1.6 million.

CHAIRMAN PENDLETON. How long have you been in business?

MS. HAGER. It will be 12 years in June.

CHAIRMAN PENDLETON. Now, I come to my second question. Mr. Adams clearly spelled it out, and I think rightly so—I know rightly so—the 10 percent set-aside for minority businesses, and women are considered to be minorities in this sense.

MS. HAGER. I beg your pardon?

CHAIRMAN PENDLETON. In this SBA thing, women are considered to be minorities.

MS. HAGER. No, they are not. In the 8(a) program you're talking about?

CHAIRMAN PENDLETON. No, I'm sorry. Last night Ms. Henderson said there should be a special set-aside or special opportunity program for women.

Would you happen to agree with that? Would you buy into that if there were a special program for women?

MS. HAGER. Yes, I would buy into that, but I believe she said if you couldn't come up with anything else to sort of start to change the percentages. I think that was according to several years down the road. As I read that testimony, she proposed several other things first in hopes of that. But there is no question that a set-aside program would make an enormous difference to my business. Yes, I would be three times the size I am now.

Would I take advantage of it if it were there? Yes, I would, definitely.

CHAIRMAN PENDLETON. Mr. Adams, just a couple of quick questions. You mentioned the 10 percent set-asides, the 10 percent versus the 90 percent.

As a minority contractor did you ever say, "I want to take the 90 percent pot and not the 10 percent pot," or does the government restrict you from being in the 90 percent pot?

MR. ADAMS. It's the set-aside program that permits me to operate in the 90 percent pot. Without it, I'd be restricted to the 10 percent pot, which we do operate in.

CHAIRMAN PENDLETON. Okay.

MR. ADAMS. In other words, we bid on contracts.

CHAIRMAN PENDLETON. When you gave your testimony, it was like you had to stay in the 10 percent pot forever, and I wasn't sure whether that was true.

MR. ADAMS. No, in my testimony I was saying—

CHAIRMAN PENDLETON. I mean, in the last answer you gave to somebody about 10 percent versus 90 percent. I got the impression you meant you could only be in the 10 percent pot—"Why should somebody complain about them having 90 percent when I'm limited to 10 percent?"

MR. ADAMS. Okay. Clarence, I recall—Mr. Chairman, I recall—

CHAIRMAN PENDLETON. "Clarence" is all right.

MR. ADAMS. I do recall the statement. What I was saying was—it's like the *Bakke* case. What Mr. Bakke complained about was that 10 percent was being set aside for minority students. What no one ever said was that Mr. Bakke was not smart enough or too dumb to compete in the 90 percent arena, and that argument went all the way to the Supreme Court. When we defended the 10 percent set-aside on the public works bill, we brought out that fact and said, "Look, there's a 90 percent set-aside for white males in this country."

CHAIRMAN PENDLETON. I thought that Bakke's problem was there were 100 slots open to minorities and only 83 open to him.

MR. ADAMS. No, he was complaining about the 10 percent set-aside for minorities. And what I said was somebody should have asked Mr. Bakke, "Why can't you compete in the 90 percent set-aside for white folks."

CHAIRMAN PENDLETON. I guess my point is that in this case blacks could compete for the whole 100 percent, and he could only compete for the 90, which was his problem. There was a total of 100 percent for minorities, but only 90 percent for Bakke. That was his problem, I thought.

MR. ADAMS. A little earlier, Mr. Chairman, I testified to the extent that this Commission must consider under its charter the trickle-down theory that has allowed the majority population to gain an overwhelming advantage from their fathers, their grandfathers, their great-great grandfathers, and what have you, and all this advantage was gained at the expense of blacks and other minorities.

Take Washington, D.C., for example. Washington is a city that is controlled by blacks politically, but I defy you to go out of this office and within a five-block radius walk out and touch a building that is owned by blacks. Now, that's a trickle down. Now, we will probably own some buildings. Maybe my son will own one of these apartment buildings or what have you, but it will be very difficult in my lifetime to do it.

CHAIRMAN PENDLETON. I have no further questions.

COMMISSIONER BUCKLEY. Ms. Chavez.

MS. CHAVEZ. No.

COMMISSIONER GUESS. I have one.

COMMISSIONER BUCKLEY. One question. Rebuttal.

COMMISSIONER GUESS. Madam Chair, I'm surprised you think that there's anything that's been said here today that I'd feel compelled to rebut.

One of the things that has fascinated me during the 2 days of these hearings and the consultation has been the concept of fairness. We've looked at fair share, what one would consider their fair share to be.

By and large I have concluded that the definition of fair share that has been presented during the last 2 days is one's fair share is whatever they can get. If you can get 100 percent of it, then that's your fair

share. And I've also heard during the last 2 days that the fair share everybody is looking for, at least prior to hearing Mr. Adams, was all of it: "I want it all."

Now, Mr. Adams, what do you consider your fair share?

MR. ADAMS. I ran that study, too, about 10 or 12 years ago.

If you look at the population, the percentage of the population we represent, and if you arbitrarily today said, "I want to redistribute the business"—and I'm just talking about the Federal Government business—"and give it to blacks," we couldn't handle it.

However, as a black I must, for the sake of myself and my conscience and that of my children, say that I feel a fair share for blacks and a goal that we should strive for is parity, that we should be willing and able to control and contribute to the wealth of this great Nation at the same percentage of the population that we represent.

COMMISSIONER GUESS. Ms. Jenkins, what do you consider your fair share to be?

MS. JENKINS. Whatever the government is putting out, I want a part of it.

COMMISSIONER GUESS. Ms. Hager, what do you consider our fair share to be?

MS. JENKINS. What my male counterpart makes.

COMMISSIONER GUESS. Mr. Chairman, for the record I want to express that I consider my fair share to be it all. I want it all.

[Laughter.]

CHAIRMAN PENDLETON. The record so notes that you want everything.

COMMISSIONER GUESS. I want it all.

[Laughter.]

CHAIRMAN PENDLETON. I want to thank the panel. Thank you very much.

We are going to stretch for the sake of the recorder.

[Recess.]

CHAIRMAN PENDLETON. We will start the fourth and final round. I remind my colleagues of the fact that we have to be out of here promptly at the witching hour when this panel ends.

Roger R. Blunt is founder and president of Tyroc Construction Corporation, a building construction firm in Washington, D.C. The firm did approximately $11 million in business in 1984 and was included in the *Black Enterprise* magazine list of the top 100 black businesses in America.

Mr. Blunt is president-elect of the Greater Washington Board of Trade and the first black so elected. He is a brigadier general in the U.S. Army Reserves. A graduate of the U.S. Military Academy, Mr. Blunt served 14 years in the U.S. Army. He holds masters degrees in civil and nuclear engineering from the Massachusetts Institute of Technology. Tyroc Construction was an 8(a) firm from 1972 to 1983 and never did more than 25 percent of its volume in 8(a) work.

Clarence H. Braddock is president of Automated Sciences Group, Inc., a systems engineering firm headquartered in Silver Spring, Maryland. The firm did $15 million in business last year. Mr. Braddock has worked in systems design with Burroughs, ITT, Aerojet General, and Litton Industries. From 1972 to 1979 he was chief of the Systems Analysis Division, Federal Railroad Administration. He then joined Automated Sciences Group.

Automated Sciences Group is an 8(a) firm and is scheduled to graduate in April 1987. Seventy percent of its business is 8(a) work. The firm has 450 employees across the country.

Toni Y. Luck is founder and president of Luck Manufacturing, Inc., a Washington, D.C., baked potato and meat-packing concern. Formed in 1984, the firm did $20,000 in business in its first year. Revenues are expected to top $1.5 million this year. Luck Manufacturing is finalizing a $540,000 enterprise zone package with the District of Columbia government. The firm will obtain a plant and equipment for its baked potato endeavors and will sell the potatoes from carts in shopping plazas. Ms. Luck has been approached by McDonald's, Pizza Hut, and Amtrak.

Ms. Luck has been a minority entrepreneur for many years, founding a magazine and a cosmetics company. She holds a B.S. in economics from Fordham in 1980, and has completed 1½ years of study at Georgetown Law School. She is a former administrator of legal services with Mobil Oil Corporation.

Jerry Davis is president of Unified Services, Inc., a Washington, D.C., janitorial services firm, which he founded in 1971. This year the firm should approach $10 million in business. The firm has offices in New York and Florida. Among its projects is the cleaning of the buildings at the Kennedy Space Center, often requiring totally dust-free environments.

The firm was 8(a) from 1972 to 1982. In the beginning, 90 percent of the firm's business was 8(a). By the time of graduation, the percentage had been reduced to 15 percent.

Mr. Davis enlisted in the Army and rose to the rank of lieutenant colonel. In Vietnam he commanded a battalion of over 700 men. He retired from the military in 1970 after 26 years of military service. Mr. Davis is a graduate of the smaller company management program of Harvard University's Graduate School of Business Administration. In 1980 he was a delegate to the White House Conference on Small Business.

Welcome to the panel.

Now I have to swear you in.

[Roger R. Blunt, Clarence H. Braddock, Jerry Davis, and Toni Y. Luck were sworn.]

CHAIRMAN PENDLETON. Please be seated, and counsel will start with the testimony.

TESTIMONY OF ROGER R. BLUNT, PRESIDENT, TYROC CONSTRUCTION CORPORATION, WASHINGTON, D.C.; CLARENCE H. BRADDOCK, PRESIDENT, AUTOMATED SCIENCES GROUP, INC., SILVER SPRING, MARYLAND; JERRY DAVIS, JR., PRESIDENT, UNIFIED SERVICES, INC., WASHINGTON, D.C.; AND TONI Y. LUCK, PRESIDENT, LUCK MANUFACTURING, INC., WASHINGTON, D.C.

MR. SCHULTZ. I'm going to ask each of you, beginning on the left with Mr. Davis, if you would again for the record, state your name and address and your business and its principal activity.

MR. DAVIS. I'm Jerry Davis, Jr., the president of Unified Services. We are located here in Washington at 2640 Reed Street, N.E. Our principal activity of business is contract cleaning, janitorial services, for both the public and private sector.

MR. SCHULTZ. Mr. Blunt.

MR. BLUNT. My name is Roger Blunt. I am the chairman of Blunt Enterprises which is located at 2018 Fifth Street, N.E., in Washington, D.C.

MR. SCHULTZ. And the nature of your business?

MR. BLUNT. The nature of the business is construction, construction management, and engineering.

MS. LUCK. My name is Toni Luck. I'm president of Luck Manufacturers. We are located at 3005 Bladensburg Road, N.E., and we are in the process of building a food manufacturing plant in Washington.

MR. SCHULTZ. Mr. Braddock.

MR. BRADDOCK. My name is Clarence Braddock. I'm president and chief executive officer of Automated Sciences Group, Inc. We are headquartered at 700 Roeder Road in Silver Spring, Maryland. We are engaged in systems engineering, office automation, and computer-related services for the Federal Government and for the State and local governments.

MR. SCHULTZ. Thank you.

The first question is for Mr. Davis and for Mr. Blunt. First Mr. Davis: Would you describe briefly your experiences with set-asides and how they have helped your firm?

MR. DAVIS. Okay. First of all, I'd like to say that I want the record to reflect that I agree totally with the testimony of Ted Adams. Our careers paralleled. We were in the Army together. Everything he went through, I went through, and in terms of getting on the 8(a) program, we did it at about the same time.

Insofar as my experience with the 8(a) program, as you heard a minute ago, we were on the program for 10 years. I am absolutely certain that I wouldn't be in business today, or certainly not at the level that I am, if it had not been for the 8(a) program.

Just very briefly, the program allowed me, number one, to establish a track record, which is very important in business. It enabled me to assemble and train a top-notch management team, including myself, because when I started in business I did not have a business background. And then, most importantly, it helped me to establish a solid banking relationship. I was able to do that rather quickly because of the set-aside program. If it had not been for the set-aside program, I wouldn't have been able to do that.

By the way, I'd like you to know that today we employ 1,000 people, and they all pay taxes and they are drawing salaries.

MR. SCHULTZ. Thank you.

Mr. Blunt, your experiences and how it's helped your firm.

MR. BLUNT. Yes. I formed my business in 1972 from scratch, and after it was formed my first contract that I won competitively was to repave Missouri Avenue. Subsequent to that, I heard about the 8(a) program, got registered in it, and after a few years received some contracts, which I found were of great assistance to me in evening out my work

program, principally because I was limited in the capital structure. My organization had a quantity of borrowed money, and it wasn't able to amass the kind of bonding that enabled me to build up a big work program.

The problem I had with the 8(a) program was that it was inflexible and did not recognize my strategy toward diversification. And while it promised me help in areas of high risk, it precluded my ability to branch out and do other things I felt capable of doing. So in the midseventies, as I recognized the 8(a) program would be of less and less assistance, I began to diversify and to do those new things that would take me into a new arena.

I would say, on the other hand, in the early seventies, were it not for that particular set-aside program for procurement assistance, certainly no money assistance, because some of the jobs I got I probably shouldn't have taken—they were jobs they put in the 8(a) program that I think should not have been there. But I will say that if it were not for at least that balanced work program I had in the early years, it might have been difficult for me to reach this particular level.

MR. SCHULTZ. Ms. Luck, you have applied for 8(a) certification, but only after being urged by others to do so. Do you feel that you need 8(a) in order to be successful?

MS. LUCK. Well, let me just separate two of my businesses. We have a retail operation, which is what the Chairman alluded to in terms of our potato business, which needs no subsidy or set-aside because it's retail and operates in the direct marketplace.

However, we have found the opportunity to be in another business, which is ground beef. And in order for us to really take full advantage of that opportunity, like from a McDonald's or from a Wendy's who have a seasonal buying pattern, an 8(a) contract keeps us, as Mr. Blunt has said, in a work kind of mode, because those contracts go 52 weeks a year. Like in the Department of Defense, they buy 51 weeks a year. In the very cold months, McDonald's buys less. So when you tool up a factory at the rate of $2 to $3 million, you can't really afford to be slow, because those pieces of equipment have to be paid for, etc.

In our discussions, when I have gone to banks or even to a McDonald's to sell our ability to produce, they have been more impressed that we were in the 8(a) process and that we will be becoming 8(a) because that showed a different kind of stability. And, of course, I don't come from a family of cowboys, so I can't say we've been in the ground beef business for 20 years. So that 8(a) piece gives us a different kind of credibility and allows us to break into another industry. And that particular business will provide over 200 jobs. So it's something that we have been very seriously looking at, and the 8(a) will be of assistance.

MR. SCHULTZ. Mr. Braddock, did you need the assistance of set-asides to become a successful business owner?

MR. BRADDOCK. I think without question, although I'd like to parenthetically, or maybe not parenthetically, add not without a great deal of trial and trepidation.

Let me say a few words about the 8(a) program. It is one that is fraught with a lot of schizophrenia, and I think, as with most government programs, there's always a lot of slippage between the formulation of the policy and the implementation.

In my judgment, the purpose of the 8(a) program was to provide an opportunity, as such programs have in the past, for those who were perceived to be lacking in the resources or conditions that would allow them to achieve some kind of equity in society. And at least in the formulation sense, it was intended to be a program to provide opportunities for emerging businesses owned by socially and economically disadvantaged persons to have an opportunity to develop to some sort of critical mass so that they would have a fair chance of surviving in the competitive marketplace.

Tracking back to something that Roger has said—and I think in his case it was peculiar to his sort of business—in the implementation sense the 8(a) program is unfairly restrictive and rigid. It almost dictates to the corporation what its business should be, which is foreign to any principles of business that I know.

The program as it is implemented began to be more of a contract assistance program, trying to help as many as they could. There were, at last count, over 2,000 firms in the program. There seemed to be a mood within the program to try to help everybody. And I think that that has worked to the detriment of the program.

If you look back at the recent history in the changes in the program, even the concept of graduation came about primarily from the cries of either those minorities who felt they couldn't get

into the program because there were too many firms in there and nobody ever, quote-unquote, got out, or from a large majority of firms within the program who felt they had no contracts.

Yet, within the business world in general, I think we see it work in the so-called 80–20 rule. My point is that those people who have some business expertise, who have a product to sell and the know-how to do that, with an 8(a) program are penalized for doing that in terms of their ability to go out and market. The 8(a) program in its simplest form is a certification. It sure is not a condition of birth; it is not a stigma, but the program seems to make it so.

Having said that, the program has been helpful to us in the sense that it gave us an opportunity to go out and engage the client, convince them that we had a service that met some of their needs, and because I had the certification I could then work to encourage the 8(a) program officials to allow me to do that job.

We had an awfully hard time over the first 5 or 6 years of the corporation—and the corporation is now some 11 years old. I joined it 5½ years ago. Up until that time, the company was almost forced to take the work the SBA was going to give it. What we adopted was then a strategy of going out and finding our own work and fighting like hell to get the SBA to allow us to have the work.

We have been successful, I think, but without that credential, without that ability to go to the client, engage him, and use the 8(a) certification as a way to quickly bring that contract to fruition, we would not be anywhere near where we are today.

MR. SCHULTZ. Let me direct this question to the entire panel, whoever wishes to answer. Is there a buddy system out there? We have heard testimony about this over the course of the last couple of days. Is there a buddy system out there and, if so, does it work to the disadvantage of minority business enterprises?

MR. DAVIS. But of course. We could talk about that all day. We know it's out there; we who try to operate in the marketplace, and we who are minorities. I can speak most authoritatively about my industry. I know that the buddy system is out there. I know that they gather and they decide who is going to clean what building, and I am basically talking about the commercial market. It's there.

MS. LUCK. I'd like to add something too. There are organizations of folk who get together—and it's really basically an old boy network and it shuts out women; it shuts out blacks; it shuts out Hispanics. And as has been said earlier, those kinds of meetings, as Mr. Adams stated earlier, are where the deals are made.

I got to McDonald's through an old boy network. I did not call up the president of McDonald's and he was ecstatic to talk to me. You know, I knew someone who knew him and he made arrangements for me to talk to them. But had that contact not been made, I wouldn't have been able to walk to McDonald's door and say, "Listen, I grind beef. Can I do yours?" It really doesn't work like that.

But I would like to add, before we get any further—and I'm always concerned when black folk have to justify something that creates an equity situation—these programs for white folks are subsidies. They are called sole-source situations. When we want to build a missile, we go to one missile builder. It's no problem.

When we talk about black folk, we talk about welfare situations, set-aside situations. So as has been stated, you set up a whole stigma situation that is to create a system of equality. And I think from your panels that you have assembled, there is not a black entrepreneur who wants anything. The only thing that we want is for the racism to get out of the way, and you can't do that unless you're in an environment to make money. And those kinds of things are closed. And one of the ways it's closed is through the old boy network.

First of all, they don't tell on each other. So a lot of the information we find—Mr. Davis has mentioned that he knows—it's through someone saying. I mean that's not public knowledge. People do not write articles about it. It's not in the *Washington Post.* Black business people in America wear 12 hats. We have to run our business. But then we have to do espionage. We have to find out who's doing what to whom, when, where and how. We have to stay in business; we have to stay afloat; we have to feed families. We have to do so many things just to bring our product—you know, I'm almost sure sometimes that someone sets this up, because if we ever got a chance to participate in a free market system, white folks would be in trouble, because we go through a lot just to be where we are.

I think we need to start talking about some verbal hygiene when it comes to what is for black folks, that's the welfare side; and whatever is for Grumman, that's a sole source bid; that's the best way to do it, the most efficient. There's a whole different

kind of language. And I think we have to really start laying out the language for us.

You have asked that question over and over about the buddy system. I don't know if it breaks down, because I'd like to do business with black folk, and I don't want to 10 years from now be accused of doing business with black folks because it's a buddy system. But I think it does hurt us because there is a visible racial barrier to being in those clubs. Once you're in there, you certainly have been allowed to get there, but the problem is getting in there, and it does hurt.

MR. BRADDOCK. Could I make a comment?

MR. SCHULTZ. Mr. Braddock.

MR. BRADDOCK. I think within the arena of Federal contracting that there is a buddy system, but it's a much more insidious kind of a buddy system. If you look at the term "preferential"—and I think it's ironic that, as I read the press, there is a big hue and cry about the evils of preferential programs. Yet, if you read Webster, it simply says, "A preference for or an advantage." And what we are really talking about is the fact that society has always used preferential programs as a means of curing its perceived ills.

It is also ironic to state that the so-called preferential programs like an 8(a) program that everybody gets upset about was fostered because of a perception on the part of society that the then-existing preferential program was causing somebody some pain. Whenever you take a step to help those who are disadvantaged, then those other folks are going to get upset.

Within the arena of Federal contracting, the kind of buddy system that works is the preference for the known commodity, the older existing company, the IBMs. That is insidious in the sense that if you balance it off against some of the myths about the 8(a) program, where you get poor workmanship, there's fraud and abuse, and it costs too much money—you read the paper, and that ain't peculiar to us, friend. They are withholding money from General Dynamics. They've had $800 toilet seats. We didn't create that. So the fraud and abuse is not peculiar to the 8(a) programs.

But what happens is if we didn't have them, the government would still spend this money with the known firm, the larger firms first, maybe with some of the well-established so-called small business second, and then, getting back to what Toni is saying, with minorities last because we are perceived as incapable, incompetent, and if I know my textbook, that sounds like racism to me.

MR. SCHULTZ. Mr. Blunt, in the construction industry is there a buddy system?

MR. BLUNT. Well, I'm not so sure I can answer that question—and I haven't heard the panels and the people who have presented. I have been at it well over 12 or 13 years. I can make a few observations. I would say that the first observation is that the set-aside programs do not appear to be working. Had they been working, quite frankly, there would be a lot more people in the situation such as we find ourselves—emerging.

I rather suspect our problem is one of credibility and performance and getting on the inside to demonstrate that we can deliver. And that is a difficult thing. When you deal with humans or deal with the procurement process, they are not going to take any chances. There are a lot of risks out there.

And that brings me to the point of discussing construction versus regular goods and services. Construction is perhaps the most risky enterprise we have in our system, where a designer who responds to an owner's needs creates a set of specifications and limits his liability, where the marketplace throws in a bid for a certain price to deliver in accordance with those plans and specifications, where mistakes are made and everything has to be done on schedule or ahead and within a budget.

In that kind of a competitive environment, I rather suspect that people are not going to voluntarily reach out and find minorities. I think in that kind of environment for construction we need to provide incentives and strong mechanisms to make people reach out.

It has been my observation that the majority of construction contractors are in a peculiar position. On the one hand we are saying, "Find a minority," and on the other hand we're saying, "We're going to take the lowest price." I have to explain that a little.

Quite frankly, contractor *A* might reach a very competent and capable qualified minority firm, but contractor *B* may not. Quite frankly, voluntarily, just adding someone to the list and trying to compete against contractor *A* is a dangerous enterprise.

Add another dimension. It is quite natural for a contractor to protect his market. And if that large contractor recognizes that he has to give something away in a competitive environment whereby he may be limiting his market, he is not likely to do it.

I say that the government has the ability, through its procurement process, to affect the equation. And it seems to me if they could provide opportunities for the larger contractors that they otherwise might not have gotten and require them at the same time to work in joint venture with minority firms, it is possible with that kind of benefit the majority contractors might do something.

Just to set it in perspective, I would say that the typical very large construction contractor, the majority construction contractor, does most of his business on a negotiated basis in the private market. What the minority firms are struggling to do is to be able to compete in that private market with the majority firm. They can't do it without a reputation, they cannot do it without bonding, they cannot do it without good access to credit, and certainly, they can't do it without good management teams to bring all of that together.

The government can create an opportunity because it has goods and services that it has to procure. The government has to find a way to do that in achieving some kind of incentive for the majority firm so that they, in a competitive environment, will find a mechanism to increase the work that minority firms are doing.

It is difficult. Had it not been so, we would be further along today.

MR. SCHULTZ. This system you propose, if you could have an incentive-driven system as you have described—we have heard a lot of testimony about shams or fronts or shell organizations—would it also serve to minimize the likelihood of those existing?

MR. BLUNT. If it is done in a very open way, I could say, off the top of my head, conceptualize a system that might work. For example, a two-stage procurement whereby firms are invited in the marketplace to respond to a requirement, one of the requirements being that they joint venture with a minority firm, and, say, a minimum of *X* percent.

In that first stage, where you examine the technical capacity to perform, the financial strength, the credibility, who would be the sponsor, what relationship the majority firm would have with the minority firm, it would be pretty easy to examine the details of that joint venture as to who is putting up working capital, what the share of the profits would be, what the share of the liabilities would be, and what affirmative activity on the part of the general contractor would be to help the small firm. It could be that he doesn't have to put up a bond. It could be that the small contractor only has to put up a limited amount of working capital, and if more working capital is required, basically, it could be put in by the majority firm without attacking the percentage.

There are a number of ways. And I would say after that first stage where three, four, or five firms would come in with their proposals to joint venture with minority firms, a certain three might be selected to compete on price. The government could always determine a fair and a reasonable price, and I submit to you that the competition would bring that in at the market price or below in a competitive environment.

And then, of course, one would want to examine the results of this effort to see how the joint venture worked, the penalty being, of course, if the minority firm was abused, some sanctions would be applied.

Now, what would make a majority firm want to do this? It seems to me that in certain cycles of our procurement we find 18 to 20 to 30 firms picking up invitations and sometimes responses by 18 to 20 or 30 firms. Take a $30 or $40 million project—it would cost a significant amount of money to be put together by a large firm. So as a result, they tend sometimes not to want to put the price together when you have so many firms like that, and they walk away from it.

The government may not be getting the best performance or the best contract. In fact, in an environment like that, the tendency is for someone to make a mistake or someone to take it at a very low price, and while the government benefits in some respects, it has an awful lot of problems.

But I'm saying to you that if a contractor could be assured that he's got a one out of a three chance after that technical phase of winning, he would certainly put out a lot of effort. And it seems to me this might be one mechanism. The concept here is give some kind of a benefit to the majority firms to give them a reason why they could reach out to the minority firms and build them because the government cannot.

MR. SCHULTZ. Let me ask the entire panel, beginning with Mr. Davis: You have mentioned the barrier of the old boy's network. What other barriers do you see to the success of your firms—now and in the past?

MR. DAVIS. First of all, we do have the old boy network. We have the financial institution. You have a problem with them in terms of getting a line of

credit, especially when you're just trying to get started.

Then, of course, we have a barrier we can't do anything about. We are so highly visible because we are black, and when we walk in trying to sell our goods and services, people have to get used to that. Because the truth of the matter is, it's only been in the last 20 years, maybe, that blacks have been in business.

For instance, when I was growing up, my family didn't sit around the table talking about business because going in business for blacks in those days was not a viable option. You could be a school teacher or a preacher out of my home town.

So those are some of the barriers. They are traditional barriers and everybody knows about them. I know about them the instant I walk in trying to sell my service to somebody.

MR. SCHULTZ. Anybody else on other barriers you face?

MR. BRADDOCK. Let me make a comment. I think one of the most significant barriers is perhaps the barrier of perception. I heard one of the Commissioners say earlier—and I think I heard him right—that it should be okay for society in the form of this government to periodically, for the purpose of righting some wrongs or correcting some deficiencies, to distort the free enterprise system and to take care of those folks.

I think that right now the thing that really infuriates me, even at hearings like this and when I read the papers, is that we have this constant perception, this blind belief, this blind faith, that the free enterprise system in the marketplace is the way it should be.

I have heard the term, "What we really need to get to is a colorblind society." And that scares me to death. Because again I refer you to Webster from the scientific definition, "Inability to distinguish between colors." Read it carefully. It also says—and let me read it: "Not noticing or considering." Then it finally says, "Blind, insensitive, oblivious."

And what I'm saying to you is that where we sit in our society, I think the set-aside programs have been very helpful. They have not been anywhere near as helpful as they could have been because every 4 years, 2 years, we get somebody who says there ought to be free enterprise. And as soon as we get off that dumb podium and look at the realities of what goes on out there in this free marketplace—in the time of Plato the marketplace was such a bad place that kids weren't even allowed to go, and that tells you something about the marketplace.

So in this marketplace minorities are, indeed, children. If this government does not recognize what is real out there and put its full faith and support behind it as they do with the zero coupon bonds, then we are never going to be able to take the full advantage of whatever the set-aside programs are.

MR. SCHULTZ. Mr. Blunt.

MR. BLUNT. I would say in construction—and I'm sure the earlier panels have dealt with it—one of the real barriers is access to surety support, bonding. And I say that the general contractors who have the responsibility to deliver to an owner or to the government are being asked to take on a risk that they traditionally pass off to someone else. The contractor manages the work, coordinates it for a fee, and if he has to deal with the minority community and the emerging small businesses, he is going to be coordinating or dealing with work at that level, and he is going to be taking on something which isn't his traditional risk area.

In talking with majority firms and asking them this very question, I repeatedly get the answer, "You give me a minority firm or any firm that can give me a bond and I'd be happy to deal with that firm. I can adjust and we can negotiate price, but if they can't come up with a performance bond, then basically I'm not going to be competitive with my other people in the marketplace."

More and more today, general contractors are becoming construction managers and passers-on of risk. And to the extent that the small firms cannot come up with this kind of surety support, they can't play the game.

That is a significant, real, continuing barrier which can be corrected by money, by indemnities, by the government who could create maybe an improved mechanism to deal with. But unless that is handled in the construction arena where we are dealing with risk, very high risk, it may not be possible for small firms to emerge and continue and to grow, even those firms that want to stay small, the specialty firms.

MS. LUCK. I'd like to also add to Mr. Braddock's comments—the entire promise perception—we cannot get bonds; we have problems with access to capital; we have problems with access to knowledge; and all that comes out of the public perception of being a minority and also the public perception

that the government is standing around handing out to minorities all these wonderful deals.

As many success stories that are in 8(a), you have horror stories in the 8(a) program by insensitive bureaucracies. Companies can't hold out 3 or 4 years while the wheels grind, because you also have humans who are administering those policies who have perceptions that you have this black company that is getting something.

What I'd like to see come out of these hearings is the fact that we start talking openly and honestly, that America has yet to participate in the free enterprise system. We have subsidized the automobile industry; we have subsidized the airline industry—we have subsidized transportation, period. We have subsidized farmers. We have subsidized every known entity in this country. Whenever there has been a problem with them, we have come and stepped in. We subsidize banks through something called the FDIC. But they are called different things because the majority is writing the rules. And I think the most important thing is that someone write some rules that say, "Black folk are now coming up to the table. We have been in this country this year 430 years and we are now coming up to the table to get a parity share, no more and no less." But as long as we keep saying, "Blacks are getting this other thing," like the majority isn't getting that other thing, we're always going to have people administering whatever it is that is handed down legislatively in a haphazard way.

So that is always going to be a barrier. And sometimes when you access capital, you cannot get a bond. You have money and yóu can't get a bond. Or you have a location and you can't get money. Or you have both of those things and you can't get customers, because there's this perception of black folk that they don't do it as good as white folk.

And I have to agree, I don't know any black folk who have sold $800 toilets. If I did, I'd be in that business. I could sell 10 a week, you know, and retire. And I think that's real important.

But whenever it comes to us, it's a whole different kind of perception. So I think if you gentlemen are very serious about this, the thing that needs to be thought about is how we are perceived.

I don't think that I want set-asides forever because I don't like the idea that there is 90 percent over there, and this set-aside thing is for me. I want to jump in there. But how do I get in there? How do I access that business? How do I get into a new business? How do I provide employment for other black folk if I can't break into those industries that have traditionally not been allowed for us?

So I think the biggest barrier is the skin color. I can't do anything about it, and if I could, I'm not sure I would. I think it's all right. But I think you have too many human elements of people who are sitting behind a desk earning $30,000, $35,000, and angry that this black person has the audacity to write a business plan that can make $20 million. And they are bringing with them 430 years of that. So without some thought to that, we are always going to have that problem.

We are getting ready to go into the 21st century, and black folk are really in a little worse shape than they were 100 years ago. Because now we can conceivably sit at the lunch counter and conceivably ride at the front of the bus. But we don't make buses, and we have that capability. We don't provide food in large numbers. Black folks don't make food. We don't do a lot of things that we are capable of doing, and that is because of that physical barrier.

I'm not sure what we do with that. I don't know how you get into the minds of those humans and say, "Listen, let's go for fairness because unless you do it from your end and we do it from proving we're capable business people, we'll always be talking about this." We'll have this kind of hearing in 10 more years about how come the Asian Americans—they're the fastest growing population; so are the Hispanics. Black folk aren't going to be the largest. And we'll still be talking about this kind of stuff.

So I am concerned about that public perception that this is a handout kind of situation. And I challenge those people because we are very serious business people. You have Mr. Davis employing 1,000 people. That's serious. There aren't a lot of white firms that do that.

So when you see the examples of failures and all those kinds of things, that's not what is really happening. We are out here taking care of some serious business. We'd like you out of our business as fast as possible. We'd like to do $20 million and get graduated so we can go on and do $50 million. We really want to do that. But what is perceived is that we are just hanging out in this program because we don't really want to be in the free enterprise system, and that is really not the truth, and I think we need to change the perception.

MR. SCHULTZ. Mr. Blunt.

MR. BLUNT. I spoke of one barrier being bonding, and as we know it's tied to capital. Of course, I'm sure we all recognize that another barrier is lack of equity because, with sufficient equity, we could weather the economic cycles and the downturns. But there is another barrier. It's a real barrier out there, and that happens to be the natural concentration of power in certain segments of certain industries.

I think we recognize that they would not have an antitrust law if that were not so, but I would say that minority firms, small firms, any firm that is emerging, needs at least a helping hand from the government, not necessarily to break up these cartels, but to facilitate a competitive environment.

To the extent it does so, it will lower the cost of goods and services and perhaps do a favor to lots of majority contractors. That, in reality, exists when large contractors indicate that they can't find minority firms to do, say, landscaping or guardrail work, but that typically is what is spoken of when I hear the Associated General Contractors or others, and I'm not really casting these stones there. I'm basically saying that in some markets it is quite obvious it would be very healthy to create small businesses and new opportunities for a healthy environment that would help us all.

So to the extent the government has a procurement control in certain areas, it should have a policy which facilitates this kind of competition. To the extent we can work a joint venture between majority and minority firms to facilitate that, I think we will achieve some of our objectives in growing and prospering.

MR. SCHULTZ. Thank you, each of you.

I yield to the chairman.

CHAIRMAN PENDLETON. Sorry I was out of the room. I had one ear on what you were saying and one ear on the telephone.

If I could just ask a question. Mr. Davis, you and I and Mr. Adams are in the real world, and I just want to pose a scenario and see how you react to it.

I can remember living here before the time of integration in Washington, D.C. I remember when the black community before it became a ghetto was a very viable kind of community, and a lot of it centered around U Street and some parts of 14th Street and some parts of far northeast and some parts of Florida Avenue.

In 1954 when Mary Church Terrell and others integrated the Peoples Drug Store at 14th and New York Avenue, the first theater downtown to admit blacks was the Plaza Theater at 14th and New York Avenue, and that became symbolic of a couple of things.

We were denied entrance to white economic domains. And after we were allowed entrance, we couldn't go downtown fast enough to spend the money that we spent in black communities in many of the stores. You can recall when you couldn't sit at the lunch counter in Lansburg's or Kahn's, or your parents certainly couldn't try on clothes in Garfinckels. They might be able to try on a little something in Lansburg's.

It is my belief that we didn't protect black economic institutions when we did that, that as we moved away from what we thought were viable businesses, we ran away and didn't say, "Well, wait a minute, white folks; we have some acceptable institutions this way" and begin to prop up black businesses.

That happened in a lot of towns, Pennsylvania Avenue in Baltimore, the uptown area in Philadelphia, 125th Street and the like in New York. And the community suddenly died as we began to move out.

What I applaud you for is trying to make it in that world that a lot of us deserted. And that is extremely difficult. I don't know how it is you assemble the minority and the black dollar to do what used to be done when they were viable businesses.

That is not so much a question as it is a situation that I think bears some consideration.

Now, I'm chairman of the board of the San Diego County and Local Development Corporation, and we're an SBA 503 program, and we're the number one 503 program in America, and in 5 years or less we have $120 million on the ground in capital and equipment, and we have been able to combine some 7As with that. And there are close to 10,000 jobs created and saved in that process. I know that SBA is thinking about cutting all that out because the debentures we sell come from the Federal Financing Bank.

I don't know what all the answers are, but I would hope that at some point in this whole process we could begin to talk from some historical base about what it is that legitimizes black people in business and minority people in business that at one time was legitimate. I wonder whether or not we delegitimize ourselves or whether or not somebody else did it to us.

I have very strong feelings about that, and it was a sad day when I began to see U Street crumble. When I see my black brothers and sisters all over town in all kinds of places that they were never in before, it bothers me about where the black community is that they talk about. You guys know that in many cases if you had to depend upon blacks to support your business, you'd be in deep trouble.

So I don't know what we are really talking about except I know that you want to survive. And I put that on the record just because I think it's important to do. And I applaud you all for what it is you have been able to do in the face of great odds. I do believe you want to be in the free enterprise system. I really believe it. And I'm just sorry that the only way you can get into it is with the complexities of a government program that may be here today and may be gone tomorrow, like anything else.

I happen to believe that import quotas are set-asides. I happen to believe, in contrast to some other colleagues, that farm subsidies are set-asides. And I also believe that tobacco subsidies are set-asides. If that is going to be the case, then I don't like set-asides like you don't like them, Ted. But I'm clear that you're going to have set-asides. And we have concentrated this discussion primarily on minority set-asides, and I think the discussion needs to be a broader discussion with respect to who gets the fair shake in this country and who has access to the resources.

I'm not talking about whether or not the Defense Department is right or wrong. But why is it that we have to have a hearing that in a sense castigates people who are trying to make it and does not castigate those who are making it, based upon the very same principle that governments put out?

I would just hope that at some point, Ted, we could drop our acrimonious discussion and differences about where we are and talk about the broader picture and do some comparatives. You and I all know that that's the way things go down.

I'm sorry, my colleagues, that I had to wait until the last part of this consultation/hearing to say that.

COMMISSIONER GUESS. Mr. Chairman, could I make an observation on what you just said?

CHAIRMAN PENDLETON. Just let me end.

I don't know what kind of recommendations you want to make to us in terms of where we go with this, but one of my own in the process of when this hearing record is put together, I do want to talk about what else in this country is a government set-aside, and not to have minority people and other people blamed for the same principle. That is where my head is, and that is why I'm opposed to them because there are preferences all the way around, and I don't want anybody blamed for anything.

Mr. Guess.

COMMISSIONER GUESS. Mr. Chairman, based on what I have just heard you say, logic would dictate from your analysis that it was the desegregation of public facilities in the city of Washington which led to the disintegration of black communities, and as such, logic would dictate that the viability of the black communities would be enhanced if we were to return to a segregated society. Please tell me my logic is incorrect.

CHAIRMAN PENDLETON. It's incorrect, sir. What I am saying is that I think we had the obligation—with hindsight—to protect the institutions that we had in communities and not to destroy them because we moved in and out of them. I do think that there should be integrated communities, but we cannot blame the black community for its own progress when a lot of us have left it. I'm only saying that from the standpoint of observation, Mr. Guess, and in no way do I talk about resegregating America.

In Baltimore, we know that when the Baltimore city government decided to make the houses available in intown Baltimore, they sold them for $1. There was a caveat to the $1; you had to spend $50,000 to fix them up and bring them up to code.

So where we talk about one kind of development, you know, in a sense that was a different kind of a subsidy, if you will, but based upon the people, whether they were black or white, Mr. Guess, that had the money to move back downtown. And a lot of the people that moved out could never move back.

So I just want the record to show, in terms of my opposition to set-asides and the kind of treatment, I'm not talking about it against minorities and blacks. I wish the whole thing would be reviewed. That is my only point.

COMMISSIONER GUESS. Mr. Chairman, a final point, and this is an extension of the point you and I had in a private conversation yesterday, but since you injected it for the record, I'd also like to take this opportunity for the record to invite you to move back into the black community as I have done.

CHAIRMAN PENDLETON. Mr. Guess, I make my own decisions about where it is that I want to live and what I want to do like everybody else does.

COMMISSIONER GUESS. Thank you, Mr. Chairman.

MR. BRADDOCK. Mr. Chairman, may I make a comment?

CHAIRMAN PENDLETON. Yes, sir. And you and I know each other, Mr. Braddock.

MR. BRADDOCK. We were here at the same time and went to school right across the street from each other.

I think what we have to put into real sharp perspective is exactly the scenario that you talked about. But, again, we talk about perception. We grew up and all of our perception about what was good and what was bad we got from the majority. So whatever it was that they had, we wanted to have. When schools were desegregated, when theaters were, we were euphoric. Freedom is worse than cocaine. It's the worst aphrodisiac. You want to go out and do it without ever examining it. We had theaters on U Street that were six times better than the theaters downtown, but it didn't make any difference.

A case in point, the Kappas used to have a dawn dance every year over at the Armory—a great affair. They desegregated the hotels. We couldn't wait to go to the Hilton where it cost us 12 times as much to have the same affair and had a hell of a lot less fun. It takes a long time to get over that euphoria.

CHAIRMAN PENDLETON. I agree with you.

MR. BRADDOCK. I think we are finally getting to do that. Right here in this town now there's an organization of black churches which are forming their own insurance agency so they will collect those fees. They are doing collective banking. It took us a while, but we're finally getting smart.

Now, whether we go back into the neighborhoods, I'm not sure. I'm saying we have been on a freedom train. We got—

CHAIRMAN PENDLETON. —to oblivion.

MR. BRADDOCK. We got equal access to education, to jobs, to housing. Now we have the final piece, which is the equal opportunity to go out into the business world.

Now, with respect to set-asides, I would like to foresee a world without them. I don't. That is idealistic because, in order to do that, you are going to have to change the minds of men, and that is not going to happen in anybody's lifetime. So I think it's a good and proper function of the government—and it's not perfect because it's human beings—to do whatever it has to do to correct whatever the ills it sees in any segment at any given point in time.

I would love to be accepted as I am, but I'm not. Thank you.

MS. LUCK. Mr. Chairman, you might not want to say that integration wasn't such a good idea, but I can say it because we are now faced with $190 billion—blacks in America spend $190 billion annually. I'm not so sure I wouldn't want to be in that exclusively. And I think we have to really consider past 20 years ago. From Reconstruction, blacks have been in business. Blacks have been providing services to each other. And I would like to agree with my fellow panelist, we have really gotten too euphoric about this thing called freedom, and I'm not sure we have it.

So I'd like to go on the record to concur with the Chairman, first, and to say that I would like to market in that $190 billion market. But we don't respect each other in that market. And it's quite true that if I sold my products to black folk, I don't think I'd be selling a lot of them. And that is because we have lost the idea that we do good business.

I'm not sure that cutting things out or putting things on is the idea. I think the whole thing is publicity, PR. If you guys want to spend some money, do some PR about it's good doing business with black folk, and let black folk see that it's good to do business with other black folk.

But I have personal problems with integration. I thought it could have gone backwards. I thought the Apollo was pretty neat. I'm from New York, and I thought it would be nice for white folk to come up there and go to the Apollo as opposed to me going downtown to 42nd Street. But I think we have to rethink ourselves. But, Mr. Pendleton, I think that's something black folk have to do, and I don't think you can decodify it.

CHAIRMAN PENDLETON. I think you're right.

MS. LUCK. I think we have to feel it. But the critical thing we have to keep going back to that is very important, as you have said, is that there are so many people that are subsidized. We're not the culprit.

I was saying to someone today in another meeting that I was afraid that the farm situation is getting ready to get us in a riot. Black folk always get it when something is wrong. I mean those probably are our farms—you know what I mean, the 40-acre and the mule farms. But the farmers are getting ready to get real mad. And they are getting ready to

get mad at black folk, because they're going to be able to put up that we got these set-asides. We become the scapegoat.

So I'm always concerned. I don't know if I'm so happy about having a separate State so they can cut the water off. I'm just concerned that all these things that put us over here make us appear that we are doing something other than the United States.

Like I said, I would like to see free enterprise come to America. It's in Japan; it's in Germany; it's now hit Russia. I would like to see free enterprise come to America, and subsidies and government intervention get out of the way. If Mr. Blunt has a good product, he makes it; if Mr. Adams has a good product, he makes it and sells it; if I make a good product, I make it and sell it without somebody buying my bad product.

We have cheese sitting somewhere that's molding because the cheese industry made too much, and nobody wanted to buy it.

CHAIRMAN PENDLETON. That's right.

MS. LUCK. So it's sitting there molding, and then they give it to old black folk with no bread. So we sold the cheese twice that nobody wants, and people are angry because we get 10 percent of something that we can do 20 percent of.

So I'm not sure I want this public dissection for minorities over here. *Bakke* was created because there was something to create. I'm not even sure I want even more laws on the books, because every time we put one on the books somebody creatively files away and takes something else from black folk. So I don't know if I need any more laws at all.

I think it's real critical that we start talking about everybody. I agree with you. We should broaden this up—bring the farmers in, bring the dairy industry in, bring Amtrak, bring everybody in to justify. Black folks are always justifying what should have been ours because we helped build this country—and everybody has heard that before, but we keep forgetting it every few years. If the administration changes, we've got to have—we always are commentary.

I kind of had mixed feelings to even come because I'm fueling the commentary. To come is not so good; not to come is boycotting. Black people get mad at you if you don't come. White people say you ain't got no courage. I mean you're really in bad shape.

So we have to start getting very clear why we even come to this. And if I'm going to be subject to it, let's start to put in the mechanism that black folk are not asking for anything more than we deserve. The set-aside program should be something you get into; you get out as quickly as possible. But it's no different than buying cheese and having it sit in a warehouse or buying wheat and burning it. I think we have some critical things we are not looking at because we are always looking at us.

COMMISSIONER GUESS. Mr. Chairman, Ms. Luck has agreed with you. Do you agree with her?

CHAIRMAN PENDLETON. I think there are some things I agree with. I'm not so sure it's a matter of agreement. I think what we're doing now is what they're doing at church—you testify a little bit.

As you were saying, Mr. Braddock, Bishop McCollough has a $21.5 million housing project going on in the middle of the community, and he hasn't asked for anything, but the people decided to put their money up.

And I guess my concern is that one has to look at whether the government brings you together or does it do things, like you're saying, Mr. Braddock, that divide you? And it's a little bit of something over here and a little bit of something over there. I think it doesn't do something for you; it does something to you. And I think a lot of these preferences are a result of doing things to people, not really helping people to get along, like they should be able to get along, and have the kind of freedom to do what they want to do. That's kind of libertarian, but I think it's a very fair position to take from where my head is.

Jerry, I started with you, and we got off on testifying, but maybe you have something to say.

MR. DAVIS. I don't really have anything to say. I agree with what my fellow panel members have said.

There's one thing I wanted to say about this integration issue that you brought up and about all the so-called thriving businesses here in Washington, D.C. There might have been a few, but by and large they were mom and pop, and I'd like to see us get beyond that.

CHAIRMAN PENDLETON. So would I.

MR. DAVIS. The next thing I would like to say is that condition—and I was in Washington at the time—was not nationwide. You know, you could go to the Dunbar Hotel here and sleep, but when I was on my way home to Louisiana and passing through Mississippi, there were no black hotels or motels, so

I was relegated to sleeping in the car with my wife and two kids.

So I think integration had to be. And we had to move downtown, and I'm all for that. I think we ought to have these set-aside programs and create some viable black businesses so we can do some of the things we want to do, realize our aspirations.

CHAIRMAN PENDLETON. Bob.

COMMISSIONER DESTRO. I would just like to make one comment for the record, and I think it goes to the comment that everybody has made here.

On the topic of testifying and saying what you really think, rightly or wrongly, sometimes I am perceived on the Commission as being a representative of the ethnic community. And when I go to some of the communities that are not defined as being minority communities, like the Italian community—the Asian community is, but when I listen to representatives of the Asian community what I hear is the frustration about being defined as a minority. They say, "Look, we don't need to be defined as a minority to succeed. What we want is the opportunity to do some testifying."

And in my recollections of negotiations, most of negotiation is both sides testifying until they cut a deal.

What I've heard Mr. Blunt say so far this afternoon is not a whole lot different from what I heard the other contractors say about how contractors do business and what contractors need to do business and to succeed.

I wish that more and more people who are involved in business would get down to talking about, in public, in places like this and everywhere else, what it is they need to do business and what it is they don't need. But more and more I've heard here is that there are sometimes very good-intentioned programs that get in the way of progress. And I think we need everybody's help and everybody's support in defining what the problems are and what the solutions are.

I really do thank you for sharing your impressions with us.

CHAIRMAN PENDLETON. Well, these proceedings have come to, I think, a good end.

Mr. Braddock, I hope you still play basketball when you have a chance. Mr. Braddock was quite a ballplayer in one of the colored high schools around here.

COMMISSIONER GUESS. Mr. Chairman, do you think he could have been admitted to Georgetown at that time?

[Laughter.]

CHAIRMAN PENDLETON. He could have been.

I'd like to thank Michael McGoings from the staff who, like in our consultation on comparable worth, put all this together with the witnesses. He had some staff help, but it was Mike being the anchor point and making all this happen. And on behalf of the Commissioners, Mr. McGoings, I want to thank you.

I want to thank our recorder for bearing with us under trying circumstances.

I would also like to note for the record that after taking into account the absences due to illnesses and emergencies and other things, 37 of 42 slots at this 2-day event were filled. Even some of the groups which pulled out had already submitted written testimony—that includes all of those people.

It is not true that all civil rights advocacy groups declined to appear. Among those groups that appeared were the Anti-Defamation League, the American Jewish Committee, the American Federation of Teachers, and a great number of people who represented minority and women's businesses.

In short, the effort to prevent the Commission from hearing a wide range of views, in my estimation, failed. And I thank goodness that everybody came to let us know how they feel about this kind of program.

Thank you very much for coming. The results will be out as soon as the transcript is completed.

Thank you very much.

INDEX

E

F

G

H

I

J

K

L

M

T

U

V

W

*U.S. GOVERNMENT PRINTING OFFICE: 1986-620-610:40708

UNITED STATES COMMISSION
ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

SECOND CLASS MAIL
POSTAGE AND FEES PAID
U.S. COMMISSION ON CIVIL RIGHTS
G-73