

CRS Report for Congress

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Affirmative Action: Recent Congressional and Presidential Activity

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Summary

In recent years, the U.S. Congress and the President have been reevaluating, and proposing changes to, existing affirmative action policies. Multiple bills to restrict affirmative action were introduced in the 104th Congress, but only one limited measure was enacted. Some anti-preference legislation is currently before the 105th Congress. The Clinton Administration has generally opposed efforts to terminate affirmative action programs and, instead, has proposed various reforms.

Background

The U.S. Commission on Civil Rights has defined affirmative action to encompass “any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.”¹ Affirmative action operates in areas including employment, public contracting, education, and housing. In recent years, congressional and presidential attention has been focused mainly on affirmative action employment and contracting programs.

Affirmative action in employment dates to the 1960s. Title VII of the Civil Rights Act of 1964 (P.L. 88-352) prohibited discrimination by private employers on the basis of race, color, religion, sex, or national origin. Under Title VII, a court that found that an employer had intentionally engaged in discrimination could order affirmative action remedies. Executive orders issued in the 1960s, including Executive Order 11246 issued by President Lyndon Johnson in 1965, required that federal government contractors take affirmative action toward employees and applicants for employment in areas such as recruitment, employment, and promotion. Regulations issued by the Nixon

¹ U.S. Commission on Civil Rights, *Statement on Affirmative Action* (Washington: 1977), p. 2.

Administration in 1970 and revised in 1971 required larger federal contractors to develop written affirmative action plans that included goals and timetables. In the early 1970s, federal agencies were authorized, though not required, to use employment goals and timetables.² During the Reagan Administration, the Justice Department attempted to revise E.O. 11246 to eliminate the requirement that contractors set numerical goals. This effort was abandoned, however, in the face of opposition from some administration officials and others.

Federal efforts to assist the development of small minority- and women-owned businesses include various contract set-aside programs. Prominent among them is the Small Business Administration's 8(a) program, which channels federal procurement contracts to small businesses owned by minorities or other "socially and economically disadvantaged" individuals.³

Actions of the 104th Congress

Following the November 1994 elections, in which Republicans gained control of both the House and the Senate, affirmative action emerged as a key legislative issue. Congressional activity on affirmative action began early in the 104th Congress, in February 1995, with the introduction of a bill (H.R. 831) to amend the Internal Revenue Code. H.R. 831 contained a provision repealing a Federal Communications Commission program intended to encourage minority ownership of broadcast companies. The House and Senate approved the conference report on H.R. 831 in March 1995 and April 1995, respectively. President Clinton signed the bill into law on April 11, 1995 (P.L. 104-7).

Other bills to restrict affirmative action were introduced in the 104th Congress, but none were enacted. Of these measures, the proposal that saw the most legislative activity was the "Equal Opportunity Act" (S. 1085, H.R. 2128). The companion bills, introduced by Senate Majority Leader Bob Dole and Representative Charles Canady on July 27, 1995, sought to bar the federal government from intentionally discriminating against, or granting a preference to, any individual or group based on race, color, national origin, or sex, in federal contracting, federal employment, or federally conducted programs. House and Senate hearings on the companion bills were held in 1995 and 1996. In March 1996, the Constitution Subcommittee of the House Judiciary Committee marked up H.R. 2128. The subcommittee voted along party lines to approve the bill, as amended. Although H.R. 2128 was on the full Judiciary Committee's agenda for markup, it was never taken up and died at the end of the Congress.

² For additional information on affirmative action in employment, see U.S. Library of Congress, Congressional Research Service, *Affirmative Action in Employment*, by Andorra Bruno, CRS Report 95-165 GOV.

³ For additional information on affirmative action in federal contracting, see U.S. Library of Congress, Congressional Research Service, *Minority and Women-Owned Business Programs of the Federal Government*, by Mark Eddy, CRS Report 95-757 GOV.

Actions of the 105th Congress

Civil Rights Act of 1997. On June 17, 1997, Representative Canady introduced the “Civil Rights Act of 1997” (H.R. 1909). The bill, which is similar to legislation he introduced in the 104th Congress (see above), would prohibit the federal government from intentionally discriminating against, or granting a preference to, any individual or group based on race, color, national origin, or sex, in federal contracting, federal employment, or federally conducted programs. H.R. 1909 was referred to the Committees on the Judiciary, Education and the Workforce, Government Reform and Oversight, and House Oversight.

The Constitution Subcommittee of the House Judiciary Committee held a hearing on H.R. 1909 on June 26, 1997. On July 9, at the subcommittee markup, the bill was approved by voice vote. On November 6, the Judiciary Committee met to mark up H.R. 1909. A motion to table the bill was offered and was approved by a vote of 17 to 9.

On June 23, 1997, Senator Mitch McConnell introduced the “Civil Rights Act of 1997” (S. 950) in the Senate;⁴ it was placed on the calendar. On June 24, he introduced a second bill (S. 952) containing some of the provisions of S. 950. S. 952 was referred to the Judiciary Committee. Senator McConnell also introduced an amendment to S. 952 (S.Amdt. 433) on June 24, consisting of the text of S. 950. The amendment would strike all after the enacting clause of S. 952 and insert the text of S. 950.

Amendments to ISTEA Reauthorization Bills. On March 5, 1998, Senator McConnell offered a floor amendment during Senate consideration of the bill (S. 1173) to reauthorize the Intermodal Surface Transportation Efficiency Act (ISTEA). The amendment (S.Amdt. 1708) would have eliminated the section of S. 1173 reauthorizing the Department of Transportation’s disadvantaged business enterprises (DBE) program.⁵ The DBE program requires that not less than 10% of federal transportation contract funds be expended with small disadvantaged businesses owned by minorities or women.⁶ In place of the DBE program, S.Amdt. 1708 would have established a race-neutral Emerging Business Enterprise program. This program would have required states to engage in outreach to small businesses in the construction industry and to provide them with technical services and assistance. On March 6, the Senate voted, 58 to 37, to table the McConnell amendment.

⁴ S. 950 differs from H.R. 1909 in that the Senate bill includes an additional section entitled “Findings and Purpose.”

⁵ For a discussion of ISTEA reauthorization legislation, see U.S. Library of Congress, Congressional Research Service, *ISTEA Reauthorization: Highway and Transit Legislative Proposals in the 105th Congress, 2nd Session*, by John W. Fischer, CRS Report 98-221 E. For a discussion of the legal implications of reauthorizing the Department of Transportation’s DBE program, see U.S. Library of Congress, Congressional Research Service, *Legal Effect of Congressional Reauthorization of 10% Disadvantaged Small Business Set-Aside Provisions of the Intermodal Surface Transportation Efficiency Act*, by Charles V. Dale, CRS Report 98-160 A.

⁶ For information about the Department of Transportation’s DBE programs, see *Minority and Women-Owned Business Programs*, CRS Report 97-757 GOV.

On April 1, 1998, Representative Marge Roukema offered a floor amendment (H.Amdt. 548) to the House transportation reauthorization bill (H.R. 2400). The amendment sought to strike the section of the Building Efficient Surface Transportation and Equity Act (BESTEA) reauthorizing the Transportation Department's DBE program. In its place, the measure would have added language encouraging affirmative action in the form of outreach and recruitment but prohibiting race- or gender-based preferential treatment in connection with transportation contracts. The House rejected H.Amdt. 548 by a vote of 225 to 194.

Amendments to House Higher Education Bill. On May 6, 1998, the House considered two affirmative action-related amendments to a bill to reauthorize programs under the Higher Education Act of 1965 (H.R. 6). Representative Frank Riggs offered an amendment (H.Amdt. 612) to prohibit public colleges and universities that participate in programs authorized under the 1965 act from discriminating, or granting preferential treatment, in admissions based on race, sex, color, ethnicity, or national origin. H.Amdt. 612 was defeated by a vote of 249 to 171. (A similar bill introduced by Representative Riggs is discussed below.) An amendment by Representative Tom Campbell (H.Amdt. 613) would have prohibited the exclusion of any individual from any authorized program or activity on the basis of race or religion.⁷ H.Amdt. 613 was rejected on a 227-189 vote.

Senate Defense Authorization Bill. On May 11, 1998, the Senate Armed Services Committee reported an original FY1999 defense authorization bill (S. 2057) containing a provision (Sec. 803) that would place restrictions on the Defense Department's small disadvantaged business program. The Defense Department has a goal to award 5% of the total value of its procurement contracts to small disadvantaged businesses and can give such businesses a price evaluation preference when they are competing for contracts with non-small disadvantaged businesses. The agency may not enter into a contract with a small disadvantaged business for a price exceeding fair market cost by more than 10%. S. 2057 would amend current law to prohibit the Defense Department from entering into a contract with a small disadvantaged business for a price above fair market cost if the agency had met its 5% contracting goal in the previous fiscal year. The Defense Department has exceeded its 5% goal in every year since FY1992.

Other Measures and Actions. Other affirmative action-related measures before the 105th Congress include two identical Senate bills (S. 46, S. 188), known as the "Civil Rights Restoration Act of 1997." The bills, introduced by Senator Jesse Helms, would amend Title VII of the 1964 Civil Rights Act to make it an unlawful employment practice for an employer to grant preferential treatment on the basis of race, color, religion, sex, or national origin. S. 46 was placed on the calendar, and S. 188 was referred to the Labor and Human Resources Committee.

⁷ In explaining the amendment on the floor, Representative Campbell stated that it would prohibit individuals from being excluded from, *or from having* "a diminished chance of acceptance" to, authorized programs. According to his staff, Representative Campbell had intended to file an additional amendment containing this broader language, but never did. Thus, there was a discrepancy between the amendment language being debated on the floor and the content of the amendment under consideration (H.Amdt. 613).

In the House, Representative Campbell introduced a bill (H.R. 2079) to require the implementation of an alternative program whenever a federal program granting a benefit or preference based on race, gender, or national origin is invalidated by a court. H.R. 2079, the “Racial and Gender Preference Reform Act,” was referred to the Judiciary Committee. A bill (H.R. 3330) sponsored by Representative Riggs concerns affirmative action in college admissions. It would prohibit institutions of higher education that participate in programs authorized under the 1965 Higher Education Act from discriminating, or granting preferential treatment, in admissions on the basis of race, sex, color, ethnicity, or national origin. H.R. 3330, the “Anti-Discrimination in College Admissions Act of 1998,” was referred to the Committee on Education and the Workforce.

The Senate Judiciary Committee held an oversight hearing on affirmative action on June 16, 1997. That Committee’s Subcommittee on the Constitution, Federalism, and Property Rights held a hearing on the Transportation Department’s DBE program on September 30, 1997.

Actions of the Clinton Administration

The Clinton Administration has shown support for affirmative action. In February 1995, the President ordered a review of all federal affirmative action programs. In a July 19, 1995, address, he discussed the results of the study. “This review concluded,” he said, “that affirmative action remains a useful tool for widening economic and educational opportunity.” According to President Clinton, “When affirmative action is done right, it is flexible, it is fair, and it works.” At the same time, the President stated that “affirmative action has not always been perfect” and “should not go on forever.”⁸ The review’s written report made various recommendations. In the area of contract set-aside programs, it suggested a number of reforms to address shortcomings and abuses.

Prior to the President’s speech, on June 12, 1995, the Supreme Court handed down its decision in *Adarand Constructors Inc. v. Peña*, a case concerning a federal highway funding program that awarded bonuses to contractors who subcontracted with small businesses owned by minorities or other disadvantaged individuals. The Supreme Court ruled that federal affirmative action policies to benefit minorities must meet the same strict standards that apply to state and local programs.⁹ On June 28, 1995, the Justice Department issued a memorandum to federal agencies, which provided an overview of the *Adarand* decision and discussed, in general terms, application of the “strict scrutiny” standard to federal affirmative action programs.

In July 1995, the Justice Department began working with agencies to review their race-conscious programs for compliance with *Adarand*. According to the Department,

⁸ For the text of the President’s speech, see “Address by President Clinton on Affirmative Action, July 19, 1995,” in remarks of Sen. Edward Kennedy, *Congressional Record*, daily edition, vol. 141, July 19, 1995, pp. S10306-S10309.

⁹ For further information on the *Adarand* case, see U.S. Library of Congress, Congressional Research Service, *Minority and Small Disadvantaged Business Contracting: Legal and Constitutional Developments*, by Charles V. Dale, CRS Report 97-665 A.

over the course of the review it has directed agencies to terminate or modify a number of contracting practices and other programs.¹⁰ In a notable early termination, the Defense Department suspended a contracting rule known as the “rule of two” in October 1995. Under the rule of two, contracts are set aside for small disadvantaged businesses “when there is a reasonable expectation” that at least two such firms qualified to perform the work will offer bids; other conditions also apply.¹¹

On February 29, 1996, the Justice Department issued a memorandum to federal agencies addressing the application of “strict scrutiny” to affirmative action in federal employment. The memorandum stated that “the application of strict scrutiny should not require major modifications in the way federal agencies have been properly implementing affirmative action policies” and set forth guidelines for such policies.¹²

With respect to federal procurement, the Justice Department proposed new rules for the use of affirmative action on May 22, 1996.¹³ The proposal set forth guidelines to limit, as appropriate, the use of race-conscious measures in specific areas of procurement. Under the proposed rules, the Small Business Administration’s 8(a) program would be retained but reformed. After receiving public comment, the Justice Department modified its proposal.¹⁴

The Justice Department proposal is expected to be implemented in several parts. On May 9, 1997, the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration published proposed amendments to the Federal Acquisition Regulation concerning programs for small, disadvantaged businesses.¹⁵ On August 14, 1997, the Small Business Administration published proposed amendments to the regulations governing the 8(a) program.¹⁶

¹⁰ See Raymond C. Fisher, Associate Attorney General, Department of Justice, letter to Honorable Charles Canady, Chairman, House Subcommittee on the Constitution, Feb. 24, 1998 (on file with author). Also see Steven A. Holmes, “Administration Cuts Affirmative Action While Defending It,” *New York Times*, Washington edition, Mar. 16, 1998, p. A17.

¹¹ 48 C.F.R. 219.502-2-70

¹² U.S. Dept. Of Justice, Office of the Associate Attorney General, *Post-Adarand Guidance on Affirmative Action in Federal Employment*, by John Schmidt, memorandum to general counsels, Feb. 29, 1996 (on file with author).

¹³ See U.S. Dept. Of Justice, “Proposed Reforms to Affirmative Action in Federal Procurement,” *Federal Register*, vol. 61, no. 101, May 23, 1996, pp. 26041-26063.

¹⁴ See U.S. Dept. Of Justice, “Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement,” *Federal Register*, vol. 62, no. 90, May 9, 1997, pp. 25648-25653.

¹⁵ See U.S. Dept. Of Defense, General Services Administration, and National Aeronautics and Space Administration, “Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement,” *Federal Register*, vol. 62, no. 90, May 9, 1997, pp. 25786-25795.

¹⁶ See U.S. Small Business Administration, “Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations . . .,” *Federal Register*, vol. 62, no. 157, Aug. 14, 1997, pp. 43584-43628.