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### The State of Black Education

J. Clay Smith Jr.

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U.S. DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

July 15, 1991

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Jeanette J. Lim  
Acting Director  
Policy Development Division  
Office for Civil Rights  
U.S. Department of Education  
330 C Street, S.W.  
Washington, D.C. 20202

MANAGEMENT INFORMATION SYSTEMS

Dear Ms. Lim,

The National Bar Association (NBA) and the National Association for Equal Opportunity in Higher Education (NAFEO), by its attorneys, hereby timely submits these comments in response to the Notice of Request for Comments issued by the U.S. Department of Education and published in the Federal Register on May 30, 1991. See Notice of Request for Comments, 56 Fed. Reg. 24383 (May 30, 1991) (Notice). By its Notice, the U.S. Department of Education requests public comment on the necessity for, and the constitutionality of, "financial aid programs that consider race or national origin as a factor in the award process." Id.

As discussed herein, minority-based scholarships are tools that have played a significant role in educating minority students, particularly Black American students. The education of the Black American population has historically been very poor. There has been, and continues to be, a dearth of Black enrollment in higher education. However, the availability of minority-based scholarships has been instrumental in assisting a few Black American students to afford a college education, thus benefiting the American economy and society.

I. The State of Black Education.

The United States Census Bureau issued a report recently entitled, "Educational Attainment in the United States," which found that whites are twice as likely as Blacks to complete college. In 1940, when the Bureau first conducted a study as to how much education American adults had completed, 26 percent of white adults 25 years and older and seven percent of Black adults were high school graduates. In 1985, the proportions were 76 percent for whites and 60 percent for Blacks. Only five percent of white adults and one percent of Blacks had completed college in 1940; in 1985, 20 percent of white adults and 11 percent of Blacks were college graduates. While the gap has narrowed considerably in the past half century, barriers and erosion to Black retainment in higher education remains.

The dearth of Black enrollment in higher education has caused alarm among schools of business in major universities. Two years ago, it was reported that the proportion of minority students entering graduate business schools had declined so dramatically that educators were warning that business schools risk a serious

overall decline in enrollment.

Graduate education for science and math degrees has also declined among Blacks. There is no question that the post-Brown generation must be concerned about the fact that Blacks and Hispanics earn less than four percent of the masters degrees in the physical and biological sciences. See "Number of Applicants to Medical Schools Declines," New York Times, August 30, 1987, at 22 Col. 1.

Turning to the cost of education, there is no relief in sight. On August 6, 1988, an article appearing in The Atlanta Constitution and other major newspapers disclosed that the average cost of tuition had jumped nine percent at several private four-year schools, for a total of \$6,457. This increase was predicted in August 1987 when the College Board of Examiners stated that college tuition would rise faster than the inflation rate. It was predicted that at public colleges, where many Black students are enrolled, tuition would increase at a rate of six percent. The current alarm concerning the cost of college tuition comes as no surprise. In 1979 in an address before the Old Dominion Bar Association, one commentator postulated that "one of the greatest deterrents to increased ranks of Blacks as lawyers in the work force may be the growing cost of tuition in state and private colleges." Today, that is more than a postulate; it is a matter of undisputed fact and applies not only to law students but across the board -- to all levels of degree programs sought by Black Americans and other groups. See Smith, "Blacks and Education: Don't Shout Too Soon -- An Annotated Bibliography," 7 Harvard Blackletter Journal 99 (1990) (cites articles referred to in this section).

## II. Scholarships: Purpose and Objective.

The legality of scholarships reserved to minorities emerged as a hot political issue last year when civil rights groups criticized the NCAA and its sponsors for holding the Fiesta Bowl football game in Phoenix, Arizona, a state where the electorate rejected the proposition to make a state holiday for slain civil rights leader Rev. Martin Luther King, Jr. In anticipation of criticism from civil rights groups, sponsors suggested providing \$100,000 to each college invited to participate in the game and the money to be earmarked for scholarships limited to minority students. The colleges and universities asked the Department of Education about the suggestion from sponsors of the Fiesta Bowl, and the federal agency ruled that administration of these restricted scholarships by a college receiving any federal aid would violate the anti-discrimination provisions of Title VI of the Civil Rights Acts, as amended by the Civil Rights Restoration Act of 1988.

It is more than a little ironic that, after several hundred years of class-based discrimination against Black Americans, the Department of Education is unwilling to hold that a remedy such as

minority-based scholarships for remedying that discrimination is not permissible, particularly since there is no indication that such scholarships trammel on the majority population. In declining to so hold, the Department of Education would be ignoring a fact recognized by Justice Thurgood Marshall in a landmark civil rights case that "for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skin. It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact." Regents of the University of California v. Bakke, 438 U.S. 265, 400 (opinion of Marshall J.). The differences in the experience of the Black American make it difficult for any reasonable man to accept that minority scholarships can not be used to remedy generations of racial discrimination.

Critics of the minority scholarships raise the familiar cry that programs must be "color-blind." To borrow the message articulated by Justices Brennan, White, Marshall and Blackmun in Regents of University of California v. Bakke and tailored to the issue of minority scholarships: "Claims that [minority scholarships] must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot -- and, as we shall demonstrate, need not under our laws and public policy let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." Bakke, 438 U.S. at 327 (opinion of Brennan, White, Marshall and Blackmun).

### III. Scholarships: The Test To Uphold

The test to be applied to minority scholarships should be similar to the one adopted in Metro Broadcasting v. FCC 110 S.Ct. 2997 (1990), according to former White House counsel Lloyd N. Cutler. See Cutler, "A Test for Minority Scholarships," Washington Post, February 8, 1991 at A19, Col. 2. Metro involved the constitutionality of a policy by the Federal Communications Commission that permits a broadcast licensee facing loss of its broadcast license to avoid a hearing and possible lost of license by selling his station to a qualified minority applicant. The Supreme court held that the FCC program was not a quota or set-aside, and the policy as implemented affected less than four tenth of one percent of all broadcast sales since 1979. In his article, Mr. Cutler posits that "a single scholarship fund restricted to minority students should not be held legally discriminatory if the entire student aid program of the college, taken as a whole, does

not, in the language of Metro, "impose undue burdens on nonminorities" or anyone else. It is a test that some minority scholarships in some institutions may conceivably fail, but that the great majority should readily pass. Just as nonminority firms in Metro were "free to compete for the vast remainder of license opportunities," nonminority students are free to compete for the vast remainder of scholarship opportunities that most colleges and universities offer.

Applying the analysis used by the Court in Metro to minority scholarships is appropriate. The purpose behind minority scholarships has been supported by local and federal governments, the private sector, and the academic academy. Governments have adopted the policy of minority scholarships "not as an end in itself, but rather as a means of achieving greater" diversity in the institutions of higher learning. Such a goal carries its own natural limit, when the population of Black Americans in higher education reaches a reasonable level, the limit on these scholarships will become obvious.

Further, of the total number of scholarships available for higher education, minority scholarships are but a small fraction of the total available monies to nonminorities. Further, in most instances, the minority factor is but a "one plus" factor in the determination of the issuing of the scholarships. Oftentimes minority-based scholarships are granted to students whose parents' incomes fall at the lower end of the economic scale. These families are completely unable to afford to provide their children an opportunity to attend college. Clearly, minority based scholarships are aimed directly at the barriers that a majority of minority students face in pursuing higher education.

Moreover, minority-based scholarships do not impose impermissible burdens on nonminorities. Nonminority challengers to these scholarships must concede that they have not suffered the loss of an already-awarded scholarship. Some nonminorities challenge that they have been handicapped in their ability to receive the scholarships, regardless of the relatively few minority-based scholarships offered. These opponents must be reminded that "as part of this nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of past discrimination." Metro, 110 S.Ct at 3026; see also Wygant v. Jackson Board of Education, 476 U.S. 267, 280-81 (1986) (opinion of Powell, J.).

Lastly, some opponents of minority-based scholarships argue that the granting of such financial awards stigmatize the student, and taints his or her achievements. Contrary to such fallacious arguments, recipients of minority scholarships are not stigmatized as inferior any more than they are often stigmatized when they outperform all other competition. See Renzendes, "Campus Minorities: Confronting Racism With Mature Methods," Washington

Post, April 19, 1988 at A3, Col. 1; see also Wilkerson, "Campus Blacks Feel Racism's Nuances," New York Times, April 17, 1988 at 1, Col. 3. Furthermore, non-recipients of minority-based scholarships do not necessarily know the origins of a student's financial aid and have no reason to speculate about how he or she obtained tuition. Each student is judged on the merits of his or her grades. In addition, recipients of minority-based scholarships must satisfy otherwise applicable admission requirements to the institution of higher learning. NBA and NAFEO restates here what has been editorialized across the nation before: "If the government in all its forms cannot consider race for any purpose, the possibility exists that racial minorities will be frozen into the existing social, educational and professional patterns." "A Color-Blind Government?", Washington Post, March 4, 1977 at A22, Col.1.

### Conclusion

Clearly, in granting minority-based scholarships are legitimate means to accomplish the valid objective of improving the education and of minority students throughout this country. Minority-based scholarships are constitutional, in that they do not pose an undue burden to nonminority students. Such scholarships are such a small fraction of total monies awarded to college students each year. Therefore, for the foregoing reasons, the U.S. Department of Education's current policy regarding minority-based scholarships should remain intact.

Sincerely,

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