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AFFIRMATIVE ACTION:
SHOULD THE ARMY MEND IT OR END IT?

A Thesis
Presented to
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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United States Army

44TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1996

AFFIRMATIVE ACTION:

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ABSTRACT: In *Adarand Constructors, Inc. v. Pena*, the Supreme Court held for the first time that courts reviewing federal affirmative action programs must apply a strict scrutiny standard. This thesis examines the impact the strict scrutiny standard will have on the United States Army's employment practices, especially as they pertain to the promotion of Army officers and civilian employees. The Army's current military promotion procedures would not pass *Adarand's* strict scrutiny standard. The Army does not clearly identify a compelling interest justifying its procedures and it does not narrowly tailor the application of its procedures to further a compelling interest. This thesis analyzes the Army's military promotion procedures and recommends ways to "mend" identified problem areas.

This thesis also examines the Army's civilian promotion procedures. Army-level procedures appear to be race and gender neutral and, therefore, probably not subject to *Adarand's* strict scrutiny standard. Sometimes local practices are not neutral, however, and they would be subject to *Adarand's* standard. This thesis identifies problems with civilian procedures at the local level and recommends ways to "mend" those problems as well.

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AFFIRMATIVE ACTION:

SHOULD THE ARMY MEND IT OR END IT?

CAPTAIN HOLLY O'GRADY COOK^{*}

I. Introduction

*"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."*¹

On June 12, 1995, these mere twenty-two words sent shock waves throughout the federal government. In *Adarand Constructors, Inc. v. Pena*, the Supreme Court held for the

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¹ *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2113 (1995).

first time that the federal government must adhere to the same rules as state and local governments when establishing programs that grant minorities employment preferences.² This was a devastating blow to federal programs. Before *Adarand*, the federal government had nearly free reign to establish and operate programs involving such preferences. The Supreme Court had recognized Congress' unparalleled authority to define situations that "threaten principles of equality and to adopt prophylactic rules to deal with those situations."³ While the Court still recognizes Congress' authority, the *Adarand* decision decisively ended Congress' reign of operating virtually unchecked in the affirmative action arena.

The *Adarand* case involved a racial classification created by a federal contracting statute. While the Court held that the strict scrutiny standard applies to "all racial classifications," the Court did not actually apply the standard in *Adarand*. The Court instead remanded the case so the lower court could apply the strict scrutiny standard thereby delaying *Adarand's* precise impact on federal programs. The Court's broad application of strict scrutiny to "all racial classifications" further complicates the uncertainty of the situation. Not only will *Adarand* impact on federal contracting programs, but it will also impact on any other federal program that creates a racial classification,

² *Id.*

³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989).

including affirmative action programs⁴ used in federal employment. This potential impact has added fuel to an already flaming political debate.

A. Political Reaction

One month after the Supreme Court announced the *Adarand* decision, President Clinton directed all federal agencies to evaluate programs they administer "that use race or ethnicity in decision making."⁵ President Clinton also directed federal agencies to apply the following four standards of fairness to all federal affirmative action programs:

⁴ There is no universally recognized definition for "affirmative action." However, most definitions recognize that affirmative action includes "any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration." GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., *AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT*, § 1.1, n.1 (July 19, 1995) [hereinafter *REPORT TO THE PRESIDENT*]. See *U.S. Commission of Civil Rights Briefing Paper on Affirmative Action*, Daily Lab. Rep. (BNA) No. 64, at D-33 (Apr. 4, 1995) (stating that affirmative action "encompasses any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, [or] sex . . . , 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"); BLACK'S LAW DICTIONARY 59 (6th ed. 1990) (describing affirmative action programs, in part, as "positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination"); Lara Hudgins, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 820-24 (1995) (discussing the various definitions of "affirmative action"). See also *infra* notes 145, 323, 341.

⁵ Memorandum, President William J. Clinton, to Heads of Executive Departments and Agencies, subject: Evaluation of Affirmative Action Programs (19 July 1995).

No quotas in theory or practice; no illegal discrimination of any kind, including reverse discrimination; no preference for people who are not qualified for any job or other opportunity; and as soon as a program has succeeded, it must be retired. Any program that does not meet these four principles must be eliminated or reformed to meet them.⁶

The President acknowledged that "affirmative action has not always been perfect," and it "should not go on forever."⁷ However, a review of all federal affirmative action programs proved that the need for affirmative action still exists.⁸ The President, therefore, "reaffirmed the principle of affirmative action" and developed the slogan "[m]end it, but don't end it."⁹

While President Clinton is striving to "mend" federal affirmative action programs, competing political forces are striving to "end" them. Before President Clinton ordered a review of federal affirmative action programs, Senator Robert Dole obtained "a comprehensive list of every federal statute, regulation, program, and executive order that grants a

⁶ President William J. Clinton, Remarks by the President at The Rotunda on Affirmative Action (July 19, 1995) [hereinafter Remarks by the President].

⁷ *Id.*

⁸ President Clinton ordered the review of all federal affirmative action programs on March 7, 1995. See REPORT TO THE PRESIDENT, *supra* note 4, § 1.1. The review identified federal affirmative action programs and initiatives, and analyzed the fairness of them. *Id.* The review did not determine "whether any particular program satisfies the constitutional standard advanced in *Adarand*." *Id.*

⁹ Remarks by the President, *supra* note 6.

preference to individuals on the basis of race, sex, national origin, or ethnic background."¹⁰ After receiving this list and reviewing the *Adarand* decision, Senator Dole introduced the "Equal Opportunity Act of 1995" in the Senate.¹¹ This Act would prohibit "the Federal government from discriminating against, or granting any preference to, any person based in whole or in part on race or sex in connection with federal employment, federal contracting and subcontracting, and other federally-conducted programs and activities."¹² The only federal affirmative action programs this Act would endorse are those designed "(1) to recruit qualified members of minority groups or women, so long as there is no preference granted in the actual award of a job, promotion, contract or other opportunity, or (2) to require the same recruitment of its contractors or subcontractors, so long as the Federal government does not require preferences in the actual award of the benefit."¹³

¹⁰ See AMERICAN LAW DIVISION, LIBRARY OF CONGRESS, COMPILATION AND OVERVIEW OF FEDERAL LAWS AND REGULATIONS ESTABLISHING AFFIRMATIVE ACTION GOALS OR OTHER PREFERENCES BASED ON RACE, GENDER, OR ETHNICITY (1995) (listing approximately 160 federal measures that grant race or gender preferences in various fields, including more than 20 laws and regulations related to federal employment policy).

¹¹ S. 1085, 104th Cong., 1st Sess. (1995). Representative Charles Canady co-sponsored the bill in the House. *Id.*

¹² *Equal Opportunity Act of 1996 (HR 2128) as Amended by House Judiciary Subcommittee March 7, 1996 and Section-by-Section Analysis*, Daily Lab. Rep. (BNA) No. 46, at D-31 (Mar. 8, 1996) (citing the section-by-section analysis of the "Equal Opportunity Act of 1996," which is the amended version of the 1995 Act, "approved on a party-line vote by a House Judiciary subcommittee" on March 7, 1996).

¹³ *Id.* (referencing § 3 of the "Equal Opportunity Act of 1996," as amended). In addition to Senator Dole's efforts, some state governors have spearheaded their own efforts to end affirmative action. In California, Governor Pete Wilson

B. How Must the Department of the Army Respond?

Amidst the legal and political controversy surrounding affirmative action, the Department of the Army stands as a major federal government contractor and employer. Both Adarand and President Clinton's directions dictate that the Army review all of its affirmative action programs to ensure they comply with the new standards. If any program does not comply, the Army must mend it or end it.

This thesis reviews employment practices used by the Army to make promotion decisions, both military and civilian.¹⁴ It

unsuccessfully petitioned the state supreme court to overturn statutory affirmative action plans. Arlene Jacobius, *Affirmative Action Suit Dismissed*, ABA JOURNAL, Mar. 1996, at 40. With Governor Wilson's support, the University of California Board of Regents had previously voted to eliminate affirmative action in admission effective the spring of 1998. See *Affirmative Action Repeal Challenged*, WASH. POST, Feb. 17, 1996, at A12; Rene Sanchez, *Struggling to Maintain Diversity: UC Berkeley Takes Steps to Offset Ban on Affirmative Action*, WASH. POST, Mar. 11, 1996, at A-1. In Louisiana, Governor Mike Foster issued an executive order eliminating affirmative action and minority set-asides for state contracts only three days after taking office. See Robert Buckman, *Louisiana Split Over Affirmative Action: Foster Stands by Campaign Vow, Angers Critics*, DALLAS MORNING NEWS, Mar. 15, 1996, at 33A. See also *Affirmative Action After Adarand: A Legal, Regulatory, Legislative Outlook*, Daily Lab. Rep. (BNA) No. 147, at D-21 (Aug. 1, 1995) (reporting that "some 20 states have introduced bills or resolutions that seek to substantially limit, ban, or weaken preferential policies").

¹⁴ The Army's affirmative action programs in the contracting arena are outside the scope of this thesis. Practitioners should know, however, that the Adarand decision has already caused major changes in federal contracting. In October 1995, the Department of Defense suspended the "Rule of Two" contracting program. Ann Devroy, *Rule Aiding Minority Firms to End: Defense Dept. Move Follows Review of*

begins with a brief history of affirmative action in federal employment and an overview of applicable case law. This thesis then identifies the affirmative action programs applicable to all Army personnel and the promotion¹⁵ procedures germane to military officers. A critical examination of the Army's officer promotion procedures reveals that, as written, they do not comply with *Adarand's* strict scrutiny standard. The Army's legal interest in using the current procedures is ambiguous and the procedures lack the narrow tailoring necessary to achieve an appropriate interest. The Army needs to "mend" its promotion procedures to pass *Adarand's*

Affirmative Action, WASH. POST, Oct. 22, 1995, at A1 (explaining that "[u]nder the rule, if at least two qualified small, disadvantaged businesses express interest in bidding for a contract, only disadvantaged businesses can compete for it. Virtually all firms certified as small, disadvantaged businesses are minority owned"). A three-year moratorium on the "rule of two" program is imminent. John A. Farrell & Maria Shao, *Moratorium on Set-Asides Seen: White House Prepares 3-Year Halt in Some Affirmative Action Programs*, BOSTON GLOBE, Mar. 9, 1996, at 3. The Clinton Administration is also preparing rules that will impose "limits on race-based [federal] government contracting and require proof of discrimination before such contracts can be awarded." Ann Devroy, *Administration Memo Outlines Limited Affirmative Action Contracting*, WASH. POST, Mar. 7, 1996, at A8-A9.

¹⁵ The Army makes numerous types of employment decisions for each of its employees. These decisions include hiring, training, promoting, and firing. Each of these decisions follows different procedures. When any of these procedures use a racial classification, it is subject to *Adarand's* strict scrutiny standard. It is impossible to review all of the procedures and issues raised by the Army's employment decisions in this thesis. This thesis will, therefore, focus on one of the employment decisions that becomes more controversial when race, ethnicity, or sex play a factor in the final decision: promotions. The rules applicable to promotions differ from those applicable to other employment decisions, but all employment-based decisions are subject to the same strict scrutiny standard.

requirements and the President's standards. This thesis addresses how the Army can do that by redefining its compelling interest and employing new promotion instructions narrowly tailored to further its interest.

After examining promotion practices for Army officers, this thesis identifies affirmative action programs applicable to all Army civilian personnel and merit promotion practices used for competitive service employees. It then critically examines these programs under *Adarand's* strict scrutiny standard. At the Department of the Army level, the Army does not create racial classifications in either its affirmative action plan for civilian personnel or in its promotion procedures. The Army-level plan and procedures are not, therefore, subject to *Adarand's* strict scrutiny standard. Some plans and practices implemented at the installation level do create racial classifications and are subject to review under *Adarand*. This thesis identifies those installation promotion practices and highlights problem areas. It then recommends ways installations must "mend" these practices or "end" them to ensure compliance with the constitutional standards imposed by *Adarand*.

II. Historical Background

Employment preferences are not new to the federal government. Congress draws distinctions between groups of

people and awards to some groups employment benefits denied to others. For example, the Veterans' Preference Act grants military veterans special rights or preferences in hiring for federal civilian employment positions.¹⁶ The Indian Reorganization Act accords a hiring and promotion preference for qualified Indians living on or near an Indian reservation; other people interested in positions on or near the reservation are ineligible.¹⁷ Individuals not eligible for

¹⁶ 5 U.S.C. § 2108 (1994). Congress codified the Veterans' Preference Act in several sections of Title 5 of the United States Code. The purpose of the Act is to aid in the readjustment and rehabilitation of veterans. See *Mitchell v. Cohen*, 332 U.S. 411 (1948). The Act grants veterans who meet specific eligibility requirements a preference in securing and retaining federal employment that nonveterans do not get. Some of the benefits preference eligible veterans receive include bonus points on competitive examinations (5 U.S.C. § 3309 (1994)); greater tenure during a reduction in force (5 U.S.C. § 3502 (1994)); additional procedural safeguards when undergoing disciplinary or removal actions (5 U.S.C. §§ 7511-7513 (1994)); and waivers of physical qualifications required for appointment (5 U.S.C. § 3312 (1994)). Veterans do not receive any preference or special consideration in promotions in the federal government. See also Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. § 2000e-11 (1988) (hereinafter all references to Title VII will be to the United States Code cite) (stating that nothing in Title VII "shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans").

¹⁷ 25 U.S.C. §§ 472, 472a (1994). The Indian Reorganization Act gives Indians a preference in hiring for various positions maintained by the Indian office. 25 U.S.C. § 472 (1994). The purpose of the statutory hiring preference was to afford Indians greater participation in their own self government, both politically and economically, and to reduce the negative effect of having non-Indians administer matters that may affect Indian tribal life. *Johnson v. Shalala*, 35 F.3d 402 (9th Cir. 1994). The Act also gives Indians a preference for the purpose of applying reduction in force procedures. 25 U.S.C. § 472a (1994). See also 42 U.S.C. § 2000e-2(i) (1988) (stating that nothing in Title VII shall apply to any business on or near an Indian reservation which has a publicly announced employment practice under which it

these preferences have challenged them on constitutional grounds. However, both preferences survived judicial scrutiny.¹⁸

Affirmative action programs in the federal government also draw distinctions between groups of people and award employment preferences to some that they do not award to others. Many of these programs base their distinctions on an individual's race, ethnicity, or sex. Unlike other federal employment preferences, however, Congress has never expressly authorized employment preferences based on race, ethnicity, or sex.¹⁹ The Supreme Court inferred congressional authorization for such preferences from the legislative history of the Civil Rights Act of 1964. Federal agencies relied on the Court's

gives a preference to any individual because they are an Indian living on or near a reservation).

¹⁸ See, e.g., *Massachusetts v. Feeney*, 442 U.S. 256 (1979) (holding that a statute that gave an absolute preference to veterans did not violate the Equal Protection Clause even though the preference operated to exclude women); *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (holding that an employment preference for Indians in the Indian service was reasonably and directly related to a legitimate, nonracially based goal of furthering Indian self government; therefore, it did not violate the Due Process Clause of the Fifth Amendment); *Fredrick v. United States*, 507 F.2d 1264 (Ct. Cl. 1974) (holding that veterans preference does not violate Fifth Amendment Equal Protection and Due Process Clauses because the government had a rational basis for differentiating between veterans and nonveterans).

¹⁹ The employment preference for Indians under the Indian Reorganization Act is not a "racial" preference. *Morton*, 417 U.S. at 553. "Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities" *Id.* at 554.

interpretation when they developed and implemented these programs and preferences. Individuals who have suffered discrimination because of these preferences have repeatedly challenged them in court.

In reviewing affirmative action cases, the Supreme Court generally applies a Title VII analysis or an equal protection analysis, depending on the allegations²⁰ and the employer.²¹ The Court's decisions in these cases have been divisive and constantly evolving, leaving employers with little guidance on what, if anything, constitutes a legally acceptable

²⁰ An individual can bring two main types of actions against a federal agency that discriminates against him in employment. First, an individual can file a Title VII action if the agency discriminates against the individual based on race, national origin, or sex. See 42 U.S.C. § 2000e-2(a) (1988). Second, an individual can bring a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment if the agency treats the individual differently than other similarly situated individuals. See U.S. CONST. amends. XIV, § 1, V.

²¹ If a private employer discriminates against an individual, the individual may only bring a Title VII action against the employer.

If a state or local government discriminates against an individual, the individual can sue under Title VII or the Fourteenth Amendment or both. The Fourteenth Amendment prohibits "states" from "denying any person within [their] jurisdiction the equal protection of the laws." MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 3.04(a) (1988). The Fourteenth Amendment does not apply to discriminatory actions by private employers or by the federal government.

If the federal government discriminates against an individual, the individual may bring a Title VII action or a Fifth Amendment due process challenge against the government. "The 'due process' requirement in the Fifth Amendment has an 'equal protection' component which subjects classifications made by the federal government to an analysis similar to that applied to classifications adopted by state governments." *Id.* § 3.01. The Fifth Amendment does not apply to actions by private employers or by state and local governments.

affirmative action plan. While the law is far from settled, employers must prepare themselves for challenges to any race-based employment preferences under *Adarand*. This preparation begins with an historical assessment of affirmative action cases to determine the current legally permissible parameters of affirmative action plans.

A. Title VII Analysis

Congress passed Title VII as part of the Civil Rights Act of 1964.²² The purpose of this title was to eliminate discrimination in employment based on race, color, religion, sex,²³ or national origin.²⁴ Title VII initially prohibited

²² 42 U.S.C. §§ 2000e-2000e-17 (1988).

²³ Initially, the House proposal did not include reference to discrimination based on sex. See H.R. REP. No. 914, 88th Cong., 1st Sess. 10 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2402 (prohibiting discrimination in employment because of "race, color, religion, or national origin"). However, Representative Smith proposed an amendment to the proposal adding "sex" as a prohibited basis for discrimination. See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 439 (1966) (extensively discussing the legislative history of Title VII). The House adopted the amendment before forwarding the bill to the Senate. *Id.* at 433. See also Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation--How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 2 n.5 (1993) (referencing several sources that discuss the addition of "sex" as a basis for discrimination under Title VII).

²⁴ H.R. REP. No. 914, 88th Cong., 1st Sess. 10 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2402. See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (stating that Congress' objective was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

only employment discrimination by private employers.²⁵ In 1972, however, Congress amended Title VII to include a prohibition against employment discrimination by public employers.²⁶

On its face, Title VII appears color blind; it does not draw race, ethnic, or gender distinctions between groups.²⁷ Title VII simply prohibits all discrimination based on race, ethnicity, or sex. It also explicitly states that it should not be interpreted as requiring employers to grant preferential treatment to any individual or group to correct

²⁵ CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 13.1, at 584-85 (2d ed. 1988).

²⁶ 42 U.S.C. § 2000e-16 (1988). Congress saw the amendment as necessary "to correct this entrenched discrimination in the Federal service." H.R. REP. NO. 238, 92d Cong., 1st Sess. 24 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2159. See also Charles R. McManis, *Racial Discrimination in Government Employment: A Problem of Remedies for Unclean Hands*, 63 GEO. L.J. 1203 (1975) (describing the federal government's equal employment record and the hurdles that federal employees must overcome before bringing a discrimination suit against the government).

²⁷ Title VII states:

It shall be an unlawful employment practice for an employer . . . to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a)(1) (1988). Title VII contains a similar prohibition against discrimination in training programs. See 42 U.S.C. § 2000e-2(d) (1988).

Congress intentionally drafted Title VII so it was race neutral. "[T]he very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." *Griggs*, 401 U.S. at 434.

imbalances in the work force.²⁸ Notwithstanding the clear language of Title VII, the Supreme Court has refused to ascribe a color-blind interpretation to Title VII.²⁹ The

²⁸ 42 U.S.C. § 2000e-2(j) (1988). Specifically, Title VII states:

Nothing contained in this subchapter shall be interpreted to require any employer . . . 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 employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in . . . the available work force

Id. See also *United Steelworkers of America v. Weber*, 443 U.S. 193, 227 (1979) (Rehnquist, J., dissenting) (basing his dissent on Title VII's two express prohibitions against discrimination in hiring and training plus its pronouncement that the Act must not be interpreted as requiring any employer to grant any preferential treatment to any individual or group because of their race, color, sex, or national origin); Bernard D. Meltzer, *The Weber Case: The Judicial Abortion of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 465 (1980) (discussing the color-blind intent of Title VII and the opinion in *Weber* where the Supreme Court "legitimated a new form of racism"); Henry J. Abraham, *Some Post-Bakke-and-Weber Reflections on "Reverse Discrimination"*, 14 U. RICH. L. REV. 373 (1980) (defining "racial discrimination" and concluding that the Supreme Court has legislated a definition that is contrary to Title VII); Richard K. Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of United Steelworkers of America v. Weber and the Misguided Policy of Numerical Employment*, 21 B.C. L. REV. 1 (1979) (criticizing the use of numerical employment and race-conscious affirmative action as a remedy for discrimination).

²⁹ Prior to 1978, the Supreme Court construed Title VII as "an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory preferences for any group, minority or majority." *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616, 642 (1987) (Stevens, J., concurring). The first time the Court even addressed Title VII it said:

Court, instead, has carved out an exception to Title VII's prohibition against considering race, ethnicity, and sex in employment decisions for affirmative action plans.³⁰

The Supreme Court first announced that "Title VII does not prohibit . . . race-conscious affirmative action plans" in *United Steelworkers of America v. Weber*.³¹ In *Weber* the Court upheld a private employer's³² voluntary affirmative action

[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed.

Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). "Good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

Griggs involved an employer's test that operated against minorities. The Court had no problem applying Title VII's explicit prohibition against discrimination to such a discriminatory tool. In 1979, however, an affirmative action plan that operated in favor of minorities, rather than against them, confronted the Court. See *Weber*, 443 U.S. at 197. The Court then abandoned its color-blind interpretation of Title VII and began upholding the favorable consideration of race or sex in the employment arena under certain circumstances.

³⁰ The Court assumes its interpretation of Title VII is correct because "Congress has not amended the statute to reject [our] construction, nor have any such amendments even been proposed." *Johnson*, 480 U.S. at 629 n.7.

³¹ 443 U.S. 193, 197 (1979).

³² The term "private employer" refers to non-government employers. In *Weber*, for example, the private employer was Kaiser Aluminum & Chemical Corporation. To review employment decisions involving private employers, the Supreme Court applies a Title VII analysis.

Had the employer been an agency of a federal, state or local government, it would have been considered a "public employer." For cases involving affirmative action programs by public employers, the Supreme Court conducts a Title VII analysis and/or an equal protection analysis under the

plan³³ and rejected a literal reading of Title VII's prohibition against race discrimination.³⁴ The Court read Title VII contrary to its legislative history and the context from which the Act arose.³⁵ From these sources, the Court implied that "Congress did not intend to limit traditional

Fourteenth or Fifth Amendments, depending on the issues raised. See *Johnson*, 480 U.S. at 620 n.2 (analyzing a public employer's affirmative action plan only under Title VII because petitioner did not raise the constitutional issue). See also discussion *infra* part II.B.1-2.

³³ A "voluntary" affirmative action plan is one that a private employer voluntarily adopts to eliminate traditional patterns of discrimination. An example of a voluntary affirmative action plan is the negotiated plan between Kaiser Aluminum & Chemical Corporation and United Steelworkers of America in *Weber*. *Weber*, 443 U.S. at 197. The parties designed their plan to eliminate conspicuous imbalances in Kaiser's almost exclusively white craft-work forces. *Id.* See also *Firefighters v. Cleveland*, 478 U.S. 501 (1986) (upholding a consent decree requiring an employer to promote a specific number of minority employees).

"Involuntary" affirmative action plans include those imposed on employers as judicial remedies for Title VII violations or those required by statute. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (involving a court-ordered promotion scheme imposed after voluntary efforts at correcting racial imbalances were unsuccessful).

³⁴ The *Weber* Court disagreed with arguments that Title VII prohibited preferential treatment. The Court drew the following distinction between what Congress said in Title VII, and what it could have said:

The section provides that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of . . . such group on account of" a de facto racial imbalance in the employers workforce. The section does not state "nothing in Title VII shall be interpreted to permit" voluntary affirmative action efforts to correct racial imbalances.

Weber, 443 U.S. at 205 (referencing 42 U.S.C. § 2000e-2(j)). The Court then said the "natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action." *Id.*

³⁵ *Id.* at 201.

business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."³⁶

In reviewing the affirmative action plan in *Weber*, the Court found the following characteristics of the plan important to its decision:

(1) The purpose of the plan was to break down old patterns of racial segregation and hierarchy, which mirrored the purpose of Title VII.³⁷

(2) The plan did not "unnecessarily trammel the interests of white employees" because it did not require "the discharge of white workers and their replacement with new black hirees."³⁸ The plan also did not create "an absolute bar to the advancement of white employees" since half of those trained in the program would be white.³⁹

(3) The plan was only a temporary measure. "It [was] not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."⁴⁰

The Court relied on these characteristics to uphold the plan, but intentionally declined to delineate the demarcation

³⁶ *Id.* at 207.

³⁷ *Id.* at 208.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

line between permissible and impermissible affirmative action plans.⁴¹ The Court found it sufficient "to hold that the challenged . . . affirmative action plan falls on the permissible side of the line."⁴²

The Supreme Court applied the characteristics of a permissible racially based affirmative action plan from *Weber* to a gender-based plan in *Johnson v. Santa Clara Transportation Agency*.⁴³ In *Johnson*, a public employer voluntarily adopted an affirmative action plan because the "mere prohibition of discriminatory practices" was not enough "to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons."⁴⁴ Relying on its plan, the employer hired a woman as a road dispatcher; no woman had ever previously held this position.⁴⁵ During the interview process, the woman scored slightly lower on an employment interview than a male applicant for a position.⁴⁶ While the *Johnson*

⁴¹ *Id.* The Court still has not issued any opinion defining the outer limits of what constitutes a permissible affirmative action program. See *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616, 642 (1987) (Stevens, J., concurring).

⁴² *Weber*, 443 U.S. at 208.

⁴³ 480 U.S. 616 (1987).

⁴⁴ *Id.* at 620.

⁴⁵ *Id.* at 621. The employer's affirmative action plan noted that women had not previously sought road dispatcher or other skilled craft worker positions "because of the limited opportunities that [had] existed in the past for them to work in such classifications. *Id.*

⁴⁶ *Id.* at 624. The petitioner received a score of 75 on his hiring interview, while the woman whom the employer hired received a score of 73. *Id.*

Court considered all of the Weber plan's characteristics, it focused primarily on two of them in deciding the legality of the employer's plan.

First, the Court examined whether there existed a "manifest imbalance" of women in "traditionally segregated job categories" that justified the public employer's consideration of the sex of the job applicants.⁴⁷

In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise . . . Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.⁴⁸

The Court did not further define manifest imbalance.⁴⁹ It said only that "as long as there is a manifest imbalance, an employer may adopt a plan even where the disparity is not so striking."⁵⁰ The imbalance "need not be such that it would support a prima facie case against the employer."⁵¹ "Of

⁴⁷ *Id.* at 631.

⁴⁸ *Id.* at 632.

⁴⁹ BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW--FIVE YEAR SUPPLEMENT 332 (2d ed. 1989).

⁵⁰ *Johnson*, 480 U.S. at 633 n.11. See also *Hudgins*, *supra* note 4, at 826 (explaining that as long as there is a manifest imbalance, evidence of employer discrimination is not necessary for an affirmative action plan to be valid under Title VII).

⁵¹ *Johnson*, 480 U.S. at 632. To establish a prima facie case under Title VII, the plaintiff has the initial burden of proving a pattern or practice of a discriminatory employment

course, where there is sufficient evidence to meet the more stringent 'prima facie' standard, . . . the employer is free to adopt an affirmative action plan."⁵²

To demonstrate a manifest imbalance in traditionally segregated job categories in *Johnson*, the employer produced statistical evidence disclosing the specific number of women hired in various agency positions.⁵³ These statistics showed

practice. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 334-35 (1977) (describing the prima facie case required for a disparate impact case). Plaintiffs generally present statistical evidence of a racial imbalance to meet this burden. "Statistics showing a racial or ethnic imbalance are probative . . . only because such imbalance is often a telltale sign of purposeful discrimination." *Id.* at 340 n.20. See also *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 n.3 (1988) (explaining there is no consensus on the mathematical standard by which to judge the "substantiality" of numerical disparities and acknowledging that a "case-by-case approach" recognizes that the usefulness of statistics depends on the surrounding facts and circumstances); *Equal Employment Opportunity Commission v. Chicago Miniature Lamp Works*, 946 F.2d 292, 297 (7th Cir. 1991) (explaining in detail how "statistics can be used to prove both disparate treatment and disparate impact" cases).

⁵² *Johnson*, 480 U.S. at 633 n.11. The Court described the use of standard deviations as a precise method of measuring the significance of statistical disparities in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977). There the Court said that as a "general rule," the disparity must be "greater than two or three standard deviations" before it will infer discrimination from an employment practice. *Id.* See also BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 98 (2d ed. 1983) (describing the mathematical showing of variance required for a manifest imbalance); David D. Meyer, Note, *Finding a "Manifest Imbalance": The Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII*, 87 MICH. L. REV. 1986, 2016-17 (1989) (discussing the degree of imbalance necessary for a manifest imbalance).

⁵³ The employer showed that 9 of its 10 paraprofessionals and 110 of its 145 office and clerical workers were women. *Johnson*, 480 U.S. at 634. By contrast, the employer showed that only 2 of the 28 officials and administrators, 5 of the 58 professionals, 12 of the 124 technicians, none of the skilled craft workers, and 1 of the 110 road maintenance

that "women were concentrated in traditionally female jobs" and would have had a higher representation in other jobs in the agency "if such traditional segregation had not occurred."⁵⁴ The employer also emphasized that eliminating underrepresentation in the work force was only one of several factors that supervisors considered when making hiring decisions.⁵⁵ The Court found that the employer's statistics and use of numerous factors to make hiring decisions satisfied "the first requirement enunciated in *Weber*."⁵⁶

The second characteristic the Court addressed was "whether the Agency Plan unnecessarily trammelled the rights of the male employees or created an absolute bar to their advancement."⁵⁷ The employer's long-term goal was to increase female representation in traditionally segregated positions. The employer's plan did not set aside positions for women; it merely authorized "that consideration be given to affirmative action concerns."⁵⁸ This did not mean supervisors hired women

workers were women. *Id.* The one road maintenance worker was the woman whose hiring was at issue in *Johnson*. *Id.*

⁵⁴ *Id.*
⁵⁵ *Id.* at 636. Supervisors also considered the applicant's qualifications. *Id.* at 636. The Court said that had qualifications not been considered, the plan "would dictate mere blind hiring by the numbers, for it would hold supervisors 'to achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as . . . the number of qualified minority applicants.'" *Id.* (citing *Sheet Metal Workers v. Equal Employment Opportunity Commission*, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)).

⁵⁶ *Johnson*, 480 U.S. at 637.

⁵⁷ *Id.* at 637.

⁵⁸ *Id.* at 638.

just to achieve numbers. Supervisors still weighed the qualifications of female applicants against those of other applicants.⁵⁹ This flexible approach to attain a balanced work force satisfied the second *Weber* requirement.⁶⁰

Weber and *Johnson* embody the Supreme Court's current prerequisites for permissible affirmative action plans under Title VII.⁶¹ They do not establish precise parameters of permissible plans, but they do provide a minimally acceptable framework for such plans. Basically, an employer may adopt an affirmative action plan if it does not unnecessarily trammel the interests of white employees and is for a proper purpose, temporary, and flexible. *Weber* and *Johnson* demonstrate that an employer need not admit that it engaged in discrimination before adopting a voluntary affirmative action plan.⁶² An employer can adopt such a plan if there is a manifest imbalance sufficient to justify taking race or sex into account when making employment decisions. Employees

⁵⁹ *Id.*

⁶⁰ *Id.* at 641.

⁶¹ Although *Johnson* reaffirms *Weber*, four of the current Justices have raised questions about the *Weber* decision. See Michael K. Braswell et al., *Affirmative Action: An Assessment of its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 378-79 (1993) (discussing specific objections raised by Chief Justice Rehnquist and Justices Scalia, Stevens, and O'Connor). Three of these Justices believe the Court wrongly decided *Weber*. *Id.* See Hernicz, *supra* note 23, at 48 (noting that "at least three Justices would have overruled *Weber* because it encourages 'reverse discrimination' where there is no evidence of manifest imbalance").

⁶² *Johnson*, 480 U.S. at 652-53 (O'Connor, J., concurring).

challenging the plan will have the burden of proving it violates Title VII.⁶³

B. Equal Protection Analysis

⁶³ *Id.* at 626. In *Johnson*, the Supreme Court allocated the burden of proof for a Title VII case as follows:

Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.

Id. See also 29 U.S.C. § 2000e-12 (1994) (providing that "no person shall be subject to any liability" for an unlawful employment practice "if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission"); 29 C.F.R. § 1608.1(e) (1995) (limiting liability protection to "affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines"); 29 C.F.R. § 1608.10 (1995) (granting liability protection to an employer who the Commission finds took action "pursuant to and in accordance with a plan or program which was implemented in good faith" reliance on the guidelines).

After *Adarand*, a public employer cannot rely solely on the existence of an affirmative action plan to defend itself in a discrimination case. The plan may provide some protection in a Title VII case; however, it will not protect the employer from a constitutional challenge. The employer must have a compelling government interest to support any race-based employment actions it takes and it must narrowly tailor those actions to achieve its interest. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995). If it does not, then even if the employer has an affirmative action plan, it will still fail *Adarand's* strict scrutiny standard. See discussion *infra* parts II.B.2, IV.C.

The Fourteenth Amendment Equal Protection Clause prohibits state and local governments from denying "any person within [their] jurisdiction the equal protection of the laws."⁶⁴ The Fifth Amendment Due Process Clause prohibits the federal government from depriving any person "of life, liberty, or property without due process of law."⁶⁵ These constitutional prohibitions provide special protections for public employees who suffer employment discrimination by state, local, and federal agencies. Although this article focuses on affirmative action programs employed by the federal government, especially the Department of the Army, the Supreme Court's pronouncements in cases involving state and local programs are relevant to cases involving federal programs. Consequently, this subpart will review cases involving state and federal programs and the distinctions the Court has drawn between them.

1. *State and Local Programs*--Affirmative action programs used by state and local governments when making employment decisions generally have not fared well at the Supreme Court.⁶⁶

⁶⁴ U.S. CONST. amend. XIV, § 1.

⁶⁵ U.S. CONST. amend. V.

⁶⁶ Affirmative action programs used by state and local governments when making decisions related to education have also not fared well. In *Regents of the University of California v. Bakke*, the Court faced a Fourteenth Amendment equal protection challenge to a state-run medical school's admission policy that reserved 16 out of 100 places for minority students. 438 U.S. 265 (1978). A plurality of the Court found that a race-based admission program that foreclosed consideration to nonminorities was unnecessary to the achievement of the state's compelling interest in attaining a diverse student body. *Id.* at 315. If the program

In *Wygant v. Jackson Board of Education*,⁶⁷ the Court struck down a collectively bargained affirmative action plan that extended preferential protection against layoffs to some employees because of their race.⁶⁸ In *City of Richmond v. J.A. Croson*,⁶⁹ the Court struck down a city ordinance that required construction contractors to subcontract at least thirty percent of the dollar value of city contracts to minority-owned businesses.⁷⁰ The Supreme Court applied a strict scrutiny standard to review both of these cases.⁷¹

had taken race or ethnic background into account simply as one element "to be weighed fairly against other elements in the selection process," then the program would probably have survived judicial scrutiny. *Id.* at 318. While there was no majority opinion in *Bakke*, a majority of the Justices believed that race can be taken into account as a factor in an admissions program. *Id.* at 297 n.36 (Justice Powell agreeing with Justices Brennan, White, Marshall, and Blackmun that "the portion of the judgment that would proscribe all consideration of race must be reversed").

⁶⁷ 476 U.S. 267 (1986).

⁶⁸ *Id.* at 269, 284. In *Wygant*, the Court held that using a layoff plan based on race to remedy the effects of prior discrimination is not narrowly tailored. *Id.* at 283. The adoption of hiring goals would be less intrusive. *Id.* at 284. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Id.* at 283.

⁶⁹ 488 U.S. 469 (1989).

⁷⁰ *Id.*

⁷¹ In *Wygant*, only a plurality of the Court determined that strict scrutiny was the appropriate standard for reviewing remedial employment plans under the Fourteenth Amendment. *Wygant*, 476 U.S. at 274, 285. In *Croson*, however, a majority affirmed the *Wygant* strict scrutiny standard. *Croson*, 488 U.S. at 494 (stating that the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

To survive strict scrutiny, a racial classification must be justified by a compelling governmental interest, and the means chosen to effectuate its purpose must be narrowly tailored to the achievement of that goal.⁷² The compelling government interest prong helps "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool."⁷³ To satisfy this prong, the Equal Protection Clause requires "some showing of prior discrimination by the governmental unit involved" before an employer can use race to remedy such discrimination.⁷⁴ Societal discrimination alone is insufficient to justify a racial classification.⁷⁵

In *Croson*, the City of Richmond failed to present any evidence of past discrimination to justify a thirty-percent set-aside program for minority businesses.⁷⁶ The city based its program on a conclusory statement by a government official that such discrimination existed.⁷⁷ This declaration was

⁷² *Wygant*, 476 U.S. at 274.

⁷³ *Croson*, 488 U.S. at 493.

⁷⁴ *Croson*, 488 U.S. at 492 (citing *Wygant*, 476 U.S. at 274). "[A] contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring with the plurality).

⁷⁵ See *Wygant*, 476 U.S. at 274. See also *Croson*, 488 U.S. at 492 (requiring proof of discrimination by the governmental unit involved). A generalized assertion that there has been discrimination in an entire industry cannot justify a racial classification because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Croson*, 488 U.S. at 498.

⁷⁶ *Croson*, 488 U.S. at 505.

⁷⁷ *Id.* at 480, 505.

insufficient to satisfy the compelling government interest prong⁷⁸ of the strict scrutiny standard.⁷⁹ The Court said, however, that the city could have satisfied equal protection requirements if it had shown "that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry."⁸⁰

Besides satisfying the compelling interest prong, a valid affirmative action plan must be narrowly tailored to serve its intended purpose to survive the strict scrutiny standard. This prong "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."⁸¹ In *Croson*, there was no evidence that the City of Richmond ever considered alternatives to a race-based quota.⁸² The city's plan was "grossly overinclusive,"⁸³ was not tailored to a

⁷⁸ "To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'for remedial' relief for every disadvantaged group." *Id.* at 505.

⁷⁹ In *Wygant*, the Court held that no compelling interest could justify using race to make layoff decisions. Layoff provisions are "not a legally appropriate means of achieving even a compelling interest" because of the harsh burden imposed on particular individuals. *Wygant*, 476 U.S. at 278.

⁸⁰ *Croson*, 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment).

⁸¹ *Id.* at 493.

⁸² *Id.* at 507.

⁸³ The justification stated for the set-aside program was to compensate Black contractors for past discrimination. *Id.* at 506. The preference also applied to racial groups that may

specific goal, and awarded an absolute preference based solely on minority status.⁸⁴ These characteristics convinced the Court that the only interest furthered by the quota system was "administrative convenience."⁸⁵ The city "obviously" did not narrowly tailor its program "to remedy the effects of prior discrimination."⁸⁶ It, therefore, failed the Court's strict scrutiny standard.

Before striking down the city ordinance in *Croson*, the Supreme Court acknowledged that the legislative actions of state and local governments are entitled to deferential review by the judiciary.⁸⁷ There are, nonetheless, constitutional limits on state and local actions when they employ race as a criterion.⁸⁸ State and local legislative bodies do not have the same freedom that Congress does in remedying past

never have suffered from discrimination (e.g., Aleuts and Eskimos). *Id.*

⁸⁴ *Id.* at 506-09. But see *United States v. Paradise*, 480 U.S. 149 (1987) (holding that a court-ordered fifty percent promotion requirement did not violate the Equal Protection Clause; there was a compelling governmental interest in eradicating past discrimination by the employer and the plan was narrowly tailored in that it was flexible at all ranks, was temporary in nature, and it applied only when promotions were needed).

⁸⁵ *Croson*, 488 U.S. at 508. "But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify" a racially based quota system. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 500. Nothing "precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." *Id.* at 509.

⁸⁸ *Id.* at 491.

discrimination.⁸⁹ The Court has yet to decide, however, how much freedom Congress has to remedy past discrimination.

2. *Federal Programs*--Until June of 1995, affirmative action programs employed by the federal government more consistently survived Supreme Court review than similar state and local programs. The primary reason for this difference may have been the leniency with which the Court analyzed federal programs.

In *Fullilove v. Klutznick*,⁹⁰ the Court approved a congressional spending program that provided a preference to minority-owned businesses for public works projects.⁹¹ The program required state and local recipients of federal funds for these projects to use ten percent of the funds to procure services or supplies from businesses owned and controlled by members of statutorily defined minority groups.⁹² Because the case involved an Act of Congress, a plurality of the Court said it was "bound to approach its task with appropriate deference to Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . General Welfare of the United States' and 'to enforce, by appropriate

⁸⁹ "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490.

⁹⁰ 448 U.S. 448 (1980).

⁹¹ *Id.* at 457.

⁹² Congress included the ten percent set-aside requirement for minority-owned businesses in the Public Works Act of 1977. *Id.* at 458-59.

legislation,' the equal protection guarantees of the Fourteenth Amendment."⁹³ The Court then refused to adopt a specific standard of review for congressionally required programs.⁹⁴ Instead, the Court upheld the set-aside program after conducting a "most searching examination."⁹⁵

Ten years later, the Court imposed a more stringent standard of review on federal affirmative action programs. In *Metro Broadcasting, Inc. v. Federal Communications Commission*,⁹⁶ the Court applied an intermediate scrutiny standard rather than the "most searching examination" applied in *Fullilove*. A race-conscious measure can pass an intermediate scrutiny standard if it serves an "important

⁹³ *Id.* at 472 (plurality opinion) (citing U.S. CONST. art. I, § 8, cl. 1; amend. XIV, § 5).

⁹⁴ *Id.* at 492.

The set-aside program in *Croson*, which the Supreme Court analyzed using a strict scrutiny standard, was similar to the one in *Fullilove*. The Court, however, expressly refused to apply the lower standard of review from *Fullilove* to the *Croson* program. See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 491 (1989) (stating that *Fullilove* involved the treatment of an exercise of congressional power and could not be dispositive in *Croson*).

⁹⁵ The *Fullilove* Court said that "preferences based on race or ethnic criteria must necessarily receive a most searching examination to make sure it [sic] does not conflict with constitutional guarantees." *Fullilove*, 448 U.S. at 491 (Burger, C.J., White & Powell, JJ., plurality opinion). The Court never defined a "most searching examination." It instead employed a two-step analysis in *Fullilove*. First, it asked "whether the objectives of this legislation [were] within the powers of Congress," and second, it asked "whether the limited use of racial and ethnic criteria, in the context presented, [was] a constitutionally permissible means for achieving the congressional objectives." *Id.* at 473. Satisfied that the set-aside program met both of these requirements, the Court upheld it. *Id.* at 492.

⁹⁶ 497 U.S. 547 (1990), overruled in part by *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

government interest" and is "substantially related to the achievement of those objectives."⁹⁷ The Court expressly refused to subject federal affirmative action programs to the same strict scrutiny standard it applied one year earlier to a local program⁹⁸ because of its deference to Congress.⁹⁹

In *Metro Broadcasting*, the Federal Communications Commission considered minority status when deciding whether to issue new broadcast licenses.¹⁰⁰ The Commission's intent was to increase minority ownership of broadcast properties and ensure "diversified programming."¹⁰¹ The Court applied the intermediate scrutiny standard and found the congressionally mandated preference to be legally justified. The government's "interest in enhancing broadcast diversity" was "at the very least" an important government objective and the minority

⁹⁷ *Metro Broadcasting*, 497 U.S. at 564-65.

⁹⁸ See *Croson*, 488 U.S. at 493-94. While a majority of the Court in *Metro Broadcasting* voted for the intermediate scrutiny standard, four of the current Justices adamantly dissented, arguing that strict scrutiny was the appropriate standard of review. *Metro Broadcasting*, 497 U.S. at 602-31 (Rehnquist, C.J., O'Connor, Scalia, & Kennedy, JJ., dissenting); *id.* at 632-38 (Kennedy & Scalia, JJ., dissenting). These four Justices also refused to recognize "the interest in increasing the diversity of broadcast viewpoints" as a compelling government interest. *Id.* at 612, 633.

⁹⁹ *Metro Broadcasting*, 497 U.S. at 565 (noting that the question of congressional action was not before the Court in *Croson*). The Court observed that Congress endorsed the minority ownership preferences only after long study and painstaking consideration of all available alternatives. *Id.* at 589.

¹⁰⁰ *Id.* at 556.

¹⁰¹ *Id.*

ownership policy used in the case was substantially related to that goal.¹⁰²

In June of 1995, the Supreme Court imposed its most stringent standard of review on federal affirmative action programs. In *Adarand Constructors, Inc. v. Pena*,¹⁰³ a majority of the Court agreed that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."¹⁰⁴ The Court then expressly overruled application of the intermediate scrutiny standard used in *Metro Broadcasting*.¹⁰⁵

Adarand involved a Department of Transportation program that offered financial incentives to prime contractors for hiring subcontractors certified as small businesses controlled

¹⁰² *Id.* at 567-69.

¹⁰³ 115 S. Ct. 2097 (1995).

¹⁰⁴ *Id.* at 2113.

¹⁰⁵ *Id.* (stating that "to the extent that *Metro Broadcasting* is inconsistent with this holding, it is overruled"). The Court also said that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." *Id.* at 2117.

A turnover in Justices may account for the shift in the Court's position. After *Metro Broadcasting*, four of the Justices from the majority opinion retired. Justice Stevens, who concurred in the *Metro Broadcasting* opinion, is the only Justice from the majority remaining, along with all four of the dissenters. See *Metro Broadcasting*, 497 U.S. at 602-38 (Rehnquist, C.J., O'Connor, Scalia, & Kennedy, JJ., dissenting). President Bush appointed Justices Souter and Thomas to the Court in 1990 and 1991, respectively. President Clinton appointed Justices Ginsburg and Breyer in 1993 and 1994, respectively.

by "socially and economically disadvantaged" individuals.¹⁰⁶ To take advantage of the financial incentive offered by the program, a prime contractor awarded a highway construction project to a properly certified small business.¹⁰⁷ This small business was not the low bidder on the project; Adarand Constructors was.¹⁰⁸ Adarand Constructors sued the Department of Transportation, arguing that the subcontracting clause violated its right to equal protection.¹⁰⁹ Adarand Constructors initially lost at the lower courts where they applied the intermediate scrutiny standard pursuant to *Metro Broadcasting*.¹¹⁰ The Supreme Court, however, remanded the case for further review because the lower court should have applied strict scrutiny to review the racially based program.¹¹¹

¹⁰⁶ *Adarand*, 115 S. Ct. at 2102-03. Congress codified the United States policy of ensuring that small businesses owned and controlled by socially and economically disadvantaged individuals be given the maximum practicable opportunity to participate in the performance of government contracts in the Small Business Act. *Id.* at 2102 (citing 15 U.S.C. § 631 (1994)). In furtherance of this policy, the Act established a government-wide goal for participation of small businesses of "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Id.* (citing 15 U.S.C. § 644(g)(1) (1994)). The Act requires that contractors presume that socially and economically disadvantaged individuals include specifically enunciated minority groups. *Id.* (citing 15 U.S.C. §§ 637(d)(2), 637(d)(3) (1994)).

¹⁰⁷ *Id.* at 2101.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2103.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2118. The Court issued a five to four opinion in *Adarand*. All four of the dissenters from *Metro Broadcasting, Inc.*, voted in the *Adarand* majority, along with Justice Thomas. See *supra* note 98. Three of the new Justices voted in the dissent with Justice Stevens. The four dissenters in *Adarand* do not think that a strict scrutiny standard is necessary for congressionally authorized affirmative action measures; intermediate scrutiny is

The Supreme Court did not discuss the application of either prong of the strict scrutiny standard to the racially based program used in *Adarand* or in any way address the merits of the case. The Court emphasized, though, that strict scrutiny does not mean "strict in theory, fatal in fact."¹¹² The Constitution gives Congress the power to deal with the problem of racial discrimination and the Court will defer to the exercise of that authority.¹¹³ The Court refused to discuss the extent of that deference.¹¹⁴

C. Current Status

State and federal governments may still employ affirmative action programs after *Adarand*. These programs must pass standards imposed by both Title VII and the United States Constitution. Because constitutional standards are more restrictive than Title VII, some plans will survive Title VII analysis, but fail constitutional review.¹¹⁵ Public employers should, therefore, devise their plans to pass the higher constitutional requirements.

sufficient. *Id.* at 2120-36 (Stevens, Ginsburg, Souter, & Breyer, JJ., dissenting).

¹¹² *Id.* at 2117.

¹¹³ *Id.* at 2114.

¹¹⁴ *Id.* at 2097.

¹¹⁵ At least one Supreme Court justice thinks the "initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is not different from that required by the Equal Protection Clause." *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring in the judgment).

Under a constitutional analysis, affirmative action programs employed by state and local governments, and those employed by the federal government, are now all subject to strict scrutiny on judicial review.¹¹⁶ To pass strict scrutiny, public employers must have a compelling government interest to justify a racial classification and must use measures narrowly tailored to further that interest. To date, the Supreme Court has only recognized one interest compelling enough to justify a racial classification--remedying unlawful past discrimination.¹¹⁷ Public employers may remedy their own past discrimination, or past discrimination caused by private actors if the government became a "passive participant" in the

¹¹⁶ While *Adarand* involved a challenge to a federal contracting program, the Supreme Court did not limit its opinion to that arena. After reviewing its previous affirmative action decisions involving contracting, employment, and education, the Court used broad, sweeping language to make clear that *Adarand* will impact on any federal, state and local programs allowing race or ethnicity to be used as a basis for decisionmaking. See Memorandum, Assistant Attorney General, United States Department of Justice, to General Counsels, subject: *Adarand*, sec. I.C. (28 June 1995).

¹¹⁷ See, e.g., *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 612 (1990), *overruled in part by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (recognizing that "modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of discrimination"); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989) (noting that unless classifications based on race "are strictly reserved for remedial settings, they may in fact promote notions of inferiority and lead to a politics of racial hostility"); *United States v. Paradise*, 480 U.S. 149, 166 (1987) (stating that "[i]t is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination").

private actors' discriminatory activities.¹¹⁸ While a public employer may have other interests to justify a racial classification, a majority of the Court may not recognize those interests as compelling.¹¹⁹

To justify a compelling interest in remedying past discrimination, a public employer need not admit or prove that it discriminated against a minority or gender group.¹²⁰ A judicial or administrative finding of discrimination is also unnecessary.¹²¹ An employer must, however, have "a strong basis in evidence for its conclusion that remedial action was

¹¹⁸ See *Croson*, 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment). Public employers will need a "strong basis in evidence" to support their conclusion that remedial action is necessary. *Id.* at 500. This evidence may need to approach a *prima facie* case of a constitutional or statutory violation by the public employer or anyone in the relevant private sector. *Id.*

¹¹⁹ See, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978) (recognizing the "attainment of a diverse student body" as a "constitutionally permissible goal for an institution of higher education"); *Johnson*, 480 U.S. at 647 (Stevens, J., concurring) (noting that legitimate reasons for preferences may include dispelling the notion that white supremacy governs our social institutions, improving services to Black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of the work force); *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) (stating that at least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life or limb can justify a racial classification).

¹²⁰ See *Johnson*, 480 U.S. at 652-53 (O'Connor, J., concurring) (explaining that to require an employer to "actually prove that it had discriminated in the past would . . . unduly discourage voluntary efforts to remedy apparent discrimination").

¹²¹ *Id.*

necessary."¹²² "[S]tatistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination."¹²³ Comparisons that result in a statistical difference of more than two or three standard deviations¹²⁴ undercut the presumption that decisions were made without regard to race and justify the use of race-conscious affirmative action.¹²⁵ Statistical results that are less than two standard deviations may also be sufficient to justify race-conscious action, but there is limited precedent supporting lower deviations.¹²⁶

¹²² *Croson*, 488 U.S. at 500. See also *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1555 (11th Cir. 1994) (stating that "[e]vidence that the statistical imbalance between minorities and nonminorities in the relevant work force and available labor pool constitutes a gross disparity, and thus a prima facie case of constitution or statutory violation, may justify a public employer's adoption of racial or gender preferences").

¹²³ *Croson*, 488 U.S. at 501.

¹²⁴ See *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977) (using the selection of jurors drawn randomly from the general population to illustrate standard statistical deviations and how to calculate them); *Peightal*, 26 F.3d at 1556 (upholding the lower court's determination that a statistical disparity of 17.6 standard deviations constitutes a "strong basis in evidence").

¹²⁵ See *id.* See also *Hazelwood v. United States*, 433 U.S. 299, 311-12 n.17 (1977) (demonstrating how choosing the relevant labor market area can impact on statistical deviation results); SCHLEI & GROSSMAN, *supra* note 52, at 98-99 n.75 (listing cases where the statistical deviation was greater than two standard deviations).

¹²⁶ See, e.g., *Chance v. Board of Examiners*, 458 F.2d 1167, 1171 (2d Cir. 1972) (finding a substantial adverse impact where the statistical deviation between the pass rates for white and minorities to be 1.5). But see *Boggs v. Bancroft-Whitney Co.*, 25 Fair Empl. Prac. Cas. (BNA) 13, 15 (C. D. Cal. Feb. 5, 1981) (finding no adverse impact where statistical deviation between selection rates was 1.73).

To satisfy the narrowly tailored prong of the strict scrutiny standard, public employers must link their affirmative actions directly to their compelling interest.¹²⁷ For example, if a public employer has discriminated against Blacks and Hispanics, the employer must tailor its program to remedy only that discrimination. Providing a preference to other groups against which the employer has no history of discrimination will not pass the strict scrutiny standard.¹²⁸ Once the employer has remedied the discrimination against each group, the preference accorded that group must end. Where an employer has adequate evidence to justify a racial preference, the employer cannot rely solely on race to make an employment decision; the employer must also consider qualifications and other critical components.¹²⁹ An employer cannot use inflexible goals or quotas to administer a program. Any program unable to meet these criteria, or any employer unable to demonstrate that it considered race-neutral alternatives,¹³⁰ will not survive the "narrowly tailored" requirement of *Adarand*.

¹²⁷ *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995) (requiring that the reasons for racial classifications be clearly identified and that there be the most "exact connection between justification and classification").

¹²⁸ See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989).

¹²⁹ See *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616, 636 (1987).

¹³⁰ See *Croson*, 488 U.S. at 507.

Courts will yield congressionally authorized affirmative action programs greater deference than state and local programs because of Congress' authority to identify and remedy the effects of past discrimination.¹³¹ The Court has not yet decided the extent of that deference.¹³² One thing the Court has decided is that Congress is not immune from judicial scrutiny. The Supreme Court "would not hesitate to invoke the Constitution should [it] determine that Congress has overstepped the bounds of its constitutional power."¹³³ Consequently, federal employers should proceed cautiously if they adopt programs that would not meet the Court's minimum requirements for state programs, especially if Congress has not specifically authorized the federal program.

Thus far, the Supreme Court has only issued opinions in cases involving constitutional challenges to affirmative action programs based on racial classifications. The Court has not yet decided the proper standard of review for affirmative action programs involving gender classifications.¹³⁴ Some courts still apply an intermediate

¹³¹ *Adarand*, 115 S. Ct. at 2114.

¹³² The *Adarand* majority specifically said "[w]e need not, and do not, address these differences today," referring to various Court opinions discussing judicial deference to Congress. *Id.* at 2114.

¹³³ *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980).

¹³⁴ In *Bakke*, however, the Court inferred it would apply a lower standard of review for gender classifications. *Regents of the University of California v. Bakke*, 438 U.S. 265, 302-03 (1978).

Gender-based distinctions are less likely to create the analytical and practical problems present in

level of scrutiny to such cases.¹³⁵ Other courts may apply a strict scrutiny standard based on *Adarand*. In the recent Supreme Court argument on the case involving gender-based discrimination at Virginia Military Institute, even the Solicitor General argued that strict scrutiny is the proper standard for reviewing gender-based classifications.¹³⁶ Perhaps when the Court issues its opinion in that case, it will finally resolve this issue. In the interim, the Army and other public employers should analyze gender-based programs under the strict scrutiny standard to ensure compliance with whichever standard the Court imposes.

III. Military Personnel

preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

Id.

¹³⁵ See, e.g., *Associated General Contractors of California, Inc. v. San Francisco*, 813 F.2d 922 (9th Cir. 1987) (applying an intermediate scrutiny standard to a gender preference, but a strict scrutiny standard to a racial preference).

¹³⁶ See *United States v. Virginia*, Nos. 94-1941, 94-2107, 1996 WL 16020, at *5 (U.S. Jan. 17, 1996) (oral argument urging the Supreme Court to adopt the highest standard of strict scrutiny).

The Army currently has approximately 500,000 soldiers on active duty.¹³⁷ The Army regularly makes employment decisions affecting these soldiers.¹³⁸ The procedures applicable to each decision vary. Some procedures allow Army officials to consider race, ethnicity, or sex to ensure that all soldiers receive an equal opportunity to succeed.¹³⁹ Whenever the Army considers race, ethnicity or sex to make an employment decision affecting an active duty service member, it must justify such considerations under the Due Process Clause of the Fifth Amendment.¹⁴⁰ The Army need not justify these decisions under Title VII because Title VII does not apply to service members.¹⁴¹

¹³⁷ At the end of fiscal year 1995, the Army had 82,000 officers and 420,000 enlisted personnel. Telephone Interview with Randall Rakers, Military History Institute, Army War College (Feb. 23, 1996) [hereinafter Randall Rakers Interview] (quoting Gary Bounds, Headquarters, Department of the Army, Deputy Chief of Staff for Operations, Force Design).

¹³⁸ The Army regularly decides which soldiers to train, which soldiers to retain on active duty especially in this time of downsizing, which soldiers to promote, which soldiers to assign to available positions, and which soldiers to place in leadership positions.

¹³⁹ Military leaders prefer to use the term "equal opportunity" rather than "affirmative action" or "diversity" when describing the ongoing integration of minorities and women into the work force. See REPORT TO THE PRESIDENT, *supra* note 4, § 7.1 n.54. However, "[i]nsofar as bias and prejudice persist, effective equal opportunity strategies will often entail affirmative action." *Id.*

¹⁴⁰ See discussion *supra* part II.B.2.

¹⁴¹ See *Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2d Cir. 1987) (holding that "[i]n the absence of some express indication in the legislative history that Congress intended Title VII to apply to uniformed members of the armed forces," the court refused "to extend a judicial remedy for alleged discrimination in civilian employment to the dissimilar employment context of the military"); *Gonzalez v. Dep't of the Army*, 718 F.2d 926, 928 (9th Cir. 1982) (concluding that the term "military departments" in Title VII includes only civilian employees of the military services and not military

One of the most important employment decisions the Army makes is promotions. The Army's officer promotion process exemplifies the Army's commitment to ensuring equal opportunity for its personnel. The Army's affirmative action plan and instructions governing officer promotions contain goals and special procedures for examining the selection of minorities and women. Use of these procedures has contributed to the Army becoming "the most racially diverse and best-qualified military in our history."¹⁴² Continuing to use them after *Adarand*, however, may result in a constitutional violation of the Fifth Amendment.

A. Affirmative Action Programs

The Department of Defense requires each of the military services to establish military equal opportunity and

personnel); *Johnson v. Alexander*, 572 F.2d 1219, 1223 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978) (finding that the term "employee" in Title VII does not encompass service members because military service differs from civilian employment in critical respects). See also *Mier v. Owens*, 57 F.3d 747, 748 (9th Cir. 1995), *cert. denied*, 516 U.S. ___, 64 U.S.L.W. 36 (U.S. Mar. 25, 1996) (No. 95-816) (holding that Title VII applies to National Guard technicians whose jobs are hybrid military-civilian positions, except when they challenge personnel actions integrally related to the military's unique structure).

¹⁴² Remarks by the President, *supra* note 6 (praising the Army for setting "such a fine example" with its affirmative action program and for "ensuring that it has a wide pool of qualified candidates for every level of promotion").

affirmative action programs.¹⁴³ Equal opportunity programs ensure that individuals are "evaluated only on individual merit, fitness, and capability, regardless of race, color, sex, [or] national origin"¹⁴⁴ Affirmative action programs are a management tool "intended to assist in overcoming the effects of discriminatory treatment as it affects equal opportunity, upward mobility, and the quality of life for military personnel."¹⁴⁵ The Army maintains that both of these programs are essential because illegal discrimination based on race, color, or gender is "contrary to good order and discipline" and "counterproductive to combat readiness and mission accomplishment."¹⁴⁶

The Army designed its Equal Opportunity Program to provide equal opportunity for military personnel and to "contribute to mission accomplishment, cohesion, and readiness."¹⁴⁷ The Army's equal opportunity policy generally

¹⁴³ DEP'T OF DEFENSE DIR. 1350.2, THE DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM, para. D.4 (18 Aug. 1995) [hereinafter DOD DIR. 1350.2].

¹⁴⁴ DOD DIR. 1350.2, *supra* note 143, encl. 2, para. 6. Equal opportunity is "[t]he right of all persons to participate in, and benefit from, programs and activities for which they are qualified" *Id.*

¹⁴⁵ DEP'T OF DEFENSE INSTRUCTION 1350.3, AFFIRMATIVE ACTION PLANNING AND ASSESSMENT PROCESS, encl. 1, para. 1 (29 Feb. 1988) [hereinafter DODI 1350.3]. The Department of Defense defines affirmative action as "methods used to achieve the objectives of the [Military Equal Opportunity] program" DOD DIR. 1350.2, *supra* note 143, encl. 2, para. 1.

The Equal Opportunity Policy Office for the Department of Defense is circulating a revised draft of DODI 1350.2. A new instruction should be available by May, 1996.

¹⁴⁶ DOD DIR. 1350.2, *supra* note 143, para. D.2.

¹⁴⁷ DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 6-1 (30 Mar. 1988) (IO4, 17 Sept. 1993) [hereinafter AR 600-20].

prohibits soldiers from being promoted or otherwise managed on the basis of race, color, or gender.¹⁴⁸ There are two exceptions to this "totally nonbiased personnel management process."¹⁴⁹ First, the Army can assign and use female soldiers pursuant to its coding system.¹⁵⁰ Second, the Army can support "established equal opportunity goals . . . to increase representation of a particular group in one or more monitored area(s) of affirmative action plans."¹⁵¹

The Army requires each major command, installation, unit, agency, and activity down to the brigade level to develop and implement affirmative action plans.¹⁵² Each plan must include "conditions requiring affirmative action(s), remedial action steps (with goals and milestones as necessary), and a description of the end-condition sought for each subject area

The Army sent Interim Change 5 to AR 600-20 to the publisher and expects to release it in May 1996. In its entirety, Interim Change 5 will say "See Interim Change 4 to AR 600-20." Telephone Interview with Chaplain (Lieutenant Colonel) Willard D. Goldman, Army Command Policy (Feb. 28, 1996).

¹⁴⁸ AR 600-20, *supra* note 147, para. 6-3b (IO4, 17 Sept. 1993).

¹⁴⁹ *Id.*

¹⁵⁰ AR 600-20, *supra* note 147, para. 6-3b(1) (IO4, 17 Sept. 1993). See also DEP'T OF ARMY, REG. 600-13, ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS (27 Mar. 1992) [hereinafter AR 600-13]. The Army's assignment policy for female soldiers allows women to serve in any officer or enlisted specialty or position except where the routine mission of such unit, specialty, or position is to engage in direct combat or to collocate routinely with units assigned a direct combat mission. *Id.* para. 1-12. If a position routinely entails direct combat missions, the Army codes that position as "P1," indicating that female soldiers cannot hold the position. *Id.* para. 2-3.

¹⁵¹ AR 600-20, *supra* note 147, para. 6-3b(2) (IO4, 17 Sept. 1993).

¹⁵² *Id.* para. 6-13a.

included."¹⁵³ Activities that have affirmative action plans must review them at least annually "to assess the effectiveness of past actions; to initiate new actions; and to sustain, monitor, or delete goals already achieved."¹⁵⁴ After this review, activities will collect statistical data that shows achievements and shortfalls in the programs and forward the information through the major command to Headquarters, Department of the Army.¹⁵⁵

Besides these lower level plans, the Department of the Army has its own master affirmative action plan. One stated

¹⁵³ *Id.*

¹⁵⁴ *Id.* para. 6-13b.

¹⁵⁵ See *id.* para. 6-16a. The Department of Army compiles this information and records it on a Military Equal Opportunity Assessment form. See Dep't of Defense, DD Form 2509, Military Equal Opportunity Assessment (Dec. 1987) [hereinafter DD Form 2509]. See DODI 1350.3, *supra* note 145, encl. 2. The Army submits Military Equal Opportunity Assessments to the Department of Defense annually. The Army prepares separate assessment forms to capture data by racial, ethnic, and gender groups for accessions, promotions, military education, separations, augmentations, and other specified categories. *Id.*

For promotions, the Army prepares separate Military Equal Opportunity Assessments for each rank considered by promotion boards. Consequently, there are separate forms for the ranks of captain, major, lieutenant colonel, colonel, sergeant first class, master sergeant, and sergeant major. *Id.* encl. 2, para. 3b. Each assessment shows the total number of personnel considered by the board as compared to the total number selected in each racial, ethnic, and gender group. The assessments contain "no analysis of whether the observed promotion differences signify equal opportunity problems, or are simply due to random chance." CAROL A. ROBINSON & STEVEN S. PREVETTE, DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE, DISPARITIES IN MINORITY PROMOTION RATES: A TOTAL QUALITY APPROACH FISCAL YEARS 1987-1991 1 (1992). The Army analyzes this information separately on executive summaries. Telephone Interview with Sergeant Major Terry Stegemeyer, Senior Equal Opportunity Advisor, Headquarters, Department of the Army, Deputy Chief of Staff Personnel (Apr. 1, 1996).

reason for the Army's affirmative actions is to compensate minority groups "for disadvantages and inequities that may have resulted from past discrimination."¹⁵⁶ Another stated reason is to accomplish the military mission.

Soldiers must be committed to accomplishing the mission through unit cohesion developed as a result of a healthy leadership climate. Leaders at all levels promote individual readiness by developing competence and confidence in their subordinates. A leadership climate in which all soldiers perceive they are treated with fairness, justice, and equity is crucial to the development of this confidence.¹⁵⁷

The Army's plan establishes specific affirmative action goals that "are intended to be realistic and achievable."¹⁵⁸ These "[g]oals are not ceilings, nor are they base figures that are to be reached at the expense of requisite qualifications and standards."¹⁵⁹ For Army officer promotions, the goal is "selection rates for all categories" that are not less than "the overall selection rate for the total population considered."¹⁶⁰ After a promotion board has met, the Army

¹⁵⁶ DEP'T OF ARMY, PAM. 600-26, DEPARTMENT OF THE ARMY AFFIRMATIVE ACTION PLAN, glossary (23 May 1990) [hereinafter DA PAM. 600-26].

¹⁵⁷ *Id.* para. 1-4b.

¹⁵⁸ *Id.* para. 2-1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* para. 2-5a(4). While the Army's Affirmative Action Plan states that selection rates for each category should be compared to the "overall selection rate for the total population," the written instructions provided to selection board members limit the comparison to "all officers in the promotion zone (first time considered)." Compare DA PAM 600-26, *supra* note 156, para. 2-5a(4) with DEP'T OF ARMY, MEMO 600-2, POLICIES AND PROCEDURES FOR ACTIVE COMPONENT OFFICER SELECTION BOARDS (26 Nov. 1993) [hereinafter DA MEMO 600-2].

compares the actual selection rates achieved to its affirmative action goals to highlight progress and identify problem areas.¹⁶¹

B. Officer Promotion Procedures

Congress charged the Secretary of Defense with the responsibility of promoting military officers to the next higher grade.¹⁶² The Secretary of Defense has delegated responsibility for developing written promotion procedures and administering promotion programs to the Secretaries of each of the military departments.¹⁶³

Comparing minority and female selection rates to all officers considered or to first-time considered officers is important because it allows the board to determine whether it is selecting qualified minority and female officers at rates comparable to other officers considered for promotion. The rationale behind this selection rate is that "fair employment practices, over time, would result in a selection rate for minorities that essentially tracks the availability of minorities in the qualified labor market." Memorandum, Associate Attorney General, Department of Justice, to General Counsels, subject: Post-Adarand Guidance on Affirmative Action in Federal Employment, para. III.B.3 (29 Feb. 1996). For military promotions, the qualified labor market includes only military officers serving in the rank specified by the Secretary of the Army as eligible for promotion. See discussion *infra* parts III.B.1, III.C.3. Comparing minority and female selection rates to the broader Army population or to the civilian labor force would not be a proper comparison. See *infra* note 283 and accompanying text.

¹⁶¹ DA PAM. 600-26, *supra* note 156, paras. 3-4a(1), 3-4a(2). The Army uses a representation index to measure any changes and determine the percentage of over- and under-representation in each category. *Id.* para. 3-4b. This index does not determine the cause of any change; it merely isolates particular areas that require closer examination. *Id.*

¹⁶² 10 U.S.C. §§ 611-632 (1994).

¹⁶³ DEP'T OF DEFENSE DIR. 1320.12, DEFENSE OFFICER PROMOTION PROGRAM, para. E.2 (4 Feb. 1994) [hereinafter DOD DIR. 1320.12].

1. *Convening a Promotion Board*--The Secretary of the Army convenes promotion boards¹⁶⁴ for Army officers.¹⁶⁵ These boards select officers for promotion from a select group of fully qualified officers. Before convening a board, the Secretary designates the officers eligible for consideration by their rank and the date they achieved that rank.¹⁶⁶ For example, the Secretary can convene a board for promotion to major and limit the officers eligible for consideration to captains with dates of rank¹⁶⁷ between January 1, 1989, and January 1, 1990. Captains possessing the requisite date of rank constitute the qualified pool of officers for the rank of major. During the promotion process, the board will identify which of these captains are fully qualified for promotion.¹⁶⁸ The board will recommend captains who are "best qualified" for promotion from the group of fully qualified captains.

¹⁶⁴ 10 U.S.C. § 611(a) (1994). See also DOD DIR. 1320.12, *supra* note 163, para. E.2.h. Each board shall consist of five or more active duty Army officers. 10 U.S.C. § 612(a) (1) (1994). Each member of the board must be senior in rank to those being considered, but no member may be less than the rank of major. *Id.*

¹⁶⁵ The President, with the advice and consent of the Senate, appoints generals and lieutenant generals. 10 U.S.C. § 601a (1994). Commanders in the grade of lieutenant colonel or above are authorized to promote officers to the grades of first lieutenant and chief warrant officer W-2. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS, para. 1-7 (30 Nov. 1994) [hereinafter AR 600-8-29].

¹⁶⁶ 10 U.S.C. § 619(c) (1) (1994).

¹⁶⁷ "Date of rank" refers to the date the Army promoted the officer to their current rank.

¹⁶⁸ See *infra* note 176 and accompanying text.

Once convened, the Secretary gives each member of the board written instructions containing the policies and procedures needed to conduct the board.¹⁶⁹ These instructions are generally the same for all Army promotion boards.¹⁷⁰ In the basic instructions, the Secretary describes the Army's commitment to equal opportunity for all soldiers and the role that equal opportunity plays in the selection process.¹⁷¹ The Secretary also tells the board to "be alert to the possibility of past personal or institutional discrimination . . . in the assignment patterns, evaluations, or professional development of officers in those groups" for which it has an equal opportunity selection goal.¹⁷² All promotion boards have the following equal opportunity selection goal for minority and female officers:

[A] selection rate in each minority and gender group (minority groups: Black, Hispanic, Asian/Pacific Islander, American Indian, and Others; gender: males for Army Nurse Corps (ANC) competitive category and females for all other competitive categories) that

¹⁶⁹ See 10 U.S.C. § 615(b)(6) (1994) (requiring the Secretary of the military department concerned to "furnish each selection board . . . with . . . guidelines as may be necessary to enable the board to properly perform its functions"). See also DOD Dir. 1320.12, *supra* note 163, para. F.1; AR 600-8-29, *supra* note 165, para. 1-33a.

¹⁷⁰ Department of the Army Memo 600-2 contains boilerplate language used in the Secretary's written instructions to each promotion board. DA MEMO 600-2, *supra* note 160. The Secretary sometimes modifies these instructions for specific boards.

¹⁷¹ Equal opportunity "is especially important to demonstrate in the selection process. To the extent each board demonstrates that race, ethnic background, and gender are not impediments to . . . promotion, our soldiers will have a clear perception of equal opportunity in the selection process." DA MEMO 600-2, *supra* note 160, para. 10.

¹⁷² *Id.* para. 10a.

is not less than the selection rate for all officers in the promotion zone (first time considered).¹⁷³

2. *Promotion Board Procedures*--Each promotion board has four phases. At least one board recorder is present during all board deliberations to assist the board and to ensure it strictly complies with the Secretary's Memorandum of Instruction.¹⁷⁴ During the first phase, the board reviews the files of each officer in and above the promotion zone¹⁷⁵ to identify officers who are fully qualified for promotion.¹⁷⁶ Each board member reviews each file, assigns a numerical score to it, and passes it to the next board member to do the same.¹⁷⁷ This process continues until all board members have

¹⁷³ *Id.* para. A-2.

¹⁷⁴ DOD DIR. 1320.12, *supra* note 163, para. F.2.b. A board recorder is a commissioned officer who has completed, in the twelve months prior to the board, a program of instruction on the duties and responsibilities of board recorders and board members. *Id.*

¹⁷⁵ DA MEMO 600-2, *supra* note 160, para. A-8a. The promotion zone is the category of commissioned officers on the active duty list who are eligible for promotion consideration because they were promoted to their current rank during the requisite time period announced by the Secretary prior to convening the board. See AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. The "above the zone" category consists of commissioned officers who are eligible for promotion and whose date of rank is senior to any officer in the promotion zone. *Id.* at 33.

¹⁷⁶ "Fully qualified officers are those, by definition, whose demonstrated potential unequivocally warrants their promotion to the next higher grade." DA Memo 600-2, *supra* note 160, para. A-8a(3).

¹⁷⁷ Board members use "blind vote sheets" to vote officer files during promotion boards. This means that each member writes the score for each file on a voting card that has removable slips. After writing the score, the member tears off the slip with the score written on it. A master voting card is attached to the back of the removable slips and carbon paper ensures that an imprint of each score remains with the

reviewed all files. When every board member has finished reviewing a file, the recorder takes the file, adds the scores from all board members, and assigns the file one numerical score. Next the recorder passes the file to another recorder who checks the score. A programmer inputs the score into a database that arranges each officer's name in a single list containing the relative standings of all officers considered.¹⁷⁸ This list is commonly known as the "Order of Merit List."

After voting all files, the board verifies the numerical scores. It looks at the officers and the scores on the Order of Merit List, and draws a line between "officers who are fully qualified and who are not fully qualified for promotion."¹⁷⁹ The board will not recommend for promotion any officer deemed not fully qualified.¹⁸⁰

file. As files pass between board members, no one can see how the other members voted a particular file. There is also no discussion between the board members during the voting process.

¹⁷⁸ DA MEMO 600-2, *supra* note 160, para. A-8a(2).

¹⁷⁹ *Id.* para. A-8a(3).

¹⁸⁰ See 10 U.S.C. § 616(c) (1994) (stating that a selection board "may not recommend an officer for promotion unless (1) the officer receives the recommendation of a majority of the members of the board; and (2) a majority of the members finds the officer is fully qualified for promotion"); 10 U.S.C. § 616(d) (1994) (stating that "an officer on the active-duty list may not be promoted to a higher grade . . . unless he is considered and recommended for promotion to that grade by a selection board . . .").

In phase two, each board member reviews the files of officers considered for promotion below the zone.¹⁸¹ To be recommended for promotion, officers considered in this category must "possess the potential for promotion ahead of their contemporaries."¹⁸² Each board member assigns a numerical score to each file considered. The board uses that score to determine the relative standing of below the zone officers.¹⁸³ After the board determines the minimum and maximum number of below the zone selections allowed, the programmer integrates the tentative below the zone selectees into the Order of Merit List for officers in and above the zone.¹⁸⁴ By the end of phase two, the board will have one Order of Merit List for all officers considered for promotion ranked by their numerical score from highest to lowest.

In phase three, the board identifies the officers on the Order of Merit List who are "best qualified" for promotion.¹⁸⁵ The board initially determines who is best qualified by drawing a line on the Order of Merit List after the number of officers that the Secretary has authorized for promotion.¹⁸⁶

¹⁸¹ Officers eligible for promotion consideration below the zone have served less time in their current rank than most of the other officers considered with them for promotion. AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. Below-the-zone consideration does not apply to promotions to captain. DA MEMO 600-2, *supra* note 160, para. A-8(b).

¹⁸² DA MEMO 600-2, *supra* note 160, para. A-8b(4).

¹⁸³ *Id.* para. A-8b(3).

¹⁸⁴ *Id.* para. A-8b(5).

¹⁸⁵ *Id.* para. A-8c(1).

¹⁸⁶ In addition to providing general instructions to the board in the Memorandum of Instruction, the Secretary must tell each board member the maximum number of officers in each

For example, if there are 1000 officers considered by the promotion board and the Secretary has authorized the promotion of 700 officers, the board will tentatively draw a line after the 700th name on the Order of Merit List.

After the board draws the line between those officers tentatively selected and those not selected, the board conducts an equal opportunity assessment.¹⁸⁷ The board compares the number of officers above the tentative selection line to the total number of first-time considered officers in the promotion zone to determine the selection rate.¹⁸⁸ The board then compares the total number of minorities and females selected to the total number of minorities and females first-time considered in the promotion zone to determine the selection rate for each minority and gender category identified by the Secretary.¹⁸⁹ If the board fails to achieve the same selection rate for minority and female officers as

competitive category under consideration that the board may recommend for promotion to the next higher grade. 10 U.S.C. § 615(b)(1) (1994). See also DOD DIR. 1320.12, *supra* note 163, para. F.1.b(2); AR 600-8-29, *supra* note 165, para. 1-33a(1)(e).

¹⁸⁷ DA MEMO 600-2, *supra* note 160, para. A-8c(2)(a).

¹⁸⁸ The board does not limit this comparison to those officers who are fully qualified.

¹⁸⁹ For example, if a board may select 700 of the 1000 officers considered, then the overall selection rate is 70 percent. If the overall selection rate is 70 percent, the selection goal in each of the stated minority and gender categories should also be 70 percent. This means that if there are 100 Black officers in the 1000 officers considered, the board would need to select 70, or 70 percent, of these officers to meet its selection goal. If 200 of the officers considered are female, then the board would need to select 140 of them to meet its selection goal. The goal is to promote all categories of officers considered at the same rate.

the selection rate for all other officers considered for the first time, the board must conduct another review of the files in the specific group or groups where it failed to achieve the same rate. "This review is required even if the selection of one additional individual in a minority or gender group would result in a selection rate equal to or greater than the equal opportunity goal for the minority or gender group."¹⁹⁰

During this second review of the files, board members look for indicators of past personal or institutional discrimination against individual officers. "Such indicators

¹⁹⁰ The quoted language takes precedence over the language currently stated in the first sentence of Department of Army Memo 600-2, paragraph A-8c(2)(a)(1), and has been used in Memoranda of Instruction to promotion boards since November, 1995. In its entirety, the following language has replaced the general guidance contained in the first sentence of Department of Army Memo 600-2, paragraph A-8c(2)(a)(1):

Your goal is to achieve a selection rate in each minority or gender group (minority groups: Black, Hispanic, Asian/Pacific Islander, American Indian, and Other/Unknown; gender group: Female) that is not less than the selection rate for all officers in the primary zone of consideration. You are required to conduct a review of files for the effects of past discrimination in any case in which the selection rate for a minority or gender group is less than the selection rate for all first time considered officers. This review is required even if the selection of one additional minority or gender group would result in a selection rate equal to or greater than the equal opportunity goal for the minority or gender group.

See Memorandum of Instruction for Fiscal Year 1996 Lieutenant Colonel, Army Competitive Category, Promotion Board, released 14 Mar. 1996 (original on file with Headquarters, Department of the Army, Deputy Chief of Staff Personnel). The remainder of paragraph A-8c, remains unchanged.

may include disproportionately lower evaluation reports, assignments of lesser importance or responsibility, or lack of opportunity to attend career-building military schools."¹⁹¹ If the board finds these indicators or any other evidence of discrimination, it must "revote the record of that officer and adjust his or her relative standing to reflect the most current score."¹⁹² The new score could be higher, lower, or the same as the original score. If the new score is higher, this revote may result in the promotion of a minority or female officer who may not have been promoted based on initial scores. If a minority or female officer moves above the tentative select line on the Order of Merit List, another officer may move down the list. The officer who moves down may be a minority or a nonminority officer. This downward movement may result in the nonselection of an officer who would have been selected but for the revote of the minority or female officer's file.¹⁹³

After completing the revote of files, the board must again determine whether it has met the Secretary's equal

¹⁹¹ DA MEMO 600-2, *supra* note 160, para. 10.

¹⁹² *Id.* para. A-8(c)(2)(a)(1). If the board does not find any indication of discrimination against any officers, it has no authority to revote files.

¹⁹³ Some promotion boards receive an "optimum number" and a "maximum number" of officers to select for promotion. See *id.* para. A-8(d)(6). If a board revotes a file and raises the numerical score, the affected officer will move up on the Order of Merit List. Officers who move down the list may fall below the optimum number of officers allowed to be selected, but still be above the maximum number of officers authorized for promotion. As a result, the officer moving down may still be recommended for promotion.

opportunity selection goals in each minority or gender category. If it still has not met the goals, it may not conduct any further votes on the files. It must, however, review the files in groups where it failed to achieve selection goals to "assess any patterns in the files of nonselected officers of that minority or gender group."¹⁹⁴ The board must discuss any patterns found and the nonattainment of specific selection goals in its after-action report to the Secretary.¹⁹⁵

Besides assessing whether it has met equal opportunity goals, the board must also assess whether it has met other goals set by the Secretary.¹⁹⁶ If it fails to meet other goals, the board must follow the Memorandum of Instruction requirements for adjusting officers on the Order of Merit List.¹⁹⁷ The board must also discuss the failure to meet these goals in its after-action report. Once the board has finished conducting all of the required phase three assessments, it

¹⁹⁴ *Id.* para. A-8(c)(2)(a)(2).

¹⁹⁵ The after-action report to the Secretary also contains the list of officers the board recommends for promotion, the list of those not recommended for promotion, the statistical summaries of the board, and the board's certification that it has followed all the instructions given to it. *Id.* para. I-1.

¹⁹⁶ Usually the Secretary establishes goals for selecting officers who served in joint duty assignments and specific career fields, and for selecting officers with special skills. See *id.* paras. A-8c(2)(b), A-8c(2)(c), A-8c(2)(d).

¹⁹⁷ The instructions establish revote procedures if a board fails to meet its goal for officers who served in joint duty assignments. See *id.* para. A-8c(2)(b). There are also specific instructions requiring the board to shift officers on the Order of Merit List if it fails to meet career field or skill selection goals. See *id.* paras. A-8c(2)(c), A-8c(2)(d).

draws a firm line on the Order of Merit List between those officers best qualified for promotion in light of the Army's needs and those who are not. The board uses the Order of Merit List to develop two separate lists to include as enclosures to its report to the Secretary. The names on both lists are in alphabetical order; the board does not reveal how it ranked officers on the Order of Merit List.

Throughout the promotion process, board members may identify files of officers who they think should be considered for possible involuntary separation. During phase four, each board member must reconsider each file so identified.¹⁹⁸ If a majority of the board determines officers should have to show cause why they should be retained on active duty, then the board will forward a list of those officers to the Secretary.¹⁹⁹

C. Evaluation Under Adarand

In *Adarand*, the Supreme Court held that a strict scrutiny standard applies to "all racial classifications" imposed by federal, state, and local actors.²⁰⁰ Applying this standard to the Army's promotion process raises three issues. First, whether the promotion process even involves a racial

¹⁹⁸ *Id.* para. A-8d.

¹⁹⁹ *Id.* para. I-1a(1). See also 10 U.S.C. § 617(b) (1994).

²⁰⁰ *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995).

classification subject to *Adarand's* strict scrutiny standard. If it does, the second issue is whether there is a compelling Army interest justifying the use of the process. If a compelling interest exists, then the third issue is whether the Army has narrowly tailored the process to achieve that compelling interest.

1. *Racial Classification*--Determining whether the Army's promotion process creates a racial classification subject to *Adarand's* strict scrutiny standard requires an examination of several sections of the Memorandum of Instruction to the board.

Paragraph 10 of the Memorandum of Instruction, titled "[e]qual opportunity," contains an introduction and three subparagraphs.²⁰¹ The introduction briefly explains the Army's equal opportunity policy. Although the introduction mentions race and gender,²⁰² that is insufficient to create a racial or

²⁰¹ DA MEMO 600-2, *supra* note 160, para. 10.

²⁰² The introduction to paragraph 10 reads in its entirety:

The success of today's Army comes from total commitment to the ideals of freedom, fairness, and human dignity upon which our country was founded. People remain the cornerstone of readiness. To this end, equal opportunity for all soldiers is the only acceptable standard for our Army. This principle applies to every aspect of career development and utilization in our Army, but it is especially important to demonstrate in the selection process. To the extent that each board demonstrates that race, ethnic background, and gender are not impediments to selection for school, command, or promotion, our soldiers will have a clear perception

gender classification triggering review under either a strict scrutiny or intermediate scrutiny standard.²⁰³ There must be other characteristics present to "transform the mere mention of race into a racial classification."²⁰⁴

The three subparagraphs of paragraph 10, coupled with the other board instructions, go beyond merely mentioning race and gender. These paragraphs impose specific selection goals²⁰⁵ on

of equal opportunity in the selection process.
(emphasis added).

Id. para. 10.

²⁰³ See *Baker v. United States*, No. 94-453C, 1995 U.S. Claims LEXIS 236, at *29, *34-35 (Ct. Cl. Dec. 12, 1995). In *Baker*, 83 retired Air Force colonels challenged on equal protection grounds the Memorandum of Instruction given to a Selective Early Retirement Board in 1992. *Id.* One part of the instruction told the board to "be particularly sensitive to the possibility that past individual and societal attitudes" may have placed minority and female officers at a disadvantage from a total career perspective. *Id.* at *22. The instruction did not tell the board that it had to consider race or gender in its discharge decisions; it did not establish a quota or goal for the percentage of minorities or women to be discharged; and it did not list race or gender in the list of factors that the board members should consider in making separation decisions. *Id.* at *27. Since the instruction was "nothing more than a hortative comment . . . or reminder," the court held it did not constitute a racial classification subject to strict scrutiny. *Id.*

The Army's instruction would not be classified as a "hortative comment." It lists specific minority groups, imposes goals for each of those groups, and requires special procedures anytime a board does not achieve a specific racial goal. The Army's instruction is, therefore, clearly distinguishable from the instructions in *Baker*.

²⁰⁴ Characteristics that would transform the mere mention of race or gender into a race or gender classification include quotas, goals, and incentives. *Id.* at *29.

²⁰⁵ The selection goal for each of the stated minority and gender groups is "not less than the selection rate for all officers in the promotion zone." DA MEMO 600-2, *supra* note 160, para. A-8c(2)(a)(2).

the board based on race and gender,²⁰⁶ require the board to look again at minority and gender files when selection goals have not been met,²⁰⁷ and direct the board to report the extent to which it failed to achieve any goals by the end of the board process.²⁰⁸ While the board bases its first review of files primarily on merit, the second review goes well beyond that; it clearly requires the board to isolate files based solely on race, ethnicity, and sex.

During the second review, the board searches the segregated files for any evidence of discrimination. If a board member subjectively "thinks" there is evidence that the Army has discriminated against someone, the board must revote the file and assign it another numerical score. Merit plays

²⁰⁶ The first subparagraph alerts the board to the possibility that "officers in groups for which [it had] an equal opportunity selection goal" may have been subject to past personal or institutional discrimination. *Id.* para. 10a. The groups for which the board has selection goals are Blacks, Hispanics, Asian/Pacific Islanders, American Indians, and women (except for the Army Nurse Corps where there is a selection goal for men). *Id.* para. A-2.

²⁰⁷ The second subparagraph explains that the selection goal is not to be interpreted as a quota. *Id.* para. 10b. However, if the board fails to meet the goals after the first review of the files, it is "required" to target the files in the minority or gender group where it did not meet the selection rate and "look again for evidence of discrimination." *Id.* See also *id.* para. A-8c(2)(a)(1).

²⁰⁸ After reviewing the files again, if the board still has not met its selection goal, the last subparagraph requires the board to report "the extent to which minority and female officers were selected at a rate less than . . . nonminority officers." *Id.* para. 10c. See also *id.* para. A-8c(2)(a)(2) (requiring the promotion board to discuss in its after action report the extent to which it does not meet equal opportunity selection goals and patterns in the files of nonselected officers of affected minority or gender groups).

no part in determining whether to revote a file. If the board still has not met its selection goals after revoting the files, it must explain the variance in writing. At no time does the Secretary require the board to document what evidence of discrimination prompted it to revote any file.

These equal opportunity instructions contain distinct race- and sex-based procedures that potentially benefit only minority and female officers. The plain language of the instructions forecloses the possibility that white males²⁰⁹ could ever benefit from the revote procedure.²¹⁰ Differentiating between groups in this manner clearly creates racial and gender classifications.²¹¹ After *Adarand*, such classifications²¹² are subject to strict scrutiny review.²¹³

²⁰⁹ Only white males considered at Army Nurse Corps promotion boards may benefit from the revote procedure because they are in the minority of officers considered. It is interesting to note, however, that while these white males receive the revote benefit like other minority officers, no majority group loses the benefit.

²¹⁰ See *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir. 1993) (finding a racial classification from the plain language of an ordinance that foreclosed a benefit to white males otherwise provided to minorities, women, and handicapped individuals).

²¹¹ See *Baker v. United States*, No. 94-453C, 1995 U.S. Claims LEXIS 236, at *29, *32 (Ct. Cl. Dec. 12, 1995) (explaining in dicta that if the instruction to the Selective Early Retirement Board had "required a consideration of race, or if it had established racial goals and quotas," the court's conclusion that the instruction did not create a racial classification "may well have been different").

²¹² Again, gender classifications may only be subject to an intermediate scrutiny standard. See *supra* notes 134-135 and accompanying text. Since the Court has not definitively resolved this issue, though, this paper will analyze it under the higher strict scrutiny standard.

²¹³ See *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 609 (1990), *overruled in part by*

2. *Compelling Government Interest*--For the equal opportunity instructions in the Army's promotion process to pass *Adarand's* strict scrutiny standard, the Army needs a compelling government interest justifying the racial classifications created by the instructions. Two potential compelling interests are remedying past discrimination and maintaining combat readiness. This section will discuss both of these interests in detail.

a. *Remedying Past Discrimination*--Remedying unlawful past discrimination is the only compelling interest the Supreme Court has approved.²¹⁴ To advocate this interest, the Army needs documented evidence of discrimination in its work force. This evidence may include policies, witness statements, statistics, administrative or judicial findings of discrimination, or any other tangible evidence. Mere admissions of discrimination or evidence of societal

Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995) (professing that "[g]overnmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by [Supreme Court] cases, exact costs and carry with them substantial dangers"); *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989) (explaining that classifications based on race "carry a danger of stigmatic harm" and "may promote notions of racial inferiority;" they must be "strictly reserved for remedial settings"); *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (applying constitutional scrutiny to "a program that employs racial or ethnic criteria, even in the remedial context").

²¹⁴ *United States v. Paradise*, 480 U.S. 149, 166 (1987).

discrimination against women and particular minority groups are inadequate.²¹⁵

The Army has a long history of discrimination against Black soldiers. These soldiers have participated in every war in which America has fought.²¹⁶ During much of their participation, white soldiers and commanders treated Black soldiers like second class citizens by either rejecting their participation completely or by segregating them into separate units. From the Revolutionary War until 1940, Black soldiers served in the military only when the military needed them.²¹⁷ During World War II, the Army allowed Black soldiers to serve, but it excluded them from many jobs and forced them to serve in segregated units.²¹⁸ In 1948, President Truman took the first affirmative action toward integrating Black soldiers into the armed forces when he signed an executive order requiring "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin."²¹⁹ Notwithstanding this action, true integration did not come until the Korean War when white

²¹⁵ *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986).

²¹⁶ RICHARD J. STILLMAN, II, *INTEGRATION OF THE NEGRO IN THE U.S. ARMED FORCES 1* (1968) (tracing the integration of Black soldiers into the United States military from the American Revolution until the Vietnam War).

²¹⁷ *Id.* at 20. "When it did not [need them], [the military] rejected them." *Id.* at 20-21.

²¹⁸ *Id.* at 22-23.

²¹⁹ Exec. Order No. 9981 (1948), reprinted in *BLACKS IN THE MILITARY: ESSENTIAL DOCUMENTS* 239 (Bernard C. Nalty & Morris J. MacGregor eds., 1981).

commanders realized that segregated units diminished the overall effectiveness of the military.²²⁰

Although the Army finally ended segregation, discrimination did not end.²²¹ During Vietnam, there were very few Black officers and racial tensions ran high.²²² The Army then became more aggressive with its equal opportunity programs.²²³ In 1971, only 3.5% of the Army's officer personnel and 13.7% of its enlisted personnel were Black.²²⁴

²²⁰ 12 BLACKS IN THE UNITED STATES ARMED FORCES: BASIC DOCUMENTS 141 (Morris J. MacGregor & Bernard C. Nalty eds., 1977). "By the end of 1953, the Army was ninety-five percent integrated and so the services have remained ever since." Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 521 (1991) (tracing the integration of Blacks, women, and gays into the armed forces).

²²¹ After the Korean War the Army reduced its personnel. These reductions affected Blacks in greater proportions than other minorities. RICHARD O. HOPE, *RACIAL STRIFE IN THE U.S. MILITARY: TOWARD THE ELIMINATION OF DISCRIMINATION* 37 (1979). To help alleviate the problem, the Secretary of Defense issued a directive in 1963 clearly stating that the Department of Defense "was to conduct all of its activities free of racial discrimination and to provide equal opportunity to all personnel in the armed forces . . . irrespective of their race." *Id.*

²²² Karst, *supra* note 220, at 521.

²²³ "In 1969, the Secretary of Defense issued a Human Goals Charter that remains the basis for [the Department of Defense's] equal opportunity program." UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/NSIAD-96-17, *MILITARY EQUAL OPPORTUNITY: CERTAIN TRENDS IN RACIAL AND GENDER DATA MAY WARRANT FURTHER ANALYSIS* 2 (1995). The Charter states "that [the Department of Defense] should strive to ensure that equal opportunity programs are an integral part of readiness and to make the military a model of equal opportunity for all, regardless of race, color, sex, religion, or national origin." *Id.* The equal opportunity and affirmative action directives, instructions, and regulations issued since the Charter all help to ensure equal opportunity.

²²⁴ BLACKS IN THE MILITARY: ESSENTIAL DOCUMENTS 344 (Bernard C. Nalty & Morris J. MacGregor eds., 1981). See also UNITED STATES ARMY RESEARCH INSTITUTE FOR BEHAVIORAL AND SOCIAL SCIENCES, *RACE RELATIONS RESEARCH IN THE U.S. ARMY IN THE 1970s: A COLLECTION OF SELECTED READINGS* 413-71 (James A. Thomas ed., 1988) (describing institutional

As of September 1995, the Army's Black population increased to 11.2% of the total number of officers²²⁵ and thirty percent of the enlisted personnel.²²⁶

Besides discriminating against Black soldiers, the Army has a long history of discriminating against female soldiers. During World War II, the Army established the Women's Auxiliary Corps as a separate "auxiliary" force to meet

discrimination against Black personnel in the United States Army from 1962 to 1982).

²²⁵ DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE, SEMI-ANNUAL RACE/ETHNIC/GENDER PROFILE OF THE DEPARTMENT OF DEFENSE FORCES, (ACTIVE AND RESERVE), THE UNITED STATES COAST GUARD, AND DEPARTMENT OF DEFENSE CIVILIANS 14 (1995) [hereinafter SEMI-ANNUAL RACE/ETHNIC/GENDER PROFILE].

Active duty Army officers are generally college graduates. During fiscal year 1993, approximately seven percent of newly commissioned officers were Black. OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE [FORCE MANAGEMENT POLICY], POPULATION REPRESENTATION IN THE MILITARY SERVICES FISCAL YEAR 1993 iv (1994) [hereinafter POPULATION REPRESENTATION IN THE MILITARY SERVICES]. Since only seven percent of the 21-35 year old college graduate civilian population was also Black, the seven percent accession rate of Blacks into the Army officer population shows proportional representation. *Id.*

²²⁶ SEMI-ANNUAL RACE/ETHNIC/GENDER PROFILE, *supra* note 225, at 14.

In fiscal year 1995, Blacks composed 12% of the officers entering active duty and 22.5% of the enlisted soldiers. DD Forms 2509, *supra* note 155 (containing statistics from fiscal year 1995 Army officer and enlisted recruiting and/or accessions). Unfortunately, accurate statistics showing the percentage of Blacks qualified for officer and enlisted positions in fiscal year 1995 are not yet available.

Fiscal year 1993 statistics are the latest available. These statistics show that "throughout the history of the all-volunteer force," "Blacks were amply represented in the military overall." POPULATION REPRESENTATION IN THE MILITARY SERVICES, *supra* note 225, at iii. In fact, "within the enlisted force, Blacks were overrepresented among [non-prior service] duty accessions (17 percent) relative to the 18-23 year-old civilian population (14 percent)." *Id.*

manpower shortages.²²⁷ These women experienced "unequal enlistment and discharge procedures, dependency benefits, and promotion and combat restrictions."²²⁸ In 1948, Congress took affirmative action to establish permanent places for women in the military by passing the Women's Armed Services Act of 1948.²²⁹ However, women still could not serve in combat positions²³⁰ and could only join the Army in limited numbers.²³¹ In 1967, President Johnson signed a public law removing the restrictions on the careers of female officers and removing the two-percent ceiling on the number of women allowed to serve.²³² Shortly thereafter, the Army promoted two women to brigadier general.²³³ Since then, the Army's female population has increased from 6.3% to 13.4%.²³⁴

²²⁷ Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLINE J. PUB. L. & POL'Y 199, 202 (1994).

²²⁸ *Id.* The result of stereotyping women into support roles and excluding them from "the real action" is "a serious risk of demoralization." Karst, *supra* note 220, at 524.

²²⁹ JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 113 (rev. ed. 1992).

²³⁰ Reasons behind the combat exclusion included concerns about the physical strength of women, placing them among combat soldiers thereby distracting them, and very high attrition rates of women. *Id.* at 162. "Of enlisted women, 70 to 80 percent left the service before their first enlistments were up." *Id.* at 163. This turnover rate during the 1960s resulted in questions about the cost effectiveness of all programs for women. *Id.*

²³¹ The act imposed a two-percent ceiling on the proportion of women on duty in each service. *Id.* at 120.

²³² *Id.* at 192. The media saw Public Law 90-130 as a women's promotion law because of serious problems the military had in lower officer ranks. *Id.* at 193.

²³³ *Id.* at 202.

²³⁴ DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE, *REPRESENTATION OF MINORITIES AND WOMEN IN THE ARMED FORCES: 1976-1995* 5 (1996).

Along with historical evidence of discrimination, the Army may also use statistical evidence to demonstrate discrimination. Developing statistical evidence requires the Army to compare minority and female representation in specific ranks to the relevant labor pool. In the officer promotion process, officers eligible for promotion to a specific rank constitute the relevant labor pool.²³⁵ The Army must compare the selection rates of minority and female officers to the selection rates of all other officers eligible for promotion at specific ranks. Statistically significant differences between these selection rates provide the Army with support for its affirmative actions. These differences must be great enough to provide the Army a "strong basis in evidence" for the conclusion that affirmative actions are necessary.²³⁶ Evidence that boards have merely failed to achieve selection goals will be insufficient. Only a pattern of substantial disparities will undercut the presumption that race or gender did not impact the results.²³⁷ The greater the statistical disparity over a period of time, the stronger the Army's argument that it needs to take affirmative action to remedy discrimination.

²³⁵ See discussion *infra* part III.C.3.a.

²³⁶ See *supra* notes 124-126 and accompanying text.

²³⁷ Currently, two standard deviations is the only statistical disparity expressly recognized by the Supreme Court as sufficient to constitute a "strong basis in evidence." See *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977).

During the last twenty years, the Army has consistently taken affirmative actions to remedy its discrimination against Blacks, females, and other minorities. Even now, the Army engages in extensive recruiting and outreach programs targeting minorities and women.²³⁸ It also provides training and sets goals to ensure that minorities and females progress in the service. Unlike many civilian jobs, soldiers cannot enter the Army at senior levels. It is a closed system that requires soldiers to enter at the lower enlisted and officer ranks and progress from there. As a result, the Army has few affirmative actions available to promote soldiers.

The affirmative action the Army uses to promote officers is a selection goal for each minority and gender group considered by a promotion board. The Army designed its selection goals as a diagnostic tool so the board can measure whether each group has received an equal opportunity for promotion.²³⁹ Since 1992, statistics prove that the Army has consistently provided equal opportunity to several minority groups. For example, promotion boards have regularly selected

²³⁸ See OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (PUBLIC AFFAIRS), NEWS RELEASE No. 604-95, FY 1995 RECRUITING EFFORTS PRODUCE RIGHT-SIZED, QUALITY FORCE (1995); POPULATION REPRESENTATION IN THE MILITARY SERVICES, *supra* note 225. Army outreach and recruitment efforts that do not "work to create a 'minority-only' pool of applicants" or to place nonminorities "at a significant competitive disadvantage" should be "considered [a] race-neutral means of increasing minority opportunity" and not subject to the *Adarand* standards. Memorandum, Assistant Attorney General, United States Department of Justice, to General Counsels, subject: *Adarand*, 7 (28 June 1995). See also REPORT TO THE PRESIDENT, *supra* note 4, at 41.

²³⁹ DA MEMO 600-20, *supra* note 160, para. 10b.

Asian Americans and American Indians at rates comparable²⁴⁰ to the selection rates for all other officers considered by boards promoting officers to the ranks of captain, major, lieutenant colonel, and colonel.²⁴¹ The boards have also generally achieved comparable selection rates for Hispanics²⁴²

²⁴⁰ The Army has developed an automated system that calculates the selection rates on all of its Military Equal Opportunity Assessments and determines whether the rates achieved are within a satisfactory range of the established goals. See *supra* note 155 and accompanying text. The computer then generates a Military Equal Opportunity Assessment that reflects whether "comparable" or "different" selection rates have been achieved. The author offers no explanation of the statistical difference between "comparable" selection rates and "different" selection rates because no written explanation could be located.

²⁴¹ Promotion boards for captains through colonels selected Asian Americans at comparable rates during all four fiscal years. See DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal year 1992 through 1995 for the ranks of captain through colonel).

Promotion boards for majors through colonels selected American Indians at comparable rates during all four fiscal years. DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal year 1992 through 1995 for the ranks of major through colonel). Captains' boards achieved comparable selection rates for fiscal years 1992 through 1994. The fiscal year 1995 captain's board showed a statistical difference in selection rates, but the numbers do not appear egregious. There were 12 American Indians considered by the board and the board selected nine of them, resulting in a 75% selection rate. The overall selection rate for the board was 91.59%. Had the board selected two more American Indians for a total of 11 out of the 12 considered, the board would have achieved a comparable selection rate. This result demonstrates that the smaller the number of officers available to consider in a minority or gender group, the greater the impact that not selecting one officer will have on the selection rate. DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal year 1992 through 1995 for the rank of captain).

²⁴² Promotion boards for lieutenant colonels and colonels selected Hispanics at comparable rates during all four fiscal years. DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal year 1992 through 1995 for the ranks of lieutenant colonel and colonel).

Promotion boards to major achieved comparable rates of selection for fiscal years 1994 and 1995. DD Forms 2509,

and females.²⁴³ Only promotion boards for the rank of colonel, however, have consistently achieved comparable selection rates for Black officers.²⁴⁴ Captain through lieutenant colonel boards have consistently fallen short of their goals for promoting Black officers.²⁴⁵

The failure of these boards to achieve comparable selection rates for Black officers does not mean the Army has

supra note 155 (containing promotion statistics from fiscal year 1992 through 1995 for the rank of major).

Captains' boards only achieved a comparable rate in fiscal year 1994. In fiscal year 1995, the board was four officers short of achieving its goal. Promotion boards for captains through colonels selected Asian Americans at comparable rates during all four fiscal years. DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal year 1992 through 1995 for the ranks of captain through colonel).

²⁴³ Colonels' boards selected females at comparable rates during all four fiscal years. DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal year 1992 through 1995 for the rank of colonel). Majors' boards achieved comparable selection rates during the last three fiscal years. DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal year 1993 through 1995 for the rank of major).

Promotion boards for the ranks of lieutenant colonel and captain achieved comparable selection rates for females in fiscal year 1995. However, neither the lieutenant colonels' nor the captains' boards achieved comparable selection rates for fiscal year 1994. The captains' boards also failed to achieve a comparable rate in fiscal year 1993. DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal years 1992 through 1995 for captains and lieutenant colonels).

²⁴⁴ See DD Forms 2509, *supra* note 155 (revealing comparable selection rates for Black officers to the rank of colonel for fiscal years 1992 through 1995).

²⁴⁵ Captains' boards did not achieve comparable selection rates for Black officers in any of the last four fiscal years. Majors' boards only achieved a comparable rate in fiscal year 1995. Lieutenant colonels' boards achieved comparable rates in fiscal years 1992 and 1994. DD Forms 2509, *supra* note 155 (containing promotion statistics from fiscal years 1992 through 1995 for the ranks of captain through lieutenant colonel).

not provided them an equal opportunity for promotion or that it currently discriminates against them.²⁴⁶ Yet the Army's consistent failure to achieve comparable selection rates at certain promotion boards, coupled with its extensive history of discrimination, demonstrates that the Army still has a compelling interest in remedying past discrimination against Black officers at ranks where the selection rate is significantly lower²⁴⁷ than the overall selection rate for all officers considered.²⁴⁸ As such, the Supreme Court's "compelling interest" analysis would permit the Army to give an equal opportunity instruction to those promotion boards to help increase the representation of Black officers.

The Army may also have a compelling interest in remedying discrimination against some female officers. While the numbers indicate that boards generally select female officers at rates comparable to the selection rate for other officers considered, the Army still precludes females from serving in

²⁴⁶ See UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/NSIAD-96-17, MILITARY EQUAL OPPORTUNITY: CERTAIN TRENDS IN RACIAL AND GENDER DATA MAY WARRANT FURTHER ANALYSIS 3 (1995) (noting that "the existence of statistically significant disparities does not necessarily mean they are the result of unwarranted or prohibited discrimination. Many job-related or societal factors can contribute to racial or gender disparities").

²⁴⁷ See discussion *supra* part II.C and *infra* part IV.C.2.a (elaborating on how great a statistical disparity must exist before race- or gender-conscious action is justified).

²⁴⁸ See discussion *infra* part III.C.3 (explaining that the Army may only give equal opportunity instructions for certain ranks and certain minority or gender groups depending on the evidence the Army has to support such instructions).

certain combat positions.²⁴⁹ To the extent the Army's combat restrictions have limited career-enhancing opportunities for female officers, the Army still has a compelling interest in alerting a board of its discriminatory policy.²⁵⁰ The Army may use an equal opportunity instruction to alert boards considering females adversely affected by the policy, but it may not furnish a similar instruction to all boards. For instance, Army competitive category promotion boards²⁵¹ may receive such an instruction because females considered at those boards will be disadvantaged by their failure to hold certain positions.²⁵² Conversely, specialty branch promotion

²⁴⁹ In April 1993, the Army lifted some of the restrictions placed on combat positions. Some restrictions remain in effect. See REPORT TO THE PRESIDENT, *supra* note 4, at 43; AR 600-13, *supra* note 150. These restrictions have interfered with the ability of some women to progress in the military. REPORT TO THE PRESIDENT, *id.*

²⁵⁰ See WOMEN SOLDIERS 74 (Elisabetta Addis et al. eds., 1994) (discussing a lieutenant general's prediction that "if the combat exclusion was fully repealed, women's promotion rates would remain relatively unchanged, but a greater number would reach the colonel and general officer grades").

²⁵¹ A "competitive category" is a "group of officers who compete among themselves for promotion and, if selected, are promoted in order of rank as additional officers in the higher rank are needed." AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. The Army competitive category includes all branches of officers except those officers in one of the Army's specialty branches. See *infra* note 253 and accompanying text. Army competitive category branches include, *inter alia*, Infantry, Armor, Field Artillery, Finance, Military Intelligence, Military Police, Signal, and Quartermaster. AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. All of these Army competitive category branches are considered together for promotion at a central Army promotion board.

²⁵² For example, a female officer considered for promotion at an Army competitive category promotion board may not have been able to hold an S3 (operations) position in a field artillery unit under the Army's female assignment policy. See *supra* note 150 and accompanying text. At a promotion board, failing to hold an S3 (operations) position in a field

boards²⁵³ should not receive the instruction unless the Army's combat exclusion policy adversely affects female officers considered at these boards.²⁵⁴ Statistics demonstrate that selection rates for specialty branch officers are comparable to the overall selection rates for the relevant boards²⁵⁵ and do not warrant an equal opportunity instruction.²⁵⁶

artillery unit may hurt that female soldier when she is competing against men who have held such positions. To ensure the female officer receives an equal opportunity for promotion, the Army's current promotion procedures allow boards to look at the female officer's file and determine whether she was discriminated against because of the policy. If the board determines she was, it may revote her file taking the discrimination into consideration. This revote does not guarantee that the female officer affected by the discrimination will be promoted. The board will only recommend that the Army promote her if the numerical score on her revote moves her name above the select line on the Order of Merit List. See discussion *supra* part III.B.2.

²⁵³ The Army "specialty branches" include, *inter alia*, Chaplain's Corps, Judge Advocate General's Corps, Medical Service Corps, Dental Corps, Veterinary Corps, Army Nurse Corps, and Army Medical Specialist Corps. AR 600-8-29, *supra* note 165, glossary, sec. II, at 34. Each of these corps constitutes a separate competitive category and has its own promotion board apart from other branches.

²⁵⁴ There are still some combat positions closed to female officers in the specialty branches, but the number of closed positions is fewer than in Army competitive category branches. Failure of a specialty branch officer to hold closed positions may not be as important during the promotion process. If the Army has evidence that a female officer's failure to hold a closed position in one of the specialty branches may hurt her, then it should give an appropriate equal opportunity instruction to the promotion board. See discussion *infra* part III.D.1 and appendix A.

²⁵⁵ In 1995, the Secretary of the Army convened twenty-three officer promotion boards for the various specialty branches. Twenty-one of these boards selected female officers at rates comparable to the first-time considered selection rate. Had the other two boards selected two more female officers, they too would have achieved comparable selection rates. See 1995 Statistical Run for Lieutenant Colonel/Dental Corps promotion board results from the board convened 11 April 1995 [hereinafter 1995 LTC/DC Promotion Board Results] (revealing that the board selected four of the seven female officers considered for a 57.1% selection rate; the overall

Although the Army has a compelling interest in remedying discrimination against Black officers and perhaps some female officers, it does not have a compelling interest in remedying discrimination against other minority officers.²⁵⁷ The consistent achievement of comparable selection rates for Asian American, American Indian, and Hispanic officers demonstrates that discrimination, to the extent it formerly existed against each group, has been remedied. The Army has established selection goals for each of these minority groups. The boards have regularly selected officers in each of these groups at rates comparable to the boards' first-time considered selection rates. Therefore, the Army no longer needs the instruction for these groups. If the Army continues to use selection goals for these minority officers, it would no longer be to attain a racial balance, but rather to maintain

selection rate for first-time considered officers was 75.8%); 1995 Statistical Run for Major/Army Medical Specialist Corps promotion board results from the board convened 31 January 1995 (revealing that the board selected nine out of ten of the female officers considered for a selection rate of 69.2%; the board's overall selection rate for first-time considered officers was 81.8%). The author obtained the above statistical results from the 1995 promotion boards through a Freedom of Information Act request to the Department of the Army, Deputy Chief of Staff Personnel. All future references to the 1995 promotion boards originate from this information.

²⁵⁶ PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT 49 (Nov. 15, 1992) (stating that "there is no compelling reason to enact quotas and goals" to influence Department of Defense promotion policies).

²⁵⁷ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (explaining that remedying discrimination against one minority group for which there is evidence of discrimination does not justify remedying discrimination against other minority groups when there is no evidence of discrimination).

one. Such action would ignore the remedial purpose of affirmative action and the Supreme Court's clear prohibition against employing racial and gender classifications indefinitely.²⁵⁸

While remedying past discrimination is the only compelling interest recognized thus far,²⁵⁹ the Supreme Court stressed in *Adarand* that the government may have other compelling interests that would justify a racial

²⁵⁸ See, e.g., *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616, 630 (1987) (observing that a plan "was not designed to maintain a racial balance"); *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) (noting that a plan was a temporary measure; "it [was] not intended to maintain a racial balance, but simply to eliminate a manifest imbalance"). See also *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) (cautioning that "even when race can be taken into account to attain a balanced work force, racial classifications may not be employed to maintain a balanced work force"); *Ledoux v. District of Columbia*, 820 F.2d 1293, 1302 (D.C. Cir. 1987) (agreeing that an employer "may voluntarily adopt a plan the long-term goal of which is 'to attain a balanced work force, not to maintain one'").

²⁵⁹ The *Bakke* Court indicated that ethnic diversity in a university furthers a compelling government interest if it encompasses a broad "array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Regents of the University of California v. Bakke*, 438 U.S. 265, 256 (1978). The *Metro Broadcasting* Court recognized that the interest in enhancing broadcast diversity is "at the very least, an important governmental objective" *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 567-68 (1990), *overruled in part by Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995). Both *Bakke* and *Metro Broadcasting* were plurality opinions. Had the current Supreme Court decided these cases, the results would have been different. Four of the current Justices dissented in *Metro Broadcasting* because "the interest in increasing the diversity of broadcast views is clearly not a compelling interest." *Id.* at 612 (Rehnquist, C.J., O'Connor, Scalia, & Kennedy, JJ., dissenting).

classification.²⁶⁰ Despite this assertion by the Court, it is unclear whether a majority of the current Justices will accept nonremedial interests to justify racial classifications.²⁶¹

b. *Maintaining Combat Readiness*--Assuming the Supreme Court will recognize a compelling interest that is not remedial, the Army could argue that "combat readiness" and "military necessity" compel it to maintain a diverse work

²⁶⁰ *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995) (stating "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'").

²⁶¹ See *Croson*, 488 U.S. at 493 (Rehnquist, C.J., O'Connor, White, & Kennedy, JJ., plurality opinion) (stating that "[u]nless [racial classifications] are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"); *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in judgment) (professing that "[i]n [his] view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction"); *id.* (Thomas, J., concurring in part and concurring in judgment) (maintaining that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice"); Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough*, 5 YALE L. & POL'Y REV. 402, 403 n.3 (1987) (professing that "preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context"). But see *Croson*, 488 U.S. at 511 (Stevens, J., concurring in part and concurring in judgment) (stating that he does not agree with the premise in *Croson* or in *Wygant* that "a governmental decision is never permissible except as a remedy for a past wrong"); *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) (expressing her opinion that remedying a "past wrong is not the exclusive basis upon which racial classification must be justified").

force.²⁶² Providing equal opportunity instructions to promotion boards furthers this interest. These boards determine whether soldiers will progress in the military. Soldiers must believe that when promotion boards consider their files, the boards will treat them fairly. If boards do not treat soldiers fairly, or if soldiers think the boards will not treat them fairly, morale will decrease and frustration or anger will increase. These emotions will distract soldiers from their duties and threaten their combat readiness. Such distractions are not acceptable in a military environment that requires all soldiers to be mentally prepared at all times to accomplish any assigned mission.

The Army could also argue that boards must promote soldiers within the various race, ethnic, and gender groups at comparable rates. While boards might promote groups at comparable rates even without an equal opportunity instruction, the Army cannot afford to risk that not happening. The only way to ensure boards achieve comparable selection rates is to remind them how important equal opportunity is in a military environment. Boards must conduct themselves fairly and soldiers must have extrinsic evidence that they can advance regardless of their race, ethnicity, or sex. Comparable selection rates and diverse military units

²⁶² See *Bakke*, 438 U.S. at 311-12 (recognizing the "attainment of a diverse student body" as a "constitutionally permissible goal for an institution of higher education"). See also *supra* note 259 and accompanying text.

provide that evidence. If soldiers do not believe that promotion boards are fair and that they have an equal chance to progress, then morale and discipline problems will arise that interfere with the military mission.²⁶³

The Army must convince the Court that its compelling interest in protecting combat readiness and the integrity of the military promotion process warrants using the equal opportunity instructions. It must present concrete military policies, studies, and examples to the Court to sustain these interests. General assertions of military necessity will not sway the Court.²⁶⁴

Recent comments made within the Department of Defense and current military policies corroborate the Army's interest in combat readiness. For instance, the Secretary of Defense told the President and Congress in his annual report that "if [Department of Defense] personnel are not treated fairly, then missions they are asked to do will suffer."²⁶⁵ Additionally, the Department of Defense's equal opportunity directive states it is the Department's policy to support the Military Equal Opportunity program "as a military and economic necessity."²⁶⁶

²⁶³ See, e.g., Karst, *supra* note 220, at 521 (discussing how racial tensions ran high in the Army during the Vietnam War because there were few Black officers and a general decline in discipline and morale).

²⁶⁴ See, e.g., Croson, 488 U.S. at 505.

²⁶⁵ WILLIAM J. PERRY, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 62 (Feb. 1995).

²⁶⁶ DOD DIR. 1350.2, *supra* note 143, para. D.1. The Department of Defense added this language when it issued its

The Directive also condemns unlawful discrimination because it is "contrary to good order and discipline" and "counterproductive to combat readiness and mission accomplishment."²⁶⁷ The Army echoes that position in its command policy on equal opportunity.²⁶⁸ The Army briefly elaborates on the relationship between mission accomplishment and equal opportunity in its affirmative action plan.²⁶⁹

Presenting only the Secretary of Defense's comments and the military regulations claiming that equal opportunity is a military necessity will not be suffice to prove that equal opportunity instructions are a military necessity. History will provide additional support.²⁷⁰ The Army can refer to

new directive in August 1995. The prior directive dated December 1988 said that the Military Equal Opportunity program was "an integral element in total force readiness."

²⁶⁷ DOD DIR. 1350.2, *supra* note 143, para. D.3.

²⁶⁸ See AR 600-20, *supra* note 147, para. 6-1 (IO4, 17 Sept. 1993) (stating that the Army specifically designed its plan to "[c]ontribute to mission accomplishment, cohesion and readiness").

²⁶⁹ See *supra* note 157 and accompanying text.

²⁷⁰ Although history provides support for the Army's argument that it has a compelling interest in combat readiness, most of the historical support is from when there was a draft Army and an active civil rights movement. Today there is an all volunteer Army that has been integrated for approximately twenty years. While historical examples may be persuasive, courts may want more current examples. The Army should study the effects of racial tensions in today's military environment. Analyzing the impact that allegations of "serious race-related problems" and "racism" are having on soldiers at Fort Bragg, North Carolina, is a good place to start. See *NAACP Seeks Military Race Training*, WASH. POST, Mar. 2, 1996, at A-2; SECRETARY OF THE ARMY'S TASK FORCE ON EXTREMIST ACTIVITIES, DEFENDING AMERICAN VALUES, 3, 14 (Mar. 21, 1996) (observing that a racial, ethnic, and cultural undercurrent at the lower Army ranks "must be addressed").

specific incidents from the Vietnam War²⁷¹ to prove that maintaining a diverse military force and ensuring equal opportunity in promotions are necessary for good order and discipline.²⁷² In 1969 alone, there were almost a hundred incidents of military misconduct because of racial tensions; in 1970 there were more than two hundred such incidents.²⁷³

[T]he outbreaks of racial violence . . . could be seen as manifestations of a general collapse of morale and failure of purpose that permeated the armed forces At the root of the problem was a loss of confidence in the military as an institution, its officers, and its values. Mistrust gave way to contempt, and contempt to disobedience and revenge.²⁷⁴

²⁷¹ Even before the Vietnam War, history provides the Army with evidence that equal opportunity is a military necessity. See, e.g., STILLMAN, *supra* note 216, at 59 (discussing that when Black soldiers were serving in segregated units in World War II until the Korean War, the perception that "they were discriminated against and treated unfairly contributed to poorer performance in combat and racial tensions in peacetime assignments").

²⁷² See David Maraniss, *U.S. Military Struggles to Make Equality Work: Army Institute Confronts Racial Conflict Series*, WASH. POST, Mar. 6, 1990 (asserting that "[d]uring the 1960s and early 1970s, bases around the world were plagued by internal racial strife triggered by black frustration over discrimination in assignments, military justice and promotions In Vietnam, racial tensions reached a point where there was an inability to fight").

²⁷³ See BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* 309 (1986). At that time, an investigative reporter found that even in combat units where the bonds of mutual respect and shared responsibility were strongest, racial tensions dissolved those bonds "as the two races lashed out at each other." *Id.* at 305.

²⁷⁴ *Id.* at 309. General (Retired) Colin Powell described his observations of racial tension in Vietnam as follows:

[B]ases like Duc Pho were increasingly divided by the same racial polarization that had begun to plague America during the sixties. The base contained dozens of new men waiting to be sent out to the field and short-timers waiting to go home.

Racial tensions stemming from the Vietnam War adversely affected combat readiness and levels of unit cohesiveness until the late 1970s. Numerous studies show that unit cohesion²⁷⁵ is "a critical variable affecting soldier handling of stress in combat."²⁷⁶ In fact, "there was widespread feeling that the high levels of unit cohesion . . . achieved in [Desert Storm] had been central to the absolute minimization of the number of casualties that U.S. ground

For both groups, the unifying force of shared mission and shared danger did not exist. Racial friction took its place.

COLIN L. POWELL, *MY AMERICAN JOURNEY* 133 (1995). See also HOPE, *supra* note 221, at 39 (discussing the results of an investigation that said the major cause of "acute frustration" and "volatile anger" of Black soldiers in 1970 was "the failure in too many instances of command leadership to exercise the authority and responsibility" in monitoring military equal opportunity provisions).

²⁷⁵ "In its simplest form cohesion could be viewed as that set of factors and processes that bonded soldiers together and bonded them to their leaders so they would stand in the line of battle, mutually support each other, withstand the shock, terror and trauma of combat, sustain each other in the completion of their mission and neither break nor run." *Policy Concerning Homosexuality in the Armed Forces, Hearings Before the Senate Comm. on Armed Services, 103d Cong., 2d Sess. 266 (1993) [hereinafter Hearings]* (prepared testimony of Dr. David H. Marlowe, Chief, Department of Military Psychiatry, Walter Reed Army Institute of Research) (discussing Walter Reed Army Institute of Research studies bearing on unit cohesion).

²⁷⁶ *Id.* See also *id.* (testimony of William Darryl Henderson, Former Commander of the Army Research Institute, Author of "Cohesion: The Human Element in Combat") (testifying that "the nature of the relationship among soldiers in combat is a critical factor in combat motivation").

forces had taken."²⁷⁷ Maintaining "highly cohesive military units [is even] more important to the future than they even have been in the past" ²⁷⁸

The Army must maintain equal opportunity and the perception of equal opportunity to preserve unit cohesion and combat readiness. Decisions made at promotion boards play a critical role in the process. If the Army does not alert board members to the importance of equal opportunity at the time they are deciding the fate of officers considered, there may be statistically significant differences in promotion rates. That result would jeopardize the perception of equal opportunity and cast doubt on the entire promotion process. In turn, unit cohesion would disintegrate and combat readiness would deteriorate. Military necessity dictates that the Army not tolerate such a result.²⁷⁹

3. *Narrowly Tailored to Meet Compelling Interest*--Once the Army evinces a compelling interest in either remedying past discrimination or in maintaining combat readiness, the

²⁷⁷ *Id.* at 264 (prepared testimony of Dr. David H. Marlowe).

²⁷⁸ *Id.* at 276.

²⁷⁹ Other federal agencies can make similar arguments. Yet unless these agencies work directly in hostile or life-threatening conditions, or in law enforcement functions, their arguments would not be as compelling as the Army's. Unit cohesion and teamwork are critical during the Army's diverse missions. If soldiers do not trust each other or if they harbor discriminatory biases, it could jeopardize the success of the missions. The Army must make every effort to prevent such circumstances from developing.

Army must next prove it narrowly tailored its remedy to achieve only those interests. Courts determining whether the Army narrowly tailored its remedy will consider the following: "the necessity for the relief and efficacy of alternative remedies . . . ; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."²⁸⁰ Courts will also consider whether the remedy so closely fits the interest that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice"²⁸¹

Some portions of the Army's equal opportunity instructions clearly meet the narrowly tailored requirements of the strict scrutiny standard. The Army ties its selection goals directly to qualified officers in the zone for consideration.²⁸² This meets the requirement that employers make comparisons to relevant labor pools.²⁸³ The selection

²⁸⁰ United States v. Paradise, 480 U.S. 149, 171 (1987).

²⁸¹ City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

²⁸² See *supra* part III.B.2.

²⁸³ See, e.g., *Croson*, 488 U.S. at 501-02 (explaining that when special qualifications are needed for a position, the relevant statistical pool for the purposes of demonstrating discriminatory exclusion must be the number of people qualified to hold the position); *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977) (stating that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value").

Comparing the officers selected to the total number of officers in the Army or some other large group would not meet judicial requirements. See, e.g., *Wards Cove Packing, Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989) (determining that a comparison between the racial composition of a cannery work

goals are not quotas. Statistics prove they are aspirational goals.²⁸⁴ Boards do not achieve comparable selection rates for every minority group in every rank.²⁸⁵ While a promotion board considers race, ethnicity, or gender to discover whether it has met selection goals, it does not consider those factors to judge whether an officer is fully qualified for promotion. The board looks only at "demonstrated professionalism or potential for future service. No single factor is overriding."²⁸⁶ No officer considered for promotion has a "right" to be promoted. Each officer understands it is a competitive process and the Army only selects those officers who best meet its needs. As a result, the burden on third-party officers not selected for promotion is minimal.

a. *Identifying Specific Discrimination*--While the Army narrowly tailors some aspects of its promotion process, it fails to narrowly tailor others. For example, the Army

force with the noncannery work force was not proper because the cannery work force did not reflect "the pool of qualified job applicants").

²⁸⁴ In 1995, the Army convened a total of twenty-seven officer promotion boards for the ranks of captain through colonel. Only fourteen of these boards promoted officers in all of the minority and gender groups considered at rates comparable to the selection rate for first-time considered officers.

²⁸⁵ See discussion *supra* part III.C.2.a.

²⁸⁶ DA MEMO 600-2, *supra* note 160, para. 8.a. "However, board members may properly base their recommendation on disciplinary action, relief for cause, cowardice, moral turpitude, professional ineptitude, inability to treat others with respect and fairness, or lack of integrity." *Id.* The Army does not list race, ethnicity or gender as factors that make an officer eligible for promotion from the outset. They only become considerations if the board has not met its selection goals.

does not narrowly tailor the application of its equal opportunity instructions. The Army distributes its current instructions to centralized promotion boards for every rank and establishes selection goals for every minority and gender group. Evidence to support this broad application does not exist. To the extent the Army is remedying past discrimination, there is no evidence that remedial instructions are necessary for certain minority or gender²⁸⁷ groups at certain boards. Those boards should not, therefore, be subject to selection goals.

For example, statistics²⁸⁸ demonstrate that promotion boards for captains through lieutenant colonels have not

²⁸⁷ At most boards, women are the minority gender group. However, at promotion boards considering officers from the Army Nurse Corps, men are the minority gender group. See DA MEMO 600-2, *supra* note 160, para. A-2. If the Army has evidence that it discriminated against men in the Army Nurse Corps or evidence showing a significant statistical disparity between men and women in that corps, the Army may give an equal opportunity instruction for males considered for promotion in the Army Nurse Corps.

²⁸⁸ The statistics referenced are from the Army's Military Equal Opportunity Assessments for fiscal years 1992 through 1995. These assessments consolidate the statistical results from all Army competitive category and individual specialty branch officer promotion boards held during an entire fiscal year into one report. See *supra* notes 155, 240, 251, and 253 and accompanying text. The assessments fail to distinguish between selection rates for all officers considered by the board and those officers considered for the first time. This section will, therefore, use the overall selection rate from the assessments to analyze the need for specific promotion instructions.

When the Army analyzes whether it has a compelling interest to justify an equal opportunity instruction for a specific minority or gender group at a specific rank, it must focus on the first-time considered selection rates from previous boards similar to the one being convened. For example, when the Army convenes a board to consider the

selected Black officers at rates comparable to overall selection rates.²⁸⁹ Colonel boards have achieved comparable selection rates for Black officers.²⁹⁰ A narrow tailoring of the Army's instruction requires that the Army only furnish equal opportunity instructions for Black officers at boards recommending officers for promotion to captain, major, or lieutenant colonel.²⁹¹ Once the Army regularly achieves selection rates comparable to its selection goals at each of these ranks, it should cease issuing the instruction. Since boards have consistently achieved selection goals for Black officers at the colonel level, instructions are no longer warranted.

promotion of Dental Corps officers to the rank of lieutenant colonel, it must look only at the selection rates for minority and female officers at prior Dental Corps promotion boards for lieutenant colonel. If prior results reveal gross statistical disparities between selection rates for minority or female officers when compared to the first-time considered selection rates, then the Army has a compelling interest in giving a narrowly tailored equal opportunity instruction for the affected minority or gender groups at that promotion board. See 1995 LTC/DC Promotion Board Results, *supra* note 255 (revealing an overall selection rate of 75.8% and comparable selection rates for all but Asian and female officers; report does not reveal how statistically significant the lower selection rates for Asian and female officers are).

²⁸⁹ See *supra* note 245 and accompanying text.

²⁹⁰ See *supra* note 244 and accompanying text.

²⁹¹ Similarly, the Army should only provide equal opportunity instructions for female officers to boards considering female officers who may have been harmed by the Army's combat exclusion policy. This would not include most specialty branch promotion boards, unless statistical evidence supports such an instruction. See *supra* notes 252, 254 and accompanying text.

Should the Army attempt to argue it is necessary²⁹² to use selection goals at the colonel level even after boards have consistently achieved comparable selection rates because representation levels are low, it will lose. The proper comparison for determining whether minority and female representation levels are low is to the pool of individuals qualified to hold the higher ranking position. Lieutenant colonels with the requisite time in grade are the only people in the relevant pool for promotion to colonel. Since the Army has been selecting Black officers from this pool at rates comparable to the selection rates of all other officers considered, the Army has achieved comparable representation. The representation of Black officers will increase at the higher rank proportionate to the availability of Black officers at the lower rank. To ensure increases in minority representation at the higher ranks, the Army should focus on increasing the availability of qualified officers at lower ranks²⁹³ instead of focusing on an instruction that has already served its purpose at the colonel level.

Just as the Army should limit its instructions to specific ranks where it has evidence of discrimination, it

²⁹² Critical to this argument is the fact that the Army is a closed system and promotions are the only way minorities and females can advance in it.

²⁹³ The Army's efforts to increase minority and gender representation at the lower ranks should include aggressive recruiting and outreach to encourage accessions, as well as training individuals once accessed to ensure they possess the qualifications needed for advancement.

must also limit them to specific minority groups. For example, the Army should not mention Asian Americans, American Indians, or Hispanics in its instructions to officer promotion boards because the statistics demonstrate that remedial instructions are not necessary for those minority groups.²⁹⁴ To the extent that the Army includes specific instructions for these groups at officer boards, the instructions are overinclusive and not limited in duration. Therefore, they are not narrowly tailored.²⁹⁵

b. Limiting Board Discretion--The instructions also fail the narrowly tailored requirement because they authorize the board too much discretion to determine whether the Army has discriminated against an officer during a military career. The Army instructions state:

. . . be alert to the possibility of past personal or institutional discrimination--either intentional or inadvertent--in the assignment patterns, evaluations, or professional development of officers in those groups for which you have an equal opportunity selection goal. Such indicators may include disproportionately lower evaluation reports, assignments of lesser importance or responsibility, or lack of opportunity to attend career-building military schools. Taking these factors into consideration, assess the degree to which an officer's record as a whole is an accurate

²⁹⁴ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (demonstrating that discrimination against one group does not justify remedying discrimination against another where there is no evidence that remedial action for those groups is necessary).

²⁹⁵ See *Croson*, 488 U.S. at 506.

reflection, free from bias, of that officer's performance and potential.²⁹⁶

Considering these instructions, if a majority of the promotion board "thinks" it sees something in an individual officer's file indicating Army-related discrimination,²⁹⁷ it can revoke that officer's file and assign it a new numerical score. If that score is high enough, the board will recommend that officer for promotion.

While these instructions require boards to identify discrimination against the individual before engaging in remedial revotes of the file, the instructions are not specific enough to prevent the board from remedying discrimination that does not exist. It is impossible for a board member to look, for example, at an officer's assignment history and determine the officer did not have more challenging positions because of race or gender. Such a conclusion fails to consider other possible explanations for the assignments. Perhaps the officer repeatedly requested certain assignments because of geographic location or because the officer did not want the responsibility of tougher

²⁹⁶ DA MEMO 600-2, *supra* note 160, para. 10a.

²⁹⁷ Read in their entirety, the board instructions appear to remedy only Army-related discrimination. Read another way, however, the instructions could allow a board to remedy past personal discrimination in career development unrelated to an Army career. The Army must ensure it is correcting only Army-related discrimination; correcting societal or educational discrimination unrelated to the Army is not allowed.

assignments. When requesting those assignments, the officer probably understood and accepted that they were not career enhancing, but requested them anyway. To allow a board to look later at the assignment history in the officer's file, with no other information, and determine that the Army discriminated against the officer is clearly erroneous. The board may ultimately reward an officer for lack of judgment, ambition, or achievement.

Authorizing promotion boards to make subjective determinations of discrimination fails to narrowly remedy discrimination. Either the Army should investigate past discrimination in other forums²⁹⁸ or it should draft more specific board instructions. For example, under the Army's assignment policy for females,²⁹⁹ female officers cannot serve in certain combat-related positions. At promotion boards where the members will consider files of women who are adversely affected by the policy, the Army should tell the

²⁹⁸ The Army has several forums better suited for conducting investigations into alleged discrimination. See AR 600-20, *supra* note 147, para. 6-8 (IO4, 17 Sept. 1993) (establishing procedures for processing discrimination complaints for military personnel); DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) (establishing procedures for investigations and boards of officers not specifically authorized by other directives); DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977) (establishing procedures for requesting that errors or injustices be removed from military files); UCMJ art. 138 (1995 ed.) (establishing procedures enabling service members to request redress from superior officers when they believe themselves wronged).

²⁹⁹ See *supra* note 150 and accompanying text.

boards to be sensitive to that policy and its impact on the assignments of female officers.

Anytime the Army allows a board to remedy discrimination, the board must document the discrimination it is remedying. If the board does not document it, as in the current procedures, the Army will be unable to prove to a court that it made the required showing of discrimination before it conducted a revote, thereby creating a racial or gender classification.

c. Ensuring Combat Readiness--Should the Army pursue an interest in combat readiness, it must change the current promotion instructions to further that interest.³⁰⁰ The Army's promotion policies use the terms "mission accomplishment," "unit cohesion," and "readiness."³⁰¹ The Army does not, however, convey these concepts in the actual promotion instructions.³⁰² The instructions mention that people are the "cornerstone of readiness" and that equal opportunity "is the only acceptable standard for our Army."³⁰³

³⁰⁰ In addition to revising the promotion instructions, the Army will also need to revise its affirmative action plans, equal opportunity regulations, and promotion regulations to reflect the rationale behind continuing those plans.

³⁰¹ See DA PAM. 600-26, *supra* note 156, para. 1-4b; AR 600-20, *supra* note 147, para. 6-1 (IO4, 17 Sept. 1993).

³⁰² The current instructions mention mission accomplishment, but only remedy past discrimination. The Army needs to shift the focus of board instruction to combat readiness. It must also ensure that boards select officers based on qualifications, not race or sex.

³⁰³ DA MEMO 600-2, *supra* note 160, para. 10.

Yet the revote procedures protect only the Army's interest in remedying past discrimination. A board that finds no evidence of discrimination in an officer's file has no authority to make any adjustment based on equal opportunity. If the Army actually has a compelling interest in maintaining diversity to ensure combat readiness, then limiting the board to making changes based solely on remedying discrimination is inconsistent with that interest. The Army must modify its instructions to reflect its combat readiness interest. If it does not, and it pursues that interest, the instructions will fail the narrowly tailored prong of the strict scrutiny standard.

4. *Deference by the Courts*--The Army has two compelling interests justifying its current promotion procedures: remedying past discrimination and combat readiness. When reviewing the Army's procedures,³⁰⁴ courts will give "great deference to the professional judgment of [the Army] concerning the relative importance of a particular military interest."³⁰⁵ "This deference is at its highest when the

³⁰⁴ Courts won't even review internal military affairs unless there is "(a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." *Mindes v. Seaman*, 453 F.2d 197, 201 (1971).

³⁰⁵ *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (holding that the First Amendment does not prohibit a military regulation from restricting a servicemember from wearing a yarmulke while on duty and in uniform).

military, pursuant to its own regulations, effects personnel changes through the promotion . . . process."³⁰⁶

Courts recognize that military necessity sometimes compels discriminatory treatment.³⁰⁷

[F]rom top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.³⁰⁸

While courts will give the Army more latitude than civilian employers who engage in discriminatory practices, courts will not accord the Army blind judicial deference.³⁰⁹

³⁰⁶ Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979). See also Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (stating that "a claim to a military promotion . . . is limited by the fundamental and highly salutary principle that judges are not given the task of running the Army"); John N. Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & Pol. 147 (1993) (providing a thorough discussion of the deference accorded to the military by courts and the rationale behind it). See also Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI-KENT L. REV. 265 (1994) (criticizing the Supreme Court for the hands-off approach it has taken towards the military).

³⁰⁷ Orloff v. Willoughby, 345 U.S. 534, 540 (1955) (refusing to interfere with the decision not to commission an Army officer).

³⁰⁸ Id.

³⁰⁹ See, e.g., Anderson v. Laird, 466 F.2d 283, 296 (D.C. Cir. 1972) (declaring invalid a military regulation that

The Army must articulate and demonstrate military reasons sufficient to override a soldier's constitutional rights.³¹⁰

When the Army determined that equal opportunity instructions best met its need for remedying past discrimination, it exercised discretion. Determining whether the Army still suffers from discrimination or statistical disparities in minority or gender groups is not a discretionary question. It is a factual question. As such, courts may not afford the Army as much deference as they otherwise would have. Even if the courts accord the Army considerable deference, the Army must still put forth sufficient evidence to pass the strict scrutiny standard established by *Adarand*.³¹¹ Since the Army does not have evidence to justify its promotion instructions for every minority group at every promotion board, the instructions as written will fail judicial scrutiny.

The Army's determination that combat readiness and military necessity justify promotion instructions that create racial and gender classifications is a discretionary determination. The Army's mission is to prepare for and fight

required chapel-church attendance for West Point cadets when it was not "vital to our immediate national security, or even to military operational or disciplinary procedures").

³¹⁰ See *id.*

³¹¹ See *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting) (requiring that even when the government is pursuing its most compelling interests, it must remain within the bounds of the law).

wars.³¹² Any challenge to this determination would be a challenge to the Army's assessment of what is necessary for military personnel to be combat ready. Because military necessity and combat readiness are discretionary determinations, courts will accord the Army great deference if its promotion procedures are challenged and reviewed under *Adarand's* strict scrutiny standard.³¹³

D. Proposed Changes

To pass strict scrutiny, the Army needs to change the language and the application of the equal opportunity instructions provided to promotion boards. The Army must initially determine whether it has evidence justifying a compelling interest in remedying past discrimination or in maintaining diversity to ensure combat readiness. If the Army has insufficient evidence to establish a compelling interest in either of these, it must cease using equal opportunity instructions at all promotion boards or it must employ instructions that do not create race or gender classifications.

³¹² See *Hearings*, *supra* note 275, at 50 (explaining the different standards for uniformed and civilian employees in the Congressional Research Report to Congress on Homosexuals and U.S. Military Personnel Policy).

³¹³ See *Baker v. United States*, No. 94-453C, 1995 U.S. Claims LEXIS 236, at *19 (Ct. Cl. Dec. 12, 1995).

Should the Army determine it has a compelling interest in providing an equal opportunity instruction to a specific promotion board, it must draft instructions appropriate to that interest. This subpart explains three possible instructions proposed at Appendices A through C. The objective of each of these instructions is to protect the Army's compelling interests while also protecting the soldier's right to equal protection. Only an instruction designed to remedy past discrimination (Appendix A) or an instruction that is race and gender neutral (Appendix C) will definitely pass judicial scrutiny. However, if the Army successfully argues that maintaining diversity to ensure combat readiness is a compelling interest, then courts may allow it to use an instruction narrowly tailored to further that interest (Appendix B).

1. *Instruction to Remedy Past Discrimination*--An equal opportunity instruction designed to remedy past discrimination must specifically identify the discrimination that boards may correct. The Army should have this information prior to convening the board. It is insufficient to authorize a board during its deliberations to search a file and "guess" that discrimination occurred before it revotes that file. If the Army lacks adequate evidence to support an equal opportunity instruction for a specific minority or gender group before convening a board, then it should not mention that group in the board instructions.

The Army may establish selection goals for minority or gender groups where it has evidence of discrimination or evidence of significant statistical disparities in selection rates. However, the Army must ensure that these goals remain aspirational goals and do not become inflexible quotas. If a board fails to meet a selection goal initially, the Army may allow the board to review files for evidence of specifically identified discrimination against a specific minority or gender group. The board may also review the files to ensure it has provided each person in the affected group with an equal opportunity for promotion. If the board finds the specified discrimination or determines it did not provide an officer with an equal opportunity for promotion, it may revoke the affected file. When the Army allows a board to review an officer's file for discrimination, the Army must require the board to document the evidence it relied on and the remedy it took.

The Army may authorize an equal opportunity instruction for a particular minority or gender group only until boards consistently achieve selection rates comparable to the selection rates of all officers considered. The Army should establish an objective end date for use of the instruction. One such date could be upon achievement of comparable selection rates at consecutive promotion boards over a designated period of time. The Army must also implement a

review procedure to monitor this information. Appendix A contains an instruction designed to further the Army's interest in remedying past discrimination.

2. *Instruction to Ensure Combat Readiness*--The best instruction for ensuring combat readiness is one that clearly conveys the critical role diversity plays in the military and in the selection process, but that does not mention specific minority groups, establish selection goals, or authorize a revote procedure. This type of instruction would not create racial or gender classifications. It would not, therefore, be subject to strict scrutiny under *Adarand*.

A combat readiness instruction that contains selection goals or revote procedures would be subject to constitutional review. This review would focus not only on whether combat readiness is a compelling interest, but also on whether the Army has narrowly tailored an instruction to serve that interest. The Army's argument is that it needs diversity in its units to ensure combat readiness. Assuming a court recognizes this interest, the question becomes how may the Army achieve diversity. Outreach and targeted recruiting programs are ways the Army can increase minority and female representation in the pools of qualified individuals from which it selects new soldiers. The more minorities and females available in these pools, the greater the likelihood that the Army will select them, thereby increasing their

representation at the entry ranks. As minorities and females progress through the system, their representation at the higher ranks will increase.

Using outreach and recruiting programs will increase minority and female representation at the lower ranks, but it will not initially increase their representation at the higher ranks. Selection goals and revote procedures imposed as part of a promotion instruction will increase representation at higher levels. Courts will not, however, recognize these procedures as narrowly tailored unless the Army has evidence to that effect. The Army must demonstrate that even after recruiting specific groups, conducting extensive outreach, and furnishing a promotion board instruction that sensitizes boards to the need for diversity in the ranks, it will not be able to further its compelling interest in combat readiness. The Army must convince a court that selection goals and revote procedures are the most narrowly tailored alternative the Army has to achieve this interest. If it does not, a court will not allow it to employ such procedures.

Assuming the Army persuades a court that an instruction containing selection goals and relook procedures is narrowly tailored, the court will allow it to use an instruction such as that proposed at Appendix B. While using this instruction, the Army must carefully monitor the procedures to ensure boards strictly adhere to them. If the aspirational goals

become quotas or the second vote is based solely on race or gender, the Army will fail the strict scrutiny standard. The Army must also ensure that boards continue to select officers best qualified to meet the Army's needs. Failure to do so will result in a constitutional violation.

3. *Race and Gender Neutral Instruction*--For minority or gender groups where the Army has no evidence of discrimination or significant statistical disparities,³¹⁴ it may furnish an equal opportunity instruction that is race and gender neutral. Appendix C proposes a neutral instruction that conveys the significance of equal opportunity in the Army. Because this instruction does not list any specific minority or gender groups, does not impose any selection goals, and limits itself to conveying only the Army's equal opportunity policy, it does not create racial or gender classifications. Courts will not, therefore, apply the strict scrutiny standard to review this instruction.

IV. Civilian Personnel

Besides its military personnel, the Army also employs more than 280,000 civilians.³¹⁵ The Army regularly decides which of these employees to promote, train, assign, and fire. Each of these employment decisions follows different

³¹⁴ See *supra* notes 122-126 and accompanying text.

³¹⁵ Randall Rakers Interview, *supra* note 137.

procedures. Sometimes the consideration of race, ethnicity, or sex impacts on these decisions. As a public employer of civilian employees, the Army must justify such considerations under Title VII and the Due Process Clause of the Fifth Amendment.³¹⁶ After *Adarand*, the Fifth Amendment requires that public employers have a compelling government interest justifying the use of race-conscious affirmative action programs.³¹⁷ Even with a compelling interest, public employers must narrowly tailor affirmative action programs to accomplish that interest. Title VII's requirements are not as strict.³¹⁸ The Army should, therefore, ensure its affirmative action programs pass *Adarand's* strict scrutiny standard. By doing so, its programs will also pass Title VII's requirements.

The Army's civilian promotion process is vastly different from the military promotion process. While the Army centralizes the military process at the Department of the Army level, it affords local installations wide latitude to develop

³¹⁶ See discussion *supra* part II.B.2, II.C.

A civilian employee who challenges discrimination by a federal agency must base a claim on Section 717 of Title VII. 42 U.S.C. § 2000e-16 (1988 & Supp. V 1993). See *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976) (holding that "§ 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment"). However, the "federal government . . . is [still] obligated to act in accordance with the Constitution, and, therefore, use of race-based decisionmaking in federal government" must comply with the constitutional standards set by *Adarand*. Memorandum, Office of the Associate Attorney General, U.S. Department of Justice, to General Counsels, subject: Post-*Adarand* Guidance on Affirmative Action in Federal Employment (29 Feb. 1996).

³¹⁷ See discussion *supra* parts II.B.2, II.C.

³¹⁸ See discussion *supra* parts II.A, II.C.

their own merit promotion procedures for civilian employees. A general understanding of these local procedures and of the Army's affirmative action policies form the factual basis for determining how *Adarand* will impact on the civilian promotion process.

A. Affirmative Action Programs

The United States Government's policy is to provide "equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex or national origin."³¹⁹ Each federal agency administers its own equal employment opportunity process for civilian personnel.³²⁰ The Equal Employment Opportunity

³¹⁹ Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969). See also Exec. Order No. 10,590, 20 Fed. Reg. 409 (1955) (prohibiting "discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin," and establishing a "President's Committee on Government Employment Policy"); Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (repeating the "positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons" seeking employment with the Federal Government and establishing the "President's Committee on Equal Employment Opportunity"); Exec. Order 11,197, 29 Fed. Reg. 1721 (1965) (establishing the President's Council on Equal Opportunity); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965) (stating the United States policies of nondiscrimination in government employment and in employment by government contractors and subcontractors); Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967) (amending Executive Order 11,246 to include "sex" as a prohibited form of discrimination).

³²⁰ EARNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW AND PRACTICE 13 (8th ed. 1995).

Commission has review and oversight responsibilities for the process.³²¹

The Equal Employment Opportunity Commission requires each federal agency to maintain "a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies."³²² The Commission does

³²¹ *Id.* See also Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978) (transferring responsibility for enforcement of equal employment opportunity programs from the Civil Service Commission to the Equal Employment Opportunity Commission); J. EDWARD KELLOUGH, FEDERAL EQUAL EMPLOYMENT OPPORTUNITY POLICY AND NUMERICAL GOALS AND TIMETABLES: AN IMPACT ASSESSMENT 13-23 (1989) (tracing the history of equal employment opportunity in the federal government and the progression of responsible agencies).

³²² 29 C.F.R. § 1614.102(a) (1995). For agencies with more than 500 employees or installations with more than 2,000 employees, there are seven steps in the development and submission of an affirmative employment program. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, MANAGEMENT DIR. 714, INSTRUCTIONS FOR THE DEVELOPMENT AND SUBMISSION OF FEDERAL AFFIRMATIVE ACTION PLANS 1-5 (1988) [hereinafter MD 714]. First, the agency must conduct a program analysis. This is a comprehensive "analysis of the current status of all affirmative employment efforts within an agency." *Id.* at 1. Included in the program analysis is a work force analysis during which an agency should identify and document which equal employment opportunity groups require affirmative action efforts. *Id.* at 2.

Second, the agency uses the results from the program analysis to identify any problems or barriers the employer has. *Id.* at 3. The directive defines a "problem" as a situation or condition which needs to be corrected or changed." *Id.* A "barrier" is a "principle, policy or employment practice which restricts or tends to limit the representative employment of applicants and employees, especially protected group members." *Id.*

Third, the agency develops objectives and action items to eliminate the problems or barriers. *Id.* at 4. This should ensure equal opportunity for all employees. The agency may establish numerical goals as part of its action items, but the Equal Employment Opportunity Commission does not require it to do so. See *id.*

Fourth, the agency submits its multi-year plan to the Equal Employment Opportunity Commission. *Id.* at 4. Fifth, the Commission reviews the plan and meets with the agency to discuss it. "The ultimate objective of these meetings will be

not require affirmative action³²³ plans or programs that are race, sex, or national origin conscious.³²⁴ Nevertheless, agencies often adopt such plans to improve conditions for minorities and women.³²⁵ To protect agencies³²⁶ voluntarily adopting these affirmative action plans from "reverse discrimination"³²⁷ claims, the Equal Employment Opportunity Commission established guidelines describing when a federal agency can take affirmative actions and what kinds of actions it may take.³²⁸

The guidelines allow a federal agency to take affirmative action to correct the effects of prior discriminatory

approval of all submissions." *Id.* Sixth, the Commission approves the agency plan. *Id.* Once the Commission approves the basic plan, the agency must submit annual accomplishment reports and updates to the Commission as the seventh step in the process. *Id.*

³²³ The Commission defines "affirmative actions" for the purposes of Part 1608 as "those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." 29 C.F.R. § 1608.1(c) (1995).

³²⁴ See 29 C.F.R. § 1614.102(b)(1) (1995) (requiring that agencies "[d]evelop the plans, procedures and regulations necessary to carry out its program").

³²⁵ See 29 C.F.R. § 1608.1(a) (1995).

³²⁶ "The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement The Commission believes that it is now necessary to clarify and harmonize the principles of Title VII in order to achieve these Congressional objectives and protect those employers . . . complying with the principles of Title VII." *Id.*

³²⁷ When an employer makes a race, sex, or national origin conscious employment decision "to achieve the Congressional purpose of providing equal employment opportunity," its decision may be challenged "as inconsistent with Title VII." *Id.* People commonly call this a "reverse discrimination" claim. *Id.*

³²⁸ 29 C.F.R. § 1608.1(d) (1995).

practices, to correct an actual or potential adverse impact³²⁹ caused by an existing or contemplated employment practice, or to increase minority and female representation in labor pools³³⁰ from which the agency makes selections.³³¹ A federal agency must include three elements in any plan it establishes: a reasonable self analysis, a reasonable basis for concluding action is appropriate, and reasonable action.³³²

The agency conducts a reasonable self analysis to determine "whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment³³³ of previously excluded or restricted

³²⁹ "Adverse impact" is a theory of discrimination that "does not require a showing that the employer intentionally discriminates." HADLEY, *supra* note 320, at 447.

[T]he adverse impact theory focuses on the effects of the alleged discriminatory practice. The consequences of employment policies rather than the employer's motivation or intent is of paramount concern. The essence of the adverse impact theory is a showing that a policy or practice has a substantial adverse impact on a protected group, notwithstanding its equal application to all individuals.

SCHLEI & GROSSMAN, *supra* note 52, at 1287. "Statistics are almost always determinative in adverse impact cases." *Id.*

³³⁰ Steps designed to increase minority and female representation in the relevant labor pools from which selections will be made include recruitment and outreach programs designed to attract minority and female applicants, and training programs geared towards assisting employees in career advancement. 29 C.F.R. § 1608.4(c)(1) (1995).

³³¹ 29 C.F.R. § 1608.3 (1995).

³³² *Id.* § 1608.4 (1995).

³³³ "Disparate treatment" is the easiest theory of discrimination to understand. The essence of it "is different treatment: that Blacks are treated differently than whites, women differently than men. It does not matter whether the

groups or leave uncorrected the effects of prior discrimination."³³⁴ "The Commission does not mandate any particular method of self analysis, but such analysis may take into account the effects of past discriminatory practices by other institutions or employers."³³⁵ If the self analysis reveals the effects of uncorrected past discrimination or an employment practice resulting in an adverse impact, then the agency has a reasonable basis for establishing an affirmative action plan.³³⁶ Any corrective action taken pursuant to a plan must be reasonable "in relation to the problems disclosed by the self analysis."³³⁷ "[R]easonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees."³³⁸

treatment is better or worse, only that it is different." SCHLEI & GROSSMAN, *supra* note 52, at 13. See also *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (explaining that disparate treatment occurs when an employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.").

³³⁴ 29 C.F.R. § 1608.4(a) (1995).

³³⁵ HADLEY, *supra* note 320, at 580. See also 29 C.F.R. § 1608.4(a) (1995) (stating that "[i]n conducting a self analysis, the employer . . . should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions").

³³⁶ 29 C.F.R. § 1608.4(b) (1995).

³³⁷ *Id.* § 1608.4(c) (1995). "The plan should be tailored to solve the problems which were identified in the self analysis . . . and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole." 29 C.F.R. § 1608.4(c)(2)(i) (1995).

³³⁸ 29 C.F.R. § 1608.4(c) (1995). When the Equal Employment Opportunity Commission initially became responsible for supervising the federal equal employment program in 1979, it required agencies to adopt numerical goals and timetables

Pursuant to the guidelines established by the Equal Employment Opportunity Commission,³³⁹ the Department of Defense developed its Civilian Equal Employment Opportunity Program.³⁴⁰ Through this program, the Department of Defense recognizes "equal opportunity programs, including affirmative action programs,³⁴¹ as essential elements of readiness that are vital to the accomplishment of the . . . national security mission."³⁴² In fact, "[e]qual employment opportunity is the objective of affirmative action programs."³⁴³

for achieving those goals in any instance "where agencies found under-representation to exist." KELLOUGH, *supra* note 321, at 21. The Commission backed away from this requirement during the Reagan administration. Under its 1987 guidelines, goals and timetables are no longer required. *Id.*

³³⁹ See 29 C.F.R. § 1614.103(b)(1) (1995) (stating that part 1614 applies to the military departments).

³⁴⁰ See 32 C.F.R. § 191.1(a) (1995). The Civilian Equal Employment Opportunity Program defines "equal employment opportunity" as "[t]he right of all persons to work and advance on the basis of merit, ability, and potential, free from societal, personal, or institutional barriers of prejudice and discrimination." 32 C.F.R. § 191.3 (1995).

³⁴¹ The Department of Defense defines "affirmative action" as a "tool to achieve equal employment opportunity. A program of self analysis, problem identification, data collection, policy statements, reporting systems, and elimination of discriminatory policies and practices, past and present." 32 C.F.R. § 191.3 (1995).

³⁴² 32 C.F.R. § 191.4(a) (1995). See also DEP'T OF DEFENSE DIR. 1440.1, THE DOD CIVILIAN EQUAL EMPLOYMENT OPPORTUNITY PROGRAM, para. E.2.c (21 May 1987) [hereinafter DOD DIR. 1440.1] (requiring the service secretaries to "treat equal opportunity and affirmative action programs as essential elements of readiness that are vital to accomplishment of the national security").

³⁴³ DOD DIR. 1440.1, *supra* note 342, para. D.2. Affirmative action plans must be "designed to identify, recruit, select, and select qualified personnel." *Id.*

The Department of Defense requires each of the military services to "[d]evelop procedures for and implement an affirmative action program for minorities and women."³⁴⁴ As part of this program, the services must ensure that installations "establish upward mobility and other development programs to provide career enhancement for minorities [and] women"³⁴⁵ Installations must also establish "focused external recruitment programs to produce employment applications from minorities [and] women . . . who are qualified to compete effectively with internal [Department of Defense] candidates for employment at all levels and in all occupations."³⁴⁶

In accordance with Department of Defense requirements, the Department of Army established civilian equal employment opportunity and affirmative action programs. The purpose of these programs is to acquire, train, and retain "a work force that is reflective of the nation's diversity."³⁴⁷ The Army's policy is to take "affirmative action to overcome the effects of past and present discriminatory practices, policies, or other barriers to equal employment opportunity. These

³⁴⁴ *Id.* para. F.2.a.

³⁴⁵ *Id.* para. E.2.j.

³⁴⁶ *Id.* para. E.2.k.

³⁴⁷ DEP'T OF ARMY, REG. 690-12, CIVILIAN PERSONNEL EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION, para. 1-1 (4 Mar. 1988) [hereinafter AR 690-12]. The Army ensures equal employment opportunity for minorities and women by implementing "aggressive affirmative action programs that are designed to meet locally established goals and objectives." *Id.* para. 1-6a.

affirmative actions are designed to work toward achievement of a work force, at all grade levels and occupational categories, that are [sic] representative of the appropriate civilian labor force."³⁴⁸

All Army installations and activities with more than 2,000 employees have affirmative employment plans.³⁴⁹ Each plan includes aggregate work force and accomplishment data, and identifies barriers to the employment and advancement of minorities and women.³⁵⁰ On a yearly basis, installations, activities, and major Army commands with affirmative action plans submit accomplishment reports and updates to local Equal Employment Opportunity Commission offices and the Department of the Army.³⁵¹

In addition to local plans, the Department of the Army has its own master affirmative employment plan.³⁵² The Army's plan³⁵³ includes a summary analysis of its civilian work force.

³⁴⁸ *Id.* para. 2-1.

³⁴⁹ See *id.* para. 2-3 (requiring installation affirmative action program plans to meet the requirements of the Equal Employment Opportunity Commission's management directives). See also MD 714, *supra* note 322, at 1 (requiring affirmative employment plans for installations with 2,000 or more employees).

³⁵⁰ AR 690-12, *supra* note 347, para 2-3b. See also MD 714, *supra* note 322, at 2-4.

³⁵¹ AR 690-12, *supra* note 347, paras. 2-3g, 2-3h. See also MD 714, *supra* note 322, at 4.

³⁵² MD 714, *supra* note 322, at 1 (requiring "departments, agencies or instrumentalities with 500 or more employees" to submit an affirmative employment plan).

³⁵³ The Army's Affirmative Employment Plan consists of the base plan dated June 1988 and annual updates submitted thereafter with accomplishment reports to the Commission. The

To analyze its work force, the Army uses guidance developed by the Office of Personnel Management to classify its civilian employees into the following six categories: Professional,³⁵⁴ Administrative,³⁵⁵ Technical,³⁵⁶ Clerical,³⁵⁷ Other,³⁵⁸ and Blue

Army submitted its last accomplishment report on June 1, 1995; it did not submit an update for 1995. This report reflects fiscal year 1994 data.

³⁵⁴ The "professional" category includes:

White collar occupations that require knowledge in a field of science or learning characteristically acquired through education or training equivalent to a bachelor's or higher degree with major study in or pertinent to the specialized field, as distinguished from general education. The work of a professional occupation requires the exercise of discretion, judgment, and personal responsibility for the application of an organized body of knowledge that is constantly studied to make new discoveries and interpretations, and to improve the data, materials, and methods.

OFFICE OF PERSONNEL MANAGEMENT OPERATING MANUAL, DATA ELEMENT STANDARDS 140 (13 Apr. 1993) [hereinafter OPM DATA STANDARDS].

³⁵⁵ The "administrative" category includes:

White collar occupations that involve the exercise of analytical ability, judgment, discretion, and personal responsibility, and the application of a substantial body of knowledge of principles, concepts, and practices applicable to one or more fields of administration or management. While these positions do not require specialized education majors, they do involve the type of skills (analytical, research, writing, judgment) typically gained through a college level general education, or through progressively responsible experience.

Id.

³⁵⁶ The "technical" category includes:

White collar occupations that involve work typically associated with and supportive of a professional or administrative field, that is nonroutine in nature; that involves extensive practical knowledge, gained through on-job experience and/or specific training less than that represented by college graduation.

Collar.³⁵⁹ The acronym customarily used for these categories is "PATCOB."³⁶⁰ Once categorized, the Army determines what percentage of employees in each of these six categories falls

Work in these occupations may involve substantial elements of the work of the professional or administrative field, but requires less than full competence in the field involved.

Id. ³⁵⁷ The "clerical" category includes:

White collar occupations that involve structured work in support of office, business, or fiscal operations; performed in accordance with established policies, or techniques; and requiring training, experience or working knowledge related to the tasks to be performed.

Id. ³⁵⁸ The "other white collar" categories include "[w]hite collar occupations that cannot be related to the . . . professional, administrative, technical, or clerical categories." *Id.*

³⁵⁹ The "blue collar" category includes "[o]ccupations comprising the trades, crafts, and manual labor (unskilled, semiskilled, and skilled), including foreman and supervisory positions entailing trade, craft, or laboring experience and knowledge as the paramount requirement." *Id.*

³⁶⁰ The Office of Personnel Management assigned each occupational series within the federal government to a specific PATCOB category. See *id.* at 114-38. The Department of Army codes each job title at the time it fills each position so that the position clearly falls within the proper category. Telephone Interview with Ana Ortiz, Director, Affirmative Employment Planning, Equal Employment Opportunity Agency, Office of the Assistant Secretary of the Army (Manpower & Reserve Affairs) (Mar. 5, 1996) [hereinafter Ana Ortiz Interview]. For example, the occupational series for a nurse is "0610" and the PATCOB category is "professional." OPM DATA STANDARDS, *supra* note 354, at 119. The occupational series for a practical nurse is "0620" and the PATCOB category is "technical." *Id.* To the extent there is any overlap between these categories, the Army resolves the issue at the time it codes the position. Ana Ortiz Interview, *supra*. Once coded, the category normally does not change.

into each of the relevant minority or gender groups.³⁶¹ It then compares the percentage of each minority and gender group in each PATCOB category to a modified version of the national Census Availability Data³⁶² that is also arranged by PATCOB categories.³⁶³ This comparison demonstrates if there is a "conspicuous absence"³⁶⁴ or "manifest imbalance"³⁶⁵ of any

³⁶¹ The minority groups relevant to the Army's affirmative employment program are Blacks, Hispanics, Asian American/Pacific Islanders, American Indians/Alaska Natives, Whites, males and females. DEPARTMENT OF THE ARMY, ANNUAL AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT FOR FISCAL YEAR 1994 3 (1995) [hereinafter 1994 ACCOMPLISHMENT REPORT].

³⁶² The Census Availability Data represents "persons, 16 years of age or over, excluding those in the armed forces, who are employed or who are seeking employment." UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/T-GGD-91-32, FEDERAL AFFIRMATIVE ACTION: BETTER EEOC GUIDANCE AND AGENCY ANALYSIS OF UNDERREPRESENTATION NEEDED 2 (1991) (containing the statement of Bernard Ungar, Director, Federal Human Resource Management Issues, General Government Division, before the Committee of Governmental Affairs, United States Senate).

³⁶³ The United States collects census data every ten years. The last census was in 1990. The census includes data related to the national civilian labor force, which the United States uses to classify people under PATCOB.

The Equal Employment Opportunity Commission recognizes that comparing members of the federal work force to pure PATCOB data from the census would not be a reliable comparison for affirmative action purposes. The Commission, therefore, adjusts some of the data reflected in the census to provide more accurate data to which to compare the federal work force. For example, under PATCOB, beauticians would normally fall into the professional category. Since the federal government does not employ beauticians, the Equal Employment Opportunity Commission subtracts data collected for beauticians before comparing civilian professionals to that category. Ana Ortiz Interview, *supra* note 360.

³⁶⁴ The Army plan defines "conspicuous absence" as "a particular [equal employment opportunity] group that is nearly or totally nonexistent from a particular occupation or grade level in the workforce." 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 3.

³⁶⁵ The Army plan defines "manifest imbalance" as a "representation of [equal employment opportunity] groups in a specific occupational grouping or grade level in the agency's workforce that is substantially below its representation of

minority or gender group in one of the PATCOB categories in its work force. If there is a conspicuous absence or a manifest imbalance, the Army may take affirmative action to correct the situation.³⁶⁶ In 1995, the Army reported a manifest imbalance of women in the professional category,³⁶⁷ Hispanics in the administrative category,³⁶⁸ Hispanics and Asian Americans in the technical category,³⁶⁹ Hispanics in the clerical category,³⁷⁰ women in the "other" category,³⁷¹ and women and Hispanics in the blue collar category.³⁷² The Army did not report what caused these imbalances.

the appropriate [civilian labor force]." 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 3.

³⁶⁶ See MD 714, *supra* note 322, attach. A, at 3.

³⁶⁷ Women in the Army's professional workforce increased from 28.6% in fiscal year 1993 to 28.9% in fiscal year 1994. This representation was below the Census Availability Data of 37%. 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 6.

³⁶⁸ Hispanics in the administrative category increased from 3.2% to 3.3% between fiscal years 1993 and 1994. Census Availability Data showed 5.2% for Hispanics in this category. 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 6.

³⁶⁹ In the technical category, Hispanics increased from 5.7% to 5.9% between fiscal years 1993 and 1994. The Census Availability Data was slightly higher at 6.6% for Hispanics. 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 6.

Asian Americans/Pacific Islanders increased from 3.0% to 3.1%. Their 1990 Census Availability Data showed 3.5%. *Id.*

³⁷⁰ In the clerical category, Hispanics increased from 5.4% in fiscal years 1993 to 5.5% in fiscal year 1994. *Id.* at 7. The Census Availability Data in the clerical category showed 6.9%. *Id.*

³⁷¹ The representation of women in the "other" category increased from 11.3% in fiscal year 1993 to 11.5% in fiscal year 1994. *Id.* The Census Availability Data for women in the "other" category was 15.7%. *Id.*

³⁷² In the blue collar category, the representation of women declined from 8.1% in fiscal year 1993 to 7.9% in fiscal year 1994. *Id.* According to the Census Availability Data, the representation of women available in this category was 19.9%. *Id.*

The representation of Hispanics remained constant in the blue collar category at 7.7%. *Id.* The Census Availability Data showed Hispanic availability of 10.3%. *Id.*

Besides reporting the representation of minorities and women by PATCOB category, the Army reported the representation of these groups by grade levels. The grade-level statistics revealed that the representation of women and all minority categories except Hispanics exceeded the Census Availability Data for grades GS-1 through GS-8.³⁷³ For grades GS-9 through GS-12, the representation of women and Hispanics failed to exceed the availability data.³⁷⁴ For GS-13 through GS-15, the representation of Blacks and Asian Americans failed to exceed the availability data for professionals, and Hispanics and women failed to exceed the data for the professional and administrative categories.³⁷⁵ The Army did not report how the representation of women and minorities fared against the Census Availability Data at the Senior Executive Service level.³⁷⁶

³⁷³ *Id.* at 8.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 9.

³⁷⁶ *See id.* Senior Executive Service positions in the federal government include those positions classified above a GS-15 or an equivalent position "which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate." 5 U.S.C. § 3132(a)(2) (1994). Senior Executive Service employee responsibilities include directing the work of an organizational unit; being responsible for the success of one or more specific programs or projects; monitoring progress towards organizational goals and periodically evaluating and adjusting those goals; supervising the work of employees other than personal assistants; or exercising important policy-making, policy-determining, or other executive functions. *Id.*

Considering its work force analysis, the Army identified specific problems and established objectives for overcoming those problems.³⁷⁷ One problem the Army identified was the low representation of minorities and women in higher civilian grades,³⁷⁸ including the Senior Executive Service.³⁷⁹ To resolve this problem, the Army commissioned a study to determine how to overcome barriers;³⁸⁰ focused command attention on the issues at commanders' conferences, training committees, and other general officer level forums;³⁸¹ and

³⁷⁷ The Army first identified many of the problems listed in its Accomplishment Report for fiscal year 1994 several years ago. Since the Army is still working on these problems, it continues to report them. The Army also reports the progress made on each problem.

³⁷⁸ The Army identified the low number of women and minorities in grades GS-13 to GS-15 as a problem. 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 14.

³⁷⁹ The Army first identified the low number of women and minorities at the senior civilian levels in its 1988 Accomplishment Report. DEPARTMENT OF THE ARMY, ANNUAL AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT FOR FISCAL YEAR 1988 3-10 (1989) [hereinafter 1988 ACCOMPLISHMENT REPORT]. The Army continues to report the problem because it has not resolved it and it is still reporting progress on its corrective actions.

³⁸⁰ One study commissioned by the Army is the "Glass Ceiling" study. This study considered "statistical analysis, focus groups, interviews, and an Army-wide survey." 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 19. The purpose of the study is to determine whether there is a glass ceiling preventing minorities or women from advancing in the civilian work force and, if so, how to overcome existing barriers. The Army anticipates releasing the results of this study in May of 1996. Ana Ortiz Interview, *supra* note 360.

³⁸¹ In 1988, when the Army first identified the low number of women and minorities in Senior Executive Service positions as a problem, the Assistant Secretary of the Army initiated a new affirmative action policy for referring and selecting applicants for Senior Executive Service positions. See Memorandum, Assistant Secretary of the Army, Manpower and Reserve Affairs, to Director of the Army Staff, subject: Senior Executive Service (SES) Affirmative Action Policy (23 Sept. 1988); Message, Headquarters, Dep't of Army, DACS-ZD, subject: Senior Executive Service (SES) and GS/GM-15 Affirmative Action Policy (261700Z Oct 88); Memorandum,

emphasized the representation of women and minorities at long-term training programs.³⁸² The Army's affirmative actions to correct the low representation of women and minorities at the higher grades are ongoing.

B. Merit Promotion Procedures

The Army promotes most of its competitive service³⁸³ civilian employees using a merit promotion plan.³⁸⁴ Each

Assistant Secretary of the Army, Manpower and Reserve Affairs, to Assistant Secretaries of the Army and Army General Counsel, subject: SES Selection Documentation (3 Jan. 1989). There are three major elements of this policy:

First, Secretariat and Army staff functional officials are required to play a more active role in the recruitment process through review of the recruitment efforts and the development of the finalist lists for these positions. Second, in those cases where either no minorities or women applied for a position or none were placed on the best-qualified list, the policy prohibits the selection of any individual for the position unless functional officials are satisfied that efforts were made to locate and attract qualified minority group and women applicants. Third, if a woman or a minority group member is on the best-qualified list, the comments of the concerned functional official must be solicited and considered before selection of another competitor is permitted.

Ernest M. Willcher, *Speech Before the 1989 Army Major Command EEO Officer Conference: The Army Senior Executive Service Affirmative Action Policy*, ARMY LAW., Sept. 1989, at 11. See also 5 C.F.R. § 317.501 (1995) (establishing rules for the recruitment and selection for initial Senior Executive Service career appointments).

³⁸² 1994 ACCOMPLISHMENT REPORT, *supra* note 361, at 14-19.

³⁸³ Competitive service employees include:

(1) all civilian positions in the executive branch of the Federal Government not specifically excepted from the civil service laws by or pursuant to

installation develops its own merit promotion plan for positions it will fill at the local level.³⁸⁵ At installations where there is a collective bargaining agreement, the installation must negotiate the contents of the merit promotion plan with the bargaining unit representative. The

statute, by the President, or by the Office of Personnel Management, and not in the Senior Executive Service; and
(2) All positions in the legislative and judicial branches of the Federal Government

5 C.F.R. § 212.101(a) (1995). The most common way to acquire competitive status is by completing a probationary period under a career-conditional appointment. See 5 C.F.R. § 212.301 (1995). See also 5 U.S.C. § 2102 (1994) (designating positions in the competitive service of the federal government); 5 U.S.C. § 2103 (1994) (stating that the "executive service" includes civil service positions that are not in the competitive service or Senior Executive Service); 5 C.F.R. § 213.101 (1995) (echoing the definition of excepted service from the United States Code).

³⁸⁴ The Army uses merit promotions and internal placement programs to promote civilian employees who are already employees in the federal government. These procedures do not apply to civilians who are trying to enter the federal employment system. See 5 C.F.R. § 335.102 (1995) (describing specific employees who may be promoted under the merit promotion process).

³⁸⁵ See 5 C.F.R. § 335.103(b) (1995) (requiring each federal agency to "establish procedures for promoting employees which are based on merit and are available in writing to candidates"); DEP'T OF ARMY, REG. 690-300, EMPLOYMENT: CIVILIAN PERSONNEL, ch. 335, paras. 1-3a(1), 1-3b(6) (15 Oct. 1979) (C16, 1 Oct. 1986) [hereinafter AR 690-300] (requiring appointing officers in the Department of the Army to "set up [written] merit promotion plans").

In addition to using merit promotion procedures to fill competitive service positions at the local level, the Army uses merit promotion procedures to fill career program positions. These positions are usually at higher grade levels and require applicants to submit applications at the Department of Army level for processing. See DEP'T OF ARMY, REG. 690-950, CIVILIAN PERSONNEL: CAREER MANAGEMENT (8 Sept. 1988) (establishing merit placement procedures for specific career program positions). Merit promotion procedures for career program positions are outside the scope of this thesis.

installation does not have to negotiate position qualifications or the applicant pool from which the installation will promote.³⁸⁶ Since each installation develops its own plan, the procedures each employs will be different from all others.

This section generally describes the Army's merit promotion process and identifies some procedures used at individual installations. These local procedures cannot be used to draw Army-wide conclusions. They do, however, illustrate procedural differences that may determine whether local procedures will be subject to Adarand's strict scrutiny standard. They also underscore the general misapplication of constitutional standards in the merit promotion process.

1. Generally--When someone leaves a competitive service position or when a new position covered by the merit promotion plan³⁸⁷ becomes available, the manager with the available

³⁸⁶ See 5 U.S.C. § 7106(a)(2)(c) (1994) (stating management's right to make selections from "among properly ranked and certified candidates for promotion; or . . . any other appropriate source . . .").

³⁸⁷ For civilian positions, it is important to remember that individual employees do not have any "rank." The rank is in the position the employee holds. This is contrary to the military where individuals have rank and positions do not. For example, a civilian personnel officer can grade an attorney position as a GS-13. As long as an attorney is in that position, the Army will pay that attorney at that grade. However, when the attorney leaves, the GS-13 position remains open for another attorney to fill.

When a military attorney with the rank of major leaves a position, the attorney retains the military rank. If a captain replaces the major, the captain uses that rank.

position notifies the civilian personnel office and requests recruiting to fill the opening. The civilian personnel office prepares a merit promotion announcement that identifies the position available and the area of consideration for the position. The manager with the available position can limit the area of consideration to applicants within the organization, applicants outside the organization, or applicants from a specific geographic region. Any applicant who meets the stated qualifications required for a position may apply.

The civilian personnel office rates all applicants by their qualifications and prepares a referral list for the manager making the promotion decision. Upon receipt of the referral list, a manager may interview the applicants or select an applicant based on the written qualifications. The manager makes this selection without regard to race, color, or sex; the manager bases the decision "solely on job related criteria."³⁸⁸ Once a manager makes a promotion decision, the manager must document the merit-based reasons for the decision

³⁸⁸ See 5 U.S.C. § 2301(b)(2) (1994) (establishing that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to . . . race, color, . . . national origin, [or] sex"); 5 C.F.R. § 335.103(b) (1995) (mandating that promotion decisions be "based solely on job-related criteria," and without regard to race, sex, or national origin); *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.4E (1995) (stating that although affirmative action programs may be race, sex, and ethnic conscious, "selection procedures under such programs should be based upon the ability or relative ability to do the work").

and forward the information to the civilian personnel office.³⁸⁹

2. *Local Installations*--Some Army installations add steps to the merit promotion process. At Fort Knox,³⁹⁰ for example, the civilian personnel office advises managers with open positions on which area of consideration³⁹¹ is appropriate³⁹² based on the availability of qualified minority representation in that area. The manager need not follow the advice of the civilian personnel office. The manager may select someone from whichever area best meets the needs of the office.³⁹³

³⁸⁹ 5 C.F.R. § 335.103(b)(5) (1995). The installation must maintain "a temporary record of each promotion sufficient to allow reconstruction of the promotion action, including documentation on how candidates were rated and ranked." *Id.* The installation must also maintain data on the sex, race, and national origin of applicants for analysis. *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.4A (1995) (providing that "[e]ach user should maintain and have available for inspection records or other information which will disclose the impact which its . . . selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group . . .").

³⁹⁰ Telephone Interview with Sam Jones, Civilian Personnel Officer, Fort Knox, Kentucky (Mar. 7, 1996). Mr. Jones provided all information related to Fort Knox's promotion process referenced in this thesis.

³⁹¹ The recommended area of consideration can also be to a specific pool of potential applicants. *Id.*

³⁹² See AR 690-300, *supra* note 385, ch. 335, para. 1-4, requirement 2a (C16, 1 Oct. 1986) (compelling civilian personnel officers to "provide for areas of consideration which support [equal employment opportunity] affirmative action needs").

³⁹³ See 5 C.F.R. § 335.103(b)(4) (1995) (establishing an agency obligation to determine which source "is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals").

The Fort Knox civilian personnel office also sends a copy of all referral lists to the installation equal employment opportunity office. The equal employment opportunity office may contact the manager making the promotion decision to ensure the manager knows if women or minorities are underrepresented in similar positions.³⁹⁴ Even if there is an underrepresentation of women and minorities in similar positions, the manager need not select a woman or minority from the referral list.³⁹⁵

The Fort Lewis civilian personnel office³⁹⁶ also sends a copy of every referral list to the installation equal employment opportunity office.³⁹⁷ The equal employment opportunity office, however, does not contact a manager making a selection decision unless it has evidence of a manifest imbalance of minorities or women in a job category³⁹⁸ and of

³⁹⁴ See AR 690-300, *supra* note 385, ch. 335, para. 1-4, requirement 4b (C16, 1 Oct. 1986) (requiring selecting officials to consider "the activity's approved [affirmative action plans] . . . for minorities and women . . . as a part of the selection process").

³⁹⁵ Neither the civilian personnel office nor the equal employment opportunity office necessarily tell the manager that he need not select a minority or a female.

³⁹⁶ Telephone Interview with Michael Hankins, Civilian Personnel Officer, Fort Lewis, Washington (Mar. 28, 1996). Mr. Hankins provided all information related to Fort Lewis' promotion process referenced in this thesis.

³⁹⁷ This requirement is part of the merit promotion agreement that Fort Lewis negotiated with all of its unions. The unions also receive a copy of every referral list. *Id.*

³⁹⁸ The Fort Lewis civilian personnel office works in conjunction with the installation equal employment opportunity office to examine PATCOB job series and determine whether there are manifest imbalances of minority and gender groups in

some other problems in hiring for the available job series.³⁹⁹ If there is evidence of a manifest imbalance, then along with the referral list, the civilian personnel office sends a separate note to the manager notifying him of the imbalance and stating whether someone on the referral list is a member of the underrepresented group. The civilian personnel office does not say who the person is. The manager obtains that information by interviewing the applicants.

At Fort Belvoir, the civilian personnel office serves several different organizations.⁴⁰⁰ Once the civilian personnel office learns of a vacancy, it drafts an announcement for the position and advertises it. If the vacancy is in a job category where there is an underrepresentation of minorities or women,⁴⁰¹ the civilian

its work force. If there are, the installation engages in recruitment and outreach to increase the number of applicants from the underrepresented groups. Fort Lewis does not engage in targeted recruiting after it receives notice of a vacancy unless it has a delegation from the Office of Personnel Management. *Id.*

³⁹⁹ The equal employment opportunity office uses the referral lists to analyze selection and referral patterns and identify potential problem areas.

⁴⁰⁰ Telephone Interview with John Raymos, Deputy Director, Civilian Personnel Office, Fort Belvoir, Virginia (Mar. 28, 1996). Mr. Raymos provided all information related to Fort Belvoir's promotion process referenced in this thesis.

The Fort Belvoir civilian personnel office has agreements with each of the organizations it services on conducting personnel matters. Because these agreements differ, the civilian personnel office may not perform all of the steps briefly described in this thesis for every job vacancy.

⁴⁰¹ The civilian personnel office identifies such underrepresentations in conjunction with the equal employment opportunity office of each of the organizations it services. *Id.*

personnel office sends a copy of the announcement to areas targeted⁴⁰² to increase the number of applications received from members of those groups. When the civilian personnel office sends the referral list to the selecting official, it also sends a copy to the relevant organization's equal employment opportunity office if there is a previously identified underrepresentation.

C. Evaluation Under Adarand

Under the Equal Employment Opportunity Commission's guidelines, the Army may successfully use its written affirmative action plan to defend itself against a Title VII action alleging unlawful discrimination.⁴⁰³ The Army's plan will not, however, constitute a defense to a challenge on constitutional grounds.⁴⁰⁴ When a constitutional challenge arises, a court will review the Army's actions and its affirmative action plan to determine first, whether the plan

⁴⁰² Targeted areas may include universities or organizations with a large number of individuals from the relevant minority group.

⁴⁰³ See *supra* note 63 and accompanying text. See also HADLEY, *supra* note 320, at 581. But see THE BUREAU OF NATIONAL AFFAIRS, INC., AFFIRMATIVE ACTION TODAY: A LEGAL AND PRACTICAL ANALYSIS 54 (1986) (demonstrating that in court cases, "[c]ompliance with the affirmative action requirements of a federal agency does not automatically translate into compliance with Title VII").

⁴⁰⁴ The Equal Employment Opportunity Commission's guidelines do not even address the possibility that a federal agency will face a constitutional challenge. See Brian C. Eades, Note, *The United States Supreme Court Goes Color-Blind: Adarand Constructors Inc. v. Pena*, 29 CREIGHTON L. REV. 771 (1996) (arguing that racial preferences are impermissible under the constitution).

or the Army's actions create a racial or gender classification. If they do, the Army must have a compelling government interest justifying its actions and it must narrowly tailor its actions to achieve that interest.

1. *Racial Classification*--Pursuant to requirements imposed by the Equal Employment Opportunity Commission and the Department of Defense, the Army adopted an affirmative employment plan for its civilian employees. Under this plan, the Army has monitored its work force to determine the representation of minorities and women in various grade levels and positions. Where the Army has identified a manifest imbalance between the representation of these groups in its work force and the representation of these groups according to the Census Availability Data, the Army has initiated corrective actions designed to increase minority and female representation.

Thus far, the affirmative employment actions taken at the Department of Army level include, *inter alia*, reminding senior officers and officials of the importance of increasing minority and female representation, developing a policy requiring careful deliberation before selecting a nonminority or a male for a high-level position, and conducting studies to identify problems and determine possible solutions. From the Army's Affirmative Action Accomplishment Reports, it appears that Army officials stress only the importance of increasing

minority and female representation; they do not focus on any specific minority group. The Army does not require any selecting official to promote or to make any selection decision based on race, national origin, or sex.⁴⁰⁵ The Army requires selecting officials to promote the best qualified person to fill a position regardless of race or sex. The Army does not have goals⁴⁰⁶ or quotas for any minority or gender groups.⁴⁰⁷ Its policies and actions are all race and gender

⁴⁰⁵ In 1988, the Army considered developing a policy permitting the consideration of race, national origin, and sex in the promotion process. See 1988 Accomplishment Report, *supra* note 379, at 3-15. However, the Army canceled that proposal after the Office of General Counsel determined that case law did not permit such considerations. See DEPARTMENT OF THE ARMY, ANNUAL AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT FOR FISCAL YEAR 1989 3-15 (1990).

⁴⁰⁶ Federal "[a]gencies frequently do not set measurable affirmative employment goals" UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/T-GGD-94-20, EEOC: FEDERAL AFFIRMATIVE PLANNING RESPONSIBILITIES 8 (1993) [hereinafter FEDERAL AFFIRMATIVE PLANNING RESPONSIBILITIES] (containing the testimony of Nancy Kingsbury, Director of Federal Human Resource Management Issues, on how managers must be held accountable to achieve equal employment opportunity progress). Such "[s]pecificity is needed to truly gauge how successfully the executives are carrying out their affirmative employment responsibilities." *Id.*

⁴⁰⁷ The adoption of goals does not guarantee that minorities or women will increase in representation at higher grade levels. See KELLOUGH, *supra* note 321, at 37-40 (explaining that the addition of numerical goals and timetables to federal equal employment opportunity policy has not resulted in significant increases in the progression of Blacks and females to higher level positions).

[However,] goals do urge the selection of minorities or women over nonminority males when both are equally capable of performing the job and when previous discriminatory practices have caused minorities and women to be under-represented in such positions. Goals are essentially numerical targets which call attention to minority and female under-representation, and thereby help to guide recruitment, training, and selection processes toward the correction of that under-representation.

neutral. As such, they do not create race or gender classifications and would not be subject to the strict scrutiny standard imposed by *Adarand*.

While Army-level affirmative actions do not create racial or gender classifications, some local actions do create such classifications. Army installations with more than 2,000 employees have their own affirmative action plans.⁴⁰⁸ As part of these plans, local installations "may include goals and timetables . . . which recognize the race, sex, or national origin of applicants or employees."⁴⁰⁹ Installations that include goals in their plans create race and gender classifications that are subject to review under *Adarand*.⁴¹⁰

Adarand may also apply to installation practices that require managers making promotion decisions to coordinate those decisions with the installation equal employment opportunity office.⁴¹¹ During this coordination, equal employment opportunity representatives tell managers whether there is an underrepresentation of women or minorities in certain positions or at certain grade levels. While the equal

Id. at 107. Since the use of goals results in attention to specific minority or gender groups during the selection process, they create racial or gender classifications. As such, they would be subject to a strict scrutiny standard on judicial review.

⁴⁰⁸ See *supra* note 349 and accompanying text.

⁴⁰⁹ 29 C.F.R. § 1608.4(c) (1995).

⁴¹⁰ See *supra* notes 210-213 and accompanying text.

⁴¹¹ See discussion *supra* part IV.B.2.

employment opportunity representative cannot require managers to select women or minorities to fill open positions, they may strongly infer that managers should consider race, national origin, or gender when making a selection. Because of this inference, courts can legitimately find that this practice creates racial or gender classifications during the selection process. Courts reviewing this practice will certainly apply the strict scrutiny standard to analyze it.

2. *Compelling Government Interest*--Installations that either use goals to increase minority representation or permit equal employment opportunity representatives to brief managers during the selection process⁴¹² on where minority underrepresentation exists are creating racial classifications subject to *Adarand's* strict scrutiny standard. To pass this standard, an installation must have a compelling interest justifying its actions.

⁴¹² Equal employment opportunity briefings designed to inform commanders where there is minority or female underrepresentation on the installation for recruitment and outreach purposes are not objectionable. Recruitment and outreach efforts are not part of the actual employment decision and, therefore, generally are permissible. Commanders must be told, however, that the purpose of the briefing is to develop and focus outreach efforts designed to increase the number of minorities and females in the pool of qualified applicants. The purpose is not to get commanders to use the selection process to increase needed representation.

Equal employment opportunity representatives must also limit these briefings to individuals who serve recruitment and outreach functions. The only purpose behind including supervisors who make selection decisions, but who play no part in outreach or recruitment, would be to encourage them to use race or sex in their hiring and promotion decisions. Without the proper evidence, *Adarand* prohibits such considerations.

a. *Remedying Past Discrimination*--As previously discussed,⁴¹³ the only compelling interest presently recognized by the Supreme Court is remedying past discrimination. An installation or activity that has evidence demonstrating it systemically discriminated against women or minorities in the past may take affirmative actions to remedy that discrimination. Evidence of discrimination may include discriminatory policies, judicial or administrative findings⁴¹⁴ of discrimination, statements of witnesses, or statistics.

Installations may only remedy discrimination that they caused in the past or that they helped to perpetuate as a passive participant.⁴¹⁵ Contrary to Equal Employment Opportunity Commission's guidelines, installations may not remedy "potential discrimination" caused by a "contemplated employment practice."⁴¹⁶ Additionally, they may not remedy discrimination caused "by other persons or institutions."⁴¹⁷ While the Equal Employment Opportunity Commission may argue these actions meet Title VII requirements, they do not meet constitutional requirements under *Adarand*.⁴¹⁸

⁴¹³ See discussion *supra* parts II.B, III.C.2.a.

⁴¹⁴ Administrative findings of discrimination include findings from discrimination complaints filed with the Equal Employment Opportunity Commission as well as findings from local command investigations.

⁴¹⁵ See discussion *supra* part II.B.

⁴¹⁶ 29 C.F.R. § 1608.3(a) (1995).

⁴¹⁷ See *supra* notes 75-78 and accompanying text.

⁴¹⁸ See discussion *supra* part II.B.

Installations may also take affirmative actions if there exists a statistical disparity between the percentage of minorities or women in their work force and the percentage of minorities or women in the relevant labor pool "great enough [to cause] an inference of discriminatory exclusion."⁴¹⁹ The Supreme Court has never defined how great a disparity must exist in a constitutional challenge to a racial classification before it will infer that the disparity resulted from a pattern or practice of discrimination. However, the Court may not allow a statistical disparity that is less than the disparity required in Title VII cases.⁴²⁰ Installations must have more than just a "low representation" of minorities or women in the work force.⁴²¹ At a minimum, installations must have a statistical disparity sufficient to show that its selection or employment practice "has caused the exclusion of applicants for . . . promotions" because of their race, ethnicity or sex.⁴²²

⁴¹⁹ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 502 (1989).

⁴²⁰ See discussion *supra* part II.C.

⁴²¹ *Croson*, 488 U.S. at 502. The Court's reference to Title VII statistical disparities in discrimination cases involving constitutional challenges supports the argument that the Court will apply no less of a standard in constitutional cases. In fact, the Court may apply the same "gross statistical disparities" standard in constitutional cases since that may form a "strong basis in evidence." See *id.* at 501.

⁴²² See *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988). In *Watson*, the Court said that "the plaintiff's burden in establishing a prima facie case [in a Title VII action] goes beyond the need to show that there are statistical disparities in the employer's work force." *Id.* The plaintiff must also "isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id.* at 1000. If

b. *Achieving Diversity*--In the first paragraph of its civilian equal employment and affirmative action regulation, the Army states that it established its programs to acquire, train, and retain "a work force that is reflective of the nation's diversity."⁴²³ If the Army or any installation argues that it has a compelling interest in maintaining the diversity of its civilian work force, it will lose. A majority of the Supreme Court has never recognized diversity as a compelling interest justifying the creation of a racial classification.⁴²⁴ Additionally, four Justices on the current Court would likely reject such an interest.⁴²⁵ Two of the Justices have even said that an interest in diversity is too "trivial" to justify a racial classification.⁴²⁶

statistical disparities are substantial enough, they will raise an "inference of causation." *Id.* at 995. This is the proof the Court requires in a Title VII case where there is no showing of intentional discrimination by an employer. In a constitutional case, the Court will probably require proof just as strong, if not stronger, before it will infer a discriminatory employment practice.

⁴²³ AR 690-12, *supra* note 347, para. 1-1. See also 5 C.F.R. § 720, app. (1995) (citing the Civil Service Reform Act of 1978 as establishing the policy of the United States "to provide . . . a Federal workforce reflective of the Nation's diversity . . ."); FEDERAL AFFIRMATIVE PLANNING RESPONSIBILITIES, *supra* note 406, at 1 (1993) (discussing the "Equal Employment Opportunity Commission's . . . role in creating a federal workforce that is discrimination free and reflective of the nation's population").

⁴²⁴ See *supra* notes 259-261 and accompanying text.

⁴²⁵ See *supra* note 259 and accompanying text.

⁴²⁶ See *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 633 (1990), *overruled in part by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (Scalia & Kennedy, JJ., dissenting) (expressing their disagreement with the Court "that the Constitution permits the Government to discriminate among its citizens on the basis of

An Army installation should couple any attempt to prove a diversity interest with a combat readiness argument.⁴²⁷ The installation could argue that military necessity and combat readiness dictate not only that the Army maintain diversity in its military ranks,⁴²⁸ but also in its civilian population. Civilian employees are part of the total military force structure. They work side-by-side with military personnel performing the mission. The Army uses "civilian employees in all positions that do not require military incumbents"⁴²⁹ If fact, when the military deploys, it must also deploy civilian support personnel.⁴³⁰

The installation could maintain that because civilian employees are such an integral part of the Army's total force, equal opportunity is crucial not only in the military ranks, but also in the civilian ranks. If the Army does not maintain

race in order to serve interests so trivial as 'broadcast diversity'").

⁴²⁷ However, the Army must recognize that courts will not accept a compelling interest in diversity plus combat readiness for civilian employees unless the Army has sufficient evidence to support that interest.

⁴²⁸ See discussion *infra* part III.C.2.b.

⁴²⁹ DEP'T OF DEFENSE DIR. 1400.5, DoD POLICY FOR CIVILIAN EMPLOYEES, para. C.1 (21 Mar. 1983).

⁴³⁰ See, e.g., Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 116 n.7 (1995) (discussing the number of civilians who deployed on military operations in the Persian Gulf, Haiti, and the Former Yugoslav Republic of Macedonia); DEP'T OF ARMY, PAMPHLET 690-47, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE (1 Nov. 1995).

diversity in its entire force structure, combat readiness will suffer.

Army readiness begins with people and is basically a human condition. Without a sincere and dynamic commitment to the total well being of people, all our equipment modernization efforts will fail. Our ultimate high technology weapon is the soldier. That soldier, *and the civilian who supports the soldier*, must know, in every possible way, that he or she will be evaluated fairly, treated with dignity and compassion, and given every opportunity to realize their full capacity and potential. (emphasis added)⁴³¹

To prove a diversity and combat readiness interest for civilian personnel, the installation needs concrete evidence to support its position. No such evidence currently exists in the Army. The installation or the Army must develop it through a study or some other means. Installations that have a large number of deployable civilians may succeed in developing this evidence. However, installations composed predominantly of nondeployable civilians are more likely to fail. Uncorroborated assertions will certainly fail judicial scrutiny.⁴³²

⁴³¹ DEPARTMENT OF THE ARMY, MULTI-YEAR AFFIRMATIVE EMPLOYMENT PLAN 2 (1988). The Army states this policy in the front of its basic affirmative action plan. If the Army intends to use this policy to further its compelling interest in maintaining combat readiness, then it should repeat the policy in its civilian equal employment opportunity and affirmative action regulation. See AR 690-12, *supra* note 347.

⁴³² See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 505 (1989).

3. *Narrowly Tailored to Meet Compelling Interest--*

Assuming that an installation has a compelling interest in remedying past discrimination within its civilian work force or in maintaining diversity for combat readiness reasons, the installation must still prove it narrowly tailored its remedy to achieve its interests. This requires courts to consider, *inter alia*, the necessity of the remedial action, the relationship of numerical goals to the relevant labor market, the duration of the remedial action, and how closely the remedy fits the compelling interest.⁴³³

a. *Identifying Specific Discrimination--*An Army installation with evidence to support a compelling interest in remedying discrimination against specific female or minority civilian employees may take affirmative action to remedy that discrimination. Such action may include using numerical goals to increase representation of the affected groups, or receiving information from the equal employment opportunity representative on the underrepresentation of the affected groups. However, the installation must limit the use of such actions to those groups where it has evidence of discrimination or of significant statistical disparities in certain positions.

For example, an installation that has evidence that Black women are grossly underrepresented in engineering positions

⁴³³ See discussion *supra* part III.C.3.

may use goals or require coordination with the equal employment opportunity office to increase their representation in those positions. The statistical disparity of Black women in engineering positions would not, however, justify the use of these actions for other minority groups where there is no evidence of discrimination. Installation practices that include goals or require coordination where there is no evidence of discrimination are overinclusive and fail the narrowly tailored requirement of the strict scrutiny standard.

b. Employing Temporary Actions--Even where the installation has evidence of discrimination, it may only use goals or require coordination temporarily to remedy the identified discrimination. Once the installation corrects the discrimination or erases the significant statistical disparities,⁴³⁴ it must terminate the use of goals or prior notice of underrepresentation to selecting officials for the affected minority groups or civilian positions. Failure to do so results in the action becoming a nontemporary and nonremedial measure. Remedial measures that are not temporary and nonremedial measures are not narrowly tailored.

c. Using Appropriate Labor Pools--Determining whether an installation has a statistical disparity sufficient to justify a race- or gender-based employment practice requires a comparison of the installation work force in the

⁴³⁴ See discussion *supra* part II.C.

jobs at issue to the appropriate labor pool.⁴³⁵ An installation may not rely on the more convenient comparison of its minority population to the minority population in the general civilian work force or even to the minority population in one of the PATCOB categories.⁴³⁶ Those labor pools are too broad to be of any probative value. Rather, the installation must limit its comparison to the labor pool of applicants who most closely possess the qualifications required by the available position.

An installation determining whether it has a statistically significant underrepresentation of Black nurses, for example, would compare the percentage of Black nurses it has in its local work force with the percentage of Black nurses in the qualified applicant pool. It would not compare its work force to the total number of Blacks in the civilian labor force, or to the total number of Blacks in the "professional" category of PATCOB statistics.⁴³⁷ Most of the

⁴³⁵ See *supra* note 48 and accompanying text.

⁴³⁶ See discussion *supra* part IV.A. Not only are PATCOB categories insufficient for measuring installation minority and gender representation levels, they are also insufficient for measuring representation levels at the Army level. Each PATCOB category includes too many different types of employees to provide a comparison sufficient to justify a selection decision based on race, ethnicity, or gender. Because PATCOB categories do not provide a sufficient basis for comparison, the Army should use different data for the analysis it does of its work force in its affirmative action plan. See *supra* notes 367-372 and accompanying text.

⁴³⁷ See Memorandum, Office of the Associate Attorney General, United States Department of Justice, to General Counsels, subject: Post-Adarand Guidance on Affirmative Action in Federal Employment (29 Feb. 1996).

individuals included in these broad categories, whatever their race, would not qualify for a nurse's position. Therefore, they cannot be considered when determining statistical disparities.

An installation must also use current data to compare its work force to the qualified applicant pool. If reasonably current data is not available for the relevant civilian work force, the installation should work with the Office of Personnel Management to assemble such data.⁴³⁸ The installation cannot rely on data collected during the last decennial census. Several years after that data is collected, it is too outdated to be of any value.

d. *Maintaining Combat Readiness*--Assuming the Army has sufficient evidence to support a compelling interest in combat readiness, it may employ race- and gender-conscious actions narrowly tailored to further that interest. The Army can, for instance, require the civilian personnel office to send copies of the referral list for open positions to the equal employment opportunity office. An equal employment opportunity representative who determines there is a significant underrepresentation of minorities or women in a certain position as compared to the appropriate labor pool can

⁴³⁸ See *id.* (stating that the "[Office of Personnel Management] and the Census Bureau have agreed to conduct preliminary statistical studies to help agencies match job requirements and appropriate applicant pools").

relay that information to the manager making the selection. The representative should not, however, coordinate with the manager making the selection if no evidence of significant disparity exists. Regardless of the representation levels of women or minorities, the manager making the promotion decision must select the individual who is best qualified for the position. The manager must not be required to select a lesser-qualified woman or minority.

4. *Deference by the Courts*--The Constitution of the United States charges Congress "with the power 'to provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment.'" ⁴³⁹ In exercising this authority, Congress passed Title VII of the Civil Rights Act of 1964 to eliminate discrimination in employment. ⁴⁴⁰ "The Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, requires federal agencies to develop and implement affirmative employment programs to eliminate the historic underrepresentation of women and minorities in the workforce." ⁴⁴¹ Pursuant to this requirement, the Army

⁴³⁹ Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (citing U.S. CONST. art. I, § 8, cl. 1; amend. 14 § 5).

⁴⁴⁰ 42 U.S.C. § 2000e-2 (1988 & Supp. V 1993). See also discussion *supra* part II.A.

⁴⁴¹ FEDERAL AFFIRMATIVE PLANNING RESPONSIBILITIES, *supra* note 406, at 1 (explaining the background of the Equal Employment Opportunity Commission's "role in creating a federal workforce that is discrimination free").

developed its equal employment opportunity and affirmative action program for its civilian employees.

Since Congress is a co-equal branch of the federal government, the Supreme Court has generally granted "appropriate deference" to congressionally authorized affirmative action programs.⁴⁴² Before *Adarand*, this deference meant that congressionally authorized programs were subject to a lower level of judicial scrutiny than applied to state and local government programs.⁴⁴³ In *Adarand*, however, the Supreme Court repudiated its prior level of deference and held that congressionally authorized programs must meet the same constitutional standards as state and local government programs.⁴⁴⁴ The Court then refused to comment on how much deference it would provide to congressionally authorized programs in the future.⁴⁴⁵

Courts may still afford some deference to affirmative actions authorized by Congress, but it is not clear how much. Because of this uncertainty, the Army and all federal employers should not expect any special judicial deference

⁴⁴² *Fullilove*, 448 U.S. at 472. See discussion *supra* part II.C. See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (acknowledging that Congress has "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment").

⁴⁴³ See discussion *supra* part II.B.

⁴⁴⁴ *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2114 (1995).

⁴⁴⁵ *Id.* See also Eades, *supra* note 404 (arguing that Congress is not entitled to anymore deference than states are).

when reviewing and revising their affirmative action programs. The Army must instead concentrate on using programs that clearly pass constitutional requirements.

D. Proposed Changes

The legal parameters of constitutionally permissible federal affirmative actions are difficult to understand because of the numerous questions left unanswered by the *Adarand* decision. The Army must help installations answer some of these questions by developing policy guidance for civilian employment decisions. At a minimum, this guidance should address:

(1) the statistical disparity that must exist before an installation can employ race- or gender-based actions,

(2) the types of evidence indicative of historical discrimination,

(3) the number of incidents of discrimination that must exist to constitute a pattern of discrimination, and

(4) the length of time an installation can continue remedial efforts to insure it has corrected a discrimination problem.

Army guidance is necessary to sensitize installations to the pending issues and to direct them on how to address these issues. Without such direction, installations will continue to engage in practices that may meet Title VII requirements, but will certainly fail constitutional requirements.

Equal employment opportunity representatives must stop notifying selecting officials if there are shortages of women or minorities in the local work force during the selection process. Managers often misinterpret that notice to mean they should take race or gender into account when they make promotion or other selection decisions. That is certainly not appropriate after *Adarand*. Unless the installation has specific evidence of past discrimination⁴⁴⁶ or of gross statistical disparities, selecting officials must not consider race or gender when selecting from qualified candidates. If they do consider race or gender, or if they give the appearance that they are considering race or gender, then their actions will fail judicial scrutiny.

When determining whether statistical disparities exist, Army installations must compare jobs at issue in their work force to the civilian labor pool composed of individuals

⁴⁴⁶ Despite the Equal Employment Opportunity Commission's guidelines, the Army must not take affirmative actions to correct discrimination that has not yet occurred or to correct discrimination caused by other agencies. To satisfy constitutional requirements, the Army must only take affirmative actions to correct its own past discrimination.

available and qualified for such jobs. They may not rely on comparisons to PATCOB categories or on outdated census data to determine whether statistical disparities exist or to make promotion decisions. Decisions based on comparisons to the wrong labor pools will fail constitutional muster under the strict scrutiny standard imposed in *Adarand*.

The Army should change its equal employment opportunity and affirmative action regulation to reflect an interest other than merely maintaining a diverse work force. Diversity alone will not pass judicial scrutiny. The Army should reflect a compelling interest in remedying past discrimination to the extent it still has such an interest. The Army may also consider a combat readiness interest; however, adequate evidence supporting that interest does not yet exist. The Army must develop that evidence before even attempting a combat readiness argument for its civilian employees.

V. Conclusion

The Army has used affirmative action as a remedy for past discrimination for the last two decades. During that time, the Army has increased the number of minorities and women in both its military and civilian work force. The Army has not finished its work in this area. Today, the Army continues to take steps to improve minority and female representation in leadership positions for both its military and civilian

employees. These steps should be encouraged if adequate evidence exists to support them. However, the Army does not have evidence to support all of its affirmative action efforts and some of those efforts must end. Now is the time for the Army to reevaluate its military and civilian affirmative action and promotion programs. If it determines that these programs are still necessary to further a compelling interest, then it must "mend" them to ensure they comply with the strict scrutiny standard imposed by *Adarand*. If the programs are no longer necessary, the Army must "end" them.

The procedures used to promote Army officers are especially subject to challenge. The Air Force and the Navy are already defending themselves against *Adarand* attacks on their selection procedures.⁴⁴⁷ The Army's officer promotion procedures may be next. The promotion board instructions as currently written will not pass constitutional scrutiny. They do not clearly further a compelling interest in remedying past discrimination or in ensuring combat readiness. The instructions are overinclusive, not limited in duration, and allow boards too much discretion in remedying discrimination that may not even exist. Hence, they are not narrowly

⁴⁴⁷ See *Baker v. United States*, No. 94-453C, 1995 U.S. Claims LEXIS 236 (Ct. Cl. Dec. 12, 1995) (relying on *Croson* and *Adarand* to challenge the instructions used by the Air Force at a selective early retirement board); *Monforton v. Dalton*, No. SACV 95-424 LHM (EE) (D.C. Central Dist. of Cal. 1996) (relying on *Adarand* to challenge the Navy's affirmative action plan as it applies to Judge Advocate General's Corps accessions).

tailored. The Army should seize this opportunity to mend its officer promotion procedures while the courts are still battling over the exact impact that *Adarand* will have. Failure to do so may ultimately result in a court order requiring the Army to end the use of these instructions altogether.

While the procedures used to promote the Army's civilian employees are not as objectionable as its military procedures, there are still some troublesome areas at the local level. Installation practices that allow equal employment opportunity representatives to tell selecting officials whenever there is a shortage of minorities or women in the work force must end. These practices suggest to selecting officials that race, ethnicity, and gender are valid selection factors even when there is no evidence of prior discrimination or of significant statistical disparities. After *Adarand*, that is clearly wrong. The Army and installations must also cease relying on PATCOB data to make work force comparisons for their affirmative action plans and for filling available positions. This data is outdated and too broad to provide any useful information. The Army and installations employing affirmative actions to improve minority and female representation must develop more reliable data to use for comparison purposes. Comparisons based on unreliable data will not survive a constitutional challenge under *Adarand*.

President Clinton directed all federal agencies "to mend, but not end" their affirmative action programs. The Army must, therefore, reevaluate and redefine its programs to comply with the President's order and with the constitutional mandates of *Adarand*. Implementing the recommendations made in this paper will enable the Army to continue its programs and remain as the nation's model employer for equal opportunity.

Appendix A

Proposed Instruction for Remediating Specifically Identified Past Discrimination

DA Memo 600-2, para. 10 introduction (unchanged):

The success of today's Army comes from total commitment to the ideals of freedom, fairness, and human dignity upon which our country was founded. People remain the cornerstone of readiness. To this end, equal opportunity for all soldiers is the only acceptable standard for our Army. This principle applies to every aspect of career development and utilization in our Army, but is especially important to demonstrate in the selection process. To the extent that each board demonstrates that race, ethnic background, and gender are not impediments to selection for school, command, or promotion, our soldiers will have a clear perception of equal opportunity in the selection process.

DA Memo 600-2, para. 10a (changes italicized):

In evaluating the files you are about to consider, you *should be sensitive to the fact that (female officers have not been permitted to serve in certain combat positions) (Black officers have not been selected for promotion at rates comparable to that of other officers and may be suffering from the lingering effects from past discrimination).* This fact

may place these officers at a disadvantage from other officers from a career perspective. Taking these facts into consideration, assess the degree to which an officer's record as a whole is an accurate reflection, free from bias, of that officer's performance and potential.

DA Memo 600-2, para. 10b (changes italicized)

You have been given an equal opportunity selection goal for (female officers) (Black officers) at the applicable appendix. This goal is not a requirement to meet a particular quota. Comparison of tentative selection rates to the goal offers you a diagnostic tool to ensure that all officers receive equal opportunity in the selection process. You are required to review the records of (female officers) (Black officers) if you do not achieve the selection goal. During this second review, you must look for evidence that (female officers were disadvantaged by their inability to serve in combat positions) (Black officers are suffering from the lingering effects of past discrimination). You must also ensure that you provided each of these officers with an equal opportunity to be promoted. If during this second review you find evidence that (a female officer was disadvantaged) (a Black officer was discriminated against) (you may not have provided these officers with an equal opportunity), you will revote the file of that officer, taking into account the apparent disadvantage, and adjust that officer's relative

standing accordingly. This revote must not result in the promotion of an officer who is not fully qualified for promotion. If you do not find any evidence of (disadvantage) (discrimination) and you are satisfied that all officers received an equal opportunity for promotion, then you should not revote the file of any officer.

DA Memo 600-2, para. 10c (changes italicized)

Prior to recess, you must document any (evidence of disadvantage) (evidence of discrimination) (dissatisfaction you had with the initial vote of these officers) discovered during your second review. You must also document any action you took to remedy the situation. You must provide information sufficient to allow a reconstruction of your review process, including the numerical adjustments in ranking made after any revote. To help the Army meet its equal opportunity reporting requirements, you must also prepare a report of minority and female selections as compared to the selection rates for all officers considered by the board.

DA Memo 600-2, appendix A, A-2 (consider moving to para. 10a)

(Female officers) (Black officers): Your goal is to achieve a selection rate for (female officers) (Black officers) that is not less than the selection rate for all officers in the promotion zone (first-time considered).

(a) Equal opportunity assessment

1. Your goal is to achieve a selection rate for (female officers) (Black officers) that is not less than the selection rate for all officers in the primary zone of consideration. If the selection rate for (female officers) (Black officers) is less than the selection rate for all first-time considered officers, you are required to conduct a review of files (for evidence of disadvantage against a female officer caused by an inability to serve in a combat position) (for evidence of the lingering effects of discrimination against Black officers) (to ensure that [female officers] [Black officers] received an equal opportunity for promotion during the board's first review). If you find an indication that an officer's record may not accurately reflect his or her potential for service at the next higher grade due to discriminatory practices, revote the record of that officer and adjust his or her relative standing to reflect the most current score.

2. After completing any revote of files, review the extent to which the board met the equal opportunity selection goal. If the board has met the goal, report the selection rate along with the selection rate for other minority or gender groups in the after action report. In cases where the board

has not met the goal, assess any patterns in the files of
nonselected (female) (Black) officers for later discussion in
the after action report.

Appendix B

Proposed Instruction for Ensuring Combat Readiness

DA Memo 600-2, para. 10 introduction (changes italicized):

The success of today's Army comes from total commitment to the ideals of freedom, fairness, and human dignity upon which our country was founded. People remain the cornerstone of readiness. *To accomplish any mission, soldiers must be properly trained and in a proper state of readiness at all times. Soldiers must be committed to accomplishing the mission through unit cohesion developed as a result of a healthy leadership climate. A leadership climate in which soldiers perceive they are treated with fairness, justice, and equity is crucial to the development of this confidence.*

To this end, equal opportunity for all soldiers is the only acceptable standard for our Army. This principle applies to every aspect of career development and utilization in our Army, but is especially important to demonstrate in the selection process. To the extent that each board demonstrates that race, ethnic background, and gender are not impediments to selection for school, command, or promotion, our soldiers will have a clear perception of equal opportunity in the selection process.

DA Memo 600-2, para. 10a (changes italicized):

In evaluating the files you are about to consider, you must clearly afford minority and female officers fair and equitable consideration. Combat readiness demands that soldiers see visible evidence of equal opportunity in promotion results. If soldiers do not perceive they have an equal opportunity for advancement, there will be a detrimental impact on morale, unit cohesion, combat readiness, and ultimately on the Army's ability to accomplish its mission.

DA Memo 600-2, para. 10b (changes italicized)

To ensure that each soldier perceives they have an equal opportunity for advancement, your goal is to achieve a selection rate for minority and female officers that is comparable to the selection rate for all officers considered by the board. This goal is not a requirement to meet a particular quota. Comparison of tentative selection rates to the goal offers you a diagnostic tool to ensure that all officers receive equal opportunity in the selection process.

If you do not achieve your selection goal, you must review the records of those minority or gender groups that fall below the selection goal. During this second review, you must ensure that you provided each officer with an equal opportunity to be promoted. If during this second review you

are not satisfied that you provided an officer with an equal opportunity, you will revote the file of that officer and adjust that officer's relative standing accordingly. If during the second review you are satisfied that all officers received an equal opportunity for promotion, then you should not revote the file of any officer.

DA Memo 600-2, para. 10c (changes italicized)

Prior to recess, you must document any dissatisfaction you had with the initial vote of any officer discovered during your second review. You must also document any action you took to correct the situation. You must provide information sufficient to allow a reconstruction of your review process, including the numerical adjustments in ranking made after any revote. To help the Army meet its equal opportunity reporting requirements, you must also prepare a report of minority and female selections as compared to the selection rates for all officers considered by the board.

DA Memo 600-2, appendix A, A-2 (consider moving to para. 10a)

To ensure that each soldier perceives they have an equal opportunity for advancement, your goal is to achieve a selection rate for minority and female officers that is not less than the selection rate for all officers in the promotion zone (first-time considered).

(a) Equal opportunity assessment

1. To ensure that each soldier perceives they have an equal opportunity for advancement, your goal is to achieve a selection rate for minority and female officers that is not less than the selection rate for all officers in the primary zone of consideration. If the selection rate for minority or female officer is less than the selection rate for all first-time considered officers, you are required to conduct a review of files to ensure that these officers received an equal opportunity for promotion during the board's first review. If you are not satisfied that a minority or female officer received an equal opportunity during the board's initial review, revote the record of that officer and adjust his or her relative standing to reflect the most current score. If you are satisfied that these officers received an equal opportunity for promotion, then do not revote any files.

2. After completing any revoting of files, review the extent to which equal opportunity selection goals were met. To help the Army meet its equal opportunity reporting requirements, report the selection rate in each minority or gender group in the board's after action report. In cases where the goal has not been met, assess any patterns in the

files of nonselected minority and female officers for later discussion in the after action report.

****Note:** Should the Army decide to employ a race- and gender-neutral instruction geared toward combat readiness, then it may use the changes proposed for Department of Army Memo 600-2, paragraphs 10 (introduction) and 10a. It should delete reference to the other paragraphs contained in this appendix.

Appendix C

Proposed Race- and Gender-Neutral Instruction for all Promotion Boards

DA Memo 600-2, para. 10 introduction (unchanged):

The success of today's Army comes from total commitment to the ideals of freedom, fairness, and human dignity upon which our country was founded. People remain the cornerstone of readiness. To this end, equal opportunity for all soldiers is the only acceptable standard for our Army. This principle applies to every aspect of career development and utilization in our Army, but is especially important to demonstrate in the selection process. To the extent that each board demonstrates that race, ethnic background, and gender are not impediments to selection for school, command, or promotion, our soldiers will have a clear perception of equal opportunity in the selection process.

DA Memo 600-2, para. 10a & 10b (deleted)

DA Memo 600-2, para. 10c (changes italicized)

To help the Army meet its equal opportunity reporting requirements, prior to recess you must prepare a report of minority and female selections as compared to the selection

rates for all officers considered by the board (first-time considered).

DA Memo 600-2, appendix A, A-2 (deleted)

DA Memo 600-2, appendix A, para. A-8c(a) (deleted)