Focus on Affirmative Action

Minnesota Advisory Committee
to the United States Commission on Civil Rights

July 1998

A report of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights prepared for the information and consideration of the Commission. This report will be considered by the Commission and the Commission will make public its reaction. Statements and observations in the report should be attributed to individual presenters or the Advisory Committee, not to the Commission.

The United States Commission on Civil Rights

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957, and reestablished by the United States Commission on Civil Rights Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the 1983 act, as amended by the Civil Rights Commission Amendments Act of 1994, the Commission is charged with the following duties pertaining to discrimination or denials of the equal protection of the laws based on race, color, religion, sex, age, disability, or national origin, or in the administration of justice: investigation of individual discriminatory denials of the right to vote; study and collection of information relating to discrimination or denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection of the law; investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections; and preparation and issuance of public service announcements and advertising campaigns to discourage discrimination or denials of equal protection of the law. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

The State Advisory Committees

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 3(d) of the Civil Rights Commission Amendments Act of 1994. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference that the Commission may hold within the State.

Focus on Affirmative Action

Minnesota Advisory Committee to the United States Commission on Civil Rights

July 1998

A report of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights prepared for the information and consideration of the Commission. This report will be considered by the Commission and the Commission will make public its reaction. Statements and observations in the report should be attributed to individual presenters or the Advisory Committee, not to the Commission.

Letter of Transmittal

Minnesota Advisory Committee to the
U.S. Commission on Civil Rights

Members of the Commission
Mary Frances Berry, *Chairperson*
Cruz Reynoso, *Vice Chairperson*
Carl A. Anderson
Robert P. George
A. Leon Higginbotham, Jr.
Constance Horner
Yvonne Y. Lee
Russell G. Redenbaugh

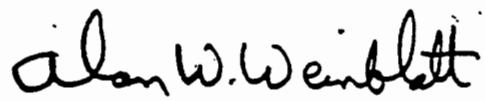
Ruby Moy, *Staff Director*

The Minnesota Advisory Committee submits this report, *Affirmative Action: Effective Civil Rights Tool or Divisive Social Policy*, as part of its responsibility to advise the Commission on civil rights issues within the State. The report was unanimously adopted by the Advisory Committee by a 12-0 vote. The Advisory Committee is indebted to the individual participants for their time and expertise and to the Midwestern Regional Office staff for the preparation of this report.

This report is a summary of a community forum held on affirmative action in Minneapolis, Minnesota, on June 19, 1997. The State's two United States Senators, Paul Wellstone (D) and Rod Grams (R), provided position statements, which are in the prologue. Participants at the community forum included individuals with diverse opinions on the subject from the business, religious, and academic communities. In addition, individuals from minority communities and constituencies contributed to the discussion.

The Advisory Committee understands the Commission has an active interest in affirmative action, and trusts the Commission and the public will find the material in this report informative.

Respectfully,



Alan W. Weinblatt, *Chairperson*
Minnesota Advisory Committee

Minnesota Advisory Committee to the U.S. Commission on Civil Rights

Alan W. Weinblatt, *Chairperson*
St. Paul

T. Jeff Bangsberg
New Hope

Angela Carter
Bloomington

Geraldine L. Kozlowski
Hermantown

Thomas R. Lawrence
Bloomington

Lupe Lopez
White Bear Lake

Terry M. Louie
Andover

John G. Morrow
Cass Lake

H. Camilla Nelson
Shorewood

Laverne Flentie Orwoll
Rochester

Carol L. Wirtschafter
Minneapolis

Thaddeus W. Wilderson
St. Paul

Contents

Tables

Figure

Prologue

Statement of the Hon. Paul D. Wellstone
United States Senator for Minnesota

The United States has a tragic history of racism, both de jure and de facto discrimination. While the laws of our nation have thankfully been updated to reflect the widely supported goal of equality for all, past injuries still disadvantage some groups. Some racial minorities still suffer from lower per capita income and from daily episodes of discrimination.

I support the goal of affirmative action policy, and the evidence suggests that in many respects the implementation has been successful. Studies have shown that as a result of affirmative action, members of historically disadvantaged minorities have made substantial gains in the workplace. Women in particular have made extraordinary advances and now make up 46 percent of the workplace. I am hopeful that we will make similar progress when it comes to parity in wages for all Americans.

It is important to note that contrary to some assertions that have been made, affirmative action has never been a program that places unqualified candidates in positions for which they are not prepared. The goal of the program has always been to advance *qualified* applicants. And affirmative action was never intended as a "quota" system with rigid requirements for the inclusion of specific numbers of people of color and women. Affirmative action simply aims to offset past discriminations that have resulted in some members of society starting at a disadvantage.

Recently I have become very concerned by the results of dropping the use of race as one criterion during consideration of candidates to some undergraduate, graduate and professional schools. The precipitous drop in minority enrollment in these schools is a dangerous precedent, and I believe is not only harmful to those who are excluded, but to the other students who need to be exposed to a diverse student body to aid in their own education. I would hope that the lack of students of color at these institutions serves as a warning to those who wish to completely abandon the consideration of race during the application process. We must nurture an academic environment that includes a wide variety of student perspectives and personal histories. Our universities must be as diverse as America as a whole.

However, if there are instances in which the implementation of this policy has lost touch with the original intent, they should be addressed appropriately. No initiative should proceed indefinitely without review or retooling. Those programs with imperfections must be examined and improved.

I salute this Minnesota Advisory Committee to the U.S. Commission on Civil Rights project as an example of constructive debate that makes public policy better. Nothing is more important in our system of government than the active participation of a wide spectrum of individuals. This in-depth discussion has led to new insights into today's opinions on affirmative action, and I look forward to the ongoing national conversation on this issue.

Statement of the Hon. Rod Grams
United States Senator for Minnesota

I welcome this opportunity to comment on the issue of affirmative action. I thank the members of the advisory committee for their invitation. In light of the President's remarks in San Diego this weekend and the speech recently delivered by Justice Clarence Thomas, this forum could not be more timely.

While the Supreme Court has not given us clear or even consistent guidance over the course of the past two centuries, I believe the Constitution is crystal clear concerning race-based policies of any kind: no one may be deprived of the equal protection of the laws—not on the grounds of race, or for that matter, creed, sex, religion, marital status, and age. More than 100 years ago, Justice John Harlan wrote the dissenting opinion in the case of Plessy v. Ferguson and his words defined quite clearly the intent of the U.S. Constitution.

> But, in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Although Justice Harlan's opinion was the minority viewpoint that day, the high Court ultimately vindicated Harlan in subsequent cases by ruling that ill-intentioned laws, such as separate-but-equal statutes that were commonplace in many states, violated the U.S. Constitution. Today, there is little room for guessing as to whether or not race-based distinctions in law are appropriate: they clearly are not.

Beyond the legal questions, however, is the equally important issue of opportunity. The United States has always been a nation of open doors, a place in which an individual of even the most limited means could lift himself or herself up to become a productive--and even a prosperous—member of society. Americans value freedom above all else, and freedom remains the bedrock on which our entire system of government is built. The people have flourished whenever they have tested their freedom and climbed to new heights, yet those opportunities begin to vanish every time the government begins to erect barriers. We must protect that freedom and work to ensure that the generations to come have more opportunities, not more barriers.

At a time when there is so much in society that tears us apart and pits neighbor against neighbor, we need governmental policies that bring us together as Americans and unite us by our strengths. and not divide us through our weaknesses.

In Minnesota, we have a long tradition of providing solutions to correct discrimination, beginning in earnest under the leadership of Governor Luther Youngdahl. That tradition was strengthened under Governor Elmer Andersen. and, more particularly under Governor Harold LeVander, who has the distinction of being the first governor in the nation to establish a state-level department on civil rights, back in 1967. Our State has been and remains a model for the nation in safeguarding civil rights.

The question of affirmative action is a difficult one that inspires passionate debate on all sides of the issue. I am encouraged that the public debate continues through community forums such as this one. The ultimate solutions will not be decided today, tomorrow, or even this year, but the people's pursuit of a fair and just government that provides true equality for all is an important goal, and one that I believe is well within our reach.

1 Introduction

Background

In the 1960s government entities at Federal and local levels began taking an active role to eliminate discrimination on the basis of race, color, religion, sex, and national origin. These initiatives included antidiscrimination measures in areas such as employment, housing, and education. Some efforts also included "affirmative action"

Today affirmative action policies and programs are swirling in controversy. Part of the controversy surrounding affirmative action stems from its multifaceted meaning. In different contexts, in different settings, in different government jurisdictions, it means different things. Indeed, some of the contention has as a basis the misunderstanding that ALL affirmative action is quota based and preferential treatment for less qualified individuals. For this study, the Advisory Committee adopts the following definition of affirmative action:

> A contemporary term that encompasses any measure beyond simple termination of a discriminatory practice that permits the consideration of race, national origin, sex, or disability along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.[1]

The preeminent antidiscrimination legislation of the civil rights era is the Civil Rights Act of 1964.[2] Title VII of that act prohibits employment discrimination, but it neither specifically requires nor prohibits affirmative action measures.[3] The legislation does, however, explicitly address preferential treatment to remedy disproportionate representation in the work force:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin...in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[4]

The principal legal requirements of affirmative action at the Federal level in the employment sector are set forth in Executive Order 11,246,[5] as amended, the Rehabilitation Act of 1973,[6] and the Vietnam Veterans Era Readjustment Assistance Act of 1972.[7] Executive Order 11,246 was signed by President Lyndon B. Johnson in 1965 and amended in 1967 to include gender as a protected status. It is considered the defining authority of affirmative action for Federal contractors, ordering the inclusion of an equal opportunity clause in every contract with the Federal Government.

> All Government contracting agencies shall include in every Government contract hereafter entered into the following provisions: During the performance of this contract, the contractor agrees as follows: (1) The contractor will. . . take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.[8]

At the Federal level, the affirmative action obligation of firms with Federal contracts to provide equal employment opportunity to minorities and women is monitored by the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor. The OFCCP considers affirmative action an active effort by employers to

---

[1] *See generally* U.S. Commission on Civil Rights, *Statement on Affirmative Action* (October 1977), p. 2.

[2] Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h (1994)).

[3] *See*, 42 U.S.C. §§ 2000e–2000e–17 (1994).

[4] 42 U.S.C. § 2000e–2(j).

[5] Exec. Order No. 11,246, 3 C.F.R. 339 (1964–65), *reprinted as amended in* 42 U.S.C. § 2000e (1994).

[6] 29 U.S.C. §§ 701–796(l)(1994).

[7] 38 U.S.C. §§ 4211–4213 (1994).

[8] Exec. Order No. 11,246, § 202, 3 C.F.R. 339 (1964–1965) *reprinted as amended in* 42 U.S.C. §2000e (1994).

equal employment opportunity. . . . It refers to a process that requires a government contractor to examine and evaluate the total scope of its personnel practices for the purpose of identifying and correcting any barriers to equal employment opportunity.[9]

The Rehabilitation Act of 1973 and the Vietnam Veterans Readjustment Act of 1972 contain affirmative action language mandating that firms with Federal contracts undertake personnel actions to employ and advance qualified handicapped individuals and veterans of the Vietnam era and disabled veterans. The most recent Federal civil rights legislation, the Civil Rights Act of 1991,[10] expressly preserves lawful affirmative action plans, leaving the courts to decide the proper parameters of such plans.

In addition to the affirmative action obligations on Federal contractors, the Federal Government has also issued regulations calling for affirmative action in apprenticeship programs and programs serving migrant and seasonal farmworkers. Federal regulations set out affirmative action requirements for apprenticeship programs administered by the Department of Labor,[11] and Federal regulations require State agencies participating in the administration of services for migrant and seasonal farmworkers to develop affirmative action plans.[12]

Although not specifically referred to as "affirmative action," government efforts to increase minority and female participation in contracting and government-assisted programs is also considered, by some, to be affirmative action initiatives. Under these programs "set-asides" or "participation goals" for members of racial or ethnic minorities and businesses owned or controlled by these or other disadvantaged persons have been implemented at the Federal, State, and local levels. The legality of such initiatives by local municipalities was considered by the U.S. Supreme Court in *Adarand Constructors, Inc. v. Pena*.[13] Although upholding the constitutionality of set-asides, the Supreme Court's decision requires strict scrutiny of the justification for, and provisions of, a broad range of existing race-based affirmative action programs, limiting the authority of government entities to adopt and implement race and gender conscious measures in the absence of specific findings of discrimination.[14] The strict scrutiny standard requires that such "affirmative action" efforts by government entities be narrowly tailored to meet a compelling governmental interest.[15] These efforts must be: (1) supported by a pattern and/or practice of discrimination, (2) narrowly tailored in application, temporary in duration, and not intended to achieve or maintain a specified gender or racial balance, and (3) not trammel unnecessarily on nonminorities.[16] The 1995 hearing on affirmative action before a subcommittee of the House of Representatives Judiciary Committee was described as "tense and sometimes rancorous" as the House considered purging sex and race preferences from Federal laws.[17]

Legislation has been introduced into Congress to eliminate preferences of any kind—including quotas, set-asides, goals, timetables, and other numerical objectives. The bill, known as the Civil Rights Act of 1997, would prohibit the Federal Government from discriminating against, or granting preferences to, individuals based in whole or in part on race, color, national origin, or sex, in connection with Federal contracts, employment, or other programs or activities. In addition, the bill would prohibit the Federal Government from requiring or encouraging Federal contractors, subcontractors, licensees, or recipients of Federal assistance, to discriminate, or grant preferences to individuals on the basis of their race, color, national origin, or sex.[18]

---

[9] OFCCP, U.S. Department of Labor, "OFCCP Defines the Terms!," March 1995. The Indiana Advisory Committee to the U.S. Commission on Civil Rights examined the enforcement of affirmative action in Indiana by the OFCCP. See, *The Enforcement of Affirmative Action Compliance in Indiana Under Executive Order 11246* (1995).

[10] 42 U.S.C. §1981 (1994).

[11] *See*, 29 C.F.R. §§ 30.3–30.8 (1997).

[12] *See*, 20 C.F.R. § 653.111(1997).

[13] 515 U.S. 200 (1995).

[14] See Ibid., at 227.

[15] *See Ibid.*

[16] *See generally, United States v. Paradise*, 480 U.S. 149 (1987).

[17] Nancy E. Roman, "Affirmative action spurs exchanges tinged with rancor," *The Washington Times*, Apr. 4, 1995, p. A10.

[18] Civil Rights Act of 1997, H.R. 1909, 105th Cong. (1997). The bill's sponsors are: Charles Canady (R–FL), House; Mitch McConnell (R–KY), Orrin Hatch (R–UT), and John Kyl (R–AZ), Senate.

TABLE 1
Minnesota's Changing Population

	1900-40	1970	1990	Projected 2020
White	99.2%	98.2%	93.7%	85.0%
African American	N/A	0.9%	2.2%	5.9%
American Indian	N/A	0.6%	1.2%	8.0%
Latino	N/A	N/A	1.2%	3.0%
Asian	N/A	0.3%	1.8%	4.3%

Note: The percentage of whites in 1990 and 2020 includes only non-Hispanic whites.
Source: *State of Diversity*, MN Planning.

State Demographics

The 1990 census reported a population of 4,375,099 residents in Minnesota. The population remains overwhelmingly white, 4,133,189 residents (93.7 percent), but the minority community is growing. In 1990 Minnesota's population was 6.3 percent minority, up from 3.9 percent in 1980, and by 2020, 15 percent of all Minnesotans are expected to be people of color. Additionally, the number of people in Minnesota between the ages of 16 and 64 who are disabled includes nearly 250,000 individuals, almost 6 percent of all adults, and these individuals constitute 5 percent of the State's labor force.[19]

The four major minority race and ethnic groups are represented in similar proportions. African Americans are the largest minority group; 94,798 residents (2.2 percent). There are 76,671 Asians and Pacific Islanders; 1.8 percent of the population. Latinos and American Indians respectively account for 1.2 percent of the State population; 49,664 Latinos and 49,507 American Indian residents. In the schools, 10 percent of public school children are African American, American Indian, Asian, or Latino. The children in the State are six times more racially diverse than the population over 65.[20] Figure 1 shows the proportion of each county's residents who are considered minority.

The economic gap between whites and minorities has increased in Minnesota in recent years. The median income of African American and Asian households in the State dropped in the 1980s, while that of white households increased. In addition, poverty rates for Latinos and other minorities rose, while that of whites fell. Poverty rates for African American and American Indian children are five times higher than that of white children; poverty rates for Asian and Hispanic children are three times higher than that of white children.

African Americans, American Indians, and Asians are less likely than whites to be in the labor force, and all people of color are more likely than whites to be in service and semi skilled manufacturing jobs or unemployed. Minority workers tend to be underrepresented in higher paid, higher skilled jobs and overrepresented in lower paid, semiskilled occupations. They are also less likely to be employed full time and, in most cases, lag behind whites in educational achievement.[21]

TABLE 2
Minnesota Median Household Income, 1979 and 1989

	1979	1989	Trend
White	$29,550	$31,320	+
African Amer.	$20,270	$18,880	–
Amer. Indian	$17,900	$15,430	–
Asian	$26,240	$22,690	–
Latino	$24,760	$25,300	+

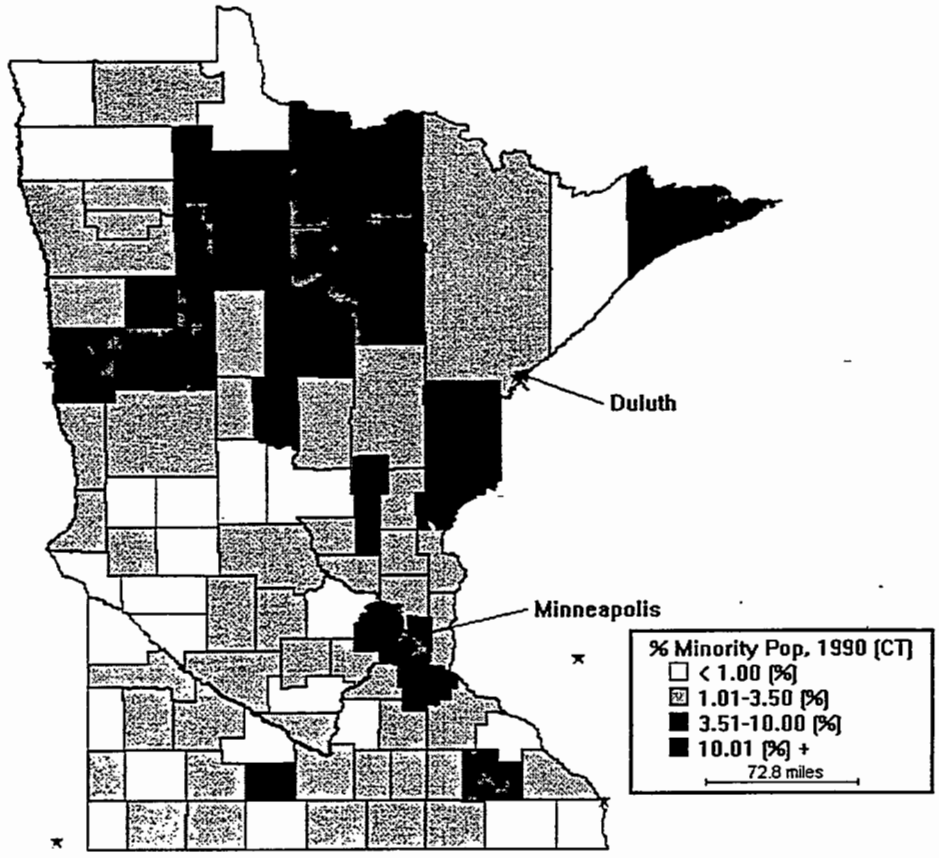
Note: Dollars are denoted in 1989 dollars.
Source: MN Planning from U.S. census.

[19] U.S. Department of Commerce, Bureau of the Census. The census reported a labor force of 2,311,336; and 111,176 of those identified themselves as disabled.

[20] Minnesota Planning, *State of Diversity*, November 1993, p. 6.

[21] Ibid., p. 7.

FIGURE 1
Minnesota Counties and Minority Population



Source: Midwestern Regional Office, USCCR.

From 1980 to 1990, the percentage of people age 16 and older participating in the labor force increased for Hispanics and whites, but stayed the same or fell for African Americans, Asians, and American Indians. The lower labor force participation rate of minorities masks the real level of minority unemployment, as the unemployment rate is determined by those in the labor force who are unemployed and seeking work. Still, the unemployment rates for all minorities were higher then for whites in 1990, with African American unemployment more than three times as high and American Indian unemployment more than four times as high.[22]

Home ownership continues to be less common for minorities in Minnesota than for nonminorities. From 1970 to 1990, white home ownership in the State increased slightly from 72.6 percent to 73 percent, a rate higher than the national average of 68 percent. But for people of color, home ownership rates in Minnesota fell during this period. The percent of housing units occupied and owned by African Americans fell from 36.6 percent to 31 percent; for Asians the rate fell from 51 percent to 41 percent; and for Latinos the rate fell from 49 percent to 47 percent. The home ownership rate for American Indians remained the same at 43 percent.[23]

[22] Ibid.

[23] Ibid., p. 16.

Minnesota Advisory Committee Study of Affirmative Action

The Minnesota Advisory Committee feels that as part of its obligation to advise the Commission on relevant information within the jurisdiction of the Commission, it could not ignore the issue and debate on affirmative action. The essential purpose of the Advisory Committee's examination and report on affirmative action is to illuminate the debate in a credible and bipartisan manner. The Minnesota Advisory Committee is well-suited to this task. By law the Committee is structured to be politically, philosophically, and socially diverse. It includes representation from both major political parties and is independent of any national, State, or local administration or policy group.

In exploring the issue of affirmative action, Advisory Committee members carefully sought a balanced presentation in a genuine spirit of openness and bipartisanship. Diverse and balanced opinion was solicited, received, and is included in this report. Chapter two contains testimony received from the State minority advisory councils: State Council on Disability, Legislative Commission on the Economic Status of Women, Indian Affairs Council, Council on Asian Pacific Minnesotans, and Council on Black Minnesotans. Affirmative action programs are targeted to women, individuals with a disability, and persons perceived as African American, Asian American, American Indian, or Latino, and representatives from these communities spoke to the Minnesota Advisory Committee about affirmative action, its impact on their respective communities, the attacks on the program, and recommendations for the program in the future. These organizations are State-funded councils that advise the Governor and the legislature of issues affecting their communities.

Chapter three sets out a debate and discussion of affirmative action. There are three sets of discussions in the first section and a second section contains public comment. The three discussion sets in the first section contrast opposing views on aspects of affirmative action. Presentations from those who have publicly voiced opposition to aspects of affirmative action are: Peter Bell, Center for the American Experiment, Stephen Young, Personnel Decisions International and a former candidate for the U.S. Senate; and Ian Maitland, professor, School of Management, University of Minnesota; presentations from individuals who have expressed support for affirmative action programs are: Stephen Cooper, Cooper Law firm; Yusef Mgeni, the Urban Coalition, and Marvin Taylor, president of the Intergovernmental Compliance Institute. The public comment section includes statements on State and local government compliance with their own internal affirmative action programs, and individual statements submitted to the Committee from the public.

Chapter four is a discussion of the implementation of affirmative action in the employment sector. Four individuals are included: (1) Wende Farrow, the Employers Association, a nonprofit member services organization that provides support and assistance to local firms in employee relations including affirmative action; (2) David Goldstein, an attorney associated with the local Industrial Liaison Group, a coalition of employers who consult with the OFCCP, U.S. Department of Labor, on affirmative action enforcement; (3) Bernard Brommer, president of the Minnesota AFL–CIO ; and (4) Barbara Forsland, chairperson of the Minnesota chapter of the National Association of Human Rights Workers, an organization that includes government employees who enforce affirmative action laws and regulations.

An additional chapter has a discussion on affirmative action from three selected religious institutions. Rev. Peg Chemberlain, executive director of the Minnesota Council of Churches, Fr. David McCauley, director of the Minnesota Catholic Conference, and Jay Tcath, executive director of Jewish Community Relations Council of Minnesota and the Dakotas, discuss affirmative action from the perspective of their individual religious institutions and communities. The Advisory Committee presents its observations in chapter six.

2 Perspectives on Affirmative Action from the Minority Community

Affirmative action is any measure beyond simple termination of a discriminatory practice adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and to prevent discrimination from reoccurring in the future.[1] In practice, affirmative action programs are targeted to women, individuals with a disability, and persons perceived as African American, Asian American, American Indian, or Latino. Representatives from these communities spoke to the Minnesota Advisory Committee about affirmative action, its impact on their respective communities, the attacks on the program, and recommendations for the program in the future.[2] Minnesota is unique in having distinct State-funded councils, corresponding to the communities targeted by affirmative action, to advise the Governor and the legislature on issues affecting their constituencies. The six councils are:

Minnesota State Council on Disability,
Legislative Commission on the Economic Status of Women,
Indian Affairs Council,
Council on Asian Pacific Minnesotans,
Council on Black Minnesotans, and
Spanish Speaking Affairs Council.

Minnesota State Council on Disability

The Americans With Disabilities Act of 1990 defines a disabled person as any individual with a "physical or mental impairment that substantially limits one or more of the major life activities of such individual.... "[3] Affirmative action programs at the Federal and State level consider those with disabilities members of a protected class, and subject to affirmative action efforts.

In the State of Minnesota, this affects a large part of the general population and the labor force. The number of people in Minnesota who are part of the disability community is almost 6 percent of all the adults between the ages of 16 and 64, and includes nearly a quarter of a million people.[4] In addition, individuals with a disability number more than 100,000 and constitute 5 percent of the State's labor force.[5]

Despite affirmative action efforts, people with disabilities have a much higher rate of unemployment than the general population. According to the 1990 census, the unemployment rate for individuals with a disability exceeds 11 percent, while the unemployment at the same period for those without disability is less than 5 percent.[6] In addition, the labor force participation rate for adults between the ages of 16 and 64 for the general population is 70 percent, while the labor force participation rate for those with disabilities is 54 percent.[7]

Margot Cross Imdieke, accessibility advocate for the Minnesota State Council on Disability, testified about the barriers in equal employment opportunity for individuals with a disability. She explained that discrimination on the basis of disability is still widespread, and asserted that affirmative action is not a quota system but a program for agencies and organizations to take to be more inclusive.

"People with disabilities come from all socioeconomic groups, from all communities, and from both genders. They are clearly part of every community. Sometimes the disabled person experiences discrimination both on the basis of

[1] *See generally* U.S. Commission on Civil Rights, *Statement on Affirmative Action* (October 1977), p. 2.

[2] Representatives from the Spanish Speaking Affairs Council did not testify at the community forum.

[3] 42 U.S.C. § 12102(2) (1994).

[4] 1990 U.S. Census of Population, summary tape file 3A. The census reported 3,317,776 residents between the ages of 16 and 64, and 203,409 identified themselves as disabled.

[5] Ibid. The census reported a labor force of 2,311,336, and 111,176 of those identified themselves as disabled.

[6] Midwestern Regional Office, USCCR, from 1990 U.S. Census of Population, summary tape file 3A.

[7] Ibid. The labor force is the number of adults who are employed or seeking employment.

disability and on the basis of race or gender. Historically people with disabilities have had little opportunity to find and keep gainful employment. Access has been limited, reasonable accommodations denied, and potential employers fearful of [one's] disability and capability. Potential employers have had, for many years, preconceived ideas about hiring people with disabilities. Low expectations blended with expectation for failure.

TABLE 3
Labor Force Comparison in Minnesota of Individuals with a Disability to the General Population

	General population	Disability community
Percent of adult population	**	6%
Percent of labor force	**	5%
Labor force participation rate	70%	54%
Unemployment rate	5%	11%

Source: Midwestern Regional Office.

"Discrimination against people with disability is very similar to the discrimination that women historically have experienced. The experience of wanting to protect the disabled in many instances, of not promoting for fear that the person might fail. There is this assumption that people with disabilities cannot participate on an equal level with nondisabled people, similar to the way it was felt that women could not participate on an equal level with men.

"Affirmative action for people with disabilities equals opportunity; it is not a quota system; it is not forced hiring of qualified or unqualified people. Affirmative action is exactly what it means; the taking of positive steps to be more inclusive. It provides employers with an opportunity to analyze their preconceived ideas and to look at people with disabilities in a different light; one that highlights abilities, not disabilities . . . . Affirmative action encourages employers to engage in a variety of recruitment activities . . . .

"Affirmative action complements the Americans with Disabilities Act. To tell an employer that he or they cannot discriminate against an individual with a disability is not the same as providing that same employer with encouragement to hire a person with a disability. It is our experience that many people with disabilities find little opportunity for advancement and promotion. Affirmative action works to eliminate this type of system discrimination. Most specifically affirmative action levels the playing field, . . . and it provides opportunities that individuals with disabilities would not otherwise have.

"Each year rehabilitation services spends millions of dollars rehabilitating [the disabled], training, educating, and providing them with the skills so that they can enter the work force. Yet the unemployment rate [of those with disabilities] is two-thirds of all people with disabilities; and of that two-thirds, two-thirds are actively seeking employment. It is not an issue of whether the disabled person can do the job, it is an issue of whether he or she can get the job. And affirmative action provides some tools for helping them get that job.

"We need to collect the necessary data on people with disabilities so that real goals can be established. Establish actual hiring goals at the Federal level for people with disabilities, because do they not currently exist at the Federal level. More training is needed on affirmative action. Targeted recruitment should be required. Tracking and reporting on disabled job applicants and candidates for promotions should be tracked and reported the same way that it's currently being done for women and minorities. And most importantly, a continued commitment for a strong and vital affirmative action program throughout this country.

"The affirmative action programs [and the] affirmative action laws...need more enforcement.... [In addition] the leadership behind the affirmative system needs to be increased [so that it is not] one of 20 different responsibilities they have. And it is often very difficult to get the authority needed to make sure what happens, happens, so I think we need to put some power behind it."[8]

[8] Margot Imdieke Cross, testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, community forum, , Minneapolis, MN, June 19, 1997, transcript pp. 9–35 (hereafter cited as MN SAC Affirmative Action Transcript).

Legislative Commission on the Economic Status of Women

Women are participating in the labor force in increasing numbers. According to the 1990 census the percent of adult women in Minnesota in the labor force was 62.8, while the participation rate for men was 77.4 percent.[9] In terms of employment, the number of adult women employed was virtually equal to the number of adult men employed, 1,026,740 women versus 1,165,677 men.[10] Though women have a lower unemployment rate than men,[11] women in the labor force in Minnesota are disproportionately found in lower paying positions and are much more likely to work part-time.[12]

Further, it is more likely for a woman between the ages of 18 and 64 than for a similarly aged male to have an income that is below the poverty level. The 1990 census reported 96,657 employed males between the ages of 18 and 64 receiving an income lower than the poverty level, a rate of 8.3 percent. For women in the State, 131,132 of the employed women between the ages of 16 and 64—12.8 percent—had an income lower than the poverty level.[13]

TABLE 4
Labor Force Comparison of Males and Females in Minnesota Ages 16–64

	Males	Females
Number employed	1,165,677	1,026,740
Labor force participation rate	77.4%	62.8%
Unemployment rate	6.0%	4.2%
Poverty rate among adults	8.3%	12.8%

Source: Midwestern Regional Office, USCCR.

Aviva Breen, executive director of the Minnesota Legislative Commission on the Economic Status of Women, addressed the Advisory Committee on affirmative action and the economic status of women. She stated that affirmative action has been extremely helpful to women in improving their economic status, and an integral part of whatever success women have had as they have expanded their participation in the labor force.

"The issue for women is not getting into the labor force. Women have an extremely high participation of women in the labor force. [The issue is] a highly occupationally segregated labor force in Minnesota, and that has changed very little . . . . The wage gap exists, [although] it has improved in [recent] years, . . . but the wage gap is there and it continues to be there. Women are making their way in a variety of places. The number of women-owned businesses has expanded enormously. Women have looked often at their opportunities in the labor force and decided perhaps opportunities would be better in another place or in another way. And they have reached whatever they can reach and have moved on to taking charge of their own future in a different way. But that has not necessarily improved their economic condition.

"With respect to the overall situation, affirmative action has been extremely critical. The evidence we have is that where there has been an enforcement mechanism, whether it is been contract compliance or other reporting requirements, there have been more opportunities. Where there is enforcement something happens, and where there isn't enforcement something might happen, but it is far more random. And there is no evidence that we have that there is any disadvantage in any situation where there has been affirmative action, where there have been affirmative action hires or promotions and productivity or output is lower. We can only find positive improvements.

"There is really a long way to go, . . . but affirmative action has been extremely critical for women . . . . Often for women the difficulty has been moving up. A lot of data that show that women can start with a whole group of management trainees, and everybody moves along this far. Then men go this way and women go this way. Mentoring and other kinds of assistance that women can get while they are within that situation are also a very critical adjunct to the overall affirmative action efforts.

". . . Most of the opposition [to affirmative action] comes from a sense of entitlement that those who have had the opportunities feel they

[9] 1990 U.S. Census of Population, summary tape 3A.

[10] Ibid.

[11] Ibid. The unemployment rate for men is 6.0 percent; the unemployment rate for women is 4.2 percent.

[12] Ibid.

[13] Midwestern Regional Office, USCCR, from 1990 U.S. Census of Population, summary tape 3A.

have been entitled to them and they should continue to be entitled to them. Any in-roads into those entitlements are a threat . . . . I think we are probably all prone to have that feeling, that if we get something, after we have had it for a while, we feel we are entitled to it. If somebody else wants it, it is a threat . . . . There has been such a pervasive monopoly on opportunities for a long time, that those who are in them felt that they belonged to them. I think we need to help them to understand that the more opportunities there are for everyone, the better it is.

"Affirmative action has . . . lots of baggage connected with it. I would not suggest that we package the same thing in a different way and call it something else; then in a way I am suggesting that. We have to look at what it is about that term [affirmative action] that engenders so much opposition, and then talk about what we really want to accomplish. Because when people think of affirmative action they think of quotas, or numbers, or hiring people who aren't qualified because you have to fulfill certain obligations. They think of a lot of things that do not describe the purpose of affirmative action. I think . . . it is a matter of making sure that the message is about what we want to accomplish. I don't think that gets rid of the opposition, but we need to make sure that we are all talking about the same thing and make sure that it is clear so that we can get rid of some of the negative."[14]

Indian Affairs Council

Over 50,000 residents in Minnesota are American Indian, and they make up more than 1 percent of the State's population.[15] Their economic status, however, is significantly worse than that of whites living in the State. According to the 1990 census, the percent of adult American Indians in the labor force was 58.2, while the participation rate for whites was 70 percent.[16] Additionally, the unemployment rate for American Indians is four times higher than for whites; the unemployment rate for American Indians is 20.1 percent, while the unemployment rate for whites is 4.8 percent.[17]

TABLE 5
Comparison of Education and Employment Attainment of Whites and American Indians in Minnesota

	Whites	American Indians
Unemployment rate	4.8%	20.1%
Adults with income below poverty	7.6%	36.3%
Percent w/ less than H.S. ed.	17.0%	31.8%
Percent w/ college degree	21.9%	7.7%

Source: Midwestern Regional Office, USCCR.

Among American Indians who are employed, over one-third of adults have incomes that are below the poverty level.[18] In educational attainment, American Indians similarly lag far behind their white counterparts. Among adults over the age of 25, nearly one-third of American Indians in Minnesota do not have a high school diploma; the rate for whites is 17 percent.[19] The ratios reverse for postsecondary educational attainment; 21.9 percent of whites in the State have a bachelor's or higher degree, while only 7.7 percent of the State's American Indian population are college graduates.[20]

Joseph Day[21] is the executive director for the Indian Affairs Council. He is from the Leach Lake Reservation and his clan is the Martin clan, which is a furbearer. He addressed not only the topic of affirmative action, but the history of the American Indian in this country, and the teaching of history in the schools and the role it plays in perpetuating patterns of discrimination.

"History started for the American Indian prior to European contact, and that is not being included in the history books, whether it is the

[14] Aviva Breen, testimony, MN SAC Affirmative Action Transcript, pp. 41–56.

[15] 1990 U.S. Census of Population, summary tape 3A.

[16] Midwestern Regional Office, USCCR, from 1990 U.S. Census of Population, summary tape 3A. For American Indians between16 and 64 years of age, 18,275 of 31,397 persons were in the labor force.

[17] Ibid. The unemployment rate for men is 6.0 percent; the unemployment rate for women is 4.2 percent.

[18] Ibid. For American Indians between 16 and 64 years of age, 9,654 of 16,967 (36.3 percent) employed persons receive wages lower than the poverty rate.

[19] Ibid. 7,420 of 23,312 American Indian adults over the age of 25 in Minnesota have not obtained a high school diploma.

[20] Ibid.

[21] Joseph Day's Indian name is Spirit Walking Around.

history of Minnesota or the history of this country. Outlining that history started when Europeans got here, has a definite negative impact on who Indian people are psychologically, emotionally, and—in today's society—in where we are going as far as tribal governments.

"American Indians have been treated as we are today since Europeans got here, but today the discrimination practices are below the surface. Take Minnesota, and say [the people of] Minnesota are nice. They really market that phrase. But that phrase is a mask of true feelings. Witness what happened in the State of Minnesota the past 6 months during the legislative session: attacks on tribal governments and Indian people. And last week in Congress there was [an initiative] to tax [just] the Indian casinos, not the casinos in Las Vegas or Donald Trump's casinos; they are targeting American Indians. To me that's racism, economic racism. . . . Even the words of people of color—who is that designed by? My response is people of no color came up with that term to mask their true feelings about who I am as an Indian. Our council took the position we are not people of color. We are American Indians. So it is those subtle battles that we have to confront and overcome before we even enter the workplace. It starts in kindergarten and it does not end throughout our lives.

"In today's workplace under affirmative action laws, [employers] are to provide equal opportunity for jobs if [minorities] have the same skills and the same expertise level when applying for a job. And I think it's incumbent upon an employer to hire American Indians, African Americans, Asians, especially if they are marketing products or services to everyone in the country. It's good to diversify, to have a diverse work force to give back to the community. I think we've lost community.

"That is what competition is all about, and that is what European philosophy is all about—competition and neglecting community. Where does competition get you. It may get you to have the biggest bank account, but what are you spiritually and morally. I think those are important aspects that Indians hold really dearly, the spiritual part and what's moral and what's right for the community. So I think we have to look at some of the values that we hold and use those values. Obviously we use some of the good things from the other communities, embrace those, recognize and respect other communities, and by doing so develop a better society, a better world, a better workplace.

"I think we need more enforcement, more ways to evaluate how we're doing. . . .The next thing to do is implement them, carry them out, and ensure that the work force really exemplifies the community that you're serving, whether it's the State of Minnesota, the counties, Honeywell, or whoever. It takes the commitment of the leadership to make that happen. . . .

"I also think the affirmative action initiative is not addressing the real problem. The problems come with the lack of inclusion through education, through the way parents raise their kids and saying others are different from those folks....It starts at an early age where development of a child and their behavior starts. We have to be inclusive in the history books. The more we learn about each other, the more we can rid ourselves of the stereotypes about American Indians, Asians, African Americans and develop a community as we grow older and work together because we have, as Indians, just as much to offer. American Indians are just as smart as everyone else is, so if they are given ample opportunities to share in the history of this country and be the same as everyone else, when they get into the work force a lot of that other stuff will dissipate. I really strongly recommend looking at those history books, the American history, and all of the 50 States history books, and be inclusive; start with the children and teach them about treating each other.[22]

Council on Asian Pacific Minnesotans

Individuals with an Asian or Pacific Island heritage are nearly 2 percent of the State's population, and the numbers continue to grow.[23] Some of the ethnic groups in Minnesota delineated by the census include: Chinese, Filipino, Japanese, Asian Indian, Korean, Vietnamese, Cambodian, Hmong, Laotian, Thai, Hawaiian, Samoan, Tongan. The economic fortunes of some Asian Americans in the State have been very

[22] Joseph Day, testimony, MN SAC Affirmative Action Transcript, pp. 42–55.

[23] 1990 U.S. Census of Population, summary tape file 3A. The census counted 76,771 individuals with an Asian or Pacific Island heritage.

good, but the group as a whole is disadvantaged in comparison to whites.

The 1990 census shows 61.7 percent of adult Asian Americans are in the labor force, less than the 70 percent participation rate of whites, and the unemployment rate of Asian Americans, 6.6 percent, is higher than for white residents, 4.8. Moreover, among Asian American adults between the ages of 16 and 64 who are employable, 30 percent have incomes below the poverty level.[24] In educational attainment, although 33 percent of Asian American Americans in Minnesota over the age of 25 have a bachelor's or higher degree, which is higher than the postsecondary graduation rate of whites, 30 percent of Asian Americans do not have a high school diploma.[25]

TABLE 6
Comparison of Education and Employment Attainment of Whites and Asian Americans in Minnesota

	Whites	Asian Americans
Unemployment rate	4.8%	6.6%
Adult poverty rate	7.6%	27.1%
Percent w/ less than H.S. ed.	17.0%	30.3%
Percent w/ college degree	21.9%	33.5%

Source: Midwestern Regional Office, USCCR.

Cherian Puthiyottil, a board member of the Council on Asian Pacific Minnesotans, spoke to the Advisory Committee about affirmative action and discrimination. He stated that it takes many more years to eliminate ingrained prejudices and drew comparison between the race relations in this country and the caste system in his native India. He supported the idea of affirmative action, holding it was a stepping stone for those with fewer advantages, and noted its particular need in the Asian community because many individuals from Asia are considered economic threats.

"Affirmative action. . .has brought many people of color or the minority or disabled to the doors. . . . There is a kind of mentality saying that affirmative action makes the people of color or the minority or the disabled people lazy and irresponsible if we force the affirmative action. But the history of this country shows that it will take many more years to eliminate the already ingrained prejudices and biases to reach the people of color or the disabled people or the minorities.

"I am from India. By law we are born into the caste system. In 1951 India passed laws ending discrimination based on one's caste. Today, after 40 years, people of the low caste are people who can reach higher level because of that court decision. At the beginning it is necessary. Down the road you can eliminate that. Some people might say, oh, some talented people it is questioning their prestige or the quality or the talents, but all are not inborn talented. They need an environment where they can show their merit or they can develop their capacity. From my own experience, many people are prejudiced against me because of my background, but because of the affirmative action I got a chance to prove my merit or my capacity. So the affirmative action is a stepping stone.

"Diversity is a blessing, not a problem. And affirmative action might be giving a kind of prestige for United States in the world population doing something about discrimination. Intentionally we need to accept the diversity and respect other people's values. Look at the black partner in the prestigious law firms. Look at the black astronaut sailing beyond the skies. Look at the black scholar sculpting the future with his or her own genius. Look at the black couples or colored people landing in a park that was closed for them one time. No Promised Land yet, but look at what we have become. Consider all that we might yet be, if we would only arise and do. The real affirmative action; adapting to diversity.

"There is a perception that minorities are stealing opportunities. When a new immigrant population from Southeast Asia came, there was a hue and cry they are going to steal job opportunities, but gradually people understand that is not the way it is. It is a kind of opportunity for people in this country to use their talents. So they are seen as a threat based on ignorance about the people who come to this country. This

[24] Midwestern Regional Office, USCCR, from 1990 U.S. Census of Population, summary tape 3A.

[25] Ibid. According to the 1990 census, 10,771 of the 32,151 Asian American adults over the age of 25 have a bachelor's degree; while 9,745 Asian American adults do not have a high school diploma.

country is a country of immigrants, and many people came here in different times and on different boats. That is the difference, but it is not a threat. It is a blessing.

"The education system in country, if you analyze it, is supporting the superiority of one race. It has been going on for years. And this society somehow or other taught those people, they are the best and superior. That is good. But at the same time we should have respect and open our eyes that there are people in our races and other cultures that also equal with abilities and capacities. . . . We have to start with the children, as the older generation is very difficult to change what they have learned. At least we should start with the children, understanding and respecting other cultures and respecting the values of other cultures."[26]

Council on Black Minnesotans

African Americans are 2.2 percent of the State's population, and almost all of the 100,000 African American residents reside in the twin cities of Minneapolis and St. Paul.[27] In terms of poverty, educational attainment, and employment, African Americans as a group are significantly disadvantaged in comparison to the white majority.

Thirty-six percent of African Americans over the age of 16 are not in the labor force; of those that are in the labor force, the unemployment rate is 17.6 percent.[28] Combining the two statistics creates an even starker reality for the African American population; in Minnesota 45 percent of all African American individuals over the age of 16 are either unemployed or out of the labor force and no longer seeking employment.

African Americans in Minnesota also have completed fewer years of education than their white counterparts. Nearly one-fourth (23.8 percent) of all African Americans in the State have not completed high school; and the rate of those in the State with a postsecondary degree is significantly lower than in the white community.[29]

TABLE 7
Comparison of Education and Employment Attainment of Whites and African Americans in Minnesota

	Whites	African Americans
Unemployment rate	4.8%	17.6%
Labor force participation rate	70.0%	35.9%
Individual poverty rates	7.6%	35.1%
Percent w/ less than H.S. ed.	17.0%	23.8%
Percent w/ college degree	21.9%	17.5%

Source: Midwestern Regional Office, USCCR.

The association between education and income is particularly observant for the African American community, as across all age categories, 33,141 of the 94,798 African Americans (35 percent) in the State live below the poverty level.[30]

Lester Collins, executive director of the Council on Black Minnesotans, asserted that there is an uneven distribution of opportunities in this country along race and gender lines, and affirmative action programs work to equalize the opportunities. He suggested that much of the opposition to affirmative action stems from the white majority perception of people of color as an economic threat and a source of competition. He added, though, that as a middle class living standard increases in minority communities, the focus of affirmative action may have to be redefined. Nevertheless, until the lack of access to opportunity is no longer concentrated among people of color, there will be a benefit to affirmative action.

'Today's uneven distribution of such opportunities in favor of primarily white men does not reflect conscious discrimination repeated thousands of millions of times over, but it certainly does reflect the fact that unequal opportunities for education, professional achievement and promotion reflect the long-standing path of exclusion of people of color and women from high status positions in our economy and our society. . . .

"To a great extent the uneven distribution of opportunity throughout American society re-

[26] Cherian Puthiyottil, testimony, MN SAC Affirmative Action Transcript, pp. 30–34.

[27] 1990 U.S. Census of Population, summary tape 3A.

[28] Ibid. The 1990 census counted 33,494 African Americans over the age of 16 as employed; 5,899 as unemployed; and 21,762 as out of the labor force.

[29] Ibid.

[30] Ibid. The 1990 census shows 15,144 of the 51,484 African Americans between the ages of 18 and 64 living in poverty.

flects this nation's racial history. Wide acceptance of the idea that white men should not monopolize economic power and by themselves control commerce and government is barely a generation old. Meanwhile, the several centuries of slavery, disenfranchisement and segregation that immediately proceeded our current times of enlightenment, if one will, have left a continuing legacy of dispossession and dependence for far too many descendants of the slaves and for sharecroppers. While the laws enforcing America's apartheid, if you will, could be and were erased virtually overnight, the social and economic consequences of America's racial history have proved much more difficult to correct.

"The U.S. Commission on Civil Rights has defined affirmative action to mean any measure beyond simple termination of a discriminatory practice adopted to correct or to compensate for the past, for present discrimination or to prevent discrimination from reoccurring in the future. Under their definition it would be hard to imagine an era of life or an American life where education, housing, employment, contracting, government, where affirmative action measures could not legitimately be brought to bear for the sake of redressing past discrimination which permeated every aspect of social, economic, and civic activity.

"The emergence of the last generation of a sizable African American middle class, however, raises a difficult question about the proper objectives of the affirmative action program. Should affirmative action operate in favor of affluent people of color or should it be more sensitive to the questions of class. If affirmative action operated only to protect and perpetuate a middle class of color while creating the illusion of a racially healthy society at the expense of truly disadvantaged African Americans, then affirmative action would be a fill policy. Because the proper emphasis of affirmative action policy should be to extend opportunity to qualified people who would not otherwise have access to it, the challenge of affirmative action in the future will be to penetrate further down the class scale in order to identify, cultivate, and reward talent among those whose disadvantages are primarily socioeconomic. In former times there was a nearly universal correspondence between membership in a racial minority and socioeconomic disadvantage. And this is not quite true today. When the disadvantages of poverty, poor education, and the lack of access to opportunity are no longer concentrated among people of color, then and only then will there be no benefit to affirmative action.

"Opponents of affirmative action state correctly that strict equality of opportunity would be completely colorblind. I hope to live to see the day when equality so understood would not need to overlook any unequal distribution of opportunity on the basis of race. We are not yet there. So the discontinuance of measures designed to correct past discrimination is not a luxury that people of color and, for that matter, people with disabilities can afford or can well afford. I think that what we are seeing in these [attacks on affirmative action is actually a response to] a perception of job loss and opportunity based on numbers. And I think that the growth in [the number of minorities] poses to many...a threat. I think that is much of what we are dealing with in California and throughout the country—. . .a threat essentially to. . .those who have generally not had to consider them."[31]

[31] Lester Collins, testimony, MN SAC Affirmative Action Transcript, pp. 16–39.

3 Affirmative Action–The Debate

The Advisory Committee listened to a series of debates on affirmative action. It should be understood by the reader, however, that affirmative action is not a simplistic term with one single meaning and application. It is a multifaceted set of programs with different applications in different settings and administered by different government entities and organizations with differing rules and regulations.

In this respect, *it is incorrect to assume that someone held to oppose affirmative action is against every part of every affirmative action program.* Those who spoke as opponents generally spoke against quotas and preferential treatment on the basis of race and gender. Similarly, those *speakers who supported affirmative action did not give unqualified support to every affirmative action program, policy, and practice.* They spoke in support of active gender-, color-, and disability-conscious programs in the recruitment and selection of qualified individuals.

The first debate was between Stephen Cooper of the Cooper Law Center and Peter Bell of the Center for the American Experiment.[1] Both individuals have been involved in discussions on affirmative action for several years, Cooper, supportive of most affirmative action initiatives, and Bell, opposed. The second discussion involved Stephen B. Young from Personnel Decisions International and Yusef Mgeni, executive director of the Minneapolis–St. Paul Urban Coalition. Young, a candidate for the Republican nomination as U.S. Senator questions the legitimacy of group-based efforts to alleviate discrimination; Mgeni, in his work with the Urban Coalition, has studied issues of race and poverty for several decades and is generally supportive of a governmental role in the alleviation of poverty and discrimination.[2] In the third section, William Maitland, professor of international business and business ethics at the University of Minnesota, is critical of race- and gender-conscious initiatives; Marvin Taylor is president of the Intergovernmental Compliance Institute, an organization of professional practitioners in affirmative action and contract compliance.[3]

Public comment on affirmative action was also received by the Advisory Committee and is included in section 4. This section includes statements made before the Advisory Committee at the community forum and comments submitted to the Committee during the 30-day period following the meeting when the record remained open. The first part of this section has three commentaries on local government compliance with their affirmative action programs. The second part of the section has a personal attestation of discrimination because of affirmative action programs and two general comments. Portions of every comment made by a member of the public before the Advisory Committee or received by the Advisory Committee and signed are included.

Stephen Cooper, Cooper Law Center, and Peter Bell, Center for the American Experiment

Stephen Cooper in support of affirmative action:

"The key thing when we talk about affirmative action is that it almost all is a debate over what the reality is for people in America, and most of that debate seems to be based on a false reality. A lot of the antiaffirmative action arguments, a lot of the arguments that say we have gone too far, or things should not continue in this direction are based on a lie. The lie is that equality has been achieved in America. Nowhere near equality has been achieved.

[1] The comments of Stephen Cooper and Peter Bell are their personal opinions and should not be attributed to their organizations.

[2] The comments of Steven Young and Yusef Mgeni are their personal opinions and should not be attributed to their organizations. Young and Mgeni debated the merits and substance of President Clinton's year-long dialogue on race relations the previous week on public radio station, KTCA–FM.

[3] The comments of William Maitland and Marvin Taylor are their personal opinions and should not be attributed to their organizations. Maitland and Taylor did not appear together before the Advisory Committee, but spoke separately.

"Sometimes we will parade out examples. . .that in a particular individual's case they managed to beat the odds and succeed. Therefore it is not a rigged game. That is like saying when you go to Las Vegas and gamble and one person wins, that means everybody is going to win. That's ridiculous logic.

"The reality is the opportunities for people of color, the opportunities for females, and the opportunities for people with disabilities from birth are dramatically different than the opportunities for white males. Every single piece of data you look at proves that, shouts that, and cannot be honestly argued with: life expectancy, median income, accumulated wealth, anything you want to look at. I challenge anybody to come up with a criteria that is based on American reality today that demonstrates that we have achieved equality. We have not.

"So then we go to the second issue. Should we do nothing about it or should we do something about it. I think then we have to look back on what has worked for us as a country. . . .The difference in the United States as compared to the rest of the world [is that] we really are the first society that took a chance on inclusion. We included a lot more people in the opportunity to produce than any other society had before us....

"When we talk about affirmative action we are first and foremost not talking perfect slotted representation in Congress or [other] places. We are talking first and foremost [about] equal access to what sustains the life of families. We are talking the opportunity to have a job. We are talking the opportunity to go to school and get a decent education. We are talking about the opportunity to be given access to those things that make life work for our families. . . .

"There is this nice image, I did it all on my own. . . . Nobody ever has. I didn't. Nobody in this room did. Nobody ever will. We all succeed or fail based upon the groups that we are part of, the society we are part of, our families, and other kinds of things. . . . We would like to believe [this fiction] because we like that John Wayne image that we are independent. The reality is, though, in a complex society we are where we are because of what that society and ourselves in combination have been able to create. . . .

"Think of the opportunities in life that you have had. How much of it came from networking? How much of it came from the fact that you knew somebody who knew somebody who gave you a break. If your network happens to give you access to people in positions of power, you have an edge—whether you want to admit it or not. If somebody else's network gives them access to a part-time job at McDonald's as opposed to your access to get that right recommendation letter to get into the college you want and that right introduction to get into that job interview you want, then that is not a fair fight. . . . If we are going to glorify the concept of letting everybody offer what they have to offer, let's make it a fair fight. . . .

"In almost every discussion of affirmative action there is a serious language difficulty. What often happens when the term affirmative action is used is that all kinds of things are attributed to it that have nothing to do with affirmative action. They may have to do with the issue generally, but they don't have to do with affirmative action.

"How does enforcement of the civil rights laws in the courts work?. . . .You are [only] finding [and] catching the people who are above and beyond the normally accepted levels of discrimination, sexism, and racism. You are not fundamentally changing the equation in society, you are just getting the really bad ones. Now, is that important? Of course it is, but it does not do what. . .affirmative action. . .is designed to do, which is fundamentally change the opportunity for people to participate. Affirmative action corrects for that.

"One [criticism] is that you are always going to have different percentages of people [who] want to do different things. Affirmative action says right in it [that it applies only] to the people who are interested and fully qualified for the position. So if you have a position that overwhelmingly has males interested, and females are not as interested, affirmative action does not say you've made the wrong choice with your life. Affirmative action is saying even though 80 percent of the applicants are male and 20 percent are females, you only hired 1 percent. So your problem is the difference between 1 percent and 20 percent. It doesn't take options away from people.

"Affirmative action alone, just like any accounting system alone, does not make a company profitable. It does, however, let a company know what it is doing and allow it to make intelligent choices. All affirmative action does is let us know where it is we are discriminating, how it is we

are discriminating, and what it is we can do about it. . . . You have to think about what created the problem, why we see this inequity, and how can we correct it. "[4]

Peter Bell opposing affirmative action:

"Certainly discrimination exists. I think racism exists. I might even argue it is getting worse today. The question or issue is not does it exist, the real question is what difference does it make. For instance, some Asian groups make more than whites. Japanese Americans do. Chinese Americans do. Now, that to me, I think, forces a very difficult question. Either they are not subject to racism or something else other than racism has an impact on income in this country. If you talk to many Asians groups today they will say they are subject to various forms of discrimination. Yet it does not have as clear an impact on income that some might think. . . .

"There is the rationale to provide representation and counsels of power for women and men who are underrepresented. This idea has grown deep political and cultural and legal roots that are just now being tested. Many, myself included, believe that affirmative action has done more to undermine the moral authority of the civil rights movement in this country than any other single activity. The push for affirmative action tragically has forced many of the communities of color to celebrate their failures and overappreciate the impact of racism in a demeaning manner to gain concessions from white America.

"A fundamental question that I would like the proponents of affirmative action to address is whether people of color can ever be seen by themselves or others as equals as long as they are seen as needing special treatment? Will we ever be seen by our fellow citizens as equal? And this goes to the heart of our humanity and our integrity as a people. It is abhorrent to me that anyone in this room would think that my son or daughter cannot compete with [a white's] son or daughter or that somehow they need special treatment. That is an abhorrent concept to me. . . .

"Affirmative action can also tragically undermine initiative. If racism and oppression are so powerful, many ask, why get an education, why delay gratification, why work hard because 'The Man' won't let you get anyplace anyway. The push for affirmative action sends the message that people of color can progress primarily via white concessions and good will. . . . I do not want to rest the advancement of communities of color on white good will. I do not know if white people are ever going to change. To say that I have to wait for white people to change before I can be okay is a disempowering statement. The push for affirmative action sends the message it is not what you know, but who you know and the type of political and cultural power that your group can garner. This creates much of the cynicism that exists in communities of color today . . . .

"Our current political institutions cannot determine. . .the merits of each group who claim victim status in America and want to use affirmative action as a way to address it. How do you calibrate the various mistreatment of individuals and groups of color in this country? They often are pitted against one another. To calibrate their various mistreatment and to determine what should be fair compensation is beyond the scope of our political institution. There is no practical political process for any affirmative action proposed by those who support it, other than this. That is proportional representation in all fields. This is something that has never happened in the history of the world; there has never been proportional representation in any field of endeavor based on demographical basis in the history of mankind. Proponents of affirmative action have that as their end goal. . ..

"We need to be very clear about the difference between antidiscrimination laws and affirmative action laws. I support the original intent of affirmative action, which is a broad outreach program. I would argue [that] you cannot have affirmative action today without quotas. . . .

"Let me tell you one thing I would not do, and one thing I would do. I would not have two lists. I would not have a black list over here, and a white list over here, and I would not say [to those] on the black list, 'you can have lower test scores,' [and to those] on the white list, 'you have to have higher test scores.' . . . That is a fundamental assault to my humanity and to my integrity in the most basic fundamental ways. We [African Americans] will not be seen as equal in

[4] Stephen Cooper, testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, community forum, Minneapolis, MN, June 19, 1997, pp. 61–68, 76–81, 89–91, 95–98, 100–01, 104–07, and 109–11 (hereafter referred to as MN SAC Affirmative Action Transcript).

the eyes of our fellow citizens as long as that is allowed to continue. . . . I am not, however, a colorblind absolutist, [as] I may entertain provisional admissions to schools. . . .

"[Further] the notion of representation [is] interesting. While I am a strong supporter of black chiefs of police—and this is the diversity argument—I do not know any example that they have better community relations. . . . The argument is if we have black superintendent of schools. . .and black teachers, the test scores will go up. I would like [supporters] to provide me any evidence at all where that's true. . . . That's part of the honest conversation that we need to have.

"I would agree with that, as well. I think there is a difference between discrimination and affirmative action in quotas, and often those things get used interchangeably. As I mentioned, I am and remain a supporter of the original intent of affirmative action. I think affirmative action, as it was originally intended, which is simply an outreach program—I think when affirmative action moves into quotas and minorities set-asides and race test scores, when it gets into those areas I become an opponent of it. . . ."[5]

Stephen B. Young, Personnel Decisions International, and Yusef Mgeni, Urban Coalition

Stephen Young challenging the continuation of affirmative action:

"I say affirmative action is not good for our society, for any American. . . . Let me begin by mentioning several assumptions on which I [base this]. . . . First, I assume a legal structure against discrimination which is in place and which is effective, . . .[and that] affirmative action is something separate from and apart from the legal structure of laws which protect all Americans against discrimination based on religion, race, gender, and other matters. Second, we are in this discussion about 32 years after this legal structure was put in place to end segregation, and segregation was a follow-up system to slavery. I fear many of us in 1997 are. . .still prisoners of an unhappy past which back to slavery and includes segregation. . . . The premise. . .used to support affirmative action in 1997 assumes that white Americans have a permanent racist bend in their genetic makeup. . . . I find this to be both fiction and a slander for many, many white people. . . .

"One of the reasons I raise this perspective is because a lot of whites do not want to speak about [race issues] publicly because someone will say, 'you're racist or you're insensitive.' They do not feel guilty, and when they see what they interpret or what they hear is public policies and the society and a political process and cultural process and media process which tends to root things on all [white] folks being guilty, therefore we've got to do this, there's a resistance and alienation. . .and politically feeds the opposition to affirmative action.

"[The issue of race] is a complicated situation. My suggestion. . .is that we need to surface a conversation on this because there are a lot of feelings and anger which are not being surfaced. In an open democratic, political system when you bury and repress strong feelings, you are going to get dysfunctional results somewhere down the road. . . .

"We must, as a society, confront and resolve very quickly the consequences of slavery for certain Americans. It is a blot on the history. It is something we must deal with. . . . There is another example of how different kinds of groups with different pasts can establish access to the heights of power and money. I submit that's the Singapore example, which I consider a procedure to move by meritocracy rather by affirmative action.

"Now some thoughts about affirmative action. . . . First, it is my feeling that affirmative action was an appropriate policy to adopt in 1965 to assist African Americans, disadvantaged by slavery and segregation, to take robust advantage of the civil rights and voting acts of 1964 and 1965. In retrospect, affirmative action should have been phased out as African Americans took advantage of new legal rights and powers and consequent social and economic opportunities. Second, there is no compelling case that affirmative action is a necessary remedy for any new immigrant group to America from Asia, Africa or Latin America. The immigrant experience from the Irish to the Jews to Indochinese refugees has been and is very different from the nonimmigrant experience, which I say as an outsider was imposed on African Americans. Nor is it to me intuitively compelling to give white

[5] Peter Bell, testimony, MN SAC Affirmative Action Transcript, pp. 69–76, 81–89, 91–93, 98–100, 102–04, 107–09, and 111.

women advantages of affirmative action after 1970 as American social values and morals changed to accommodate and value women, frankly, as economic workers. . . .

"Further, affirmative action as a permanent social cultural political norm and economic policy contains a bias towards something that I believe to be immoral. It creates and imposes group identity as the relevant human characteristic, not individual characteristics and traits. Under most moral theories...it is the unique individual distinctions and differences which provide ultimate value for human beings; not our status as members of a group, but who we are as individuals. Affirmative action, therefore, conflicts with the demands of individualism. Moral theory makes individuals responsible for their actions. Liability, in particular, is not to be imposed on a person as a consequence of his or her group membership. That is what was wrong with racism and wrong with segregation and wrong with Hitler's policy of genocide.

"Raising young Americans according to racial categories for affirmative action purposes breeds. . .a psychology of victimization. This hurts people because it undermines their capacity for self-actualization. Raising Americans in racial categories for affirmative action purposes has, from time to time, pitted African Americans against Hispanics and Asians for status as a preferred victim group and therefore to benefit from particular programs and points of view. This is and has been divisive, and it prevents us from coming together in mutual respect to solve our most significant problems."[6]

Yusef Mgeni in support of affirmative action:

"Equal employment opportunities began in the 1950s and 1960s, which essentially meant we were going to be fair. We were going to put the little die cast on our letterhead, and everyone will have the same opportunity, and...very little happened. Next we graduated in the late 1960s and early 1970s to affirmative action, which meant. . .outreach. We will publicize our policies. We will ensure that the pool of candidates who apply for positions for management, for promotions, for real estate openings, for other opportunities reflects our constituency, reflects the population. We will affirmatively seek to ensure that we have a good balance of applicants from a cross-section of backgrounds who apply for these positions. Then around the time of President Reagan's tenure, affirmative action became a dirty word. . . .

"My understanding of history and of law suggests that equal employment opportunity is the letter of the law and that affirmative action is the spirit of the law. The only time that goals, quotas, time tables, and other ills of so-called affirmative action are present is as a remedy for documented discrimination as imposed by a court. . . . Today. . .we are attacking affirmative action, the spirit of the law, in a fairly disguised attempt to eliminate the letter of the law. What we are not looking at is the political reality of our country, the social location of affirmative action on the dawn of the 21st century.

"The subtext for this discussion on affirmative action is tinged with the three triplets; race, gender, and class. Race was clearly the engine that brought the civil rights movement out of the dark ages of history. Along with it the passenger cars of age, sex, gender, and other forms of discrimination. . . .

"[In Minnesota] theTwin Cities is home to the highest percentage of poor people of color below the poverty line of the 25 largest urban metropolitan areas in the United States, 43.7 percent. If you look beyond the Twin Cities—at the metropolitan statistical area—in each of the contiguous counties with a population of 50,000 or more. . .33 percent of the inhabitants of communities of color are below the poverty line, the third poorest metropolitan region of the 25 largest regions in the United States....

"When members of the majority culture are asked what affirmative action is, they say it is an uneven playing field, they say that it rewards incompetence, malcontents, and provides employment and other economic opportunities primarily or exclusively on the basis of race, gender, physical disability, or other characteristics of protected class group members.

... "When that same question is asked of representatives of protected class groups the definition of affirmative action is one of ensuring that there is an environment with zero tolerance for discrimination. So on the one hand it means nondiscrimination, on the other hand, to many

[6] Stephen B. Young, testimony, MN SAC Affirmative Action Transcript, pp. 190–98, 207–11, 213–27, and 221–23.

very well-intentioned Americans, it means just the opposite, it means discrimination.

"Clearly [we] have a communications breach. . . . What is required is acknowledgment and accountability. . . . Unless one is a test tube baby, everyone has some relationship to the challenge of the oppression and discrimination against [minorities] and women in our society. . . . I think that it is through that acknowledgment that we move forward, rather than through denial and through camouflage of privilege and prior benefit, much of which traveled across generations."

"So if we talk about affirmative action, first we have a responsibility to talk about what it is, the spirit of [antidiscrimination] law. We have an obligation to frame this dialogue and this discussion in a mutually beneficial context so that it is not perceived as benefiting one group of protected class members at the expense of the majority culture.

"We have a responsibility to ensure that affirmative action deals with systemic issues, that it operates across generations, and that the public dialogue on it is honest and one in which people are held accountable.

"Do [minorities] need affirmative action? Sometimes yes, sometimes no. [Minorities] need to be ensured that I will not face undo prosecution in the criminal justice system or from law enforcement authorities because of where they live or what type of car they drive. They need to be ensured that if they do decide to pursue an occupation or open housing or other public accommodations, that they have the same access to it that any other individual has—not a greater access or more benefits at the expense of anyone else—just a level playing field. Just the assurance that nondiscrimination will be a requirement, that it will be the order of the land and that there will be consequences for those...who do deny access to opportunities and who do impose limitations on anyone's ability to achieve their maximum human potential."[7]

[7] Yusef Mgeni, testimony, MN SAC Affirmative Action Transcript, pp. 198–207, 211–13, and 217–23.

Ian Maitland, University of Minnesota, and Marvin Taylor, Intergovernmental Compliance Institute

Ian Maitland opposed to race- and gender-conscious policies:

"I was born in Canada and raised in Egypt, France, England, and the United States. I was raised in the United States from 1958 through 1962, and at an early age I had an opportunity to observe Jim Crow in action. . . .

"I watch the United States with consternation, amazement, and sometimes even amusement America's attempt to grapple with the issue of race. I am shocked to find that what I thought had been the promise of civil rights act—a colorblind society—has been replaced with a systematic program of emphasis on racial differences. . . .

"My concern is not so much with affirmative action in what I thought was the pristine sense of outreach. It is with policies of racial and gender preference which I think have greatly exacerbated racial and gender tensions on campuses and further afield. . . . In many ways race has become a much more salient issue than it used to be. Certainly the debate has become more embittered, more shrill. I look back on the 1960s and 1970s as a period when there still seemed to be some optimism left and a possibility of interracial solidarity. . . . I think we've turned our back on the colorblind idea that was at the heart of the civil rights movement.

"In *Brown versus Board of Education*, Thurgood Marshall contended before the Supreme Court that there was, in fact, no such thing as race, and therefore there was no rational basis for distinguishing between individuals based on race. . . . That color-blind ideal is the one that gave this enormous moral authority, the moral high ground to the civil rights movement. Increasingly I see the civil rights movement as yet another special interest. . . .

"I think that our obsession with race has prevented us [from] coming to grips with very real problems faced not just by black Americans, but all Americans particularly faced with family breakdown, crime and education. . . . I find it very difficult to grapple with the idea that there is some invisible or systemic exclusion. . . . If there is racism then we should be able to identify it. It should be manifesting itself in spe

practices, actions, or beliefs.... I am a very strong believer in very strictly enforcing antidiscrimination laws and punishing established cases of discrimination. . . .

"[However] I do not believe the evidence is there that. . .all or most Americans' views are unconsciously conditioned by racism. . . . Is racism the explanation for the major disparities in criminal sentencing, employment, award of Ph.D.s? I do not believe so. It may be a small contributory factor, but I do not believe it is this pervasive, all-purpose explanation of all of the differences that we observe."[8]

Marvin Taylor supporting affirmative action:

"Frederick Douglass stated: It seems to me that it is the relation subsisting between white and colored people of this country which is, of all other questions, the great paramount imperative and all commanding question for this age and nation to solve. These comments were made in 1863 and are unfortunately just as valid today. . . .

"Twenty-two years ago President Lyndon Johnson said [that] one does not take a person who has for years been hobbled by the chains of discrimination, liberate him, bring him up to the starting line of a race and say you are free to compete with all the others.

"During the 1960s, programs called affirmative action were either created or adjusted to address this injustice. Affirmative action is simply a plan to develop reasonable representation from all sectors of society. It may be estimated, for example, that African Americans make up 12 percent of the total population. It would therefore be reasonable to believe that absent past and present discrimination, 1 in 10 employees would be of African American descent.

"The public works act of 1977, as an example, was set up to bolster the economy by setting aside $4 billion of State and local [monies] for State and local public works projects. The recipients of these economic benefits agreed to share 10 percent of what they received with minority companies. In this fashion government is economically helping all Americans by requesting that disenfranchised Americans also have an opportunity to share a reasonable piece of the pie. Unfortunately, self-centered critics of affirmative action have sought to dismantle the effectiveness of overcoming the past discrimination by the use of shallow excuses and complaints. . . .

"Affirmative action is a means by which we can incorporate the disenfranchised persons in America who have been denied the opportunity to contribute to America. I think economics is behind racism. Economics is behind discrimination. Once we realize that it is easier to provide opportunities for persons with the same dollar that builds buildings and roads, . . .than if that same dollar has to go to build jails.

"It is a few people that want to hoard the benefits and control the economic well-being and the tax dollars that continue to dismantle and make attacks on affirmative action. . . . People have systematically attacked affirmative action to the point that the [programs] are no longer effective."[9]

Public Comment

Governmental Compliance with Affirmative Action Policies

1. Leon Rice is the director of the Employment in Housing Ombudsman Service in Minneapolis, Minnesota. Rice asserted that the various departments in the City of Minneapolis and the State of Minnesota have not complied with the law and developed affirmative action plans, which included hiring and retention goals for minorities, women, and persons who are handicapped.

"All city of Minneapolis departments [are] to annually develop and submit to the city council an affirmative action plan, including goals and timetables, for the promotion and retention of

[8] Ian Maitland, testimony, MN SAC Affirmative Action Transcript, pp. 172–83.

[9] Marvin Taylor, testimony, MN SAC Affirmative Action Transcript, pp. 241–51. In support of his testimony, Taylor submitted seven exhibits: *The Foundation and Development of Racism in America* (1997) (also submitted independently to the U.S. Commission on Civil Rights); *Institute on Race Poverty Final Report on Minority Business Enterprises* (1996); *The Disparity Study of Women/Minority Business Enterprises, City of Minneapolis* (1995); *The Disparity Study of Women/Minority Business Enterprises, Hennepin Count; The Disparity Study of Women/Minority Business Enterprises, Ramsey County; Multijursidictional Disparity Study of Minority/Women Business Enterprises, Independent School District No. 625*; and *Multijursidictional Disparity Study of Minority/Women Business Enterprises, City of St. Paul.* Exhibits available and on file at the Midwestern Regional Office, U.S. Commission on Civil Rights, Chicago, IL.

minorities, women, and persons who are handicapped; and for the purchase of goods and services from women and minorities. That is a current city statute. There is an equivalent statute at the State level for the state of Minnesota.

"These statutes at the State and city level are violated regularly and routinely with impunity. The city of Minneapolis and the Minneapolis Department of Civil Rights, which is the enforcement arm of the City, and the Minnesota Department of Human Rights, which is the enforcement arm of the State, have not updated their own plan since mid-1995. And that is true for most other departments at the city level and the State. . . .

"The members of the Minneapolis City Council have been made aware of this by a letter from our organization. . . . There are over 90 city agencies that are supposed to turn in a plan annually. It is just not on anybody's radar or agenda. It is. . .not being done."

2. John Gilbertson, an employee of 14 years with the State of Minnesota and currently in the contract compliance unit of the Minnesota Department of Human Rights, wrote to the Advisory Committee on the State's affirmative action policies and practices.

"The State of Minnesota employs over 42,000 citizens. Equal employment opportunity is a cornerstone of the State's merit-based personnel management system. Our State has legally embraced taking affirmative action to eliminate the present effects of past discrimination. State agencies are required to assess [minority] availability and set goals for the utilization of females, minorities, and disabled individuals. That analysis, in required affirmative action plans gives the State the legal foundation it needs to consider race, sex, and disability status as a part of a hiring decision.

"The present office of equal opportunity in the department of employee relations has failed in it's responsibility to audit and evaluate the State's affirmative action program. The number and percent of minority employees in State government has decreased over the last two years. Minority managers, supervisors and professional employees have decreased. Employees with disabilities have decreased significantly as well.

"A primary consideration in establishing goals for female and minority participation is their percentage in the recruiting area that have the skills necessary for a given job. In April of 1995 the goals for female and minority participation in a majority of State jobs were still based on 1980 Census data.... That means that the gains that females and minorities had made in the employment arena since 1979 had been ignored in assessing their availability for a majority of State jobs during the first Carlson administration. . . .

"The development and implementation of agency affirmative action programs has been rendered practically meaningless by the way the [Carlson] administration processes them. While some States like California have openly attacked affirmative action; others like Minnesota ignore legislated requirements. The State requires it's contractors to develop and implement affirmative action plans. Those plans must be certified before a company can execute a contract with the State. The State, itself should be required to meet the same requirements it holds private companies to. My experience and evaluation finds that those corporate citizens do a much better job in hiring and maintaining minorities in their workforces than does our State government. When correctly done, affirmative action facilitates the sharing of opportunity. When done poorly, as is presently being done by this administration, it creates discord and subjects the State to financial liability." [10]

3. Jerry Fahey works for the State of Minnesota in its department of employee relations in the equal opportunity and affirmative action division. He told the Advisory Committee that State affirmative action programs as administered are not in compliance with current laws, as implemented often illegally discriminate against whites and males, and are not adequately developed as useful tools to eliminate racial and gender discrimination.

"The State of Minnesota has an [affirmative action] plan that does not meet the requirements of what is allowed. . . . An [affirmative action] program has to be temporary in nature until. . .you attain the proper percentages, and the plan may not unnecessarily trample the rights of the nondiscriminated persons.

---

[10] John Gilbertson to the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, July 16, 1997, Midwestern Regional Office, USCCR. Chicago, IL files.

"The State of Minnesota has a problem in that they apply the [affirmative action] program to all job groups and all agencies regardless of the situation. Secondly, they have a measurement problem as. . .they require that 25 percent or less of your hires not be nonprotected group members. The problem there, of course, is statistically 25 percent of the people on the list are protected group members on the average, [so] when it comes to hiring, you have 75 percent of your hires from the protected group member status, which, of course, becomes a violation of the civil rights laws in order for them to be in compliance.

"Another problem is [that the affirmative action program] does not really address where the real problems are. There are several agencies and several job groups that, in spite of the requirements of the State, are significantly underutilized. I have data that show there are several job groups and agencies that are significantly underutilized as far as what we determine availability should be. . . .

"There is plenty of evidence to show why you need affirmative action. Plenty of evidence. However, the average State employee, average white male that applies for the job at the State. . .is going to have a extremely negative attitude against affirmative action because it is common for them to be told by managers who are usually white, male managers, 'I'm sorry, you're really pretty good, but I've got disparity here and I'm going to have to hire a protected group member.' They do this all the time. I've gotten a lot of phone calls, and so [I know] this is going on. . . .

"That is not really affirmative action. . . . Under affirmative action you determine where these problem areas are, then you investigate to see why the percentage of minorities, females, and so forth are so low. And then you put in these programs. It is not supposed to be a preferential treatment thing where you say, 'My number is too low, go hire a minority, go hire a female.' That's not the way affirmative action is supposed to work, and that is not the way the Supreme Court has ruled."[11]

[11] Jerry Fahey, testimony, MN SAC Affirmative Action Transcript, pp. 256–64. In support of his testimony, Fahey submitted to the Advisory Committee 12 exhibits, which allege preferential treatment for minorities and women in State employment and contracting affirmative action programs and violations of standing court decisions and Federal laws and regulations regarding affirmative action. The exhibits are: (1) AG memo on the legality of the State's affirmative action program; (2) complaints of race discrimination by white males in State government; (3) complaints of gender discrimination by white males in State government; (4) State patrol hiring; (5) Minnesota Department of Transportation hiring; (6) legal analysis challenging the State's expanded certification program for contractors; (6) Governor's summer jobs programs for minorities; (7) memo to legislative auditor on State affirmative action program; (8) comparison of minority hiring to number in the work force; (9) protected group hiring by year, by State; (10) minorities and females in State employment by bargaining unit; (11) minority dismissal rate from State employment; and (12) problems using "Missed Opportunities" as a measure of performance in the State's affirmative action plan. Exhibits available and on file at the Midwestern Regional Office, U.S. Commission on Civil Rights, Chicago, IL.

General Commentary

1. Diane Rivera submitted a statement on the negative impact of affirmative action on her employment.

"I am a white, single, and 51 year old woman. I was married, divorced, and left to raise three children. I have worked all my life as have my ancestors. . . . I started working for Ramsey County in February 1978. . . . In order to advance my position, I took the Financial Worker test, passed, and was hired by Ramsey County Human Services. . . .

"After working as a financial worker I for 2 years I became a financial. worker II, and worked in this position until January 1993. At that time, I decided to move to Hawaii. . . .

"Due to a medical problem I came back to Minnesota. My natural instinct was to go back to the job I knew so well, so I made an appointment with the Director of Ramsey County Human Services to discuss coming back to work. . . . While working there I had seen many people who left, and then were hired back. . . .

"I was told that I would have to take the test and start all over again. Meanwhile I found another job, outside of civil service, but kept taking every Ramsey County test that I qualified for and had my name sitting on lists. I just assumed that they never got to my number.

"I passed the test. . .and was put on the list. When I heard that Ramsey County Human Services was starting to hire off the list, I called their personnel office and spoke with the person in charge of doing the hiring. He told me right out that I did not have a chance, that they could dig down into the list (which means they don't have to interview or hire the top five, they can pick whoever they want) but without having a

backing agency (which means because I'm not a minority, or have a disability), or being a transfer from another County I would not be considered. How's that for a slap in the face!!

"I worked for Ramsey County for 15 years; I worked in this position for 7 years for Ramsey County. Yet they have to hire a minority, disabled or other County individual. . . . Now I ask, where is the logic? I've been discriminated against and no one cares. I need affirmative action, where is it? I believe that if a person is qualified to do a job it doesn't matter what color, creed, nationality, disability or anything else you should get the job, but I also believe that if a person is unqualified they should not be hired because of their ethnic group or any other reason."[12]

Darold Luze, a compliance officer with the Office of Federal Contracts Compliance Programs (OFCCP), U.S. Department of Labor, submitted the following statement.

"As one of the speakers stated at the [commuity] forum held Thursday, June 19, 1997,...whites no longer feel guilty about slavery. If a new national consensus reaffirming support and the need for affirmative action is to be developed, I agree with the movement that asserts we need to examine "white privilege."

"Whites are taught not to recognize white privilege. In order to demonstrate the continuing need for affirmative action, whites will have to realize the unearned advantages they gain by just being white in this society. . . ."[13]

3. Bob Maline, a resident of Woodbury, Minnesota, wrote that the healthiest course of action for continued affirmative action support is to discuss publicly the constitutionality of affirmative action and the conditions under which it should be ended.

"I see racial intolerence as the greatest threat to this nation. . . . I have. . .questions [however] regarding any law, including affirmative action:

(1) Is some action *compelled* by the U.S. Constitution?
(2) Is the proposed or existing action *allowed* by the U.S. Constitution?
(3) Do you (the proponent) feel strongly enough about a proposed, but unconstitutional action to seek change to the Constitution?

"I believe there are two reasons affirmative action is opposed by some people who want to improve race relations and creates doubts even among supporters or those who have benefited from it: (1) many Americans question whether affirmative action is allowed by the U.S. Constitution, and (2) there is little or no public discussion of what criteria affirmative action supporters would use to say affirmative action is no longer needed.

"Is affirmative action constitutional? When you ask the questions I've proposed above, you can't just classify people as conservative or liberal. People take sides based on whether they are strict or loose constructionist of the Constitution. Race relations is this era's great strict versus loose constructionist battle. . . . Many people would describe the greatest strength of the United States as the principle that our laws do not force preference for one group over another whether that group is defined by state of residence or color of skin; and where illegal preference exists it must be dealt with on a case by case basis rather than by creating a counter-preference. . . .

"My favorite replacement for affirmative action in the battle against racial intolerance. . .has the feel of being much more constitutional than affirmative action. I believe the best way to combat racial intolerance is to have laws that make discrimination based on race or gender illegal, and have State and Federal governments prosecute with a passion cases of illegal hiring, employment, and housing practices. . . .

"The end game.

"I cannot ever remember hearing or reading of a proponent of affirmative action stating the criteria under which affirmative action or any antidiscrimination action would be ended. . . . Affirmative action supporters should proclaim their thoughts in this area to help everyone understand the objectives of affirmative action. . . ."[14]

---

[12] Diane Rivera to the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, July 10, 1997, Midwestern Regional Office, USCCR. Chicago, IL files.

[13] Darold Luze to the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, July 16, 1997, Midwestern Regional Office, USCCR. Chicago, IL files.

[14] Bob Maline to the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, July 14, 1997, Midwestern Regional Office, USCCR. Chicago, IL files.

4 The Implementation of Affirmative Action in Employment

Federal affirmative action efforts to increase minority and female participation in contracting, federally assisted programs, and employment have been a major aspect of civil rights enforcement for more than three decades. Congress and the Executive Branch have crafted a wide range of Federal law and regulations authorizing race- and gender-conscious programs in relation to jobs, housing, education, and government contracting.

In employment, Executive orders since the 1960s have imposed affirmative minority hiring and employment goal requirements on Federally financed construction projects and on Federal supply and service contractors. Affirmative action for minority entrepreneurs is a program of the Small Business Administration, and participation goals or set-asides for women and members of racial or ethnic minorities and businesses controlled by individuals from these groups have found legislative expression in a wide range of Federal programs.[1]

Title VI of the 1964 Civil Rights Act and related laws place nondiscrimination requirements upon recipients of Federal financial assistance, which includes many educational institutions. Such laws, however, do not mandate racial, ethnic, or gender preferences *per se*. Nevertheless the various Federal departments and agencies regulating Title VI compliance almost universally authorize affirmative action by recipients to overcome the effects of prior discrimination, though such terms as 'goals' and 'set-asides' are not explicitly defined or obligated.[2]

The Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, is the Federal agency responsible for enforcing compliance with the affirmative action obligation of Federal contractors. Affirmative action in this circumstance refers only to matters of employment. Companies with 50 or more employees that annually supply $50,000 or more in nonconstruction supplies and services to the Federal Government have, as part of their affirmative action commitment, an obligation to develop a written affirmative action program. As part of this program the company must determine the availability of females and minorities for each of the firm's different job groups. If the utilization of females and/or minorities at the company in a particular job group is less than the determined availability, the firm must set a goal and make a good faith effort to recruit and hire qualified individuals of the underutilized group. There are also State and local mandatory affirmative action requirements for contractors and subcontractors.

The Indiana Advisory Committee to the U.S. Commission on Civil Rights examined the work and operation of the OFCCP in Indiana in enforcing compliance of affirmative action under Executive Order 11246.[3] Among its findings, the report found that the program "helped to ensure that employers take more responsibility in seeking, recruiting, and hiring women, minorities, and individuals with disabilities than might otherwise have been the case."[4] However, the report was critical of the technical aspects of the affirmative action program. The report stated that the process of determining the availability of minorities and females for jobs is inexact and subjectively applied by the OFCCP. In addition, the process was cumbersome, and the excessive emphasis by the Agency on the format of the program compelled firms to spend many hours to exhibit the "display" features of the regulations.

Four individuals represented organizations directly involved in the implementation of affirma-

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

[2] Ibid.

[3] *See*, report of the Indiana Advisory Committee to the U.S. Commission on Civil Rights, *The Enforcement of Affirmative Action Compliance in Indiana under Executive Order 11246* (September 1995).

[4] Ibid., p. 55.

tive action in the employment sector. They included: Wende Farrow, director of the human resource services division of the Employers Association, Bernard Brommer, president of the Minnesota AFL-CIO, David Goldstein, an attorney, representing the State's Industrial Liaison Group (ILG), a volunteer group of Federal contractors and their legal representatives who meet and consult with the OFCCP on effective ways to regulate affirmative action compliance, and Barbara Forsland, chairperson of the Minnesota Chapter of the National Association of Human Rights Workers.[5]

The Employers Association

The Employers Association is a nonprofit member services organization comprised of 1,700 employer members, located mostly in Minnesota. The association provides support and assistance to member organizations on issues that impact employer/employee relations, including affirmative action, fair employment law, diversity, recruitment, selection, compensation, benefits and collective bargaining. Farrow supported affirmative action, but was critical of the technical requirements of many affirmative action programs. She repeated some of the criticism listed in the Indiana Advisory Committee report on affirmative action compliance, noting that current regulations are cumbersome and unclear, enforcement is subjective, and there is no latitude in affirmative action enforcement to allow for the individual character of the firm. In her opinion, a better partnership between regulating agencies and employers is critical if the program is to become an effective and useful tool for the company. Farrow told the Committee:

"First of all, as an employer in a support organization to employers we support the concept of affirmative action in employment. Trying to rectify historic discriminatory practices in the workplace still makes sense today and is important in the employment setting. We continue to see actions by employers—albeit not as blatant and as conscious as in prior years—that still result in different and lesser treatment of individuals in a number of protected group of categories. . . . We still are amazed at the discriminatory impacts that we see in the workplace today. So, as far as a need for affirmative action, we think there is a fundamental importance

"[However], the process is so burdensome that most employers do not take the time to understand nor own the responsibilities. Too many go through the exercise of developing a plan and placing it on a shelf just in the event to respond to a compliance issue. . . . We also see a number of voluntary effort from both large and small employers in our member service area, rigorous efforts. . .of employers actually putting forth formal strategies in documents related to their efforts and how they approach them. To a large extent their focus has been on how to improve the representation of women and minorities in their work force. And to a large extent that focuses on employees or individuals that are currently within the work force, not individuals who have chosen to not participate or fall out of the current labor force. . . .

"Usually [affirmative action] statutes and the rules and regulations specify only basic parameters and general guidelines for employers to follow in defining and fulfilling their affirmative action requirements. . . . More often than not today we have seen that monitoring agencies and more notably compliance personnel viewed it as their prerogative to interpret the regulations and specify, often in much detail, what affirmative action should constitute for each employer. . . . This has resulted in an emphasis on such elements as the affirmative action plan document, statistical calculations, and recordkeeping [and] has clearly had a negative impact on employer understanding and ownership of affirmative action.

"Most employers we work with believe they are not afforded a lot of latitude in developing their approach to affirmative action and their plan and developing a plan that's consistent with their culture, their environment and their business strategies. The impression is that no matter what effort an employer takes under the mandatory requirements, compliance personnel will insist that it be changed to meet their expectations. And these expectations are often different from each compliance officer to each compliance officer. . . .

[5] Wende Farrow, Bernard Brommer, and David Goldstein were invited speakers. Barbara Forsland spoke to the Advisory Committee at the public session.

"The affirmative action planning, record keeping and reporting requirements become very onerous and burdensome for most organizations, especially small employers. . . . They require a great deal of time and attention on the part of the organization. . . . I feel it is critical that some basic parameters be established for employers on affirmative action. Employers need to be given greater latitude to approach the issues and to develop a plan and more importantly commitments that can become a part of their everyday way of doing business and will become ingrained in the operation. Obviously doing this is easier said than done.

". . . A better partnership between agency personnel and employers [is needed] so that they have a common and better understanding of each other's experiences and needs. Employers, in terms of how they run their businesses, are so very different, just as individuals are, and along with that goes different perspectives and different approaches. . . . If we get employers ingrained in having and required to have discussions, dialogue about how they are approaching it, about how they are living the concept of affirmative action in the work force, if we are forcing them to attend training sessions, rather than running documents, maybe we will be more successful at getting testimony to adopt the concept and see the value of it in their day-to-day operations."[6]

The Minnesota AFL-CIO

Bernard Brommer discussed the labor movement's position on affirmative action. The Minnesota AFL-CIO is a federation of 750 union organizations in the State of Minnesota. They are voluntarily affiliated with the Minnesota AFL-CIO, and represent approximately 400,000 working men and women in the State. Brommer stated that despite the attacks on affirmative action in recent years, the work of affirmative action remains unfinished as demonstrated by the disproportionate employment rates of minorities versus whites and the disproportionate wages of women versus similarly qualified males. Moreover, Brommer argued that support for affirmative action is not altruistic, but stems from an understanding that society is collectively linked, and if one segment sinks economically, it inevitably will pull others down. Brommer did acknowledge, however, that despite the leadership of organized labor supporting affirmative action, as the membership of the labor movement in the United States constitutes some 14 million men and women who reflect the diversity and the views of America at large, the rank and file is probably less sympathetic to affirmative action.[7] Brommer stated:

"Last year the AFL-CIO ran a full-page advertisement in the *New York Times*. It. . .sums up the American trade union movement's view of the affirmative action. The ad read, in part: Affirmative action has worked toward eliminating centuries of racial and gender discrimination in jobs and schooling. It has promoted inclusion of all Americans on the basis of genuine equality of opportunity. It is not a quota system. It is not a numbers game. Affirmative action has advanced fairness, not favoritism. It has helped narrow the gap in salaries, employment and education endured by minorities and women. We need to reject divisive attacks on affirmative action. We need to work together for a better future for all Americans.

"In the past several years affirmative action has come under attack, and the attacks continue as we speak. But despite hostile court rulings and political opportunism of some, the work of affirmative action remains unfinished. Our society puts a high value on equal opportunity, yet the unemployment rate for African Americans remains twice that for whites; and for Hispanics the unemployment rate is about one and a half times that of whites. Also take into consideration that these official unemployment figures do not count the many under employed or the large number of discouraged job seekers who have dropped out of the labor force altogether.

"While some progress has been made, women still make less than men for comparable work with equivalent qualifications and experience. Complaints of employment discrimination based on race, ethnicity, and gender continue to be filed

[6] Wende Farrow, testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, community forum, Minneapolis, MN, June 19, 1997, pp. 128-31, (hereafter cited as MN SAC Affirmative Action Transcript).

[7] Bernard Brommer, testimony, MN SAC Affirmative Action Transcript, p. 161.

with equal employment opportunity offices across the Nation. The promise of equal opportunity has been made, and the laws are on the books but for many they are far from being a reality....

"No law, policy, or program can make the historical legacy of centuries of discrimination disappear overnight. But in the few years that they have been in effect, affirmative action laws and policies have helped and our Nation is better off because of them. Until we find a proven, more effective way of ensuring that minorities and women have a fair chance, our government should not be retrenching from its critical role in enforcing affirmative action laws.

"This is not a matter of idealism or altruism, but of necessity and national self-interest. Minneapolis Urban League President Gary Sudduth, speaking to delegates at the Minnesota AFL-CIO convention last September said, we cannot ignore the long-term trends that are devastating many working families and their communities, and particularly families in the other America, the nonwhite America. 'We are all in the same boat,' Mr. Sudduth reminded us. 'Our end may be sinking faster,' he said, 'but if something is not done, we all go down together.'

"In the final analysis. . .it comes down to creating living wage jobs and helping people, especially the poor, get the education and training necessary to qualify for and do those jobs. Affirmative action is an important part of making sure that happens. Certainly it is not the only instrument at our government's disposal to promote equal opportunity. Other strategies, including more diligent enforcement of civil rights and labor laws must be pursued. But for the foreseeable future, affirmative action remains a useful and necessary public policy in our national pursuit of liberty and justice for all."[8]

The Industrial Liaison Group

David Goldstein spoke to the Committee from the perspective of his experiences as a lawyer working with clients in connection with development and implementation of their affirmative action programs and in connection with agency audits of those programs. Although supportive of the need for affirmative action, Goldstein is critical of some of the realities in the implementation of affirmative action. He listed four particularly troubling aspects of affirmative action: (1) less qualified females and minorities are on occasion selected over more qualified males and nonminorities, and this preferential selection breeds resentment against all affirmative action; (2) employers who do reach out to hire people from the most disadvantaged groups in society assume risks that other employers do not face, and in today's legal environment often incur additional costs for this social action; (3) historically, minority businesses have peferentially hired and advanced individuals from their communities, and this has aided the group's assimilation; and (4) the moral force of affirmative action is diminished when regulatory agencies take on adversarial roles. Goldstein told the Advisory Committee:

"It is my experience that employers are constantly faced with difficult decisions regarding employees in which all the employer wants to do is what is right from a business standpoint and from an ethical standpoint. Business employers recognize the value of affirmative action, but face very real difficulties in trying to navigate the laws relating to affirmative action and discrimination in this country as presently constituted.

"For historical and other reasons, I think it is clear that people of color, more often than not, start with disadvantages in our society, and the people who start with those disadvantages need to be given a fair shot. I think our very social fabric depends upon giving them that fair shot because the idea that we are all created equal, which I take to mean we were all given equal opportunities at birth, is clearly not a truth in our current society.

"First, under existing law, with very limited exceptions, affirmative action is not supposed to result in preferences. . . . Nevertheless, it is a fact of life that many employers do make selections on basis of race, and there are situations when a female or minority candidate is selected for a position in spite of the fact that he or she was not as qualified as a white male, protestations of innocence to the contrary. These practices are to some extent the results of pressure. . .or at least perceived pressure from OFCCP and/or State fair employment practices agencies. It is such preferences, more than anything else, that accounts for the current backlash against

[8] Ibid., pp. 156-61.

affirmative action programs. At the same time such preferences undermine the credibility of women and people of color who have succeeded in their careers and who by an overwhelming majority have succeeded on their own merits, not because of affirmative action. . . . Explicit preferences, not the game that we currently play where preferences are disguised, ought to be available to offer education and training and entry level opportunities into the workplace for people of either sex or any race who are attempting to overcome economic or other disadvantages. . . . After offering individuals a leg up and a genuinely fair start, however, there should be no place for extending preferences and filling higher level positions within organizations or awarding government contracts.

"Second is a fact of life that employers that reach out to hire people from the most disadvantaged groups in our society assume risks that other employers do not face. Individuals from such groups, which often mean from communities of color, often lack critical basic skills with regard to, for example, reading, writing, and arithmetic. They may lack thinking skills such as the ability to think creatively or make decisions or solve problems. They may exhibit deficiencies with regard to certain personal qualities, such as displaying responsibility, self-esteem, sociability, self-management, integrity, or even honesty. Employees that hire individuals with such deficiencies or histories of such deficiencies are going to have higher turnover. That's a fact of life. It is also a fact of life that employers are often afraid to demote, or deny promotions to, or discharge an employee who is a member of a protected class because anytime a protected class employee is subjected to an adverse action our laws and the legal system create a significant risk that it will lead to expensive and disruptive litigation. . . . The law must recognize that employers who reach out to individuals with limited work experience or who are trying to overcome certain disadvantages are going to have greater turnover in their work force and that such employers need to be protected from claims of desperate impact discrimination.

"The third fact of life is that very difficult issues arise as to the extent to which minority businesses can and should be allowed to preferentially hire and advance minority employees or contract with other minority businesses. The fact is that historically many immigrant groups succeeded in this country by living and working together, by giving preferences to individuals from within their own communities and, thereby, over the course of one or more generations, acquiring significant economic and political power. Arguably, real assimilation of these immigrant groups into American society began only after such economic and political power had been acquired. Unfortunately a variety of social and historical factors made it very difficult if not impossible for certain minority communities, particularly the African American community, to acquire significant economic and political power in this manner and far more difficult for such communities to assimilate into the larger American society.

"We now face very difficult questions arising out of the tension between our professed desire to become a color-blind society and the fact that people are often most motivated to help and to help to advance people who come from backgrounds similar to their own. Often, such help between and among individuals within a common community is the most effective way to improve that community's political, economic, and social position in the greater society. I do not have a particular answer to this third fact of life, but I do believe that it cannot be ignored.

"Finally, the greatest possible contribution that the government and agencies such as OFCCP can make may be the provision of both moral leadership and practical support to businesses, education institutions, and community groups. Unfortunately the moral force which can be brought to this mission is something that governmental agencies, including OFCCP and many State agencies squander on a daily basis. The moral force of the executive order and the ability of the Federal Government to provide leadership in the area of affirmative action is diminished every time a business is forced to engage in unnecessary, expensive and time consuming bureaucratic tasks. Many of the technical requirements posed by the Department of Labor's regulations implementing Executive Order 11246 fall exactly into this category.

"The moral force of executive order is further diminished every time a compliance officer or other help representative of OFCCP or a State

agency tells an employer that it has to do something because it is technically required, but the required action is really of no-consequence. In addition, OFCCP's ability to provide effective leadership and to find itself welcomed by business is severely undermined by the fact that businesses have no choice but to protect themselves against the possibility of OFCCP seeking to impose remedies or sanctions against them. By putting so much emphasis upon finding discrimination and obtaining remedies for employees, instead of what should be its main mission of promoting affirmative action, OFCCP makes employers necessarily defensive.... If OFCCP or some other agency would stop seeking monetary damages. . .and instead focus upon reviewing current practices and offering assistance to avoid future problems, such an agency might find itself becoming very valuable to business and to society, indeed."[9]

The Minnesota Chapter of the National Association of Human Rights Workers

The Minnesota Chapter of the National Association of Human Rights Workers has existed since 1947. The organization does not officially endorse or espouse any single program or method to achieve equality, but evaluates relevant circumstances and factors that advance human and civil rights. The National Association of Human Rights Workers is the only national volunteer organization that publishes a professional journal on intergroup relations. Membership is open to any individual who works in human or civil rights and is employed in local, State, or Federal government, private business, or a community organization, and include individuals who enforce affirmative action and equal employment opportunity laws. Barbara Forsland told the Advisory Committee:

"The Minnesota Chapter of the National Association of Human Rights Workers strongly supports the continuation of affirmative action in Minnesota. . . . The overall employment of women and minorities has increased as a result of affirmative action and that has provided a stabilizing influence for individuals, families, and communities. Continued affirmative action efforts are required to assure that gains of employment continue and are not offset by reductions in force, layoffs, and other market forces. Access to education for women and minorities has improved with affirmative action, and this has provided increased preparation for full participation in the American economy and increased opportunities for personal and professional growth. However, continued affirmative action is necessary to assure that access to education is maintained over time.

"Employment of women and minorities in supervisory and administrative positions and education has increased under voluntary affirmative action plans which are in place in our larger Minnesota school districts. However, we believe that mandatory affirmative action plans would likely extend this type of change to our medium and smaller sized school districts in Minnesota. Employment of women in the areas of math and science in education has increased with voluntary affirmative action plans. Again, we believe mandatory affirmative action plans would extend this type of change to our medium and small school districts.

"Access to contracting opportunities for companies owned by women and minorities has improved under affirmative action creating economic incentive for entrepreneurial efforts and providing increased stability within our communities. However, we believe that continued affirmative action in contracting is necessary to provide a business environment based on equal access to economic opportunity. Continued affirmative action for the foreseeable future is necessary in Minnesota until a critical mass of support for equality is achieved and the changes wrought through affirmative action become self-sustaining.

"One of the things that affirmative action has made possible is some very creative problem solving by our government agencies. Affirmative action overcomes institutional inertia. There is some discussion that removal of affirmative action might move us to a meritocracy, that everyone will achieve a level that they can get to by their own merits. I propose to you. . .that we do not have a meritocracy in America. . . . When choices are based on impermissible motives, affirmative

[9] Robert Goldstein, testimony, MN SAC Affirmative Action Transcript, pp. 162-72 and 183-90.

action swings into place and allows people to move forward based on their own efforts. . . .

"[There] is talk on about what would replace affirmative action. Let me remind you that affirmative action has not been very well-defined. . . . There are at least five models of affirmative action--going from a straight quota system to a self-defined affirmative action within a company. Understanding those different types of affirmative action might allow us to give different labels to programs that would not raise the hackles of people who might feel they have been taken advantage of.

"The first model is the standard quota model. . . . The second model is the preference plan, . . .where plans are race or gender conscious, but they are flexible. . . . The third model is the self-examination model...and uses goals and a timetable developed internally to measure affirmative action. . . . The fourth model is the outreach model, which...involves seeking out and recruiting those whom you want to include in your applicant pool, and assumes that the employers have been involved over time in practices which were exclusionary, whether intentional or not. The fifth model is the nondiscrimination model; it has two facets, one is active and one is passive. The active nondiscrimination portion of the program is a firm statement by leadership that there is zero tolerance for discrimination in any form. . . . The passive part is when complaints are received about discrimination, . . .they are dealt with quickly and thoroughly. This is the highest developed level of affirmative action as it does not rely on agencies or governments or rules or laws, but on the strength of leadership and moral correctness."[10]

[10] Barbara E. Forsland, testimony, MN SAC Affirmative Action Transcript, pp. 225-41. Forsland submitted the article by Ike Dansby, "Affirmative Action, or Reverse Discrimination?" *Journal of Intergroup Relations*, Fall, 1996, pp. 37-48, as an exhibit. The cite referencing different affirmative action models reads (p. 39): ". . . There is no consensus on what [affirmative action] means. David Oppenheimer proposed that we often confuse affirmative action with its many manifestations. These aspects can be classified into five models: strict quotas favoring women and minorities (Model I); preference systems in which women and minorities are given some advantage over white men (Model II); self-examination plans in which the failure to reach expected goals within expected periods of time trigger self-study, to determine whether discrimination interferes with a decision-making process (Model III); outreach plans in which attempts are made to include women and minorities within the pool of persons from which selections are made (Model IV); and, commitments not to discriminate (Model V)." (Oppenheimer, David B., "Distinguishing Five Models of Affirmative Action," *Berkeley Women's Law Journal*, 1990).

5 Religious Institutional Perspectives on Affirmative Action

Representatives from three major religious communities, the Minnesota Catholic Conference, the Jewish Community Relations Council of Minnesota and Dakotas, and the Minnesota Council of Churches, spoke to the Advisory Committee on affirmative action. The three groups represent the religious faiths of almost half the State's population and the three dominant religious heritages in the country—Protestant, Catholic, and Jewish. According to census figures, 42.5 percent of Minnesotans identify themselves as Christian[1] and 1.2 percent of the population is Jewish.[2]

The Minnesota Council of Churches is a movement in Minnesota for Christian unity and community reconciliation. There are 19 member judicatories in the State council of churches, and collectively they represent about 30 percent of the 900,000 non-Catholic Christians in Minnesota. The organization consists primarily of mainline Protestant denominations, but also includes some evangelicals and a Baptist tradition. In addition to presenting the Council's statement on affirmative action, statements on affirmative action were also presented from the United Church of Christ, the American Baptist Church, the Episcopal Church, and the United Methodist Church.

The Catholic Conference is the administrative organization of the National Catholic Conference of Bishops. Through the Catholic Conference, moral guidance is given to American Catholics, Church programs are administered, and the positions, policies, and teachings of the Catholic bishops in the United States are promulgated. Sixteen departments serve the bishops, including ecumenical and theological offices, e.g., catechism, vocations and priestly formation, and priestly life and ministry; social life offices, e.g., social development and world peace, migration and refugee services, and world youth; and publicity offices, e.g., publishing, film and broadcasting, and communications.

The Jewish Community Relations Council serves as the central public affairs arm of the Jewish community to elected officials, the media, government agencies and other religious and racial groups. Its mission is to educate and mobilize the Jewish community for advocacy, protect and promote the Jewish community's interests in the general population, and represent Jews, individually and collectively, locally and abroad.

A recently released joint document from the Minnesota Council of Churches, the Minnesota Catholic Conference, and the Jewish Community Relations Council addressed the issue of basic civil rights. The document proclaimed that all persons, having been created in the image of God, have dignity. This implies that human life has unassailable value, and each person has a right to those things which make a decent life possible. Civil authority exists to protect the dignity of all persons and the claim of each of us to basic human rights.[3]

The Minnesota Council of Churches

Reverend Peg Chemberlin is the executive director of the Minnesota Council of Churches. She stated that both the council and member churches have long-standing positions of support

[1] U.S. Department of Commerce, *Statistical Abstract of the United States*. Christian church adherents include Catholics and are defined as all members, including full members, their children, and the estimated number of other regular participants who are not considered as communicant , confirmed, or full members. Data on Christian church adherents are based on reports of 111 church bodies.

[2] Ibid. Data on Jewish population are based primarily on a compilation of individual estimates made by local Jewish federations.

[3] Peg Chemberlin, testimony before the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, community forum, Minneapolis, MN, June 19, 1997, transcript, p. 144 (hereafter referred to as MN SAC Affirmative Action Transcript).

for affirmative action, and she provided statements of support for affirmative action from several member churches. She acknowledged, though, that the support for affirmative action observed in church leadership is not as prevalent among the general membership, and argued that the reason for this may be that churches have not taught their congregations about the systemic exclusion of minorities and women that is the basis for affirmative action programs. Chemberlin told the Advisory Committee:

"The Minnesota Council of Churches has a long-standing position of support of human rights. On May 9, 1991 the council approved the following statement.

> We, the Minnesota Council of Churches, reaffirm our historic opposition to discrimination against anyone because of race, color, religion, national origin, sexual orientation, age or disability. Therefore we urge member communions to join the Minnesota Council of Churches in opposing discriminatory statements and actions and affirming antidiscriminatory statements and actions and in advocating in the public arena on behalf of all victims of discrimination.

The traditions of the member denominations of the council have also long supported nondiscriminatory activity and affirmative action.

The United Church of Christ in 1991 said:

> As a denomination which is committed to affirmative action and equality of opportunity for all persons, it is imperative that the United Church of Christ affirm its commitment and continue to implement affirmative action policies, procedures and programs in its life. Moreover, it is imperative that we join with other faith communities and civil rights organizations in urging the President of the United States and Congress to make and strengthen their commitment to affirmative action.

The American Baptist Church in 1986:

> Affirmative action is designed to bring about justice and equal opportunity for people who have long been excluded or underrepresented in certain fields. It is designed to assist in overcoming the affects of past discrimination and to make equal opportunity a reality, rather than a theoretical goal.

The Episcopal Church in 1988:

> Resolved, the House of Bishops concurring that this convocation reaffirm its commitment to a vigorous affirmative action program and all institutions and society as remedy to historical racial and sexual injustices.

The United Methodist Church 1988:

> The premise upon which affirmative action is built is essentially moral and spiritual in nature. Concern for the disadvantaged, the disinherited and the oppressed is a major feature of both what Christians call the Old Testament profits and the message and ministry of Jesus. According to biblical teaching what is required is a redress of grievances and a sincere effort to make amends.

"While these above statements represent some of the best thinking of some of the best leaders in our churches, one might also ask whether these statements reflect the opinion of those who are members of our denominations. The answer too often is no. In fact, many of what we call the members in the pew either have not reflected on the efficiencies of affirmative action or would hold a negative view. . . .

"Perhaps one of the reasons is that we have fought for affirmative action so often in the judicial and executive branches and not as often as the legislative branches that it has perhaps inhibited our public discussion about the reasons and the purposes behind affirmative action.

"The Minnesota Council of Churches is working on a project entitled, Renewing the Public Church. One of the assumptions is that renewal of the faith community and public life will require a renewed ability for public dialogue in a civil context. There needs to be increased debate and discussion about affirmative action. We believe that that case needs to be made from the churches and with the general public. Folks don't seem to get it. . . . People don't see the systemic exclusion that was behind the assumptions that put affirmative action into practice.

"The Minnesota Council of Churches has launched the Minnesota Churches antiracism initiative. . . . The important piece about this particular training as opposed to other things that we have done is that it brings to the forefront to an experienced existential understanding the systemic nature of racism. What we try to do in our antiracism training is to help each of us understand the way in which we are all part of the flow of the river which discriminates on the basis of race, gender and so forth. As we all participate in that, we do that unconsciously

more often than not, and more often than not it is our unconscious bias that propels those same racist tendencies. In the training what we try to do is to unpack our unconsciousness about that. . . . This is a very difficult concept for folks to get because we tend to think in terms of personal, isolated [racist] incidents, rather than broad system analysis. People come away from the training understanding that racism is in the stream of the culture, as are other discriminations in the stream of the culture, and unless we are intentionally swimming upstream we will be caught in the racist nature of the culture that we live in. . . .

"We would urge no backing off of affirmative action, but increased discussion, debate, public relations. and education about the basis for affirmative action. As long as the general culture understands this as an individual, isolated, one-on-one case—and not as a systemic condition which affirmative action seeks to be a barrier to—we will continue to have the kind of lack of lack of participation and a general uncooperativeness about the affirmative action. . . ."[4]

The Minnesota Catholic Conference

Father David McCauley, executive director of the Minnesota Catholic Conference, stated that there is a single, firm position of support for affirmative action from the leadership of the Catholic Church in the United States. The Catholic bishops in the United States have strongly supported affirmative action in the past, continue to do so, and have called upon Catholics in this country to do the same. That support is unequivocal, rooted in the Second Vatican Council, and has been set out in several pastoral letters to American Catholics over the past two decades. Father McCauley told the Advisory Committee:

"The Roman Catholic bishops in the United States have strongly supported affirmative action in the past and continue to do so. This is rooted in a number of documents, the constitution on the church and the modern world from the Second Vatican Council in 1965, which addresses the notion that the basic equality of all people must receive increasingly greater recognition in every type of discrimination, social or cultural, based on sex, race, color, social condition, language or religion is to be overcome and eradicated. The second document, Brothers and Sisters, comes to us from the National Conference of Catholic Bishops in 1979 and is addressed primarily to the issue of racism; [it] comes out in favor of affirmative action. . . . The document, 'Economic Justice For All,' from the National Conference of Catholic Bishops in 1986. . .was redone in a shorter version, and in 1997 was put down into a mere 11 sentences. Again, this is certainly the undergirding for [the Catholic bishops] support of affirmative action.

"The economy exists for the person, not the person for the economy. All economic life should be shaped by moral principals, economic choices. Institutions must be judged by how they protect or undermine the life and dignity of the human persons, support the family, and serve the common good. The [Catholic] bishops simply state that discrimination can never be justified.

"There is a recognition that perhaps we have to relook at affirmative action. They ask that the Nation renew its efforts to develop effective affirmation action policies assisting those who have been excluded by racial or sexual discrimination in the past, especially if there be a removal of barriers to full and equal employment. The Department of Social Development and World Peace of the United States Catholic Conference in 1996 wrote in opposition to the Equal Opportunity Act of 1995. . . . In that statement the [Catholic] bishops called for a renewed debate over how to best overcome the lasting consequences and current impact of racism and unjust discrimination in all its forms, then spoke to Pope John Paul II's questions to Americans when he visited here, how ought we live together as isolated individuals competing for limited opportunity divided into groups calling for advantage and suggested the moral task is to search for the common good in a very divisive debate to renew our nation by seeking opportunities for Americans, acknowledging that this requires judicious and appropriate affirmative action to remedy discrimination and offer opportunity for all.

"[The Catholic Church] feels that affirmative action remains a necessary tool for reaching equal opportunity. To abandon it would be to retreat in our struggle for justice. Again, in

[4] Peg Chemberlin, testimony, MN SAC Affirmative Action Transcript, pp. 141–55.

March of 1996, the United States Catholic Conference stated it as a question: What kind of racially conscious government actions, if any, are appropriate to deal with racial discrimination and division within society? Over and above calling for affirmative action in our society, the bishops have called for it in the church. . . .

"I would like to allude briefly to the catechism of the Catholic Church, published in 1994, which suggested that no legislation by itself can do away with the fears, prejudices, pride and selfishness which obstruct the establishment of truly human societies. No individual is equipped for all eventualities in life. And the Church calls us to recognize the principle of human solidarity with one another. Solidarity of the poor between themselves, the poor and the rich, workers among themselves, employees and employers, nations and people.

"In suggesting such strong support for affirmative action, I would not want to suggest that the bishops necessarily see quotas as the way of doing that, but that they very much support some kind of affirmative action that does assure all people an equal chance."[5]

The Jewish Community Relations Council

Jay Tcath, executive director of the Jewish Community Relations Council of Minnesota and Dakotas, told the Advisory Committee that there was no one absolute position on affirmative action for American Jews. Further, he stated that historically quotas have been used to exclude Jews in this country. Emanating from this experience, there is a deep mistrust in the Jewish community of any program that proposes artificial proportional representation. He also noted, though, that affirmative action has become in many ways a scapegoat for the economic and racial anxieties felt by many. Tcath told the Advisory Committee:

"There is no single, firm Jewish position on affirmative action. Indeed, one need only look at the most recent Minnesota race for United States Senate to see the differences that are represented within our communities. In that case, . . .both candidates, citing their own understanding of Jewish justice, had diametrically opposed views on affirmative action.

"For our part the Jewish Community Relations Council is undergoing our own review of affirmative action policy and expect a policy to be formulated by the end of this summer. Our tradition, however, is instructive in some ways.

"The Bible's book of Leviticus tells us, "favor no one, only judge on righteousness." Yet the Talmud, a collection of our tradition's teachings, states that rules of evidence were altered for the wealthy to prompt honest testimony from the poor who might otherwise be intimidated from speaking the whole truth, suggesting that certain societal realities must be taken into account to equitably balance the scales of justice.

"Today American Jewish organizations on the whole are more supportive of affirmative action than individual Jews. . . . Yet both Jews and Jewish groups are more supportive of affirmative action than non-Jewish Americans. But even that support for affirmative action is tempered, nuance, conditional, and very limited.

"Our understanding of affirmative action purposes based on our own experience with bigotry is perhaps unique. For Jews, quotas have always been at colleges and corporations; ceilings above which we could not rise, not the floor at which we could enter. Indeed, our State's own University, the University of Minnesota, imposed quotas against Jews in certain graduate schools throughout this century.

"What this means, therefore, is that we tend to support goals and timetables, special recruitment and training programs, but not a rigid number setting that leads to what is known as reverse discrimination. Many Jews see a logical non sequitur in the argument that to become a colorblind society we must mandate the enhanced relevance of race. Nonetheless, Jewish groups have supported race-based preferences when and only when a history of discrimination is well-documented at a particular institution, when the preferential treatment will be for a defined limited duration, when the institution, regardless of its history, is not currently integrated, and when past other affirmative action efforts have been unsuccessful.

"For American Jews, like many others, affirmative action is rarely thought about on its own merits, but rather as part and parcel of

[5] David McCauley, testimony, MN SAC Affirmative Action Transcript, pp. 113–18, and 122–24.

many other concerns, including its ramifications on intergroup relations.

"I would be remiss if I didn't also highlight some other Jewish perspectives. America today is neither colorblind nor a provider of true equal opportunity. Indeed, Americans violate and celebrate such equal opportunity violations as nepotism, cronyism, and geographical diversity programs. . . . America constantly judges and categorizes every one of us on group characteristics, from SAT scores to veteran benefits. Such [characterizations] are not necessarily bad, but should be recognized as only approximations we live with.

"Unfortunately, affirmative action has become a scapegoat for the economic and racial anxieties felt by many. . . . Its real impact, positive or negative, is relatively small compared to its prominent niche in the public psyche. We need only to look at educational, health, economic, and other societal indices to realize just how far we still have to go to attain a just society for all Americans."[6]

[6] Jay Tcath, testimony, MN SAC Affirmative Action Transcript, pp. 118–22.

6 Advisory Committee Observations

For those concerned about civil rights, the advancement of equal opportunity, and the healing of the racial and ethnic divisions within this Nation, the debate on affirmative action must not be carried on in isolation from the political reality of the 1990s. That reality is this: there simply does not exist a consensus in the 1990s on the one, best, right, moral, and most effective approach to resolving the civil rights issues facing this Nation.

Whereas in the 1950s and 1960s there was political consensus in approach among those who supported civil rights and equal opportunity, a similar consensus in resolving racial and ethnic inequality does not exist in the 1990s. Though expressed support for civil rights and equal opportunity finds standing in both political parties, across philosophical ideologies, and among majorities in all races and ethnic groups, sharp disagreements remain in the implementation of this support.

Affirmative action is caught in the oftentimes rancorous discussion on effective and efficient civil rights strategies. Believing all civil rights programs should be open to scrutiny and amendment as this society works to eliminate barriers to equal opportunity and further believing that much of the debate on affirmative action is otiose, the Minnesota Advisory Committee undertook to examine affirmative action in a bipartisan manner. The following observations on affirmative action are presented to clarify fundamental discussion points and advance the productivity of future debates on the effectiveness of affirmative action programs.

1. There is no single, universal definition of affirmative action. Depending upon the context, the administering institution, and the social setting, affirmative action means very different things. These very different meanings tend to confuse the issue, limit meaningful discussion, and hamper attempts at legitimate policy analysis.

For this study, the Advisory Committee adopted the following definition of affirmative action, set out by the U.S. Commission on Civil Rights in the 1970s:

> A contemporary term that encompasses any measure beyond simple termination of a discriminatory practice that permits the consideration of race, national origin, sex, or disability along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.[1]

The Committee learned that this definition is far too imprecise for constructive use in today's debate. The discussion heard by the Committee reflected great ambiguity of the term *affirmative action.* Debaters on both sides of the issue often spoke in isolated contexts, with little direct dialogue, as the individual speakers had distinctly different, fixed ideas as to their understanding of affirmative action. Moreover, there was some validity for every speaker's point of reference.

Today, affirmative action policies and programs swirl in controversy. Litigation and legislation are being used with increasing frequency to limit, amend, or eliminate various affirmative action programs. Battle lines on both sides of the issue have been drawn, each side claiming the higher moral ground. Though some of the contention is the result of differing views in the implementation of specific affirmative action policies, the concept of affirmative action in general suffers because both proponents and opponents alike declaim general definitions of affirmative action that do not hold in all circumstances.

Affirmative action is a multifaceted term. In different contexts, in different settings, in different government jurisdictions, it holds very different meanings. There simply is not one definition of affirmative action that accurately captures the essence of each and every affirmative action program.

---

[1] *See generally* U.S. Commission on Civil Rights, Statement on Affirmative Action (October 1977), p. 2.

In this study, the Committee heard statements about affirmative action operating in three different sectors; in each setting the administration of affirmative action was different.

(1) affirmative action in the employment sector—by employers with government contracts and by government agencies;

(2) affirmative action in admissions by post-secondary educational institutions; and

(3) affirmative action by government agencies in contracting goods, services, and construction.

Further, the Committee heard affirmative action described by five different models:

(1) a quota model;

(2) a race- and gender-conscious preference plan;

(3) the use of goals and timetables to measure nondiscrimination efforts;

(4) an outreach model involving the active recruitment of certain individuals or contractors for an applicant pool; and

(5) nondiscrimination supported and enforced from leadership, with zero tolerance for discrimination in any form, and an active commitment to investigation and resolution of discrimination complaints.

Most of the opposition to affirmative action heard by the Advisory Committee was criticism of quotas and preferential treatment—models (1) and (2). In contrast, most of the support for affirmative action was a defense of nondiscrimination and the active recruitment of minorities, females, and the disabled—models (3), (4), and (5). The individuals were talking about different things!

The U.S. Commission on Civil Rights could perform a valuable service in the debate over affirmative action if it would issue an updated, expansive, complete definition of affirmative action. Such an update would not necessarily have to be an approval of all models of affirmative action in all sectors. But a clear and comprehensive clarification of the different operational settings and types of affirmative action would allow legislators, discussants, researchers, and analysts in future policy discussions to be in agreement in their usage, understanding, and application of the term *affirmative action.*

2. Affirmative action is generally associated with programs applying to minorities, particularly African Americans. The reality is different in that affirmative action programs encompass and apply to a much wider and diverse group of people. All racial minority groups are covered under affirmative action programs, including Asians, Pacific Islanders, and American Indians, as are programs for women, Latinos and Hispanics, and individuals with a disability.

Most of the criticism directed at affirmative action heard by the Committee stemmed from assertions that affirmative action preferentially benefited minorities, particularly African Americans. The program's affect on women and the disabled was generally ignored by the critics.

The Committee finds it disturbing that when affirmative action is attacked as preferential treatment for those less qualified, it is implied that minorities are the recipients of the benefits of the program. When white women are observed in more competitive positions either in employment or education, though affirmative action is sometimes acknowledged as a contributing factor, the inference is absent that the white woman is "less qualified" or was the beneficiary of "preferential treatment." When minorities—particularly African Americans—are observed in more competitive employment and education positions, the inference often surfaces that the minority is somehow less qualified or must have received preferential treatment.

The Committee contends that holding to this conviction for minorities and not for white women, and expressed in the absence of any other information, betrays the presence of racial prejudice. Such expressions dismiss the aptitude, talent, and industry of the individual minority and the application of nondiscriminatory equal opportunity by the institution, and worse admit to a mindset that minorities are inherently inferior. The presence of such thoughts and attitudes in the minds of decisionmakers is itself

a barrier to equal opportunity for minorities, and a demonstration of the need for deliberate and conscious equal opportunity efforts.

3. Affirmative action measures have been adopted to provide opportunities to a class of qualified individuals who have historically been denied equal opportunities. There are, however, different circumstances facing each individual within those classes and to date affirmative action programs are not addressing those intragroup differences.

The Committee heard no disagreement from any quarter that the "protected classes" under affirmative action had encountered discrimination in this country, and that such discrimination was wrong. There is disagreement, however, about the level and current extent of such discrimination against these groups, and the discrimination faced by different individuals within the groups.

Several unresolved issues regarding affirmative action programs need to be addressed insofar as affirmative action initiatives remain in place to assist individuals in the protected class groups who have been denied equal opportunity. Among these are:

(1) Is every member of a protected class, simply on the basis of the individual's group membership, covered for all time by affirmative action? Or is there some requisite need or other criteria that should be established by the group member to qualify for affirmative action consideration?

(2) Is affirmative action to be a permanent part of this society's landscape, or is there is some end to the program. If there is to be an end, what are the criteria for determining when it ends?

(3) Can and should affirmative action be ended for some "protected class" groups, while continued for other protected class groups?

(4) As the number of "interracial" and "interethnic" individuals increases in this society, do the protected class categories change? Are the old classifications either too broad or too narrow?

4. The Advisory Committee heard widespread, although not consensus, support for affirmative action programs in all sectors that are outreach and recruitment efforts to the minority communities, women, and individuals with a disability. This support encompasses a diverse political and philosophical spectrum, as well as the religious, racial, ethnic, gender, academic, and business sectors who spoke before the Committee.

The Advisory Committee observes a strong sentiment for equal opportunity for all individuals in this society, and this commitment to equal opportunity finds support in both political parties, among those of different religions, and across different institutions. Particularly intriguing to the Advisory Committee is the observation that both critics and supporters alike of affirmative action linked support of their position to the notion of fairness. Indeed fairness became the fulcrum on which disagreement over affirmative action centered.

The Committee observed that, on the one hand, criticism for different types of affirmative action initiatives increased as the perception increased that certain individuals received an undeserved, i.e., unfair, preference; and on the other hand, support for affirmative action increased as the perception increased that whites and males and the nondisabled in this society have intrinsic, i.e., unfair, competitive advantages.

As the discussion from these two positions merged into considerations of conscious, affirmative efforts to reach out, be inclusive, and give opportunity equally to everyone in society, support for such measures became popular.

5a. The Advisory Committee learned that in the employment sector affirmative action at the Federal level has received bipartisan political support.

The principal legal requirement of affirmative action at the Federal level in the employment sector is Executive Order 11246, first signed by President Lyndon B. Johnson in 1965 and amended in 1967 to include gender as a protected status. It is the defining authority of affirmative action for Federal contractors, ordering the inclusion of an equal opportunity clause in every contract with the Federal Government.

All Government contracting agencies shall include in every Government contract hereafter entered into the following provisions: During the performance of this contract, the contractor agrees as follows: (1) The contractor will...take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.[2]

The affirmative action obligation on firms with Federal contracts is monitored by the Secretary of Labor through the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor. Speakers from the Industrial Liaison Group and the Employers Association (chapter IV) addressed affirmative action in this context. The OFCCP considers affirmative action as the active effort by employers to eliminate existing barriers to equal employment opportunity, specifically,

...the set of positive steps that employers use to promote equal employment opportunity.... It refers to a process that requires a government contractor to examine and evaluate the total scope of its personnel practices for the purpose of identifying and correcting any barriers to equal employment opportunity.

Executive Order 11246, similar to other Presidential executive orders, can be revoked, abrogated, or modified by the President, including Presidents subsequent to the incumbent issuing the order. Since the promulgation and amendment of Executive Order 11,246, the order has remained in force, intact, and unmodified for 30 years through the Presidencies of Richard M. Nixon (R), Gerald R. Ford (R), Jimmy Carter (D), Ronald Reagan (R), George Bush (R), and Bill Clinton (D). Similarly, the employer groups who addressed the Advisory Committee expressed their support for the affirmative action program under Executive Order 11,246.

However, there was criticism of the program as being excessively burdensome, particularly for smaller employers, and so technical that many employers do not take the time to understand nor own their affirmative action responsibilities, but just go through the exercise of developing a document to be in compliance. In addition, it was heard by the Committee that, on occasion, the emphasis by the OFCCP on having employers meet female and minority employment goals can sometimes result in the program approaching a quota-driven mandate.

Employer representatives also told the Advisory Committee that employers with Federal contracts who do reach out to recruit and hire people from the most disadvantaged groups in society assume risks that other employers do not face, i.e., they are susceptible to charges of discrimination if there is a termination or nonpromotion. In today's legal environment such initiatives can incur additional costs for the firm and stifle incentives to be a proactive equal opportunity employer.

Still, the Advisory Committee observed that this particular affirmative action program was one of action-oriented outreach and equal employment opportunity goals to women and minorities, and not a program of quotas or proportional representation. The Committee also notes that there are no affirmative action goals or timetables under the Federal contract compliance program for individuals with disabilities.

5b. Most criticism directed against affirmative action in the employment sector is grounded in a misunderstanding of such programs as being preferential treatment and quota programs for women and minorities.

A number of factors have brought about heightened insecurity in the work force. These include diminished employment security in an era of corporate downsizing and global market forces respecting no national boundaries, increasing competition for scarce resources and employment opportunities, and a general message to the middle class that it can survive only by helping itself through education and training in the global economy. In such a setting, individuals are particularly sensitive to allegations of undeserved advantages offered to others.

The Advisory Committee notes that much of the criticism it heard concerning affirmative action in the employment sector equated affirmative action with quotas and preferential treatment to obtain race and gender proportional representation in the work force. Many individuals before the Committee critical of affirmative action—who to the Committee seemed genuinely

[2] Exec. Order No. 11,246, § 202, 3 C.F.R. 339 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000e (1994).

committed to equal opportunity—maintained affirmative action to be employment programs that entail quotas and artificial proportional representation.

The Committee finds the persistence of this claim peculiar in that (1) employers operating under affirmative action guidelines who talked to the Committee, although critical of some aspects, did not view the affirmative action program as a quota program, (2) representatives of the protected classes did not perceive their group as receiving proportional representation in the employment sector, and (3) government regulators did not understand their job as enforcing quotas or proportional representation.

Instances may have occurred where less qualified minorities and/or females received employment opportunities over more qualified nonminorities and/or males. If true, that was and is illegal and unfair discrimination. The Committee also observes, however, that instances of discrimination against minorities and females occur as well, and that too is discrimination. Hence, allegations of discrimination against whites and males does not mean that affirmative action is a program of quotas and preferential treatment, any more than discrimination against minorities and females demonstrates that whites and males obtained their positions because of discrimination against minorities and women.

The misunderstanding and mischaracterization of affirmative action in the employment sector seems to typify much of the discussion surrounding affirmative action. As set out in observation (1) above, there are different models of affirmative action programs operating in different sectors. What is true of an affirmative action program in one setting, is not necessarily true of an affirmative action program in another setting.

In conclusion, the Minnesota Advisory Committee deems it essential for the debate on affirmative action to be constructive, that those engaged in discussions and reporting of affirmative action to be careful concerning the factual specifics of the particular affirmative action program under study.

U.S. COMMISSION ON CIVIL RIGHTS
Midwestern Regional Office
55 West Monroe Street
Chicago, IL 60603