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MARGINALIZING ADARAND: POLITICAL INERTIA AND THE SBA 8(A) PROGRAM

I. INTRODUCTION

Proponents of federal affirmative action programs aimed at increasing minority business opportunities have been on the defensive in recent years as they try to hold back a conservative tide that attacks those programs as inefficient, redistributive social programs that are unfair to those not eligible for participation. Following the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Peña*,¹ numerous commentators declared that the end of federal affirmative action had arrived.² Yet, despite the dire predictions of the death knell of these initiatives, the Small Business Administration's ("SBA") 8(a) Business Development Program has survived.³ Indeed, final regulatory changes published by the SBA in June 1998 will significantly strengthen and expand participation in 8(a) contracting set asides by making their unique preferences available to a broader segment of the business community.

This Comment will focus upon the recent regulatory changes to the 8(a) program and how these changes tend to marginalize the impact of *Adarand* on the 8(a) program. The central argument is that, although the 8(a) program retains its racial and ethnic preferences, it will pass constitutional muster based upon unique program participation criteria that separate it from other federal affirmative action initiatives. Part I discusses the *Adarand* decision and how, within its historical context, the opinion signaled significant changes in the interpretation of federal contracting set asides. Part II presents a background of the

1. 515 U.S. 200 (1995).

2. See generally John Richard Carrigan & John J. Coleman, III, *The Cloudy Future of Affirmative Action*, 57 ALA. LAW. 24, (Jan. 1996) (set-aside programs likely to be modified to remove explicit racial presumptions); Major Causey, *Bell Tolls for 8(a) Program—All Affirmative Action Programs Now Subject to Strict Scrutiny*, ARMY LAW. 33 (Aug. 1995) (stating *Adarand* decision will result in "complete overhaul or elimination" of affirmative action programs). But c.f., Andy Portinga, *Racial Diversity as a Compelling Governmental Interest*, 75 U. DET. MERCY L. REV. 73, (Fall 1997) (holding that racial classifications should be judged on a case-by-case basis); Rheba Cecilia Heggs, *Practitioners Viewpoint: What to Expect After Adarand*, 25 PUB. CONT. L.J. 451 (1996) (arguing *Adarand* will not be the death knell of affirmative action because it will impact only "simplistic, broad-based, race-based, and gender-based classifications that are not rationally related to economic disadvantage").

3. The 8(a) Business Development Program, named after Section 8(a) of the Small Business Act, and codified at 15 U.S.C. § 637 (1988), is a federal contracting set-aside program administered by the Small Business Administration ("SBA") that has historically benefitted ethnic and racial minorities. Reference to the statutory provision as 8(a) and the 8(a) program are made throughout this discussion. Implementing regulations are found at 13 C.F.R. §§ 121, 124 and 134. New regulations that became final in June 1998 state that the program's purpose "is to assist eligible small disadvantaged business concerns to compete in the American economy through business development." 63 Fed. Reg. 35,740 (1998) (to be codified at 13 C.F.R. § 124).

8(a) program and a discussion of its programmatic operation. Part III discusses changes resulting from the new regulatory scheme and concludes with an argument as to why the 8(a) program should survive the constitutional standard applied by the *Adarand* Court.

I. THE *ADARAND* DECISIONS

The history of affirmative action in the Supreme Court is marked by the struggle between political forces trying to validate their point of view.⁴ For the most part, the line of cases leading up to *Adarand* are muddled by plurality opinions and dissents in addition to holdings of the narrowest margins.⁵ The 1995 *Adarand* decision again offered plurality opinions on some major aspects of the case, but the majority opinion represented the first time the Court applied its strict scrutiny standard to federal race-based programs.⁶ Ultimately, the *Adarand* holding's place in constitutional law will be defined by whether its application of strict scrutiny will apply to future affirmative action efforts.

A. Discussion of Supreme Court Affirmative Action Holdings

Affirmative action rulings by the Supreme Court begin with the decision in *Regents of the University of California v. Bakke*⁷ and develop through eighteen years to *Adarand*. As one of the most polarizing political issues of our time, race-based preferences of various types have been brought time and again to the Court with "uneven" results.⁸ Briefly discussed here are the five most significant pre-*Adarand* decisions of the Court: *Regents of the University of California v. Bakke*,⁹ *Fullilove v. Klutznick*,¹⁰ *Wygant v. Jackson Board of Education*,¹¹ *City of Richmond v. Croson*,¹² and *Metro Broadcasting v. FCC*.¹³ This list of cases is by no means exhaustive of the Court's

4. See *DRAKE & HOLSWORTH*, *supra* note 1, at 158.

5. See *FISCUS*, *supra* note 1, at 1 (noting the one-vote margins in some of the decisions. Justice Lewis Powell had cast deciding votes "in three of the four most controversial and difficult cases" and had voted to uphold affirmative action programs in four of the six major cases).

6. The strict scrutiny standard developed over a period of decades in the Court but is most often traced back to Justice Black's majority opinion in *Korematsu v. United States*, 323 U.S. 214 (1944). This standard requires that governmental action which discriminates against suspect classes of citizens, such as racial or ethnic minorities, must promote a compelling state interest and must be narrowly tailored to meet that interest. See *Adarand*, 515 U.S. at 227.

7. 438 U.S. 265 (1978).

8. See *FISCUS*, *supra* note 1, at 117.

9. 438 U.S. 265 (1978).

10. 448 U.S. 448 (1980).

11. 476 U.S. 267 (1986).

12. 488 U.S. 469 (1989).

13. 497 U.S. 547 (1990).

affirmative action rulings but represents most of the developmental aspects of affirmative action jurisprudence.

Prior to the *Bakke* decision, the Court had never directly confronted and ruled upon so-called "benign" racial discrimination.¹⁴ The plurality opinion in this 1978 ruling concerning an admissions policy at the University of California Davis Medical School was accompanied by five other opinions which left no "consensus rationale"¹⁵ as to how affirmative action was to be analyzed constitutionally. Four justices argued for the intermediate scrutiny standard¹⁶ while Justice Powell argued alone that strict scrutiny should apply.¹⁷ Justice Powell, considered the "swing vote" in many of the decisions following *Bakke*, argued that race should only be used as a "flexible factor" in governmental decisions.¹⁸

Two years later the Court again faced benign governmental discrimination in *Fullilove*. The case involved minority contracting set-asides similar to those found in *Adarand* fifteen years later. Although there was no opinion for the Court—five separate justices filed opinions—the judgment of the Court was based upon an application of intermediate scrutiny. The Court stated that racial classifications "must necessarily receive a most searching examination" of constitutionality,¹⁹ but this formula did not employ strict scrutiny.²⁰ Justice Powell argued that the Court's judgment was "essentially" an application of that standard since it "determined that the set-aside was 'a necessary means of advancing a compelling governmental interest'—and had done so correctly."²¹

Wygant, decided six years after *Fullilove*, involved a collective bargaining agreement granting minority teachers certain protections from layoff. The Court's plurality opinion struck down the agreement,²² but "the justices were still unable to agree on the standard of re-

14. See Portinga, *supra* note 3, at 77 (explaining benign discrimination favors racial or ethnic minorities as opposed to "invidious" discrimination which constitutes restrictions curtailing the civil rights of racial or ethnic groups).

15. See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 57 (1996).

16. Intermediate scrutiny, a test established by the court in *Craig v. Boren*, 429 U.S. 190 (1976), requires that the governmental actor show that the state's racial classification is substantially related to an important governmental interest. This should be juxtaposed to the strict scrutiny standard of "necessary to promote a compelling state interest." See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

17. See Portinga, *supra* note 3, at 78. Ironically, Justice Powell delivered the opinion of the court but was not joined by any other justices in the application of the strict scrutiny standard. See *id.*

18. See EDLEY, *supra* note 16, at 58.

19. See *City of Richmond v. Croson*, 448 U.S. 469, 491 (1989) (Burger, J., plurality opinion).

20. See EDLEY, *supra* note 16, at 58.

21. *Adarand*, 515 U.S. at 218 (quoting Justice Powell's *Fullilove* concurrence).

22. See *Adarand*, 515 U.S. at 220-21 where Justice O'Connor refers to her own concurrence in *Wygant* which stated that the standard applied by the court appeared to be that of strict scrutiny. See *id.*

view."²³ The plurality applied a two-part test finding that the school district failed to show that the layoff provision was "supported by a compelling state purpose and whether the means chosen to accomplish that purpose [were] narrowly tailored."²⁴

Croson is often represented as the first time that the Court was able to find a majority willing to apply strict scrutiny to a benign racial classification.²⁵ *Croson* concerned a local governmental contracting set aside program which required that at least thirty percent of the city's construction contracts be awarded to minority businesses.²⁶ The set-aside plan had been closely modeled on the federal program that was upheld in *Fullilove*.²⁷ The majority in *Croson* distinguished the *Fullilove* decision by differentiating between federally-implemented affirmative action and state or local plans.²⁸ Justice O'Connor later characterized her *Croson* opinion as stating that "the standard of review for all racial classifications should be 'strict scrutiny.'"²⁹ However, the Court majority in Section III-A, which addressed strict scrutiny, was comprised of Justice O'Connor, Chief Justice Rehnquist, Justice White and Justice Kennedy with a separate concurrence by Justice Scalia.³⁰ Furthermore, the Court did not extend the strict scrutiny test beyond those programs at the state and local level, specifically reserving for another day whether the test would apply to federal race-based classifications.³¹

The door was left open for a challenge two years later of the Federal Communications Commission ("FCC") policy relating to race-based considerations in licensing of broadcast stations in *Metro Broadcasting*. The Court took a sharp turn away from *Croson* and approved the FCC programs based upon an application of intermediate scrutiny.³² Garnering support from the swing voters, Justices Stevens and White, the minority from the previous affirmative action cases now took the opportunity to distinguish benign racial classifica-

23. See GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 127 (1993).

24. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (Powell, J., plurality opinion).

25. See Portinga, *supra* note 3, at 82.

26. See *City of Richmond v. Croson*, 488 U.S. 469, 477(1989).

27. See SPANN, *supra* note 24, at 127.

28. See *id.* at 128.

29. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1994) (O'Connor, J., quoting her majority opinion from *Croson*).

30. See *Croson*, 488 U.S. at 469. Justice Scalia's concurrence disagreed with the Court that "state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination.'" *Id.* Instead, the only allowable instance of actions to undo past discrimination would be to identify those particular bidders who actually suffered past discrimination by the city or its prime contractors, and tailor contracting preferences toward those specific individuals.

31. See *id.* at 491.

32. See *Metro Broad. v. FCC*, 497 U.S. 547, 564 (1990).

tions from those invidious classifications of the earliest equal protection cases.³³ The Court explicitly set forth the federal-state distinction when Justice Brennan, writing for the majority, stated that “race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.”³⁴

Another five years passed before the Court took up the issue of federal affirmative action programs in *Adarand*. Striking down the Court’s refusal in *Fullilove* to apply strict scrutiny and the Court’s application of intermediate scrutiny in *Metro Broadcasting*, the Court now embarked on a new judicial path that applied strict scrutiny to “all racial classifications, imposed by whatever federal, state or local governmental actor.”³⁵ Leaving behind its prior indecisiveness, the Court now had the majority necessary to apply strict scrutiny to all governmental actors.

B. *The Factual and Procedural Background of Adarand*

Considering the failure of the Court to apply a single standard to federal affirmative action programs, *Adarand* Constructors and the foes of federal affirmative action now were able to place the issue before the Justices for a final, decisive ruling. The lengthy discussion was composed of partial majority and plurality holdings, in addition to one section joined only by Justice Kennedy. Justice O’Connor handed down an historic ruling subjecting all federal race-based preferences to strict scrutiny.³⁶

Originally filed in Colorado Federal District Court, *Adarand* was a prospective subcontractor’s³⁷ challenge of a subcontract award to other than the low bidder³⁸ for a portion of a highway construction

33. *See id.* at 564 n.12 (discussing at length the definition of “benign race-conscious measures”).

34. *Id.* at 565 (finding Federal affirmative action programs can use racial classifications while state and local governments cannot).

35. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

36. *See id.*

37. A “prospective subcontractor” as used in this context refers to an entity submitting an offer to a prime contractor for completion of a portion of the overall prime contract work. *See* RALPH C. NASH, JR. ET AL., *THE GOVERNMENT CONTRACTS REFERENCE BOOK* (2d ed. 1998). In *Adarand* the prime contractor, Mountain Gravel, was performing road construction work and the prospective subcontractor, *Adarand Construction*, had submitted an offer for completion of the guardrail construction portion of that road work. *See Adarand*, 515 U.S. at 205.

38. The phrase “other than the low bidder” refers to a firm which did not offer the lowest price for completion of the work. Government contracts solicited on the basis of sealed bids are awarded to the lowest responsive, responsible bidder. *See* GOVERNMENT CONTRACT LAW: THE DESKBOOK FOR PROCUREMENT PROFESSIONALS 40 (American Bar Association Section on Public Contract Law ed. 1996) (“Bid responsiveness” refers to whether a bidder has conformed to the “essential requirements of the invitation for bids.”); W. NOEL KEYES, *GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION* 281 (2d ed. 1996). Responsibility refers to an

project.³⁹ Adarand Constructors, Inc., the low bidder, had successfully bid on the guardrail portions of various federally-funded highway construction contracts for many years but was passed over for this subcontract award by Mountain Gravel Construction Company, the prime contractor.⁴⁰ Mountain Gravel awarded the subcontract based upon the minority ownership status of the winning firm,⁴¹ rather than upon the lowest bid price.

Mountain Gravel had been awarded its highway construction prime contract through an arm of the U.S. Department of Transportation ("DOT"). That agency was subject to an "appropriations measure" known as the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA").⁴² Congress stipulated in Section 106(c) of STURAA that "[e]xcept to the extent that the Secretary [of Transportation] determines otherwise, not less than ten per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals"⁴³ as defined by section 8(a) of the Small Business Act. Based in part on STURAA's ten percent requirement and other federal contracting set-aside directives of Congress, federal procurement regulations stipulate that certain prime contracts must contain a provision which encourages prime contractors to subcontract with minority contractors.⁴⁴

One such provision, known as the Subcontractor Compensation Clause ("SCC"),⁴⁵ provides financial incentives to prime contractors that meet certain targeted thresholds for award of subcontracts to minority firms.⁴⁶ In the *Adarand* case, the DOT agency that awarded Mountain Gravel's prime contract inserted a standard clause from the Federal Acquisition Regulation which provided that Mountain Gravel would receive a monetary bonus payment of one percent of the total

offeror's financial and other general capability to perform the required work. *See id.* at 177-80. Adarand's argument was that, as the lowest responsive, responsible bidder, his offer would have been accepted by Mountain Gravel in the absence of the minority set-aside provisions of the prime contract. *See generally* Adarand, 515 U.S. at 205-09.

39. *See* Adarand Constructors, Inc. v. Pena, 790 F. Supp. 240 (D. Colo. 1992). There are four different Adarand cases that are referred to. No reference is made to the Tenth Circuit's remand of the case to the District Court because there were no substantive findings in that opinion.

40. *See* Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997).

41. *See* Adarand, 790 F. Supp. at 240.

42. Pub. L. No. 100-17, 101 Stat. 132 (1987).

43. *Id.* § 145.

44. *See generally* Federal Acquisition Regulations, 48 C.F.R. § 19 (1998). This section of the regulation pertains to a variety of small business programs, incorporating various business size standards and implementing numerous programs targeted at disadvantaged businesses.

45. The title of the clause has now been changed to "Incentive Subcontracting Program." *See* 48 C.F.R. § 19.707(c) (1998).

46. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205 (1995).

contract amount⁴⁷ if the company awarded ten percent or more of its subcontracts to small, minority firms.⁴⁸ When Mountain Gravel solicited bids for the guardrail portion of the construction contract, it relied upon this contractual provision to choose its subcontractors. The prime contractor awarded the subcontract for guardrail work to Gonzales Construction, a minority-owned firm, under the SCC's bonus provisions.⁴⁹ Adarand Constructors believed that its bid was lowest and that, in the absence of the SCC, it should have won the subcontract.

Part of the difficulty in understanding the *Adarand* cases, and a source of apparent difficulty for the various courts ruling on this matter, was the "complex scheme of federal statutes and regulations"⁵⁰ that governmental agencies utilize to designate which firms are minority business enterprises ("MBEs"). Discussed in greater detail in Part II's analysis of the section 8(a) program, federal regulations defining participation in contracting set-asides originate in the Small Business Act Sections 8(a) and 8(d).⁵¹ At the heart of both statutory sections and their implementing regulations are certain rebuttable presumptions that any member of specified racial or ethnic classes is eligible for designation as an MBE.⁵² Because Gonzales Construction was owned by a Hispanic American, it fit into one of these classes and thus was eligible for award of contracts set aside for minority firms. Adarand Constructors was owned by a white male⁵³ and, thus, was presumptively not eligible for award of set-aside contracts.

Alleging Civil Rights Act violations under 42 U.S.C. §§ 1983 and 2000(d), Adarand claimed that the basis for the award was the racial classification scheme of the SCC and, thus, was a constitutional violation.⁵⁴ The District Court made short shrift of the claim. It applied intermediate scrutiny analysis, and found that the Government had "demonstrated that the program serves important governmental objectives and that it is substantially related to achievement of these

47. See *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1541 (10th Cir. 1994).

48. See *id.* at 1541-42. See also 48 C.F.R. § 19.702 (1998) (regulatory provision's policy statement) and 48 C.F.R. § 19.707(c)(1) (1998) (implementing instructions). The prescribed clause at 48 C.F.R. § 52.219-10 (1998) allows the agency using the provision to insert a percentage of the total prime contract amount as the bonus for meeting the minority subcontracting goal.

49. See *Adarand*, 515 U.S. at 209-10.

50. *Id.* at 206.

51. 15 U.S.C. §§ 637(a) and (d) are the codified provisions of the Act where detailed criteria for participation are set forth.

52. The implementing regulations for various minority set-aside programs are set forth at 13 C.F.R. § 124 (1998) and define the specified groups to include, but not be limited to, African Americans, Hispanic Americans, and Native Americans. Gonzales Construction was owned by a Hispanic American and, thus, presumptively qualified as a minority business.

53. See *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1539 (10th Cir. 1994).

54. See *Adarand Constructors, Inc. v. Pena*, 790 F. Supp. 240 (D. Colo. 1992).

objectives.”⁵⁵ In applying the Supreme Court’s *Fullilove*⁵⁶ intermediate scrutiny standard, the District Court stated that the federal government has a “freer hand than states and municipalities”⁵⁷ in matters of affirmative action.⁵⁸

On appeal, the Tenth Circuit affirmed.⁵⁹ Noting that the SCC incentive did not require large non-minority businesses to utilize minority subcontractors, the Court of Appeals again cited the *Fullilove* opinion, stating:

[T]he Supreme Court approved the use of a 10% minority business enterprise (MBE) set-aside mandated by Congress. In rejecting a facial challenge to the constitutionality of the statute authorizing the MBE program, the Court found that Congress acts within its unique and broad powers under the Commerce Clause and section 5 of the Fourteenth Amendment when it imposes an affirmative action program to remedy nationwide discrimination in the construction industry.⁶⁰

The Tenth Circuit applied an intermediate-scrutiny analysis and held that the SCC program was substantially related to an important governmental interest because it was “not limited to members of racial minority groups” and because Mountain Gravel “had the option, not the obligation, of subcontracting with a[n] [8(d) firm,] it exercised its own judgment.”⁶¹

C. *The Supreme Court Decision*

Adarand Constructors appeared to have received the ruling it sought when the Supreme Court’s landmark decision was finally announced in 1995.⁶² Justice O’Connor’s lead opinion rejected the assertion that the SCC was based upon social and not racial factors, and held that “the race-based rebuttable presumptions” found in the process should be “subject to some heightened level of scrutiny.”⁶³ The Court further reasoned that its failure to garner majority opinions in prior decisions⁶⁴ involving federal race-based preferences meant that the issue remained “unresolved” at the federal level.⁶⁵ The Court turned to its prior decision in *City of Richmond v. Croson*,⁶⁶ and char-

55. *Id.* at 244.

56. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980).

57. *Adarand*, 790 F. Supp. at 244.

58. *See id.*

59. *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994).

60. *Id.* at 1543-44.

61. *Id.* at 1547.

62. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

63. *Id.* at 213.

64. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Metro Broad. v. FCC*, 497 U.S. 547 (1990), and *infra* Section I.A.

65. *See Adarand*, 515 U.S. at 221.

66. 448 U.S. 469 (1989).

acterized the holding as having applied strict scrutiny to state and local governmental race-based affirmative action programs⁶⁷ of all types.⁶⁸

Justice O'Connor's opinion laid out three "general propositions" regarding racial classifications that "lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."⁶⁹ First, the opinion stated, "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination."⁷⁰ Second, it cited "consistency: 'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.'"⁷¹ Finally, Justice O'Connor noted that "congruence" plays a role in the analysis since equal protection standards for both the Fifth and Fourteenth Amendments must be the same.⁷² Therefore, Justice O'Connor reasoned, "any person, of whatever race, has the right to demand that any governmental actor . . . justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."⁷³

Near the end of her opinion, Justice O'Connor took pains to disavow the widespread perception that strict scrutiny automatically entails the death of any race-based affirmative action program.⁷⁴ Justice O'Connor admitted that "both the practice and the lingering effects of racial discrimination against minority groups in this country are an unfortunate reality."⁷⁵ She briefly mentioned *United States v. Paradise*⁷⁶ in which the court let stand a race-based program relating to the Alabama Department of Public Safety. The opinion then stated that race-based action is necessary to further a compelling interest; such action is within constitutional constraints if it satisfies the "narrow tailoring" test.⁷⁷

67. See *Adarand*, 515 U.S. at 222 (citing *City of Richmond v. Croson*, 488 U.S. 469 (1989)).

68. *Croson* has been applied to strike down numerous state and local affirmative action programs, most recently in the high profile *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) case. However, it had not been applied to those programs which were primarily federal in nature or which had been established by the federal government but were administered by the states. See *Adarand*, 515 U.S. at 223.

69. *Id.* at 224.

70. *Id.* at 223 (quoting from Powell's plurality opinion in *Wygant*).

71. *Id.* at 224 (quoting her own plurality opinion in *Croson*).

72. See *id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1975)).

73. *Id.*

74. See *id.* at 237.

75. *Id.*

76. 480 U.S. 167 (1986).

77. See *Adarand*, 515 U.S. at 237.

Although the statement has been questioned as dicta,⁷⁸ it has been the statement around which affirmative action proponents have rallied to gather support for the proposition that federal affirmative action must survive.⁷⁹ The primary unresolved issue was whether the government could show a compelling interest for the race-based classifications of the 8(d) program and the SCC. The *Adarand* decision made clear that remediation of generalized historical discrimination alone would not suffice to prove a compelling governmental interest.⁸⁰ The Justice Department has recently published a report entitled "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey" in which it states that "[s]even of the nine justices of the Court embraced the principle that it is possible for affirmative action by the federal government to meet strict scrutiny."⁸¹

In this report, the Clinton Administration makes clear that it interprets Justice O'Connor's concluding remarks to mean that "*Adarand* did not alter the principle that the government may take race-conscious remedial action in the absence of a formal judicial or administrative determination that there has been discrimination against individual members of minority groups (or minorities as a class)."⁸²

Ultimately, the Court failed to rule on the merits of the SCC and its enabling legislation, opting instead to remand the case.⁸³ Citing "unresolved questions . . . concerning the details of the complex regulatory regimes implicated by the subcontractor compensation clauses,"⁸⁴ the Court remanded the case to the lower court to apply the new judicial standard of strict scrutiny. Justice O'Connor was joined by Chief Justice Rehnquist and Justice Kennedy, with concurring opinions written by Justices Scalia⁸⁵ and Thomas⁸⁶ arguing against affirmative action programs. In dissent, Justice Stevens argued at length that

78. See Karen M. Berberich, *Strict in Theory, Not Fatal in Fact: An Analysis of Federal Affirmative Action Programs in the Wake of Adarand v. Peña*, 11 ST. JOHN'S J. LEGAL COMMENT 101 (Fall 1995).

79. See Federal Procurement; Proposed Reforms to Affirmative Action; Notice, 61 Fed. Reg. 26,041, 26,050, (1996) [hereinafter 1996 Proposed Reforms]. As further discussed in Part III *infra*, the Clinton Administration's Justice Department references this apparent failure to rule whether there was a compelling governmental interest in an appendix to the proposed regulatory reforms called "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey." The argument is then made that the federal government can show "diminished contracting opportunities for members of racial and ethnic minority groups," and has thus met the compelling interest burden of strict scrutiny.

80. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995).

81. Proposed Reforms to Affirmative Action, *supra* note 79, at 26,050 n.2.

82. *Id.* at 26050 n.3.

83. See *Adarand*, 515 U.S. at 238.

84. *Id.*

85. Justice Scalia's brief concurrence argued that the "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.* at 239 (Scalia, J., concurring).

86. Justice Thomas's concurrence argued that affirmative action "programs stamp minorities with the badge of inferiority and may cause them to develop dependencies

federal programs are distinct from state and local programs.⁸⁷ Justices Souter⁸⁸ and Ginsburg⁸⁹ wrote opinions based upon arguments that had carried the day in prior applications of intermediate scrutiny. Justice Breyer joined the dissent but did not submit a written opinion.

Notably, the Court discussed the 8(a) program within the context of the racial classifications of the statute and regulation. Specifically, the Court appeared to set the 8(a) program apart from other race-based contracting preferences, noting that “the SBA’s 8(a) program requires an individualized inquiry into the economic disadvantage of every participant” and that there were discrepancies “between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs.”⁹⁰ As discussed below in Parts II and III, this vague reference to the subtle regulatory distinctions among the various race-based contracting set-aside programs coupled with the court’s failure to find a majority on the “compelling interest” portion of the strict scrutiny test,⁹¹ may ultimately have provided the ammunition needed by affirmative action proponents to repackage and expand the 8(a) program.

D. *On Remand to the Colorado Federal District Court*

1. Discussion of Overall Holding.

On remand to the Tenth Circuit, that court also remanded the case to the original Colorado District Court where it was filed in 1991. By the time the District Court made its final ruling on *Adarand* in 1997, it had completed a six-year journey in which it wound its way up and slid its way down the federal judiciary back to a court from which the orig-

or to adopt an attitude that they are ‘entitled’ to preferences.” *Id.* at 241 (Thomas, J., concurring).

87. Justice Stevens’s dissent, joined by Justice Ginsburg, addressed each of Justice O’Connor’s three propositions. He agreed with the concept of judicial skepticism; however, he argued that the Court’s concept of “consistency” confuses the “difference between a ‘No Trespassing’ sign and a welcome mat,” meaning that benign classifications are analyzed using the same judicial standards as invidious classifications without regard to the “difference between good intentions and bad.” He further stated that the majority’s position on “congruence” is “untenable” because federal affirmative action programs affecting the whole country must be given more deference since they are enacted by representatives of the entire nation, while state and local programs must be held to a higher standard because they are enacted only by those in particular geographic areas and not by representatives of those who may be impacted by the programs in other regions. *See id.* at 245 (Stevens, J., dissenting).

88. Justice Souter’s opinion, joined by Justices Ginsburg and Breyer, focused on continuing racial inequality in U.S. society and distinguished benign and invidious classifications. *See id.* at 264 (Souter, J., dissenting).

89. Justice Ginsburg’s dissent, joined by Justice Breyer, focused on the “deference” owed by the judiciary to Congress. She argued that the Court should not be ruling on affirmative action matters which are the subject of policy arguments ongoing in the political arena. *See id.* at 271 (Ginsburg, J., dissenting).

90. *Id.* at 238.

91. *See* 1996 Proposed Reforms to Affirmative Action *supra* note 79, at 26,050.

inal judge had retired.⁹² In an analysis of the Supreme Court's strict scrutiny test, the District Court enjoined the Department of Transportation "from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program."⁹³ District Judge Kane specifically addressed Justice O'Connor's "pronouncement that strict scrutiny is not 'fatal in fact,'" stating that any race-based classification "[by] its very nature . . . both underinclusive and overinclusive . . . [suggests] that the criteria are lacking in substance as well as reason."⁹⁴ As to the SCC, Judge Kane noted that the presumption of disadvantage for the designated racial groups fails strict scrutiny because it is overinclusive and thus not narrowly tailored.⁹⁵

2. Discussion of Holding as to 8(a) Program.

Initially, Judge Kane appeared to offer some support for the 8(a) program by distinguishing it and noting that the regulations require "an individualized inquiry into each participant's economic disadvantage."⁹⁶ He also noted that the determining characteristics for 8(d) participation "are less restrictive than those applied . . . for the purposes of the 8(a) program."⁹⁷ Judge Kane noted the differences in "the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs."⁹⁸ In the 8(a) program, a candidate's "disadvantage" is "compared to others in the same or similar line of business who are not socially disadvantaged,"⁹⁹ while an 8(d) contractor's disadvantage is compared to others "in the same or similar line of business"¹⁰⁰ regardless of disadvantage. This distinction is important because the SBA undertakes an "individualized" investigation into the financial status of each firm applying for 8(a) recognition regardless of their race to verify the owner's disadvantaged status.¹⁰¹ However, programs administered

92. See *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997).

93. *Id.* at 1558.

94. *Id.* at 1580. This statement contradicts Justice O'Connor's argument that some racial classifications may be justified by a compelling interest. It instead adopts Justice Scalia's interpretation of strict scrutiny that the government can never have a compelling interest. See *Adarand*, 515 U.S. at 239.

95. See *Adarand*, 965 F. Supp. at 1581.

96. *Id.*

97. *Id.* (citing 13 C.F.R. § 124.106(b) (1996)).

98. *Id.*

99. 13 C.F.R. § 124.106(a)(1)(i) (1996).

100. 13 C.F.R. § 124.106(b)(1) (1996).

101. See *Dynalantic Corp. v. United States*, 937 F. Supp. 1, 8 (D.D.C. 1996). Although this case appears to still be winding its way through the federal courts, it represents one of several challenges to the 8(a) program based, at least in part, on the *Adarand* decision. *Dynalantic* charged that the 8(a) program is unconstitutional because of the regulatory presumption of social disadvantage for racial and ethnic minorities. A federal district court rejected the claim for lack of standing. But the Court of Appeals for the District of Columbia Circuit reversed and remanded so that *Dynalantic* could "raise a general challenge to the 8(a) program as administered by

under 8(d) have no such requirement; thus, firms declaring minority ownership are presumptively eligible for recognition.¹⁰²

Judge Kane repeatedly called these regulatory differences “inconsistencies” or “contradictions” and asserted that “the resultant uncertainty as to who may or may not participate in the race-based SCC program precludes a finding of narrow tailoring.”¹⁰³ It appears that one factor confusing the court was the fact that, at the time of the contract dispute many years earlier, the subcontractor that was awarded the highway job by Mountain Gravel–Gonzales Construction—was a participant only in the 8(d) program. By the time the case arrived in district court, Gonzales Construction had become certified and was fully participating in the 8(a) program.¹⁰⁴ Judge Kane specifically addressed Section 8(d) and struck it down as unconstitutional¹⁰⁵ because it was both underinclusive and overinclusive as to racial clas-

the SBA and participated in by the Defense Department.” 115 F.3d 1012, 1015. The Circuit Court opinion first argued that because “over 99% of the [8(a)] firms qualified as a result of race-based presumptions,” a successful challenge to the program would make fewer contracts available for the 8(a) program and more available for non-8(a) firms such as Dynalantic. However the assumption that fewer 8(a) firms would equal fewer 8(a) contracts might be true if there were no 8(a) firms whatsoever. But since firms may be qualified because of factors other than race, it is not correct to assume that all those meeting the social disadvantage leg of the participation requirement because of their race would not be able to qualify under other criteria (see discussion in Part II below for means firms may use to participate in the 8(a) program if they do not automatically qualify under the race-based presumption).

Ironically, three other challenges to the 8(a) program since *Adarand* have been brought by former participants in the program who allege that the program is unconstitutional or is being unconstitutionally applied. See *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357, (D.D.C. 1996) (charging that the 8(a) program was being administered in an unconstitutional manner); *Ervin & Associates v. Cisneros*, 939 F. Supp. 793 (D.D.C. 1996) (challenging the U.S. Department of Housing Urban Development’s setting aside for the 8(a) program certain procurements in the plaintiff’s field of specialization); and *Ellsworth & Associates v. United States*, 926 F. Supp. 207 (D.C. Colo. 1996) (noting that participation in an 8(a) procurement discriminated).

Although none of these cases has resulted in any significant impact on the 8(a) program, they are instructive as to the nature of the battle for federal contract dollars. The *Cortez* case was won by the disgruntled former 8(a) participant because, according to the district court opinion, NASA’s decision to set aside a procurement for the 8(a) program did “not satisfy *Adarand’s* requirements for strict scrutiny.” See *Cortez III Serv. Corp.* 950 F. Supp. at 362. The district court reasoned that the decision to set aside had to “explain what societal disadvantages it intend[ed] to correct.” *Id.* at 363.

Ellsworth & Associates resulted in a ruling by the Colorado district court that the former 8(a) firm lacked standing to challenge 8(a) contract set-asides since the lack of eligibility of the firm was based not on the race of the owner, but the firm’s completion of its nine-year eligibility period in the 8(a) program. See *Ellsworth & Associates*, 926 F. Supp. at 209. The “inability to bid . . . rest[ed] on a racially neutral and constitutionally unassailable ground.” according to the court. *Id.* at 210.

102. See *Adarand Constructors, Inc., v. Pena*, 965 F. Supp. 1556, 1564 (D. Colo. 1997).

103. *Id.* at 1581.

104. See *id.* at 1580-81.

105. See *id.* at 1584.

sifications.¹⁰⁶ His side-by-side comparisons of 8(a) and 8(d) appear to indicate that an analysis of 8(a)'s operation might somehow turn out differently than 8(d), making the 8(a) program a potential candidate for survival of strict scrutiny.

II. THE 8(A) PROGRAM

The 8(a) program provides for the award of government contracts to participating businesses through a tripartite arrangement: a participating agency awards a contract to the U.S. Small Business Administration ("SBA"), that in turn awards a subcontract for the identical requirement to the 8(a) firm.¹⁰⁷ The program's regulations allow federal agencies to identify procurements to be awarded through 8(a) contracts and in some cases to award those contracts non-competitively to a single 8(a) firm.¹⁰⁸ Through these special contracting procedures, the 8(a) program remains very much a child of agency affirmative action goals across the federal government.¹⁰⁹

A. *Historic Development and Operation*

The 8(a) Program was created by 1968 amendments to the Small Business Act of 1958 ("Small Business Act")¹¹⁰ after Congress determined that efforts should be made toward increasing minority participation in federal contracting programs.¹¹¹ Federal law has mandated that small business concerns be awarded federal contracts through preferences since the 1950's.¹¹² By amending the Small Business Act

106. *See id.* at 1580.

107. *See* U.S. Small Business Administration, *The Most Frequently Asked Questions About the 8(a) Program, 11/95* (visited Feb. 17, 1998) <<http://www.sba.gov/gopher/Minority-Small-Business/-8aquest.html>>. Recent trial initiatives undertaken by the SBA and other federal agencies have resulted in the signing of inter-agency agreements that allow those agencies to directly contract with 8(a) firms. *See id.*

108. This process, also known as "sole-source" contracting, is for the most part against federal policy except in the 8(a) program and in specifically enumerated circumstances. *See generally*, U.S. GENERAL ACCOUNTING OFFICE, SMALL BUSINESS ADMINISTRATION: 8(a) IS VULNERABLE TO PROGRAM AND CONTRACTOR ABUSE (GAO OSI-95-15, Sept. 1995). Federal procurement regulations are governed in part by the Competition in Contracting Act of 1984 ("CICA"), 10 U.S.C. § 2304 (1994) and 41 U.S.C. § 253 (1994), which require that all procurements not specifically meeting the enumerated criteria shall be awarded only after all responsible offerors are permitted to submit sealed bids or competitive proposals. *See* 48 C.F.R. § 6.100 (1998).

109. For a discussion of the many federal affirmative programs that remain in place today, see, Note, *Strict Scrutiny Across the Board: The Effect of Adarand Constructors, Inc. v. Pena on Race-Based Affirmative Action Programs*, 45 CATH. U. L. REV. 1405 (Summer 1996).

110. *See* Small Business Act of 1958, Pub. L. 110 85-536, § 2[8], 72 Stat. 389.

111. *See* S. REP. NO. 1714 and CONF. REP. NO. 2135, *reprinted in* 1968 U.S.C.C.A.N. 3071.

112. *See* U.S. GENERAL ACCOUNTING OFFICE, SMALL BUSINESS: PROBLEMS IN RESTRUCTURING SBA'S MINORITY BUSINESS DEVELOPMENT PROGRAM (GAO/RCED-92-68, Jan. 1992).

to add 8(a), Congress established an affirmative action program designed to "open the doors of . . . business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination—for the most part, women and minorities."¹¹³ As discussed in Part III, reforms finalized in 1998 changed some of the fundamental aspects of the 8(a) program.¹¹⁴

Federal agencies, working with the SBA, identify and plan procurements that will be set-aside for 8(a) firms.¹¹⁵ When a set-aside determination is made, only firms participating in the 8(a) program are eligible for any contract award from these targeted contract actions.¹¹⁶ Regulations stipulate which acquisitions must be competitively awarded and which may be awarded using "sole source" procedures.¹¹⁷ Generally, agencies must competitively award 8(a) contracts among eligible firms if: (1) there is a "reasonable expectation" that more than one 8(a) firm will submit an offer; or (2) the estimated contract price is expected to exceed \$5 million for manufacturing contracts and \$3 million for all other types of contracts.¹¹⁸ The non-competitive purchases, also known as sole-source acquisitions, are an important part of the 8(a) program and are often criticized as allowing agencies to circumvent overall federal policy toward competition in contracting.¹¹⁹

113. Jere W. Glover, *Procurement Opportunities: A Small Business Guide to Procurement Reform*, U.S. Small Business Administration (visited Feb. 17, 1998) <<http://www.sba.gov/ADVO/special/opport/html>>.

114. In addition to the substantive changes, the final regulations change the numbering of some of the C.F.R. § 124 subsections. Therefore, in order to alleviate confusion regarding numbering changes, citations to both the pre-reform and post-reform sections are made if changed in 1998. See Final Rule: Small Business Size Regulations; 8(a) Business Development / Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 63 Fed. Reg. 35,726 (1998) [hereinafter Final 8(a) Program Regulations].

115. See *Dynalantic v. Dep't of Defense*, 115 F.3d 1012, 1014 (1997).

116. See *id.* There are generally three levels of competition in federal procurement: (1) "full and open" that is open to all firms wishing to submit offers; (2) "competitive among eligible 8(a) firms" that is open only to 8(a) contractors identified to or by the procuring agency; and (3) "sole-source" which is open to only one firm based upon either 8(a) considerations or other specified exemptions listed at 48 C.F.R. § 6 (1998). See *id.*

117. See Final 8(a) Program Regulations, *supra* note 114, at 35,758.

118. See 13 C.F.R. § 124.311 (1994); Final 8(a) Program Regulations, *supra* note 114, at 35,758 (to be codified at 13 C.F.R. § 124.506).

119. See U.S. GENERAL ACCOUNTING OFFICE, SMALL BUSINESS ADMINISTRATION: 8(a) IS VULNERABLE TO PROGRAM AND CONTRACTUAL ABUSE 18 (GAO/OSI-95-15, Sept. 1995). Criticism of the sole source method of contracting has led to alterations in each of these two initiatives which were designed to bring federal procurement closer to professional purchasing practices found in the private sector. For example, FASA raised the limit for so-called "simplified purchases" from \$25,000 to \$100,000, thus allowing agencies to use less formal procedures for meeting various additional acquisition needs. See *id.*

Firms wishing to participate in the 8(a) program must complete an application and forward it to the SBA for review.¹²⁰ The SBA examines the application and verifies compliance with various regulations and program requirements.¹²¹ An 8(a) contractor company must be at least 51 percent unconditionally owned¹²² by a United States citizen who is determined by the SBA to be both “socially and economically disadvantaged.”¹²³ The regulation makes a distinction between social disadvantage and economic disadvantage. “Social disadvantage” prior to *Adarand* was defined as applying to those “individuals . . . who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities.”¹²⁴ The presumption of social disadvantage for racial and ethnic minorities in the 8(a) program was made in the “absence of evidence to the contrary.”¹²⁵ However, the regulations clearly provided that disadvantaged status was a rebuttable presumption where the individual seeking status “may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group.”¹²⁶

For individuals who were not members of the designated groups, the SBA had to confirm through “clear and convincing evidence”¹²⁷ that social disadvantage existed. The clear and convincing case must have included proof of five different items: (1) the disadvantage stemmed from color, ethnic origin, gender, physical handicap, long term residential isolation from mainstream society, or similar cause not common to small business people; (2) the individual personally suffered social disadvantage; (3) the disadvantaged treatment was suffered in American society, not in other countries; (4) the social disadvantage was “chronic and substantial, not fleeting or insignificant;” and (5) the social disadvantage “negatively impacted” on the individual’s entry or advancement in the business world.¹²⁸ The SBA was authorized to include as proof of social disadvantage, evidence of denial of equal access to education, employment, credit, capital, govern-

120. See 13 C.F.R. §§ 124.201-124.207 (1994). See also U.S. Small Business Administration, *8(a) Program Application* (last visited Feb. 17, 1998) <<http://www.sba.gov/gopher/Minority-Small-Business/osdbu.txt>>.

121. See 13 C.F.R. § 124.206 (1994); Final 8(a) Program Regulations, *supra* note 114, at 35,758 (to be codified at 13 C.F.R. § 124.204).

122. “Unconditional ownership” means that ownership of the firm is not subject to any type of encumbrance or restriction that limits the ability of the socially or economically disadvantaged individual’s to control of the day-to-day operation of company. See 13 C.F.R. § 124.105 (1994).

123. 13 C.F.R. §§ 124.103 & 124.104 (1994).

124. See *id.* § 124.105 (1994).

125. See *id.* § 124.105(b)(1) (1994).

126. See *id.* § 125.105(b)(2) (1994). See also *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 207 (1995).

127. See 1996 Proposed Reforms, *supra* note 79, at 26,041.

128. See 13 C.F.R. § 124.105(c)(1) (1994).

ment contracts, and other matters it considered important to determine the existence of the disadvantage.¹²⁹

A person with an "economic disadvantage" at the time of the *Adarand* decisions, and prior to the 1998 regulatory revisions, was defined as "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged."¹³⁰ This is a major difference between 8(a) and other set-aside programs because the SBA must verify the net worth of every individual business owner applying for 8(a) status.¹³¹ This section of the regulation specifically distinguishes the 8(d) program by stating that SBA will apply standards that are "less restrictive than those applied when determining economic disadvantage for purpose of the 8(a) program."¹³² Participants in the 8(a) program may not have a personal net worth exceeding \$250,000 when entering the program or exceeding \$500,000 during participation in the program.¹³³

The question as to the so-called "rebuttable presumption" is "who is going to rebut the social or economic disadvantage of any given firm?" It should be noted that critics have frequently cited examples of the SBA not fully investigating ownership of 8(a) firms where such control actually rested with non-eligible individuals who were using the companies as "fronts" to obtain lucrative government contracts.¹³⁴ Justice O'Connor noted that the disadvantage is "rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged."¹³⁵ Competitor companies or employees of the "front" 8(a) firm who become aware of such apparent violations of the statute can report the matter to the SBA. That agency is obligated to fully investigate the ownership status of all 8(a) firms and to re-verify ownership annually or when new information is received.¹³⁶ The regulation lists twenty-five separate infractions which could constitute "good cause" for termination of 8(a) status.¹³⁷

In addition to the social and economic disadvantage requirement, 8(a) firms must also have been in business for at least two years prior

129. *See id.*

130. 13 C.F.R. § 124.106(a)(1)(i) (1994).

131. *See id.* § 124.106(a)(2) (1994).

132. *See id.* § 124.106(b)(1) (1994).

133. *See id.* §§ 124.106(a)(2)(i) and 124.111(2) (1994).

134. *See* U.S. GENERAL ACCOUNTING OFFICE, SMALL BUSINESS ADMINISTRATION: 8(a) IS VULNERABLE TO PROGRAM AND CONTRACTUAL ABUSE 5 (GAO/OSI-95-15, Sept. 1995).

135. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 208 (1995).

136. *See* 13 C.F.R. §§ 124.207-09 (1994); Final 8(a) Program Regulations, *supra* note 114, at 35,732 (to be codified as 13 C.F.R. §§ 124.301 - 124.305).

137. *See id.* § 124.209 (1994).

to submission of their application, and the SBA must find that the firm has reasonable prospects for success in competing in the private sector.¹³⁸ The two-year requirement may be waived if the ownership can demonstrate that it has “substantial and demonstrated business management experience” in addition to other stipulated exceptions.¹³⁹

A characteristic distinguishing the 8(a) program from other contracting set-aside programs is that the rigorous certification process is only the first step in a constant evaluation process spanning the entire length of the firm’s program participation.¹⁴⁰ Following approval of its application, a certified firm must submit a business plan to the SBA for review and approval.¹⁴¹ The plan must include an analysis of the market potential of the company, specific strengths and weaknesses of the participants, specific targets, objectives and goals for business development, and how the firm plans to transition itself away from the 8(a) program.¹⁴² Annual review of the business plan is required by the SBA as part of a recertification process that requires an analysis of the firm’s ownership and business operations.¹⁴³

Another important distinguishing characteristic of the 8(a) program is that certification has a fixed duration. Participants are eligible for award of contracts for a maximum of nine years. The SBA considers the first four years of program participation to be the “developmental stage” and the final five years as the “transitional stage.”¹⁴⁴ Generally, at the end of the nine-year program period, a firm is “graduated” from 8(a) and is no longer eligible for award of contracts set aside for 8(a) participants.¹⁴⁵ This limited duration stands in contrast to the more simple designation of a company as a “minority-owned business” or a “minority business enterprise,” that may remain in effect during the entire life of the company without expiration so long as ownership is not transferred out of the hands of the socially or economically disadvantaged individual.¹⁴⁶

138. *See id.* § 124.107 (1994).

139. *See id.* § 124.107(b)(1) (1994).

140. *See id.* § 124.111 (1994); Final 8(a) Program Regulations, *supra* note 114, at 35,749 (to be codified at 13 C.F.R. § 124.202).

141. *See id.* § 124.301 (1994); Final 8(a) Program Regulations, *supra* note 114, at 35,752 (to be codified at 13 C.F.R. §§ 124.401-03).

142. *See id.*

143. *See id.*

144. *See* U.S. Small Business Administration, *The Most Frequently Asked Questions About the 8(a) Program, 11/95* (last visited Feb. 17, 1998) <<http://www.sba.gov/gopher/Minority-Small-Business/8aquest.html>>.

145. *See* 13 C.F.R. 124.110 (1994); Final 8(a) Program Regulations, *supra* note 114, at 35,750 (to be codified at 13 C.F.R. § 124.301).

146. *See* *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1566 (D. Colo. 1997).

B. *Effect of Certification - Presumption of Qualification for Participation in Other Set-Aside Programs*

It is important to note that not all 8(a) firms automatically receive contracts or opportunities to bid on contracts simply because they are program participants. There were 6,115 businesses in the 8(a) program in 1996 whose owners had an average personal net worth, including their stake in the 8(a) company, of \$66,761,¹⁴⁷ indicating that the program does not guarantee great personal wealth to any of its participants. In the first four years of participation, an average 8(a) contractor receives about one quarter of its revenue from government contracts.¹⁴⁸ Considering the fact that regulations require that the firm be in business at least two years prior to submitting an 8(a) application, it can be a long wait—generally in the fifth year of program participation—before revenues from government business can approach fifty percent of total revenues.¹⁴⁹

On the other hand, certification and designation as an 8(a) business has advantages beyond participation in 8(a) set-asides. Designation as a minority-owned firm under 8(a) makes a firm eligible for Disadvantaged Business Enterprise (“DBE”) set-asides outside of 8(a), such as 8(d)¹⁵⁰ at the federal level, or scores of state and local set-asides around the country.¹⁵¹ In other words, if a firm already has the certification necessary to participate in 8(a), it does not have to recertify itself as eligible for other set-asides, such as the Subcontractor Compensation Clause (“SCC”) in *Adarand*, where the presumption of disadvantage is not explicitly rebuttable or where the standard of proof is lower.¹⁵² This link in the affirmative action chain means that 8(a) firms may use their status to be presumptively eligible for other con-

147. See U.S. Small Business Administration, 1996 Annual Report to Congress, at 7.

148. See *id.* at 25.

149. See *id.*

150. The 8(d) program, codified at 15 U.S.C. § 637(d), unlike the 8(a) program, does not involve a lengthy application process or the provision of detailed business plans or financial reports. There is no requirement for an individualized showing of economic disadvantage, and members of identified groups are presumed to be socially disadvantaged for purposes of 8(d) eligibility. This presumption has changed in the 1998 affirmative action reforms. However, detailed discussion of 8(d) is beyond the scope of this analysis.

151. See 13 C.F.R. § 124.106(b)(1) (1994). State and local Disadvantaged Business Programs are typically patterned after those at the federal level because of federal regulatory requirements and the financial purse strings attached. For example, the Department of Transportation requires that all public transit agencies use DBE rules essentially the same as those found in its regulations in order to receive federal public transportation funds. See *Adarand*, 515 U.S. at 209.

152. See 48 C.F.R. § 19.703(a)(2) (1998). This is the SCC Federal Acquisition Regulation provision based upon 8(d) which allows any federal agency to automatically recognize an 8(a) contractor as a “Small Disadvantaged Business” (“SDB”) for the purpose of awarding contracts set aside for disadvantaged businesses. The 8(a) regulations are set forth separately at 48 C.F.R. §§ 19.800-812.

tracting set-asides and thus increase their business opportunities with other federal, state, and local governmental agencies around the nation.

The SCC discussed in *Adarand* was at the center of the racial classification debate. The 8(a) program was brought into the discussion because of the ability of 8(a) firms to automatically qualify for subcontract award under the SCC. Therefore, it is not surprising that after race-based contracting preferences were subjected to strict scrutiny in *Adarand*, 8(a) came under attack along with 8(d) programs as easy targets for dissolution.¹⁵³ What critics did not anticipate was the power of the inertial force that has propelled 8(a) well beyond its pre-*Adarand* borders into a program that appears to have been tailor-made for post-*Adarand* realities.

III. THE POST-*ADARAND* OPERATION OF THE 8(A) PROGRAM

As courts make rulings that shape and measure the edges of the law, political actors conduct themselves in ways that paint the canvas in the middle of the law.

The impact of a Supreme Court decision . . . is always dependent on the manner in which it is interpreted by the government officials who are charged with enforcing it, by the judges in the lower courts who are initially responsible for settling the controversies that arise about its meaning, and by the commentators and pundits who help to shape public opinion.¹⁵⁴

As Drake and Holsworth note, although outright defiance of Supreme Court decisions may be a thing of the past, "efforts to reverse the thrust of the Court's decisions legislatively, to define its reach in the narrowest terms, and to mitigate its capacity to alter existing policies are common responses by those whose activities are placed under critical scrutiny."¹⁵⁵ In light of the political realities of the late twentieth century, opposition to affirmative action appears to be coming primarily from the courts and legislative policymakers, while the promotion and development of affirmative action programs is coming from executive branch bureaucracies and policy keepers.

A. Congressional Reaction

Almost immediately following the *Adarand* decision, foes of contracting set-asides moved quickly to enact legislation that would end race considerations at the federal level. The proposed Equal Opportunity Act,¹⁵⁶ sponsored by Senator Dole and Representative Canady,

153. See Causey, *supra* note 3, at 35.

154. DRAKE & HOLSWORTH, *supra* note 1, at 157.

155. *Id.*

156. Equal Opportunity Act of 1995, S. 1085, Introduced July 27, 1995. The bill never was reported out of committee.

would have “expressly prohibited ‘any preferential treatment,’ including use of a quota, set-aside, numerical goal, time-table, or other numerical objective.”¹⁵⁷ Hearings held on the matter featured such well-known affirmative action foes as California’s Governor Pete Wilson, who lambasted affirmative action, saying that “a system that confers preferences by race, ethnicity, or gender can’t be defended today. It is by definition racial, ethnic and gender discrimination, and that is indefensible.”¹⁵⁸ Although the proposed act never passed, the gauntlet had been laid down, and the Republican Congress let it be known that affirmative action was either going to change significantly or end completely.¹⁵⁹

The initial heated debate over affirmative action changed tone in the first session of the 105th Congress, turning more toward compromise. The Small Business Reauthorization Act of 1997 (“SBRA”)¹⁶⁰ reflected significant revisions of many of the SBA’s duties and responsibilities.¹⁶¹ Some actions relating to 8(a) were taken in the bill which authorized regulatory changes that became effective in June 1998.¹⁶² A great deal of focus was placed upon the increasing practice by governmental agencies of combining smaller purchases in order to save procurement costs, a process known as bundling.¹⁶³ It was Congress’s intent to prevent contracting opportunities from becoming “out of the reach of many small businesses that have previously contracted with the government or who wish to bid on Federal contracts.”¹⁶⁴

Another example of changes authorized in the Small Business Reauthorization Act of 1997 appears in Title VI of the SBRA, the HUBZone Act of 1997. It establishes “historically under utilized business zones” that will form the basis for future set-asides.¹⁶⁵ This attempt at limiting the geographic coverage of some set-aside programs appears to be an effort to address one of the “overinclusive” aspects of set-asides addressed in *Adarand*. It also does not restrict participation in these HUBZones to minority businesses. Only businesses that operate in these primarily urban areas will qualify, meaning that ownership and control has a primarily geographic, and not racial, defini-

157. Affirmative Action Factions to Testify to Senate, 62 *Managing Government Contracts* 2, June 1996.

158. *Id.*

159. For a detailed discussion of hearings and other Congressional background material during this initial post-*Adarand* period, see Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriation Bill, 1996, S. Rep. 104-139, 1995 WL 548950 (Legislative History), Sept. 12, 1995.

160. Small Business Reauthorization Act of 1997, Pub. L. 105-35, 111 Stat. 2618.

161. *See id.*

162. *See id.*

163. *See* Small Business Reauthorization Act of 1997, Report of the Committee on Small Business, S. 1139, Aug. 19, 1997, at 21.

164. *Id.*

165. *See* Small Business Reauthorization Act of 1997, P.L. 105-35, 111 Stat. 2592.

tion.¹⁶⁶ This clearly marks a step toward a compromise position on minority set-asides, but, ironically, there will be competition between HUBZone and 8(a) firms. HUBZone's goal of "moving people off welfare and into meaningful jobs"¹⁶⁷ means that individuals in pockets of poverty will be identified for assistance in obtaining government contracts. Congress admitted that while "HUBZone is not designed to compete with SBA's 8(a) Program," there will be competition.¹⁶⁸ The bill "gives the procuring agency's contracting officer the flexibility to decide whether to target a specific procurement requirement for the HUBZone program or the 8(a) Program."¹⁶⁹

B. Clinton Administration Reaction

Although Congress moved toward ending minority contracting set-asides, as discussed below, the Clinton Administration took a more cautious approach, choosing in some ways to ignore the *Adarand* ruling, while, in others, choosing to take efforts to acknowledge the *Adarand* decision by making regulatory and systemic adjustments.

1. Department of Defense ("DOD") Activity.

The first official act by any agency in response to *Adarand* appears to have been DOD's elimination of its "rule of two."¹⁷⁰ The rule provided that if DOD could obtain bids from at least two disadvantaged contractors for any given requirement and the price obtained was within ten percent of fair market value, then it was to be set aside as a disadvantaged purchase.¹⁷¹ The Final Rule that DOD believed addressed the *Adarand* concerns was implemented later,¹⁷² permanently eliminating the "rule of two," and leaving only 8(a) and a few other set-asides remaining under 8(d) for DOD. Consequently, DOD's statutory mandate to award a total of five percent of its prime contracts to disadvantaged businesses was threatened because approximately one-sixth of DOD awards to minority-owned firms had resulted from the "rule of two."¹⁷³ Indeed, there was a sharp-drop off of awards to disadvantaged firms: in 1996, only 3% of DOD's contracting dollars went to disadvantaged businesses.¹⁷⁴

166. *See id.*

167. Small Business Reauthorization Act of 1997, Report of the Committee on Small Business, S. 1139, August 19, 1997 at 25.

168. *Id.* at 26.

169. *Id.*

170. *See* Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Business Concerns, 60 Fed. Reg. 64,135 (1995).

171. *See* 1996 Proposed Reforms, *supra* note 79, at 26,043.

172. *See* Defense Federal Acquisition Regulation Supplement; Small Business Concerns, 61 Fed. Reg. 18,686 (1996).

173. *See* 1996 Proposed Reforms, *supra* note 79, at 26,043.

174. *See Small and Disadvantaged Business Share of Prime Contracts*, U.S. Department of HUD World Wide Web Site (last visited Apr. 20, 1998) <<http://www.hud.gov/cts/osdbctb4.html>>.

2. Justice Department.

The Justice Department's first major pronouncement came almost one year after *Adarand* in a *Federal Register* Notice,¹⁷⁵ which proposed changes to procurement set-aside programs operating under both Sections 8(a) and 8(d) of the Small Business Act.¹⁷⁶ These initial recommendations involved five subject areas: "(1) certification and eligibility; (2) benchmark limitations; (3) mechanisms for increasing minority opportunity; (4) the interaction of benchmark limitations and mechanisms; and (5) outreach and technical assistance."¹⁷⁷ The proposed reforms were designed to "form a model for amending the affirmative action provisions" of certain contracting set-sides.¹⁷⁸ The Administration announced its intention to continue contracting set-asides by making changes to the existing programs—not through their elimination.

A significant change to federal policy was recommended in the *Federal Register* Notice. The standard of proving social disadvantage would be changed from "clear and convincing evidence" to a "preponderance of evidence."¹⁷⁹ Responses to the Department of Justice generally argued against this lowering of the standard of proof because it might allow companies who are not truly disadvantaged to gain certification and win contracts which should go to legitimate disadvantaged firms.¹⁸⁰ The Clinton Administration argued that the burden of proof remains with the applicant and that "careful scrutiny" of all applications by the SBA will "ensure that only truly deserving candidates" are certified.¹⁸¹

Also important for the purpose of this analysis was the focus of the Justice Department's *Federal Register* Notice on the "compelling interest" standard of strict scrutiny. The proposed rules addressed the standard in an introduction and contained an appendix containing a survey of the evidence on the compelling interest standard. The appendix set forth the Clinton Administration's view that the federal government could readily show a compelling interest in race-based contracting set-asides because "the evidence indicates that racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets."¹⁸² It concluded that:

175. See 1996 Proposed Reforms, *supra* note 79, at 26,041.

176. See *id.* at 26,042.

177. *Id.* at 26,043.

178. *Id.* at 26,042.

179. See 1996 Proposed Reforms, *supra* note 79, at 26,044.

180. See Response to Comments to Department of Justice Proposed Reforms to Affirmation Action in Federal Procurement, 62 Fed. Reg. 25,649 (1997) [hereinafter Response to 1996 Proposed Reforms].

181. *Id.*

182. 62 Fed. Reg. 26,050 (1997).

[T]he federal government has a compelling interest in eradicating the effects of two kinds of discriminatory barriers: first, discrimination by employers, unions, and lenders that has hindered the ability of members of racial minority groups to form and develop businesses as an initial matter; [and] second, discrimination by prime contractors, private sector customers, business networks, suppliers and bonding companies that raises the costs of doing business for minority firms once they are formed, and prevents them from competing on an equal playing field with nonminority businesses. This discrimination . . . reflects practices that work to maintain barriers to equal opportunity.¹⁸³

The Administration later indicated that further study would be conducted by the Department of Commerce to determine if minorities were receiving government contracts in fair proportion to the rest of the society after *Adarand*. The study would look at the “percentages of minority-owned firms that win government contracts in 80 industries and compare those with the percentage of minority firms operating in each industry.”¹⁸⁴ There was hope among supporters of various contracting set-aside programs that the study would provide the proof of continuing discrimination in federal contracting required by *Adarand*.¹⁸⁵

3. The Impact on Set-Asides

a. Growth of Set-Aside Awards. Although *Adarand* was seen as a nail in the coffin of minority contracting set-asides,¹⁸⁶ awards to disadvantaged firms overall actually increased in the years following the 1995 decision. Fiscal Year 1996 saw a total of \$10.9 billion in set-asides, an increase of over \$2 billion from 1992 levels.¹⁸⁷ Total federal contracting purchases exceeded \$170 billion in 1996, with just over twenty five percent of those dollars going to small businesses under small business set-aside rules and regulations.¹⁸⁸

b. Continuation of Certifications and Awards to 8(a) Firms. No negative impact can be proven in terms of the numbers of firms applying for or qualifying for 8(a) status. Statistics indicate that the number of 8(a) contractors has increased in addition to the dollar value of awards and the percentage of the overall federal procurement pie for

183. *Id.* at 26,062.

184. Rochelle Sharpe, *Stark Transformation: Asian-Americans Advance in U.S. Business Program*, *ASIAN WALL ST. J.*, Sept. 10, 1997, at 1.

185. *See id.*

186. *See Causey, supra* note 3.

187. *See Hilary Stout & Eva M. Rodriguez, Government Contracts to Minority Firms Increase Despite 1995 Curb on Affirmative Action*, *WALL ST. J.*, May 7, 1997, at A20.

188. *See Small Business Share of Prime Contracts*, U.S. Department of HUD World Wide Web Site (visited Apr. 20, 1998) <<http://www.hud.gov/cts/osdbctb1.html>>.

the 8(a) program overall.¹⁸⁹ Specifically, \$5.1 billion in 8(a) awards were made in 1993, comprising 2.6% of federal contract dollars; \$6.4 billion in awards were made in the program in 1997, comprising 3.4% of federal contract dollars.¹⁹⁰ Again, rather than a death knell sounding, the noise appears to be the quiet tolling of a regular hourly bell marking the simple passage of time and the continuation of life as usual.

C. Regulatory Changes

1. Clinton Administration Approach: Mend It Don't End It.¹⁹¹

In one of the first detailed official statements of the SBA regarding the future of minority set-asides following *Adarand*, the SBA issued a White Paper entitled "Procurement Opportunities: A Small Business Guide to Procurement Reform."¹⁹² The paper contained a brief discussion of *Adarand* that seemed to mark the opening of an effort to marginalize *Adarand's* holdings by tinkering with the operation of set-aside programs, but by no means calling for their termination. The paper noted that one of the likely effects of *Adarand* would be that "[p]rocurement set-asides and other preferential programs for minority-owners may likely be focused on particular regions and business sectors where problems of discrimination or exclusion are provable and can be quantified."¹⁹³ The report also noted that regulations were already being drafted to address the *Adarand* strict-scrutiny criteria.

In May 1996, President Clinton issued Executive Order 13005,¹⁹⁴ "Empowerment Contracting," which was "aimed at promoting growth of federal contractors in economically distressed communities."¹⁹⁵ As discussed above, the Justice Department published new draft guidelines for the conduct of affirmative action programs across all government agencies.¹⁹⁶ The proposed reforms "would require, for the first time, that set-aside participants in 8(d) programs certify to their status as small disadvantaged businesses."¹⁹⁷ Among several significant changes proposed was one requiring non-minority contractors to prove by a "preponderance of the evidence" standard that they are

189. See *Profile of Federal Procurement Activity 1* (June 1998) (unpublished Small Business Administration document on file with the Texas Wesleyan Law Review.).

190. See *id.*

191. Stout & Rodriguez, *supra* note 187, at A20.

192. Jere W. Glover, *Procurement Opportunities: A Small Business Guide to Procurement Reform*, U.S. Small Business Administration (visited Feb. 7, 1998) <<http://www.sba.gov/ADVO/special/opport/html>>.

193. *Id.* at 16.

194. Exec. Order No. 13,005, 61 Fed. Reg. 26,069 (1996).

195. *Clinton Order Promotes Growth of Contracting in Distressed Communities*, 62 MANAGING GOV'T. CONT. 1, June 1996.

196. See 1996 Proposed Reforms, *supra* note 79, at 26,041.

197. *DOJ Proposes Affirmative Action Procurement Guidelines*, 62 MANAGING GOV'T. CONT. 3, June 1996.

disadvantaged rather than the former standard of "clear and convincing evidence."¹⁹⁸ Other changes focused on the operation of minority set-asides, generally, and sought to alter some of the apparent contradictions within the SBA regulations as they relate to disadvantaged business programs, but no major ending to any single program was discussed or proposed.¹⁹⁹

Instructive as to the overall Clinton Administration attitude toward 8(a) was a lengthy discussion in the initial proposed regulation concerning 8(a).²⁰⁰ The 8(a) program was clearly being defended vigorously as if a line had been drawn in the sand. The Administration wrote:

The 8(a) program merits special mention at the outset. This program serves a purpose that is distinct from that served by general SDB programs. The 8(a) program is designed to assist the development of businesses owned by socially and economically disadvantaged individuals. . . . Participants in the program are required to establish business development plans and are eligible for technical, financial, and practical assistance, and may compete in a sheltered market for a limited time before graduating from the program.²⁰¹

The approach taken was that 8(a) should be looked upon as an example of a narrowly tailored set-aside and that other programs such as 8(d) would be changed to become more like 8(a) by requiring stricter certification standards and less restrictive eligibility standards while developing so-called benchmarks to compare businesses in one field with others in the same field across the nation.

Reaction to the proposed changes apparently overwhelmed the Department of Justice ("DOJ"),²⁰² and instead of issuing a final rule on the 1996 proposal, a revised draft rule was published in May 1997.²⁰³ These changes again attempted to alter the landscape surrounding disadvantaged businesses by expanding beyond racial criteria the scope of eligibility to receive such awards. Proposed amendments to the Federal Acquisition Regulation which would implement the Justice Department's new policy were published the same day. However, the Justice Department left specific changes in the 8(a) program up to the SBA to propose at a later date.²⁰⁴

198. *See id.*

199. *See generally* 1996 Proposed Reforms, *supra* note 79, at 26,041.

200. *See id.* at 26,043.

201. *Id.*

202. *See* Response to 1996 Proposed Reforms, *supra* note 180, at 25,648. The Notice stated that over 1000 responses had been received.

203. *See id.*

204. *See id.*

2. The "New" 8(a) Program.

In August 1997, the SBA proposed its set of rules for the 8(a) program based upon a "total agency review" of the *Adarand* criteria and the DOJ "preponderance of the evidence" standard.²⁰⁵ The new rules changed the name of the program to the 8(a) Business Development ("BD") program, reorganized 13 C.F.R. 124 with a new numbering scheme, removed "duplicative provisions," and rewrote those that "appeared wordy or unclearly written."²⁰⁶ Those rules became final in June 1998. The following changes are significant to this analysis:

(a) *Eligibility Standards*. As previously discussed, prior to the 1998 changes, individuals applying for 8(a) status had to belong to one of the racial or ethnic groups identified by SBA in order to be presumptively socially disadvantaged. The new regulation retains the provision that "[s]ocially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities."²⁰⁷ The regulation further provides a detailed list of which groups the individual must belong to in order to gain the presumption of disadvantage, including "Black Americans; Hispanic Americans; Native Americans; [and] Asian-Pacific Americans."²⁰⁸

Prior to the 1998 changes, individuals applying for eligibility who were not members of the designated groups had to show by "clear and convincing evidence" that they were socially disadvantaged. Under the new criteria, those individuals have only to show by a "preponderance of the evidence" that they are socially disadvantaged.²⁰⁹ The SBA admits that this new standard is a direct response to the holding in *Adarand* and "continues to believe that the use of this standard strengthens the defense of the 8(a) BD program."²¹⁰ In making its determination as to whether a non-minority applicant meets eligibility criteria, the SBA will require evidence that: (1) the individual has "[a]t least one objective distinguishing feature that has contributed to social disadvantage," (2) the individual has had "[p]ersonal experiences of substantial and chronic disadvantage," and (3) "the individual has a history of having barriers to education, employment, and business success because of the disadvantage."²¹¹ These three evaluation factors

205. See Proposed Rules: Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 62 Fed. Reg. 43,584 (1997).

206. See Final 8(a) Program Regulations, *supra* note 114, at 35,727.

207. *Id.* at 35,741 (to be codified at 13 C.F.R. § 124.103(b)).

208. *Id.*

209. See *id.* at 35,728.

210. *Id.*

211. *Id.* at 35,741.

replace the five that previously had to be proven by clear and convincing evidence under the old regulation.

The agency will make determinations of eligibility using "any relevant evidence [to determine] if the totality of circumstances shows disadvantage in entering into or advancing in the business world."²¹² It is entirely possible that white men and women will become eligible for 8(a) based upon barriers they have faced due to disabilities or geographic isolation as anticipated by the SBA in the Final Rule²¹³ or that additional criteria such as sexual orientation may someday be used. In its discussion of the new regulation, the SBA stated:

Evidence which tends to show generalized patterns of discrimination against a non-designated group or statistical data showing that businesses owned by a specific non-designated group are disproportionately under-represented in a particular industry may be used to augment an individual's case. Statistics and generalized patterns are not sufficient by themselves to establish a case of individual social disadvantage. However, an individual's statement of personal experiences in combination with generalized evidence may be sufficient to demonstrate social disadvantage.²¹⁴

Anyone who wants to participate in 8(a) must also still show that they are economically disadvantaged. "Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged."²¹⁵ These measurements remain essentially the same as they have always been, except that SBA will now more closely scrutinize the way certain assets are accounted for in joint ventures, transfers of property, and sale of portions of the business.²¹⁶ Social disadvantage under the 1998 regulatory reforms must stem from an individual's "race, ethnic origin, gender, physical handicap, longer-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged."²¹⁷

(b) *Small Business Size Standards.* SBA will raise the threshold for its size eligibility criteria that previously limited which 8(a) firms were eligible for awards under sole source contracts. Small business size standards are used by the federal government in its overall small business set-aside program to determine eligibility for participation in set-

212. *Id.*

213. *See id.*

214. *Id.* at 35,728.

215. *Id.* at 35,742.

216. *See generally id.*

217. Final 8(a) Program Regulations, *supra* note 114, at 35,741 (to be codified at 13 C.F.R. § 124.103).

aside procurements. Firms are grouped by their Standard Industrial Classification code ("SIC code") and small businesses are those whose number of employees or annual receipts fall below limits set by the SBA. Those firms which exceed certain annual receipts averaged over a three-year period are ineligible for participation in any small business set-aside.²¹⁸ Some 8(a) firms might previously have become ineligible for additional government contracts if they received only one contract valued in excess of the small business size standard. SBA will now allow 8(a) firms to receive sole source awards if they receive contract awards in excess of five times the standard for their SIC code or \$100,000,000, whichever is less.²¹⁹

(c) *Contracting Authority.* The tripartite contracting arrangement is no longer required under the new regulations. SBA and various federal agencies are now allowed to execute Memoranda of Agreement whereby participating agencies may directly contract with 8(a)'s and eliminate SBA participation altogether.²²⁰ This process had already begun prior to issuance of the Final Rule since it had been authorized by Congress in the Small Business Reauthorization Act of 1997.²²¹ In addition to eliminating the "middleman" aspect of the procurement process, it will allow agencies to more readily award smaller purchases to 8(a) firms. In the past, federal agencies were reluctant to utilize the 8(a) program for small purchases since they took longer periods of time to process through SBA.²²²

D. *Impact of Changes to the 8(a) Program*

The discussion of *Adarand*, strict scrutiny, and Clinton Administration resistance thereto would not be complete without a final analysis of whether the 8(a) program will survive strict scrutiny. It is clear that there are no moves underway to eliminate 8(a), but it remains less clear as to the impact of the new changes on the long-term existence of the program.

1. Scope of Program.

The final regulations change the standards for eligibility in the program, focus more generally on race neutral evaluation of the disadvantaged background of any applicant, and broaden the power of agencies to directly award contracts to eligible 8(a) firms.²²³ Taken together, these changes mean that 8(a) will expand to include more economically disadvantaged individuals and that there will most likely be an increase in both the number of participants and the dollar value

218. See 48 C.F.R. § 19.102 (1996).

219. See Final 8(a) Program Regulations, *supra* note 114, at 35,736.

220. See *id.* at 35,734.

221. See Small Business Reauthorization Act of 1997, P.L. 105-135, 111 Stat. 2592.

222. See Responses to 1996 Proposed Rule, *supra* note 180, at 43,584.

223. See Final 8(a) Program Regulations, *supra* note 114, at 35,738.

of awards.²²⁴ The proposed rules will open up 8(a) and other set-aside programs to many groups of people regardless of their race or ethnicity. The Government must continue to focus its efforts at increasing opportunities for disadvantaged individuals by enlarging the definition of such classifications.

1. Will it be Subject to Strict Scrutiny?

The race-based rebuttable presumptions of social disadvantage in the 8(a) program and other set-asides continue to exist.²²⁵ This is despite the fact that the new regulation clearly provides that participation in the program is open to socially and economically disadvantaged individuals regardless of race who can show by a preponderance of the evidence that they are indeed disadvantaged.²²⁶ The *Adarand* Court made it clear that any race-based evaluation factors will be subject to the strict scrutiny standard in the future. Therefore, because racial classifications are still used as presumptions for eligibility, the 8(a) program remains subject to attacks on its constitutionality.

2. Will it Survive Strict Scrutiny?

The validity of Justice O'Connor's pronouncement regarding "strict in theory, not fatal in fact" will surely be tested if the 8(a) program is brought before the court. The 8(a) eligibility criteria use racial preferences as only part of the formula for introduction of disadvantaged individuals into the economic mainstream. The SBA anticipates that additional business concerns will apply for eligibility into 8(a) and that the size of the program will increase due to higher participation.²²⁷ These may be individuals whose disadvantage comes from their gender, physical handicap, or geographic identity, such as rural isolation.²²⁸ Current studies aimed at providing "benchmarks" of minority representation will insert a modicum of social science and demographics into the equation for determining underutilized regions and sectors of the economy for inclusion into the program.²²⁹

(a) *Is There a Compelling Interest?* The Clinton Administration has gone to great lengths to demonstrate the federal government's compelling interest in maintaining race-based affirmative action. The Department of Commerce is continuing to develop its demographic data

224. *See id.* at 35,727.

225. *See id.* at 35,741.

226. *See id.*

227. *See id.* at 35,738.

228. *See id.* at 35,741.

229. *See id.* at 35,732. Benchmarks are the subject of an entirely different line of analysis regarding compelling interest. Because the research is not final, SBA did not include the benchmark provisions recommended by the Department of Justice in the June 1998 final regulations. It instead intends to issue separate rules for that program at a later date.

of minority representation in selected locations and selected industries. The SBA is expected to further refine the 8(a) program and other contracting set-asides once this process is complete. However, in the meantime, the Clinton Administration feels it has clearly demonstrated a compelling interest through publication of its "survey" of discrimination studies in 1996.²³⁰

The 8(a) program is unique because of the requirement that there be an individualized inquiry into the disadvantaged status of each applicant. This is not just a race-based inquiry—it includes an analysis of the individual's economic background. The current 8(a) program will theoretically prohibit participation by minority individuals whose personal net worth is too high. It will also prohibit participation by minority individuals whose business idea is deemed not to be viable. These are non-race factors which will play a fundamental role in whether any individual is granted 8(a) certification. Because the individual must show that he or she is disadvantaged, the program does not rely upon the "generalized" or "historical" basis of discrimination that the *Adarand* court admonished would fail strict scrutiny.

(b) *Is the Program Narrowly Tailored?* The program is narrowly tailored because it remains one of limited duration for its participants: nine years is the maximum certification period. The program also provides for early termination of firms for which ownership net worth exceed various thresholds. There are also provisions for removal of 8(a) certification status based upon numerous other criteria. After graduation or termination, a firm no longer is granted the many potential benefits of sole source contracts and business assistance from the SBA. They become businesses like any other and survive or fail based upon the abilities of their owners to grow and adapt their companies away from their reliance on government contracts.

The 8(a) program is less overinclusive as to the economic disadvantage of members of any given race and less underinclusive as to exclusion of those with social or economic disadvantage that were previously ineligible for the program. Again, as the program is broadened to include those who can show social disadvantage other than from racial and ethnic characteristics, 8(a) will grow to include white men and women, disabled persons regardless of race or ethnicity, and those from isolated rural areas such as Appalachia. The court may find the racial presumption to be suspect, but the diminishing importance of race in certification decisions, and the 8(a) program's expansion to include new groups of individuals, will allow it to survive a Supreme Court challenge.

230. See 1996 Proposed Reforms, *supra* note 79, at 26,062.

CONCLUSION

It is clear that the Clinton Administration currently has the upper hand in the survival and shaping of the operation of set-asides generally, and 8(a) specifically. Congressional action has been limited to the tweaking of programs rather than their wholesale elimination. Furthermore, by carefully broadening the scope of the program, the Administration has limited the likelihood that federal courts will strike the program down. As the effort to marginalize the impact of the holding continues, it becomes a race against the clock as to whether reform can be implemented before the next application of strict scrutiny is made by the Supreme Court. Because participation in the 8(a) program is based upon numerous factors of which race is but one, it will survive constitutional challenges based upon strict scrutiny.

R. Brad Malone