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THE DOLE-CANADY BILL: AN IMPORTANT FIRST STEP

INTRODUCTION

> By making race a relevant criterion... in its own affairs, government teaches the public that the apportionment of rewards and penalties can legitimately be made according to race... and that people can, and perhaps should, view themselves and others in terms of their racial characteristics.
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> —Justice Potter Stewart, dissenting in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Unfortunately, government in America has made race a relevant criterion. Racial and gender preferences pervade the federal government: employment quotas for minority and female employees; contract "set-asides" reserved exclusively for minority and female firms; and "bid preferences" where up to 10 percent is added to the bids of nonminority firms to aid minority and female firms. Defenders characterize these programs as containing mere "goals and timetables." Such Orwellian terminology, however, cannot disguise the obvious fact that a preference by any other name is still a preference.

Last July, Senator Robert Dole (R-KS) and Representative Charles Canady (R-FL) introduced the Equal Opportunity Act of 1996.[1] The Dole-Canady bill attempts to restore the colorblind principle to federal law by prohibiting the federal government from granting any preference to any person based in whole or in part on race, color, national origin, or sex. Specifically, Dole-Canady contains two main provisions:

1) It prohibits the use of preferences based on race, color, national origin, or sex by the federal government in

   ✓ federal employment,

1 H.R. 2128 and S. 1085.

- ✓ The awarding or administering of federal contracts, and
- ✓ Any other federally conducted program or activity;

2) It prohibits the federal government from requiring or encouraging any federal contractor or subcontractor to grant preferences based on race, color, national origin, or sex to employees, suppliers, or subcontractors.

GOALS AND PREFERENCES

Section 8 of the Dole-Canady bill defines "preference" as "an advantage of any kind, and includes a quota, set-aside, numerical goal, timetable, or other numerical objective."[2]

This is one of the bill's most important provisions because it attempts to prohibit preferences from being disguised in other forms. The Dole-Canady bill prohibits the federal government from using and requiring a "numerical goal, timetable, or other numerical objective" because such goals and timetables are indistinguishable from quotas. Laurence Silberman, as Undersecretary of Labor in the Nixon Administration, helped devise the regime of employment goals and timetables now imposed on private businesses. Silberman, now a federal circuit judge, later wrote:

> I now realize that the distinction we saw between goals and timetables on the one hand, and unconstitutional quotas on the other, was not valid. Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we initially wished to avoid.[3]

Section 3 of the bill expressly protects the federal government's nonpreferential affirmative action programs. Such programs include outreach, recruiting, and marketing efforts to encourage qualified minorities to apply for federal employment and bid on federal contracts. All such programs are permissible under Dole-Canady provided no preferences are involved.

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2 Currently, the groups officially preferred by the federal government in contracting programs are African Americans, Hispanics, Native Americans, and Asian-Pacific Americans, which include persons from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia, Vietnam, Korea, the Philippines, U.S. Trust Territory of the Pacific Islands, Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, Mauru, India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, and Nepal. See Terry Eastland, *Ending Affirmative Action: The Case for Colorblind Justice* (New York: Basic Books, 1996), p. 140.

3 Laurence Silberman, "The Road to Quotas," *The Wall Street Journal*, August 11, 1977.

RHETORIC VS. REALITY

Despite its clear language and narrow focus, the purpose and effect of the Dole-Canady bill have been subject to serious misinterpretation in some quarters. For example:

> "[A]n all out, in-your-face attack, a walking away from hard-earned civil rights gains."
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> —William Raspberry, Columnist.[4]

> A "safe haven for sophisticated bigots."
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> —Representative Barney Frank (D-MA).[5]

> "It's an incredible rollback. It would basically take away equal opportunities for women and minorities."
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> —Rosemary Dempsey, Vice President, National Organization for Women.[6]

> A "unilateral disarmament in the war on racism and discrimination."
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> —Representative Nita M. Lowey (D-NY).[7]

Discrimination Remains Illegal. In reality, the bill does none of these things. It would not address, amend, or weaken any civil rights laws and protections in any way. Discrimination would still be absolutely illegal, subject to the same penalties. Nothing in the bill would impair the federal enforcement and prosecution of civil rights laws and violations. In fact, Section 8(1) of the bill exempts the federal judiciary, thus ensuring the courts' power to order remedial relief to victims in discrimination cases. Civil suits for employment and contract discrimination also would be unaffected.

Contrary to the claims of some, nothing in the Dole-Canady bill would prevent the use of numerical disparities as evidence in discrimination trials; juries still could consider such "numerical evidence" in deciding whether discrimination occurred in a particular case. In sum, Dole-Canady does not address any issues involving civil rights or employment litigation. All it does is prohibit the federal government from using and requiring racial and gender preferences.

Private Preferences. The Dole-Canady bill does not prohibit state and local governments, colleges and universities, or private businesses, including federal contractors, from granting racial, ethnic, or gender preferences otherwise permitted by law—provided such programs are truly voluntary and not adopted pursuant to pressure from the federal government. However, it does prevent the federal government from "requiring or

4 William Raspberry, "An All-Out Attack on Civil Rights Gains," *The Washington Post*, March 15, 1996, p. A29.

5 "Clinton Administration Rejects GOP Bill Banning 'Preferences,'" *Government Employee Relations Report*, Vol. 33, No. 1645 (December 18, 1995), p. 1570.

6 Donna St. George, "Bill Would Abolish Affirmative Action," *The Houston Chronicle*, July 28, 1995, p. A2.

7 Mark Johnson, "Federal Affirmative Action Takes Hit Under GOP Bills," *The Tampa Tribune*, July 28, 1995, p. 1.

encouraging" federal contractors from adopting such preferences. Currently, contractors and subcontractors are required to adopt rigid quotas and preferences as a condition of receiving and maintaining federal contracts.

Consistent with Civil Rights Act of 1964. It is indisputable that Dole-Canady is consistent with both the letter and the spirit of the Civil Rights Act of 1964, and that the current regime of preferences is not. For example, Senator Hubert H. Humphrey (D-MN), the floor manager of the landmark 1964 Act, assured the Senate specifically that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group."[8] More important, the Dole-Canady bill's concept of discrimination is consistent with the definition of discrimination in the 1964 Act: in the words of Senator Humphrey, "a distinction in treatment given to different individuals because of their different race."[9]

Politically Popular Support. An overwhelming number of Americans disapprove of racial and gender preferences. A recent poll showed that 84 percent of the American public opposes "favoring a minority who is less qualified than a white applicant, when filling a job in a business that has few minority workers."[10] However, traditional, nonpreferential forms of affirmative action are favored. For example, 73 percent of those polled approve of companies making "special efforts to find qualified minorities and women and then encouraging them to apply for jobs with that company."[11] This strongly suggests that the goals of the Dole-Canady bill are supported by the American people.

WHERE THE CLINTON ADMINISTRATION STANDS

Following last year's landmark Supreme Court ruling in *Adarand Constructors, Inc. v. Pena*,[12] which held that all racial classifications by government are subject to the strictest judicial scrutiny, the Clinton Administration unveiled a five-month long study of federal affirmative action programs.[13] This review did not recommend the elimination of a single federal preference program.[14] In fact, despite the nearly impossible standard for government preferences announced in *Adarand*, President Clinton personally endorsed virtually all existing federal race and gender preferences in a July 19 speech.

Examples of the Administration's commitment to race-based affirmative action abound:

- ✗ Assistant Attorney General Walter Dellinger has defined affirmative action as "a group-based remedy: where a group has been subject to discrimination, individual members of the group can benefit from the remedy, even if they have not proved that they have been discriminated against personally."[15]

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8 Nelson Lund, "Reforming Affirmative Action in Employment: How to Restore the Law of Equal Treatment," Heritage Foundation *Committee Brief* No. 17, August 2, 1995, p. 5; citing 110 *Congressional Record* 5423 (1964).

9 Eastland, *Ending Affirmative Action, The Case for Colorblind Justice*, p. 7.

10 "Affirmative Action: The Public Reaction," *USA Today*, March 24, 1995, p. 3A.

11 *Ibid.*

12 497 U.S. 547 (1995).

13 George Stephanopoulos and Christoper Edley, Jr., *Affirmative Action Review: Report to the President,* The White House, July 19, 1995.

14 Eastland, *Ending Affirmative Action, The Case for Colorblind Justice*, p. 182.

- ✗ Says Associate Attorney General John Schmitt, "Race can be taken into account as a preference."[16]
- ✗ Deputy Assistant Secretary of Labor Shirley Wilcher believes that "it's absolutely absurd that anyone would think affirmative action programs constitute reverse discrimination."[17]
- ✗ Says Assistant Attorney General for Civil Rights Deval Patrick, the Clinton Administration "firmly and unequivocally opposes" the Dole-Canady bill.[18]
- ✗ And President Clinton, in his July 19, 1995, address on affirmative action made it clear that "where our legitimate objectives cannot be achieved through such means, the federal government will continue to support lawful consideration of race, ethnicity, and gender" in federal programs.[19]

LIMITED YET SIGNIFICANT

Although the Dole-Canady bill focuses only on the activities of the federal government, it would have a significantly broad impact. In all, there are over 160 different federal programs that contain racial and gender preferences. Dole-Canady would eliminate such preferences from these programs. For example, under Dole-Canady the 2.8 million federal employees that comprise 3.1 percent of America's total workforce[20] would no longer be subjected to preferential hiring and promotion practices.

Even more important, roughly one-third of all private employers in the United States contract with the federal government,[21] and employees of these private-sector federal contractors comprise approximately 28 percent of the nation's workforce.[22] The Dole-Canady bill prohibits the federal government from requiring or encouraging these federal contractors to employ racial or gender preferences. In other words, the bill frees up to one-third of America's private employers from a particularly burdensome federal requirement.

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15 Michael G. Franc, "Federal Race and Sex-Based Preferences," in Stuart M. Butler and Kim R. Holmes, eds., *Issues '96: The Candidate's Briefing Book* (Washington, D.C.: The Heritage Foundation, 1996,) p. 381.
16 Terry Eastland, "Endgame for Affirmative Action," *The Wall Street Journal*, March 28, 1996.
17 Eric L. Smith, "Under the Table," *Black Enterprise*, February 1996, p. A24.
18 *Government Employee Relations Report*, December 18, 1995, p. 1570.
19 "Clinton Backs Affirmative Action," Bureau of National Affairs, *Daily Report for Executives*, August 2, 1995.
20 Lund, "Reforming Affirmative Action in Employment," p. 3.
21 Eastland, *Ending Affirmative Action, The Case for Colorblind Justice*, p. 12.
22 See Lund, "Reforming Affirmative Action in Employment," note 18.

CONCLUSION

Although the Dole-Canady bill is narrow in scope, it would accomplish one very important objective: the restoration of colorblind law to the federal government. This is a goal that can and should be supported by all Americans of goodwill. In the eloquent words of Supreme Court Justice Antonin Scalia:

> Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race... In the eyes of the government, we are just one race here. It is American.[23]

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23 *Adarand Constructors, Inc. v. Pena*, 497 U.S. 547, 558 (1995).