The Set-Aside Set

by Terry Eastland

My text this month comes from a story by Thomas W. Lippman that ran in the *Washington Post* on December 1. The headline, "Energizing Minorities' Objectives," and subhead, "Legislation Offers Opportunity for the Incoming Administration," set the tone. The piece was less journalism than ad copy (indeed, it ran on the *Post*'s "Federal Page"), about a provision added in the final stages to the voluminous Energy Policy Act of 1992, which was signed into law in late October.

The provision, as Lippman summarized it, "requires that at least 10 percent of all federal contracts for energy conservation in government buildings, purchase of natural gas-powered vehicles and energy research and development be awarded to small businesses owned by minorities or women, to historically black colleges or to universities whose student body is more than 20 percent Hispanic or American Indian." What we have here is a perfect example of a policy more commonly called a "set-aside," not that Lippman ever uses the term.

His piece is disturbing in several ways. The first concerns press coverage of government. As the textbooks tell us, Congress makes the law, the executive enforces it. Obviously, the press can't report on every new law or effort at enforcement. Journalists have to pick and choose, and they often are as much in the dark as the public they claim to serve. Still, I would argue that the kind of fishy law-making Lippman reported (I'll give him this much: I saw no other news story on the set-aside) ought routinely to attract press attention, if only because items tacked on late in the legislative game are often ones their sponsors do not want debated in public.

The 10-percent set-aside was just such a debate-avoiding late addition. As Lippman observed, the idea "was hardly mentioned in all the months of hearings and floor debates over nuclear power, offshore oil drilling, and expanded use of natural gas"—the main stuff in the bill. The set-aside was the work of Michigan Democrat John Conyers, who "had no particular interest in energy as such," according to Lippman's congressional sources, and who "kept quiet so as not to arouse opposition from legislators opposed to affirmative action 'quotas.'" Certainly there's a role for journalism in exposing efforts to make law with no one noticing.

Then there's the question of the press's skimpy coverage of civil rights policies, whether set-aside laws (a congressional staple in recent years) or the executive branch's support for racial and gender preferences. And when the press does cover these issues, it often finds it hard to be timely. (The Labor Department's practice of "race-norming" the results of the General Aptitude Test Battery Examination began in 1981 but was not reported until 1990.) If Bill Clinton further tilts executive-branch enforcement in favor of measures that allocate jobs and other benefits on the basis of race and sex, will the press report it, and before the end of this century?

The open secret, of course, is that the press generally supports such measures and thus in effect colludes with politicians who advance them. Consider Lippman's lead paragraph:

> President-elect Clinton, who has espoused a policy of racial inclusion and said he wants his administration to resemble the ethnic composition of the nation as a whole, may find a useful tool for achieving those objectives in . . . the Department of Energy.

But Candidate Clinton had also espoused an anti-quota view. Thus, the lead just as easily could have been: "President-elect Clinton, who has opposed racial quotas, may find himself at odds with a provision in the recently enacted Energy Policy Act of 1992." Lippman could only have assumed that the set-aside in question was either not a quota or hardly newsworthy even if it was. He withheld pertinent facts, such as that the set-aside does not require proof that its beneficiaries have suffered from past discrimination or that, if they have, it has undermined their ability to compete successfully for federal energy contracts. He also failed to mention that Congress, in passing the Energy Policy Act, didn't find that the legally preferred groups had endured past discrimination in federal procurement contracts. The 10-percent set-aside thus is not a "remedial" provision.

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The distinction is important. The main reason the Supreme Court upheld a 1977 minority set-aside law (another Conyers special) was that Congress had made a finding of past discrimination, which served as an adequate remedial "predicate," as the lawyers call it. The set-aside in the new energy bill is therefore ripe for a lawsuit on constitutional grounds. It also merits objection as pure pork, pork dispensed to people on the most objectionable grounds: skin color, ethnicity, and gender. But Lippman doesn't seem remotely aware of these contentious points. To the contrary, let's "energize" minorities' objectives! What a wonderful opportunity for the new administration!

A few days later, the *Post*'s editorial page defended Bill Clinton against Evan Kemp, the outgoing chairman of the Equal Employment Opportunity Commission. Kemp had argued in a speech that Clinton would have a hard if not impossible time reconciling his commitment to "diversity" and his opposition to racial quotas and preferences. The *Post*, hopelessly if willfully confused, said diversity doesn't mean quotas. It simply means you have to pay attention to "forbidden factors," apparently the latest euphemism for aggrieved groups that enjoy official sanction.

Presumably, the model for diversity at the *Post* is the Clinton cabinet. During December and January, just whom Clinton would appoint to what position dominated the news, and dominating those decisions was Clinton's goal of "diversity," defined in terms of those "forbidden factors." Clinton managed to make his diversity mania even more of a story when, on December 21, he accused certain women's groups of being "bean counters" playing "quota games and math games" with his cabinet and subcabinet choices. Clinton's remarks—"his most animated comments since his election," according to one story—led the news. The move was supposedly akin to the one he made against Sister Souljah during the campaign, a signal to anti-quota Americans that he was still against quotas. Meanwhile, he continued to make his picks with diversity foremost in mind.

The press did not question the sincerity of Clinton's bean-counting remarks, if only because it has long played the same two-faced game. Thus, in its Christmas Day coverage of Clinton's final cabinet selections, the *Post* said the President-elect had selected "the most diverse Cabinet in history." There were no quotes around the word "diverse." And there was no definition of "diversity," although diversity can be defined many different ways—in terms of religion, geography, ideology, not just race, ethnicity, and gender. On January 3, Thomas Edsall, another *Post* writer, praised Clinton for trying to change the terms of debate. I'll say. The press was seconding Clinton in his doubletalk while declaring diversity an unproblematic good not requiring definition.

During all the bean counting, reporters ignored the people handling civil rights law for the transition. Granted, it was a busy time, the press can only cover so much, and the actual nominees were the big stories. But few journalists bothered, for example, to check out such figures as Emma Jordan, a law professor assigned to a most critical civil rights spot—the office of attorney general.

Jordan, president of the Association of American Law Schools, has definite views on quotas. In the November AALS newsletter, she defended the University of California at Berkeley's law school admissions policy, which had been criticized by the Bush Education Department. The policy reserved 23-27 percent of the seats in each entering class for "black, Chicano, Asian-American, and Native American" students. The applications of these "minority" students were separated from those of all other students, and comparisons were made only within each group.

I happened to write a column (December 22 for the *Washington Times*) relating Miss Jordan's views. The *Legal Times*'s Stuart Taylor decided to follow up on it, and reported that the American Civil Liberties Union's "Blueprint for Action for the Clinton Administration" even urged Clinton to revive race-norming!

With advocates like Jordan and the ACLU, one can only imagine the shape the new administration's civil rights policies—which will probably affect a majority of Americans—will take. Beware the new math of Bill Clinton! ❐

Newport's White Horse Tavern

by M. D. Carnegie

When architectural plans for what became the Rhode Island State House were drafted in the 1730s, Newport officials became embroiled in bitter controversy about the direction the new building should face. The avant-garde thought it should be toward the waterfront and the town's main thoroughfare, a nod to commerce at a time when Newport was one of the most important cities in the colonies. A vocal faction of traditionalists demurred, countering that it should point at the tavern hard by, to which the General Council was in the habit of repairing, and which, at half-a-century-old, was already something of an institution itself.

Well, the old State House is now home to District Court, whence the felonious can barely catch sight of the Atlantic for all the tony harborfront shops, and nowadays Rhode Island pols are more likely to be discovered in the minimum-security wing of the state correctional facility. But the White Horse Tavern still stands, smack where it was built in 1673. It is the oldest continuously operating public house in our United States.

Though the thirsty can no longer fortify themselves with a dram of crank, much of the tavern has remained as it ever was. Outside, a hand-painted wooden sign announces simply: Cocktails. Inside, the floors are still black and unlevel, the enormous central fireplace still roars. There is no piped-in music, no buffalo wings or nachos supreme. Food, of the French variety, is available in helpings inversely proportional to their expense, and the several dining rooms attract a necessarily well-financed crowd, whose cash is largely as *nouvelle* as the cuisine. Newporters like things that are old, however, especially money, and in the town where Cornelius Vanderbilt is still thought a bit of an *arriviste*, it is the bar at the White Horse that is the last refuge of those who make their money the old-fashioned way—by inheriting it.

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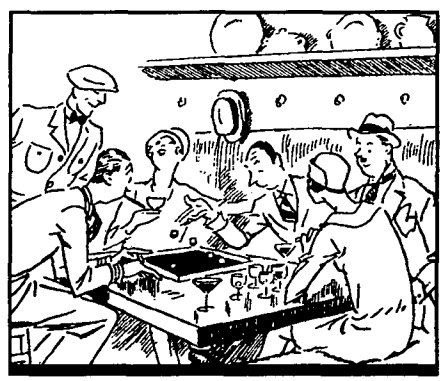
There were at least six licensed taverns operating in the town by 1691, and competition for the tippler's farthing was keen. Location counted for a great deal, as the State House architectural flap showed. And cultivation of the right clientèle, as always, was critical. The Marquis of Granby, a competing pub, was



the favored watering-hole of the Hessian soldiers in the Fusileers. Secret plans were routinely discussed there over a few steins, and the Hessians believed themselves so secure in their native tongue that they never bothered to clear the place out when talking business. Anyhow, they'd never have tossed out the barmaid who served them; young Gertrude had emigrated from Germany at age three, young enough to learn accent-free English. She listened to everything, then passed the information to a patron, a slave named Cudjo, who would then get word to the local patriots. The rest, as they say, is history: the Marquis of Granby closed after the war.

The first owner of the White Horse on record was the lesser-known Willie Mays. He handed it down to his son, but Mays *fils* was already in the midst of a staggeringly successful career as arms-dealer, rum-trader, and at-large privateer. The place was then acquired by Jonathan Nichols, who would become deputy-governor of Rhode Island. The White Horse stayed in the Nichols family for two hundred years. It changed hands several times before being purchased by a group of Texans a decade or so ago. That sale raised a few hackles around town, with some public hand-wringing about selling off a piece of local history, and a good deal of venting of local prejudices against Southerners. Just yards away, after all, Ted Turner had capped off a successful defense of the America's Cup by staggering fifth-in-hand off the side of the dock, and plunging flush into the briny deep. But the gentlemen from Texas took some pains to quell native suspicion, and in fact only two great changes have been made during their tenure. The tavern is now also the titular Atlantic headquarters for the Fort Worth Yacht Club, and it now operates at a profit.

There are guidebooks that will tell you people visit Newport for the fabulous mansions of the swells, but they are also the sorts of books that advise which pricey waterfront café serves the better eggs Florentine, and how your holiday would be incomplete without a stop at the village scrimshoner's. They are not to be trusted. In fact people come to Newport, in the summer at least, because it is full of blonde girls, heartbreakingly beautiful blonde girls. There are German *au pairs* and Grosse Pointe debutantes, Manhattan photo assistants and Aussie round-the-world sailors. There are baronesses, tennis pros, and jewelry-designers here; there are rich heiresses with trust funds. They are all