

# **AFFIRMATIVE ACTION AND THE IMPACT ON MINORITY ENGINEERING PROGRAMS**

**Robert H. Willis**

**Johns Hopkins University  
Applied Physics Laboratory Laurel, Maryland**

## **ABSTRACT**

Many educational institutions have developed special programs to deal with the underrepresentation of minorities and females on their college campuses. This has involved special admission policies, financial aide, additional support for students, recruitment of faculty, and special minority programs.

As the political, social and economic climate has changed, there have been those who seek to take advantage of the controversy surrounding affirmative action and diversity. It has been said by some that you can't solve discrimination against minorities by discriminating against nonminorities. Others have stated that institutional and personal discrimination continue and if affirmative action is eliminated then it will have a negative effect on a diverse student body and faculty.

Prop 209 has passed in California, but has been prevented from being implemented by a federal judge. The California University system recently stated that it will continue to use race and ethnic background as a factor in admissions, at least until it is resolved at the supreme court level. Other states are taking a variety of approaches, some have eliminated race based admission policies and race based scholarships, others are reviewing all programs that utilize race as a factor. At the federal level, the Clinton Administration has indicated they will support the Department of Justice fight against Prop 209. Charles Canady (R-Fla) has indicated that he will reintroduce a bill to repeal affirmative action at the federal level.

In this climate there are those of us who implement, direct, supervise and manage, affirmative action initiatives and programs. What impact will the attacks on affirmative action have on the minority engineering programs?

In states where minority programs get public funding support there will be an increased effort to eliminate this funding.

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There will be efforts to dismantle or revise programs for minorities. Studies will be conducted to show the positive impact affirmative action has had on eliminating discriminatory practices.

Coalitions will be developed and strengthened to combat the misinformation about affirmative action perpetrated by the media, and conservatives.

## **AFFIRMATIVE ACTION DEFINED**

Affirmative Action is specific programs and activities undertaken by public and private sector organizations and other covered businesses and institutions which are designed to (1) help eliminate the effects of past discriminatory employment practices; (2) avoid or ameliorate any adverse impact and effects of present employment practices, procedures or policies on protected group members; (3) provide for a work environment free of discriminatory practices and barriers to equal employment opportunity; and (4) ensure that minorities, women and persons with disabilities are employed and advanced.

## **TYPES OF DISCRIMINATION**

### **Overt Discrimination**

Overt discrimination is a specific, observable action to discriminate against a person or class of persons because of protected status (e.g., national origin). This treatment also is referred to as “intentional discrimination.” Example: Failing to interview job applicants based solely on their race (race discrimination).

### **Disparate Treatment**

Disparate Treatment is unfavorable or unfair treatment of a person in comparison to others similarly situated because of that person's protected status. This generally involves the inconsistent or unfair application of an employment rule, policy, or practice against a specific individual. This treatment also is referred to as “unequal” or “differential treatment.” Example: A male employee is reprimanded for returning late from lunch. A female employee who also returned late is not reprimanded (sex discrimination).

### **Disparate Impact**

Disparate Impact is uniform application to all applicants or employees of certain personnel policies that have the effect of denying employment or advancement to members of protected classes. Business necessity would be the only justification for continuing these policies. This treatment also is referred to as “discrimination by effect” or “adverse impact.” Example: Word of mouth advertising of job vacancies in situations where women are underrepresented in the work force. If this is the only method of communicating vacancies, men probably will be informed about job openings at a higher

rate than women (sex discrimination.)

### **Adverse Impact**

A substantially different rate of selection in hiring, promotion, transfer, training, or in other employment decisions that work to the disadvantage of members of a race, sex or ethnic group. If such rate is less than 80% of the selection rate of the race, sex, or ethnic group of the highest rate of selection, it is generally regarded as evidence of adverse impact.

## **BACKGROUND**

The origins of affirmative action are intricately linked to discrimination in the United States. The following is a brief outline of this history.

1940s: President Roosevelt signed an order making discrimination illegal in defense contracting.

1954: The U.S. Supreme Court ruled in *Brown v. Board of Education* that “separate but equal” facilities on the basis of race were unconstitutionally discriminatory.

1964: Congress passed the Civil Rights Act of 1964 prohibiting discrimination based on race, sex, national origin and religion in employment and education.

1965: President Lyndon Johnson signed an executive order requiring federal contractors to undertake affirmative action to increase the number of minorities they employed.

1969: Department of Labor hearings exposed continued widespread racial discrimination in the construction agency. In response, President Richard Nixon developed the concept of using “goals and timetables” to measure the progress federal construction companies were making in increasing the number of minorities on their payrolls.

1970: President Nixon extended the use of goals and timetables to all federal contractors.

1974: President Nixon declared that affirmative action programs should also include women.

1978: The U.S. Supreme Court held in *Regents of California v. Bakke* that universities may take race into consideration as a factor in admissions when seeking to accomplish diversity in the student body. The court in *Bakke* also held that quotas cannot be used in voluntary affirmative action programs in admissions unless absolutely necessary.

1989: The U.S. Supreme Court held in *City of Richmond v. Croson* that the standard to be used in evaluating affirmative action programs in contracting was one of “strict scrutiny.”

1990: Congress passed the Americans with Disabilities Act, which prohibits discrimination on the basis of disability in places of public accommodations.

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1995: On June 12, 1995, the U.S. Supreme Court held in *Adarand Constructors, Inc. v. Peña* that the strict judicial scrutiny standard articulated in the *Croson* case also applied to affirmative action programs mandated by Congress as well as those undertaken by government agencies

1995: On July 20, 1995, the University of California Regents voted to remove consideration of race, ethnicity, religion, gender, color or national origin in admissions, contracting and hiring.

## **TYPES OF AFFIRMATIVE ACTION**

Because of the controversy surrounding affirmative action and the misinformation that has been disseminated by the media, there is a lot of confusion regarding exactly what affirmative action is. Affirmative action is only required if you do business with the federal government or if you are under a court order. Affirmative action in education and in contracting is voluntary.

### **Affirmative Action in Employment**

The Executive Order 11246 as amended by Executive Order 11375 Subpart B Sec 202 stipulates that the employer (government contractors) agrees to:

“The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. 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. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

The Purpose of affirmative action programs as stipulated in 41 CFR 60-2.10 states:

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and

further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist. [43 FR 49249, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

### **Affirmative Action in Education**

Affirmative action in education can consist of early outreach programs, recruitment and retention programs, efforts in admissions to diversify the student population, and specific financial aid opportunities. These affirmative steps are not limited to minorities. For example, athletes, children of alumni, State residents, and low-income students are a few of the categories of students that benefit from affirmative action considerations in education.

According to a recent article by Peter Applebome from Austin, Texas<sup>1</sup>:

After decisions to dismantle affirmative action programs at public universities in California and Texas, applications from blacks and Hispanic students are down significantly at both states' most prestigious universities and professional schools, leading to fears that the initiatives will result in a long-term decline in minority enrollment.

The affirmative action program at the Texas law school, like the University of California's program, had allowed for the admission of black and Hispanic students with lower entrance test scores and grade-point averages.

Although the Hopwood case threw out any use of race as a consideration in admissions, the Texas Attorney General interpreted the ruling to also ban race-based scholarships. This, admissions officers say, has hindered their ability to compete for minority students.

Following a Federal court decision in the Hopwood reverse-discrimination case here and the California Board of Regent's decision to ban affirmative action in admissions, both states are seeing sharp declines in minority applications, with the greatest drops in applications to medical and law schools and flagship campuses like the one here.

The University of Texas Law School, against which Cheryl Hopwood and three other white students filed a lawsuit claiming they were not admitted because minorities got preferential treatment in admissions, saw applications from Blacks fall 42 percent this year.

In California, though a record number of students applied to the state university system, minority applicants fell for the second year in a row. Applications rose 1.6 percent over all, but Black applications fell 8.2 percent, Hispanic ones fell 3.7 percent and American Indian ones fell 9 percent.

Ward Connerly, the University of California Regent who proposed the end to affirmative action, said the drop was expected and reflects the degree to which racial preferences unfairly shaped admissions. "This is just basic logic," Mr. Connerly said. "If you've been given a substantial preference based on race and you take it away, the numbers are going to drop. But just because you're not going to get a preference doesn't mean you're not welcome."

He said that it was more important to focus on improving educational opportunities for Blacks and Hispanics across the board, rather than on giving preferences to a few.

### **Affirmative Action in Contracting**

Affirmative action programs in contracting often are targeted for women-owned firms, minority-owned firms, or firms that can show a disadvantage. Such programs can consist of requiring government to set aside a small percentage of contracts for the targeted firms, or requiring that the bidding process be open to include firms that are traditionally excluded.

To illustrate the controversy in this area, William Perry Pendley, the attorney who represented Adarand Constructors Inc. before the U.S. Supreme Court stated that "in June 1995, the U.S. Supreme Court ruled in the case of Adarand Constructors vs. Peña that race-based federal affirmative action programs would have to meet the same "strict scrutiny" requirements as state and local affirmative action programs." In a 5-4 ruling, the Supreme Court reversed a lower court's decision that the set-aside is Constitutional. The Court remanded the case, instructing the lower courts to determine whether this federal set-aside survives Constitutional scrutiny under the "strict scrutiny" test:

There must be a compelling state interest, defined as a judicial, legislative, or administrative "finding" of constitutional or statutory violations of discrimination laws.

The statute must be narrowly tailored, meaning that Congress must examine all race-neutral remedies before considering racial preferences. Moreover, the remedy must be targeted to give relief to identified victims of past discrimination and cannot extend longer than the discriminatory effects it was intended to eliminate.

The Adarand case originated in 1989, when a division of the U.S. Department of Labor awarded a contract for highway construction in Colorado to the Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand Constructors presented the lowest bid. Mountain Gravel, however, awarded the work to the Gonzales Construction Company because the federal government gave it a bonus for choosing to work with a company certified as a small business controlled by "socially and economically disadvantaged individuals." According to the Small Business Act, "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" are presumed to be "socially and economically disadvantaged."

"The Supreme Court is saying that if, as a government, you are going to base decisions on race - to discriminate - you need to meet a much higher standard and provide relief on a much narrower basis. You can't just make blanket decisions saying that certain racial groups should benefit and others should not."

"If set-aside is supposed to make up for slavery, or for past discrimination, why is an immigrant who came here from Guam last year qualified?" Pendley asks. "That just doesn't make sense."

"Clearly, discrimination exists. and when it is encountered and can be proved, it should be addressed," Pendley continues. "That should be the focus."

### **STILL A NEED**

The University of California-Berkeley is taking new steps to keep the number of its black and Latino students from being cut in half. To counter the recent elimination of affirmative action in admissions throughout the University of California system, Berkeley Chancellor Chang-Lin Tien announced the creation of the "Berkeley Pledge" program. The program is designed to maintain or raise the number of students from "underrepresented" racial and ethnic groups. The Pledge seeks to accomplish its goals by improving the academic standards of California students in kindergarten through 12th grade.

### **Wage Gap**

Even within the same occupation, women and people of color receive lower wages. For instance in 1995, women teachers at the college level make only 77.1% of men; female lawyers 83.7%. Overall, women make only 71.4 cents to a man's dollar<sup>2</sup>; African Americans women make 64.2 cents, Hispanic women make 53.4 cents, and Native Americans make even less.<sup>3</sup>

## Unemployment

Are white men losing jobs to people of color? The unemployment rates for people of color have consistently been double that of whites. For example, as of February 1997, the unemployment rate for African Americans men was 11.3%, and 8.1% for Hispanics, compared to 3.9% for white men<sup>4</sup>.

## Glass Ceiling

A 1995 report released by the Glass Ceiling Commission, a bipartisan federal commission established by Senator Bob Dole, confirmed yet again that the "glass ceiling" is firmly in place for women and people of color, still excluding them from the top management ranks. White males, who comprise 43% of the workforce, hold 92% of senior management positions in all Fortune 100 industrial and Fortune 500 service industries<sup>5</sup>

## CONCLUSION

Affirmative action is necessary to combat institutional barriers by challenging the assumptions and prejudices left over from the days of overt discrimination. When no one else has to compete at a higher standard and there is equal opportunity, the task of affirmative action will be done. Until then, the basic principle of fairness dictates that we must continue it. Today, some politicians are perpetuating the attack on affirmative action to stir up racial resentment in order to gain a higher office. We must realize that the problems facing white men today are the same ones facing women and people of color; namely, a stagnant economy with few opportunities, not affirmative action.

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ROBERT H. WILLIS received a B.S. in Chemistry from Lincoln University in 1969 and a M.S. in Urban Education from the State University of New York at Geneseo in 1970. He joined the Johns Hopkins University Applied Physics Laboratory in 1980 and currently serves as the Affirmative Action Officer for the Laboratory. He is the President of the Maryland Association of Affirmative Action Officers and a National Board Member of the National Industry Liaison Group.