MEMORANDUM

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

The Chief's formal re-circulation has arrived this afternoon. This memo will note substantive changes made since his private circulation to you.

P.21. To meet your objections, the Chief has re-phrased the two-part step by adding an explicit reference to the equal protection component of the Due Process Clause.

P.25. The Chief has changed the citation to Morgan so that the reference does not include those pages on which the Morgan Court suggested that Congress could determine the scope of the Fourteenth Amendment.
P.26. As you suggested, the Chief now cites City of Rome with a "cf." signal.

P.31. The Chief has altered the last paragraph to emphasize the unique position of Congress, but has not deleted reference to Congress' power to advance the general welfare.

P. 32. The Chief has stricken the sentence denying that any person has a constitutional right to a public works contract.

P. 39. The Chief has added a new ending that quotes Brandeis on the need for experimentation. More importantly, he now confronts the lack of a "test" in his opinion and describes as essential the need to subject the set-aside to "probing examination."

Each of these changes appears designed to make the Chief's opinion more palatable to you. I believe that some of the changes will make it possible for you to join additional sections of the Chief's opinion. I believe, however, that you should make no formal commitment until we see what the Brennan group does. In the meantime, I will compose a short memorandum comparing the changes you requested with the changes the Chief made. And I will recommend which portions of the Chief's opinion may not be "joinable."
Dear Chief:

The changes in your circulated draft of May 30 that are indicated in pen (in the draft your sent only to me) are helpful. I appreciate your giving me the opportunity to comment. My hope is to be able to join most if not all of your opinion if I can view it fairly as not incompatible with the analysis to which I am committed.

I will now go over your draft (assuming that the changes indicated in pen will be made). I will indicate my tentative view as to each part and subpart, with changes that you may consider:

I and II. I can join.

III. [Introduction to the analysis (pp. 21,22)].

Make clear in the last paragraph at the bottom of page 21
that the legislation is being challenged under the equal protection component of the Due Process Clause. You say this in the language you will add on page 28. Although not necessary, it would help to make this clear at the outset. I could join the introductory portion of III.


III-A(2) (p. 23). Join.

III-A(3) (p. 24). I am in accord except for some of the language you quote from *Katzenbach v. Morgan* that I always have thought was erroneous. I am asking my clerk Jon Sallet to discuss this with your clerk. In my view, the decision in *City of Rome* is a total miscarriage of justice. I am not sure I can go along with citing it except on a "cf." basis. Subject to eliminating some of the *Morgan* language, I think I can join.

rejected Lau as an authority in Bakke primarily because the remedy did not affect adversely English speaking students. It therefore is materially different from a quota. I cannot join this subpart.

III-B (introduction) (p. 28). You are adding language that describes the applicable standard as "careful judicial evaluation", and require that the means be "narrowly tailored". As you know, I feel strongly that we should adhere to the precedential standard of "strict scrutiny". Depending upon any further changes that you may think necessary to accommodate other Justices, I may be able to accept your formulation by saying in my concurring opinion that I take it to mean - as our precedents would require - strict scrutiny.

III-B(1) (p. 30). You rely here on the desegregation cases to say that in an appropriate context
remedies need not be "color blind", but must be tailored to
the violation. The sentence at the bottom of page 31
overstates, as I view it, the power of Congress as contrasted
with that of administrative agencies to whom congressional
power has been delegated and to the courts. My primary
concern, however, is that this sentence may be construed to
include the authority of state legislatures as well. If you
are disposed to eliminate the sentence, I could join this
subpart.

III-B(4) (p. 34-37). Here you discuss "over
inclusiveness" at some length. I have been worried from the
outset by the inclusion of Orientals. Yet, I have thought
that this claim was not addressed (and may not have been
urged) in the Court of Appeals. I would have preferred to
see what the dissenting opinions say about over-
inclusiveness. But I will join this subpart.
III-B(5) (p. 37-39). As my own summary and conclusion tracks my Bakke analysis, and as this is at least substantially different in form from your summary, I cannot join you.

My difficulties with your concluding subsection (III-B(5)) are several. The second sentence (p. 37) can be read as a rather open invitation to Congress "to try new techniques, such as the limited use of racial and ethnic criteria to accomplish remedial objectives". I could approve such criteria only where they serve a compelling state interest. The next sentence refers to "voluntary cooperation". If you have Weber in mind, this would be appropriate. But I do not view this case as involving such cooperation.

On page 38, just before the quotation from Justice Jackson, the reference to "reasonable assurance that the
program will function within constitutional limitations sounds too much like the "rational basis" test for me. Nor do I like the Jackson reference to what must be done to prevent "domestic disorder and violence". This sort of talk can be read — as it has recently in Miami — as inviting resort to the streets rather than to the process of the law. See TM's dissent in Mobile. I am sure you could not have had this in mind. Yet, I am afraid the language might be viewed in this light by some readers.

* * *

In sum, with relatively minor changes as indicated above, I believe I can join substantially all of your opinion with the exception of your concluding paragraphs. I would say in my concurrence that I write separately to apply my Bakke view, and that I do not understand your opinion —
though structured somewhat differently — is inconsistent.

As I indicated in my last letter, you are being "solicited" from both sides. I recognize, of course, that reasonable minds may differ and my comments above are merely "suggestions". If you should find them acceptable, and can resist the anticipated "suggestions" from our Brothers, I will join as above indicated.

Sincerely,

The Chief Justice
June 16, 1980

MEMORANDUM TO THE CONFERENCE

78-1007, Fullilove v. Klutznick

In due course, I shall circulate a Second Draft of my memorandum in this case. The following language will be substituted for the first paragraph of the First Draft:

Mr. Justice Powell, concurring in part and concurring in the judgment.

The question in this case is whether Congress constitutionally may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public works projects funded by the Act be set aside for minority business enterprises. For the reasons stated in Part III-A of the Court's opinion, I agree that Congress has the legislative authority to enact the set-aside. Because I agree that enactment of the set-aside does not violate the Due Process Clause of the Fifth Amendment, I also join all but subsections (1) & (4) of Part III-B of the Court's opinion.

This is the first case since University of California v. Bakke, 438 U.S. 265 (1978), to present the issue whether a government may establish a racial classification favoring members of minority groups. I believe that § 103(f)(2) is justifiable as a remedy that serves the compelling state interest in eradicating the continuing effects of the past discrimination identified by Congress. Although the Court's opinion does not explicitly adopt a standard for judicial review of racial classifications, I am satisfied that its analysis is essentially consistent with the traditional standard discussed in my Bakke opinion. It is on this understanding that I join the Court's opinion as noted above. I write separately to apply the traditional analysis appropriate to review of racial classifications to this case.

L.F.P., Jr.
June 16, 1980

RE: 78-1067 - Fullilove v. Klutznick

MEMORANDUM TO THE CONFERENCE

Enclosed is "one last try" which I am prepared to stay with—provided four or more join.

Regards,

[Signature]
June 16, 1980

78-1007 Fullilove

Dear Chief:

The changes in your circulated draft of May 30 that are indicated in pen (in the draft sent only to me) are helpful. I appreciate your giving me the opportunity to comment. My hope is to join most, if not all, of your opinion if I fairly can view it as not incompatible with the analysis to which I am committed.

I will now go over your draft (assuming that the changes indicated in pen will be made). I will indicate my tentative view as to each part and subpart, with changes that you may wish to consider:

I and II. I can join.

III. [Introduction to the analysis (pp. 21, 22)]. State in the last paragraph at the bottom of page 21 that the legislation is being challenged under the equal protection component of the Due Process Clause. You say this in the language you will add on page 28. With such a change, I could join the introductory portion of III.


III-A(2) (p. 23). Join.

III-A(3) (p. 24). I am in accord except for some of the language you quote from Katzenbach v. Morgan that I always have thought was erroneous. I am asking my clerk Jon Sallet to discuss this with your clerk. In my view, the decision in City of Rome is a total miscarriage of justice. I am not sure I can go along with citing it except on a "cf." basis. Subject to some changes, I think I can join.
III-A(4) (p. 27). You rely on Lau v. Nichols. I rejected Lau as an authority in Bakke primarily because the remedy did not affect adversely English speaking students. It therefore is materially different from a quota. I cannot join this subpart.

III-B (introduction) (p. 28). You are adding language that describes the applicable standard as "careful judicial evaluation", requiring that the means be "narrowly tailored". As you know, I feel strongly that we should adhere to the precedential standard of "strict scrutiny". Depending upon any further changes that you may think necessary to accommodate other Justices, I may be able to accept your formulation by saying in my concurring opinion that I take it to mean - as our precedents would require - strict scrutiny.

III-B(1) (p. 30). You rely here on the desegregation cases to say that in an appropriate context remedies need not be "color blind", but must be tailored to the violation. The sentence at the bottom of page 31 overstates, as I view it, the power of Congress by referring to its authority to advance the general welfare as well as its power to enforce the post-Civil War Amendments. My primary concern, however, is that this sentence may be construed to include the authority of state legislatures as well. If you are disposed to revise the sentence, I could join this subpart.

III-B(2) (p. 32). In general, I view this discussion as compatible with the analysis on pages 20-21 of my concurrence. I am bothered by the sentence stating that "no one has a constitutional right to be awarded a public works contract." Although the statement is clearly correct as a matter of due process, I do not think Congress may condition receipt of a benefit upon unconstitutional considerations. See n.13, p.21 of my concurrence. With deletion of this sentence, I can join this subpart.

III-B(3) (p. 33). I am slightly concerned about the suggestion that "one step at a time" analysis always defeats challenges of underinclusiveness. In some circumstances, under-inclusiveness may be relevant to a determination that governmental action is unconstitutional. See Erznoznik v. City of Jacksonville, 422 U.S., at 215. But, because I do not read your discussion of under-inclusiveness as a holding, I could join this subpart.
Here you discuss "over inclusiveness" at some length. I have been worried from the outset by the inclusion of Orientals. Yet, I have thought that this claim was not addressed (and may not have been urged) in the Court of Appeals. I prefer to see what the dissenting opinions say about over-inclusiveness. But I may be willing to join this subpart.

As my own summary and conclusion tracks my Bakke analysis, and as this is at least substantially different in form from your summary, I cannot join you.

My difficulties with your concluding subsection (III-B(5)) are several. The second sentence (p. 37) can be read as a rather open invitation to Congress "to try new techniques, such as the limited use of racial and ethnic criteria to accomplish remedial objectives". I could approve such criteria only where they serve a compelling state interest. The next sentence refers to "voluntary cooperation". If you have Weber in mind, this would be appropriate. But I do not view this case as involving such cooperation.

On page 38, just before the quotation from Justice Jackson, the reference to "reasonable assurance that the program will function within constitutional limitations sounds too much like the "rational basis" test for me. Nor do I like the Jackson reference to what must be done to prevent "domestic disorder and violence". This sort of talk can be read as inviting resort to the streets, as recently happened in Miami, rather than to the process of the law. See TM's dissent in Mobile. I am sure you could not have had this in mind. Yet, I am afraid the language might be viewed in this light by some readers.

In sum, with relatively minor changes as indicated above, I believe I can join substantially all of your opinion with the exception of your concluding paragraphs. I would say in my concurrence that I write separately to apply my Bakke view, and that I do not understand your opinion — though structured somewhat differently — is inconsistent.

As I indicated in my last letter, you are being "solicited" from both sides. I recognize, of course, that reasonable minds may differ and my comments above are merely "suggestions". If you should find them acceptable, and can
resist the anticipated "suggestions" from our Brothers, I will join as above indicated.

Sincerely,

The Chief Justice

1fp/ss
June 17, 1980

No. 78-1007, Fullilove v. Klutznick

Dear Chief:

The changes you have made are very helpful, and they will enable me to join your opinion with the exception only of Parts III-B(1) and III-B(4). Some of the language in these gives me trouble.

I will recirculate my concurrence accordingly, and will make clear that I view the opinion of the Court as essentially consistent with my Bakke position. I think the combination of our two opinions will afford reasonably clear guidance for the lower courts.

Of course, my decision to join your opinion is on the assumption that your draft will remain in its present state, without substantial change.

Sincerely,

The Chief Justice

lpf/ss
June 17, 1980

Re: No. 78-1007 - Fullilove v. Klutznick

Dear Chief:

We have read your recirculation of June 16 in this case, and we appreciate your revising the initial draft in response to the comments and suggestions of Byron, Harry, Lewis, and ourselves. For our own part, although your second draft goes a long way towards satisfying our concerns, we are troubled by the addition of the concluding paragraph, particularly the second and third sentences, commencing with "Some have characterized..." and ending with "probing examination." As we indicated in our original memorandum, we believe that some standard of review is necessary, and we intend to circulate a concurring opinion that articulates our view of the correct standard and explains how that standard is implicit in the analysis you apply to this case. Would you be willing to delete these sentences in order to avoid any inconsistency between your opinion and our concurrence? We do not think these sentences are necessary to your decision. If you find it possible to delete them, and two others agree, we would be happy to join to put together a Court.

Sincerely,

WJB, Jr.

The Chief Justice

Copies to the Conference
June 18, 1980

Re: No. 79-1007 - Fullilove v. Klutznick

MEMORANDUM TO CONFERENCE

I will try to respond, but only preliminarily, to Bill's and Thurgood’s June 18 memo and to Lewis' June 17 memo.

At the outset, it seems to me there is a "tempest in a saucer" aspect as to terms. I frankly believe that adopting a magic "word-test" is a serious error and I will neither write nor join in these "litmus" approaches. However, we are supposed to be proficient with words and I will keep trying as soon as I see the direction of the dissent or dissents.

Of course, each of us is free to write anything, but I am not prepared to subscribe to a Court opinion that is undermined by concurring opinions which undertake to say that the author of the Court opinion adopts a particular test; I would prefer to let the fragments fly.

Regards,

[Signature]
Fullilove

Dear Chief:

As was predictable, the concurring opinion Thurgood has circulated and that probably will be joined by those who agreed with him in Bakke - devotes a self conscious amount of effort to a demonstration that your opinion rejects the strict scrutiny standard heretofore applied to racial classifications.

I do not fault him for trying to bring your into that orbit. It does make it necessary, however, for me to be somewhat more explicit in making clear that I read your opinion - as I think you have intended it - to confirm to the highest level of critical examination that we ever apply.

I therefore plan, subject to any comments you care to make, to add either in the text or a footnote the enclosed
I will not circulate until I hear from you, as it would be much more preferable - if you could see your way clear to do so - if you disassociated yourself from the interpretation that Thurgood has placed on your opinion.

Sincerely,

The Chief Justice

lfp/ss
Add a footnote, keyed to page 1, along the following lines:

The several opinions that, together, constitute a Court for upholding the set-aside, present an interesting situation. The lead opinion, written by the Chief Justice, does not identify in conventional the standard of scrutiny it applies to this legislation. The opinion of Mr. Justice Marshall joins the Court opinion only on the understanding—several times repeated—that it applies the intermediate level of "scrutiny" adopted in the separate opinion of Justices Brennan, White, Marshall and Blackmun in Bakke, 438 U.S. 265, 324-379. Mr. Justice Marshall's opinion takes pains to insist that the Court "does not evaluate the set-aside provision under the conventional 'strict scrutiny' standard". Ante, at ___. Indeed, a significant portion of
his concurrence is devoted to the thesis that the Court's opinion harmonizes with the Bakke opinion of which Mr. Justice Marshall was a co-author.

As indicated above, I read the opinion of the Court quite differently. To be sure, it eschews use of conventional analysis and does not identify in familiar terms any particular standard. I join the Court's opinion only because it is clear both from its reasoning and language that it does subject the set-aside provision to the exacting examination that - in case after case - this Court uniformly has held to be necessary in reviewing a racial classification. There has never been a majority of the Court that applied the intermediate standard that Mr. Justice Marshall, would read into the opinion that I also join.

While one may have preferred, as that the Court speak in the traditional terms, it reviewed the set-aside in
language undistinguishable from that of strict scrutiny: "We recognize the need for careful judicial evaluation to assure that the racial classification is "narrowly tailored" to remedy "the present effects of past discrimination." Ante, at 28; and in the final paragraph of the Court's opinion: any "preference based on racial or ethnic criteria must necessarily receive a more searching examination . . ." and further, it is essential that any "enactment of Congress which employs racial or ethnic criteria receive[s] probing examination."

I suggest that no opinion of this Court applying anything less than strict scrutiny has ever employed such unequivocal language.

It may be regretted that this important case comes down in a posture that may puzzle federal and state courts confronted with racial classifications. But, in the
tradition of this tribunal, each of us must decide and write in accordance of his own independent best judgment.
June 19, 1980

Re: No. 78-1007, Fulljlove v. Klutznick

Dear Chief:

As I feared would happen, Thurgood and Bill Brennan claim that your opinion embraces their intermediate standard and rejects the strict scrutiny test.

I understand that you would prefer not to characterize your analysis as embodying one test or another. But I cannot join an opinion that rejects strict scrutiny analysis. Of course, I do have the opportunity to state in my own concurring opinion that the Court has acted consistently with strict scrutiny. But such a contention, especially in the face of four concurring Members of the Court who disagree, will be of little value if the Court's opinion itself remains silent.

In essence, I do not believe we disagree about this
case. As stated in your letter of 12 June, your "draft demonstrates that 'strict scrutiny' has been given" to the set-aside. We must correct the error of our Brothers who have not so read your opinion.

Sincerely,