SUPPLEMENTAL BENCH MEMORANDUM

To: Mr. Justice Powell
Re: No. 78-1007, Fullilove v. Kreps

I. The Legislative Record

In my Bench Memorandum at 29-31, I suggested that the CA2 judgment should be upheld if sufficient evidence existed in the history of congressional debate on PWEA and other measures to support the proposition that the set-aside was enacted to remedy past constitutional violations affecting minority contractors. This Supplemental Bench Memorandum will sketch more fully three specific areas of congressional action which support the belief that minority contractors suffered the effects of discriminatory action.
A. Congressional Oversight of the Small Business Administration

When Senator Brooke introduced the Senate version of the set-aside, he noted that the concept of set-asides had been used under section 8(a) of the Small Business Administration (SBA) Act, 15 U.S.C. § 637(a). Section 8(a) provides that the SBA may enter into contracts with the federal government and sub-contract them out to small-business concerns. By 1972, the SBA was administering section 8(a) to aid minority business enterprises. That term was defined to include the minority groups included with the PWEA set-aside.

The operation of section 8(a) was specifically reviewed by congressional committees between 1975 and 1977. In 1975, the Subcommittee on SBA Oversight and Minority Enterprise of the Committee on Small Business conducted hearings and issued a report reviewing the operation of section 8(a). At the outset of the hearings Subcommittee Chairman Addabbo stated that "we must pledge ourselves to the ideal of assuring that effective remedial action will be taken to guarantee opportunities for full economic participation to those members of society who have traditionally encountered impediments and obstacles to entering the mainstream of business resulting from discrimination or similar circumstances." H.R. Rep. No. 94-468 at 1 (1975). The Subcommittee heard the testimony of Representative Parren Mitchell, sponsor of the PWEA set-aside, that both the federal
government and private industry resisted implementation of section 8(a). And the Subcommittee considered a report of the United States Commission on Civil Rights that suggested that minority groups were having difficulty in obtaining contracts both at the federal and state level. See Minorities and Women as Government Contractors (May 1975). The Subcommittee heard testimony from a series of other witnesses who stated that the section 8(a) program had been ineffective in increasing the economic participation of minority business enterprises. See H.R. Rep. No. 94-468 at 11-16. After considering this testimony, the Subcommittee concluded that the low level of minority participation was "not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities." Id. at 2. The Subcommittee stated that Congress had enacted remedial programs designed to allow disadvantaged persons to participate "in the business mainstream of our economy." Id.

In 1976, the Senate Select Committee on Small Business held a hearing on section 8(a). Senator Javits noted that minority businesses received less than 1% of federal contracts, and that section 8(a) was designed to aid the development of minority business enterprises. Senator Javits stated that the goal of that program was to ensure "equal opportunity and access for all citizens to our free enterprise system."

In 1977, the full House Committee on Small Business

The Committee repeated the Subcommittee's conclusion that the low percentage of business done by minority businesses was an effect of societal discrimination. Id. at 124. The Committee further concluded that

over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent in our total business system generally, or in the construction industry in particular. However, inroads are now being made and minority contractors are attempting to "break-into" a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them.

Id. at 182-83. This report was issued on January 3, 1977, less than two months before Representative Mitchell introduced the PWEA set-aside provision into the House.

B. The Railroad Revitalization Act

In his statement introducing the PWEA set-aside in the Senate, Senator Brooke also referred to the use of the set-aside concept under the Railroad Revitalization Act. 45 U.S.C. § 803 prohibits discrimination in any activity funded by the Railroad Revitalization Act, and 49 U.S.C. § 1657a establishes a Minority Resource Center to assist minority businessmen to obtain contracts and other business opportunities related to the maintenance and rehabilitation of the nation's railroads. In
January, 1977, the Department of Transportation issued regulations pursuant to § 803 that required contractors under the Railroad Revitalization Act to formulate affirmative action programs to ensure that minority businesses would receive a fair proportion of contractual opportunities. 42 Fed. Reg. 4290-91.

These provisions were enacted by a Congress that recognized the "established national policy, since at least the passage of the Civil Rights Act of 1964, to encourage and assist in the development of minority business enterprise." S. Rep. No 94-499 (Commerce Committee), 1976 U.S. Cong. & Ad. News at 58. Recognizing that minorities included "socially or economically disadvantaged persons," the Commerce Committee concluded that "encouragement for the participation of minority business was appropriate." Id. at 58-59.

C. Congressional Review of the Philadelphia Plan

In 1969, the Department of Labor promulgated the Philadelphia Plan pursuant to Executive Order No. 11246, which required that all federal contractors take affirmative action to ensure that applicants for employment and employees were not discriminated against on the basis of race, color, religion, sex or national origin. The Philadelphia Plan ordered that past exclusionary practices towards minorities be remedied by the implementation of specific hiring goals by federal contractors.

Later that year, the Senate passed an amendment to an appropriations bill that would have had the effect of overruling
the Philadelphia Plan. After the House refused to accept the amendment, 115 Cong. Rec. 40921, the Senate voted to recede from its position. 115 Cong. Rec. 40749. In the course of that debate, several Senators supported implementation of the Philadelphia Plan as necessary to ensure equal opportunity. See 115 Cong. Rec. 40740 (Sen. Scott); id. at 40741 (Sen. Griffith); id. at 40744 (Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry, 115 Cong. Rec. at 40742-43. The day following the Senate vote, Senator Kennedy noted the "exceptionally blatant" racial discrimination in the construction trades and commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." 115 Cong. Rec. 41072.

D. Conclusion

I believe that these three areas of legislative action considered by themselves and in conjunction with the broad anti-discrimination legislation of the past two decades demonstrate that Congress had sufficient reason to conclude that minority contractors were suffering the continued effects of discrimination. The congressional review of the section 8(a) program focused on the effects of discrimination on minority business enterprises, and noted the specific difficulties of minority contractors. In the Railroad Revitalization Act,
Congress moved expressly to remedy past discrimination against minority businesses. And in rejecting efforts to overturn the Philadelphia Plan, Congress recognized the legacy of discrimination in the construction industry. Accordingly, I believe that the history of congressional action supplies the "findings" necessary to uphold the PWEA set-aside as a remedy for past discrimination.

II. Petitioners' Reply Briefs.

Petrs have filed reply briefs that add little to their opening statements. In its brief, the General Building Contractors of New York State argue that Congress lacks the power under the Fourteenth Amendment or Article I to enact the set-aside. Because this argument is based solely upon the contention that the set-aside is not a proper remedial measure, petr's contention is answered by resolution of the constitutional issue.
Bensich (Retr)
Congress made no finding.
Racial classification in presumptively invalid.
WHR asked why Gov't (Congress) can't allocate public funds discriminatorily.
(What about our Social Security Act cases applying E/E clause?)

Hickey (Retr)
Spanish speaking but not Portuguese speaking citizens included.
(P.S. noted that "Indians" includes endorses from India.)
All Orientals is too broad.
No way to tell who is excluded to be benefited by this provision.

9 P.S. asked if we have ever held a statute invalid because of absence of findings. Counsel answered "no."
But issue never presented before.

WHR: In Morgan v Katzenbach Court relied heavily on findings.
Both 5th & 14th are involved - both Fed Gov't & local Gov'ts are involved.
Hey (Asst. A.G. of U.S.)

(We interrupted for days so frequently
that he had little opportunity to make
a coherent argument)

Responding to P.S., Days said
that statute would be valid if set aside
were 100.

Congress not required to deal with
all problems at same
time. Women contractors, for example,
left out.

Congress could have legislated
exclusively to benefit Orientals.
The Chief Justice

Agreement

Habit of discrimination has been shown over years. Need not have explicit findings by Congress.
This is a temporary, experimental program.
Action of Congress entitled to special deference.
Katzenbach v. Morgan is relevant. Neither Weber nor Bubbe controls this.

Mr. Justice Brennan

Agrees with C. J.

Mr. Justice Stewart

Reverence

If 5th & 14th Amend mean anything, govt. can't confer benefits or detriments.
Racial discrimination in invidiously
involved.
Weber involved private action.
Statute in grossly unconst.
Mr. Justice White

No comments

Mr. Justice Marshall

No comments

Mr. Justice Blackmun

HAB says her voter in Dakota and Weber counts his vote here
Mr. Justice Powell

Affirm

I used my long hand notes to state my reasons. See file. 

My Baker analysis applies. 

Prior cases (Morgan, School cases, Title VII Case)

Mr. Justice Rehnquist

Reverse

Stand on Court, as its need to say Congress has greater power to discriminate than a state; in Chief had said 

"Strict scrutiny" here is absurd. We are giving it no scrutiny meaningless as to a Four Amendment

Mr. Justice Stevens

Reverse (tentative)

Not wholly at least. Don't agree with either "extreme" position (?) E/P Component of 5% in same or 

14% 

This is a hypothetical case, unlike Baker where person discriminated vs can be identified. But can sustain him in either of two grounds: (1) remedy of past discrimination now or (2) benefit our country for future. This is difficult case to find a remedy for past discrimination - no proof of anyone a victim.
I have now reviewed with care the January 18 draft of a concurring opinion. It is an excellent working draft. Although I have not reread Bakke, I believe the draft conforms in structure and basic analysis with my Bakke opinion. In addition, you have developed some helpful supplemental analysis.

As you will see, I have done a good deal of editing that should be considered in preparing the next draft. I will now comment briefly on the various Parts.

I have rewritten, as Rider A, the introductory paragraph.

Part I (pp. 2-5)

This is excellent, and summarizes the basic analysis as follows:

1. Racial classification is invalid unless necessary to serve a compelling interest.
2. Government has a compelling interest in ameliorating the effect of identified discrimination.

3. Such discrimination must be established by judicial, administrative or legislative findings. A legislative interest is not compelling absent such a finding.

4. Thus, two requirements must be met to insure that the interest is compelling: (i) the governmental body must be authorized to make findings, and (ii) appropriate findings must be made.

5. The means selected must be reasonably necessary to fulfill the governmental purpose.

Apart from my editing, I think Part I is in good shape.

Part II (pp. 5-19)

Sub-Part A (pp. 5-8) makes clear that Congress is a competent body, and appropriately emphasizes the Civil War amendments (p. 7).

Sub-Part B (pp. 9-13) meets the argument that we may not look beyond the specific legislative history of the Public Works Act. But the draft over-argues this point, at least unless it is emphasized effectively in the dissenting opinion. I view the argument as almost frivolous with
respect to Congressional action. Accordingly, at least until we see the dissent, I would end Sub-Part B at the bottom of page 10. The points made on pages 11-13 could be left out entirely, or summarized and added to footnotes.

Sub-Part C (pp. 13-19). Here, the draft lays out the legislative history in a most persuasive manner. Yet, I think we can be reasonably confident that the Chief Justice's opinion will do pretty much the same thing. The SG's brief, and other documentation, afford substantial guidance. I will not wish to duplicate the Chief's opinion in this respect if it is reasonably adequate.

Therefore, I suggest that you redraft Sub-Part C stating that the opinion of the Court (or by the Chief Justice) establishes convincingly that Congress, after extensive consideration, concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts that were awarded minority contractors. Then include a paragraph that effects a transition from Part II to Part III. Much of the language you now have from the middle of page 18 to the top of page 19 will be useful in this respect.

As a precaution, I suggest that we prepare Sub-Part C for use as an Appendix to my opinion. If the opinion of the CJ should not be entirely adequate on the
legislative history and findings, I had rather deal with this in detail in an Appendix than interrupt the textual flow of my opinion. We should go ahead and have the Appendix printed in Chambers Draft form to have it available if needed.

Part III (pp. 19-27)

Generally, and subject to my editing, I think this is close to being satisfactory. In this Part, having found that Congress established a compelling interest, we address the next inquiry: whether the 10% set aside is a necessary means of furthering that interest.

Part IV

The essence of IV is satisfactory, but I hope that between the five of us we can make this an eloquent ending.

* * *

I emphasize, Jon, the importance of consistency and precision in the language used in describing the various elements of our analysis. To the extent feasible, we should use the same language of my Bakke opinion - although refining it, where necessary, is desirable.

We also need a footnote dealing with the sticky problem of Chinese and other "minorities" being bracketed
indiscriminately with Negroes.

Finally, I would like to cite a few of the better Law Review articles.

This case will be one of the most important the Court has handed down in years. It is desirable, therefore, for all five of us in our Chambers to consider with care both the substance and form of my concurrence. In doing so, we must also think in terms of an analysis that can be applied consistently in future cases.

L.F.P., Jr.
The 10% add-on is a racial classification, and therefore is subject to strict scrutiny.

This means that:
1. The state interest must be substantial.
2. The classification (the means) adopted must be necessary to serve this interest.

The state interest in ameliorating or eliminating the effect of identifiable racial discrimination is substantial.

There must be, with respect to a legislative racial classification, reasonably clear ev. of record that the group in fact to be benefited (or at least the group not to be discriminated against). In short, there must have been a constitutional violation. Here, it must be clear on the record that the States have discriminated against the minority in the awarding of contracts and subcontracts.
Although Congress could have made a more explicit record of the finding of discrimination, I conclude that viewed as a whole the record is adequate.

Unlike a court or admin. body where findings of discrimination must be quite explicit, a legislative body functions in a broader manner. But there must be substantial evidence that the finding was made.

Congress, merely virtual of being the national leg. body and also
an ex officio determination by virtue of Section 5 of 14th Amend., perhaps
may be permitted to generalize to a
greater extent than a State legislature.

The question remains whether this
particular classification - i.e. the 180%
special preference - is necessary to
serve or further the state's interest.

Although we should accept the
judgment of Congress that it is necessary,
Count on great deference to congressional
judgment as to the necessity of a
particular remedy.
On basis of my Bakke opinion, I analyze this case as follows:

The 10% set-aside is a racial classification. It is, therefore, subject to strict scrutiny. To survive strict scrutiny, the set-aside must (i) serve a legitimate and substantial state interest and (ii) must be necessary to further that state interest.

The federal government has a legitimate and substantial interest in ameliorating or eliminating the effects of identifiable racial discrimination. Thus to establish a substantial (or compelling) state interest, Congress must have acted upon reasonably clear evidence that the groups to be benefited have, in fact, suffered discrimination. In short, there must be a showing of a constitutional violation.

In deciding whether Congress has presented a sufficient record to support its finding of racial discrimination, we must take into account the nature of congressional action. Unlike a court or administrative body, Congress does not require explicit findings in order to enact
legislation. Therefore, it is proper to look to the legislative history of congressional actions other than enactment of the set-aside. And Congress has specific constitutional power to enforce the guarantees of the Fourteenth Amendment. Consequently, Congress is permitted more leeway to generalize than other governmental bodies. Although Congress could have made a more explicit record of its finding of discrimination, I conclude that the record of congressional action viewed as a whole is adequate.

The question remains whether the 10% set-aside is necessary to further the state interest. Courts owe great deference to congressional judgment as to the necessity of a particular remedy. On this record, we should accept the judgment of Congress that the set-aside is necessary.

L.F.P., Jr.