June 2, 1980

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

Dear Chief,

I shall in due course circulate a dissenting opinion.

Sincerely yours,

The Chief Justice

Copies to the Conference
June 5, 1980

Personal

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

Dear Lewis:

I have your memo re the above.

Would it not be better to try for a "united front" instead of a cluster of concurring opinions -- a practice of which I increasingly receive complaints from judges all over the country!

With all deference to your right to express views separately in any way you wish, may I suggest that we may accomplish a good deal by exchange of memos -- one-on-one -- rather than by concurring opinions which tend to get people "locked in"? After consultation on the points of your concern, I may well be able to embrace them!

Regards,

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June 2, 1980

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Regards,

Mr. Justice Powell
Re: No. 78-1007 - Fullilove v. Klutznick

Dear Chief:

We have had an opportunity to give a preliminary reading to your careful opinion in this case. We are troubled that the opinion does not explicitly identify what we think you agree are the two major questions to be decided. The first is whether Congress has the enumerated or implied power to enact the remedial statute in question. Your opinion fully answers this question by finding congressional authority in the Spending Power and in § 5 of the Fourteenth Amendment. We agree. Since Congress has general authority to enact the statute, the crucial question then becomes whether the enactment is nonetheless unlawful under any constitutional prohibition. In this case, of course, petitioners argue that the statute violates equal protection.

We agree with the opinion's implicit recognition that remedying the present effects of prior discrimination is an important governmental interest that would justify the limited and carefully tailored use of racial or ethnic criteria to accomplish that objective. But we think that the opinion should make this more explicit. What we find especially troubling is the absence of any express declaration that the enumerated powers of Congress, such as the Spending Power, are nonetheless limited by the prohibitions of the equal protection component of the Due Process Clause of the Fifth Amendment.

These views are certainly implicit in your present draft; therefore, no major revisions would be necessary to satisfy our fundamental concerns. For example, much of our difficulty could be taken care of by deleting the sentence following the quote from Justice Jackson on the ninth line of the first full paragraph of page 28, and substituting the following:

"At the same time, Congress may employ racial or ethnic classifications in exercising its Spending Power or its enforcement authority under § 5 of the Fourteenth Amendment only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial inquiry to assure that governmental programs that employ racial or ethnic criteria to accomplish the important objective of remedying past discrimination must be narrowly tailored to the achievement of that goal."
There are other parts of the opinion that also concern us. For example, in order to avoid any implication that the Spending Power is not subject to constitutional restraints, we suggest (1) on page 22, lines 7-8, deleting the phrase "plenary within its sphere and"; and (2) on page 23, deleting the first sentence of the first full paragraph. In addition, because we are troubled by reference to the MBE provision as an "experimental project," we suggest (1) on page 34, line 20, deleting the word "experimental"; and (2) on page 37, changing lines 8-16 to read as follows:

"the congressional judgment that this limited program is a necessary step to effectuate the mandate for equality of economic opportunity. The MBE program is limited in extent and duration; this relatively short-term remedial measure will be . . . ."

It may be that after giving the opinion a more comprehensive reading, other aspects of the draft will prove troublesome. At present, however, the failure to include explicit mention of the equal protection problem is the major obstacle to our joining the opinion. If you can make the changes that would permit us to join, we will be happy to do so, although perhaps adding a few words of our own.

Sincerely,

WJB, Jr.

TM

The Chief Justice

cc: The Conference
June 5, 1980

Re: No. 78-1007, Fullilove v. Klutznik

Dear Chief:

At Conference I said that I would apply my Bakke analysis to this case. Accordingly, I have prepared a concurring opinion that will be circulated Friday or Monday.

At this point, I perceive the same flaw in your opinion that is noted in the letter from Bill and Thurgood. I agree with them that a review of this case involves two distinct inquiries: (i) Does Congress have the authority to enact § 103(f)(2), and (ii) Do the terms of § 103(f)(2) violate the equal protection component of the Fifth Amendment. You have answered the first question fully. But I believe that the second question must be addressed explicitly.

Although the changes suggested by Bill and Thurgood are helpful, in my view they are not sufficient. Having said that, I would think it necessary to address the question in terms of an established Equal Protection analysis.
We all agree that § 103(f)(2) must not violate equal protection, and the proper standard of review remains to be established. Perhaps you are now content to accept the intermediate standard of review for racial classifications suggested by Bill and Thurgood in Bakke. Of course, adoption of this standard would allow all governmental bodies, not just Congress, to impose racial quotas without strict scrutiny.

My own view is that strict scrutiny must be applied to all racial classifications. That is, a racial classification is constitutional only if it is a permissible means to achieve a compelling state interest. In this case, the legislative history behind § 103(f)(2), as explained in your opinion, establishes the compelling state interest in redressing the continuing effects of discrimination. I regard the enforcement clauses of the Thirteenth and Fourteenth Amendment as giving Congress the power to choose an equitable
and reasonably necessary means of redressing discrimination.

In this case, I believe that the set-aside does pass constitutional scrutiny. But, because of my conclusion that Congress has been granted special powers to fight discrimination, my opinion in this case does not give all governmental bodies a carte blanche to establish racial classifications.

I recognize that this case raised difficult issues. I hope to be able to join as much of your opinion as possible. This is certainly a case in which the Court would be well served by a united front. Of course, I have not spoken with either Harry or Byron, so I do not know what view they would adopt.

Sincerely,
June 5, 1980

Re: No. 78-1007, Fullilove v. Klutznik

Dear Chief:

At Conference I said that I would apply my Bakke analysis to this case. Accordingly, I have prepared a concurring opinion that probably will be circulated Friday or Monday.

I write now primarily because of the memorandum to you from Bill Brennan and Thurgood. I agree that review of this case involves two distinct inquiries: (i) Does Congress have the authority to enact § 103(f)(2), and (ii) Do the terms of § 103(f)(2) violate the equal protection component of the Fifth Amendment. You have answered the first question fully. But I view the second question as the critical issue in this case. Although you answer it generally, I would think it necessary to address the question in terms of established
equal protection analysis.

The first step in this analysis is identification of the proper standard of review. § 103(f)(2) establishes a racial classification. Prior to *Bakke*, I had understood - and I read all of the prior decisions - that the appropriate standard for a racial classification is strict scrutiny. In *Bakke*, of the five of us who reached the constitutional question, I was the only Justice who adhered to strict scrutiny analysis.

Although not so characterized, it is my view that the opinion joined by Bill and Thurgood in *Bakke* essentially applied the intermediate standard that Thurgood had urged in his dissent in *Rodriguez*. Although I respect their views, I could not agree with them in *Bakke* and do not now. Apart from turning our back on prior precedents establishing strict scrutiny as the proper standard for review of racial
classifications, see In re Griffiths, 413 U.S. 717, 721-722 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191 (1964), the intermediate standard inevitably becomes a subjective judgment. In any event, there have never been five votes (to my knowledge) for an intermediate standard where the classification is racial.

What concerns me most is that adoption of this standard presumably would allow all governmental bodies (including state universities), not just Congress, to impose racial quotas without strict scrutiny.

As my concurring opinion will say, a racial classification is constitutional only if it is a permissible means to achieve a compelling state interest. In this case, the legislative history behind § 103(f)(2), as explained in your opinion, establishes the compelling state interest in redressing the continuing effects of discrimination. I regard
the enforcement clauses of the Thirteenth and Fourteenth Amendment as giving Congress the power to choose an equitable and reasonably necessary means of redressing identified discrimination. In this case, I believe that the set-aside does pass constitutional scrutiny. But, because of my conclusion that Congress has been granted special powers to fight racial discrimination, my opinion in this case would not give all governmental bodies a carte blanche to establish racial classifications of any kind.

As my opinion may not be circulated before you reply to Bill and Thurgood, I want you to know - in general terms - the substance of my views. I voted with you at Conference. But I stated the basis for my vote as requiring the classical standard applied by our decisions to discrimination based solely on race. Still, I hope to be able to join as much of your opinion as possible.
Certainly a case in which the Court would be well served by a limited front:

Sincerely,
As perhaps my opinion will not be circulated before you reply to Bill and Thurgood, I want you to know— in general terms— the substance of my substance. I voted with you at Conference. But I stated the basis for my vote as requiring the classical standard applied by our decisions to discriminations based solely on race.

Sincerely,
In this analysis - as we all agree - the first step is identification of the proper standard of review. We are dealing here with a racial classification. Prior to Bakke, I had understood - and I so read all of the prior decisions - the appropriate standard for a racial classification is strict scrutiny. In Bakke, of the five of us who reached the constitutional question, I was the only Justice who adhered to strict scrutiny analysis.

Although not so characterized, it is my view - and I believe also the view of many commentators - that the opinion joined by Bill and Thurgood applied in essence the intermediate standard that Thurgood had urged in his dissent in Rodriguez. Although I respect their views, I could not agree with them in Bakke and do not now. Apart from turning our
back on prior precedents (here, Jon, cite the cases we rely on), the intermediate standard inevitably becomes more of a subjective judgment than a "special basis" or "strict scrutiny". In any event, there have never been five votes (to my knowledge) for an intermediate standard where the classification is racial.

What concerns me most is that adoption of this standard would allow all governmental bodies, not just Congress, to impose racial quotas without strict scrutiny.

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June 5, 1980

78-1007, Fullilove v. Klutznik

Dear Chief:

At Conference I said that I would apply my Bakke analysis to this case. Accordingly, I have prepared a concurring opinion that probably will be circulated Friday or Monday.

I write now primarily because of the memorandum to you from Bill Brennan and Thurgood. I agree that review of this case involves two distinct inquiries: (i) Does Congress have the authority to enact § 103(f)(2), and (ii) Do the terms of § 103(f)(2) violate the equal protection component of the Fifth Amendment. You have answered the first question fully. But I view the second question as the critical issue in this case, although you answer it generally, I would think it necessary to address the question in terms of established equal protection analysis.

The first step in equal protection analysis is identification of the proper standard of review. § 103(f)(2) establishes a racial classification. Prior to Bakke, I had understood — and I read all of the prior decisions to say — that the appropriate standard for a racial classification is strict scrutiny. In Bakke, of the five of us who reached the constitutional question, I was the only Justice who adhered to strict scrutiny analysis.

Although not so characterized, it is my view that the opinion joined by Bill and Thurgood in Bakke essentially applied the intermediate standard that Thurgood had urged in his dissent in Rodriguez. Although I respect their views, I could not agree with them in Bakke and do not now. I believe that our prior precedents establish strict scrutiny as the proper standard for review of racial classifications. See In re Griffiths, 413 U.S. 717, 721-722 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964). In any event, there have never been five votes (to my knowledge) for application of an
intermediate standard where the classification is racial.

What concerns me most is that adoption of this standard presumably would allow all governmental bodies (including state universities), not just Congress, to impose racial quotas without strict scrutiny.

As my concurring opinion will say, a racial classification is constitutional only if it is a permissible means to achieve a compelling state interest. In this case, the legislative history behind § 103(f)(2), as explained in your opinion, establishes the compelling state interest in redressing the continuing effects of discrimination. I regard the enforcement clauses of the Thirteenth and Fourteenth Amendment as giving Congress the power to choose an equitable and reasonably necessary means of redressing identified discrimination. In this case, I believe that the set-aside does pass constitutional scrutiny. But, because of my conclusion that Congress has been granted special powers to fight racial discrimination, my opinion would not give all governmental bodies a carte blanche to establish racial classifications on the basis of an intermediate standard of review.

I do not read your draft as intending to go so far. But as my opinion may not be circulated before you reply to Bill and Thurgood, I want you to know — in general terms — the substance of my views. I voted with you at Conference. But I stated the basis for my vote as requiring, in accordance with precedent, that we apply the classical standard to this classification based solely on race. Still, I hope to be able to join as much of your opinion as possible.

Sincerely,

The Chief Justice

cc: The Conference
June 6, 1980

Re: 78-1007 - Fullilove v. Klutznick

Dear Bill and Thurgood:

I do not consider the points you raise as presenting any insoluble problems. However, I will wait other reactions before spending more time on this case.

Regards,

[Signature]

Mr. Justice Brennan
Mr. Justice Marshall

cc: Mr. Justice White
    Mr. Justice Blackmun
    Mr. Justice Powell
June 9, 1980

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

MEMORANDUM TO THE CONFERENCE

I will defer response to the several memos until the "dust settles."

I do not share the passion expressed by some for stating "tests." The test is the Constitution. Harry once observed, accurately, that tests are often announced by us to fit the result reached in a given case.

More later.

Regards,

[Signature]

[Handwritten note: "C" and "B" at the bottom]
June 9, 1980

Re: 78-1007 - Fullilove v. Klutznick

Dear Chief,

I would favor changes in your circulating draft along the lines suggested by Bill and Thurgood. I hope not to write separately.

Sincerely yours,

[Signature]

The Chief Justice
Copies to the Conference
cnc
June 9, 1980

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

Dear Chief:

I have now had an opportunity to have my first reading of your proposed opinion as circulated in printed form on May 30. This is a careful and detailed opinion, and, obviously, you attempt to walk carefully between the opposing considerations that are submitted to us by the parties.

In line with what I assume is the suggestion contained in your note of June 6 to Bill Brennan and Thurgood, I give you the following as my reactions:

1. I am somewhat troubled by what seems to me to be the absence in the opinion of any enunciation of a standard of review to be applied to remedial racial quotas, even though of a limited kind such as is present in this case, enacted by Congress. I think we cannot escape the fact that this is a quota case so far as it goes, although, as your opinion stresses, there are limits and exceptions. The suggested material proposed by WJS and TH at the bottom of the first page of their letter of June 5 does attempt to enunciate a standard.

2. I am not able, as you apparently are, to avoid and fail to cite the Bakke case. I can vote to affirm in Fullilove on the ground that the challenged program passes the test I proposed in Bakke.

3. I am in general agreement with other comments Bill Brennan and Thurgood have made in their joint letter of June 5. My agreement, of course, is not surprising because of the fact that I was with them and Byron in the joint opinion in Bakke beginning at page 324 of 438 U.S.

Sincerely,

cc: Mr. Justice Brennan
    Mr. Justice White
    Mr. Justice Marshall
    Mr. Justice Powell
MEMORANDUM

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

Richard Friedman, the Chief's clerk on this case, called this morning to "reassure" me that the Chief would take no further action until he sees your concurrence. I told Richard that your views would be circulated in a day or so, and be entitled a "Memorandum" in deference to the Chief's request. I said that you may wish to show a copy to the Chief prior to general circulation.

Richard says that the Chief is not going to make a major overhaul his opinion, but that he will redraft several paragraphs. He will not, however, put a "test" in the opinion.
His hope is that, by avoiding labels, he can get everyone on the opinion. The impression I received is that he would very much like to get your vote, presumably so that he can demonstrate broad-based support.

As near as I can tell, the Chief's hope is to speak for everyone by saying nothing. This is unlikely to be successful, but I do think that you should at least wait to see his modifications before you state your unwillingness to join his opinion. At least so long as you have not voted definitively, the Chief will apparently fight off the Brennan bloc's attempt to characterize his opinion as an affirmation of their Bakke approach. This would be a good thing.
June 11, 1980

No. 78-1007, Fullilove v. Klutznik

PERSONAL

Dear Chief:

Enclosed is a memorandum of my views in this case.

As I indicated in my letter of June sixth, I have applied — in accord with my Conference vote — the principles of my

Bakke opinion to the facts of this case.

It is settled by our cases that racial classifications should be judged under strict scrutiny analysis (see p. ___ memo). Since the formulation of a multi-tier model of equal protection, racial classifications uniformly have been judged under this most searching standard of judicial review. This review is appropriate because of the strong constitutional presumption against the use of racial
classifications. Where the probability of illicit classification is less, as in review of strictly economic regulation, the Court has adopted the far less searching "rational basis" standard of review. See e.g., McGowan v. Maryland, 366 U.S. 420, 425-426 (1961). See e.g., Craig v. Boren, 429 U.S. 190, 210-211 n.* (1976)(Powell, J., concurring). Apart from the foregoing, I know of no analytical framework for judging equal protection cases.

I view it as essential to have such a framework. If this Court could decide every equal protection case brought in the federal system, perhaps we could rely simply on our overall judgment as to when a clarification is fair. I might be inclined to agree. But the value of carefully formulated standards of review lies in the guidance they offer to federal and state judges who are required to apply our constitutional precedents. By emphasizing the heavy burden...
that a government must bear to demonstrate the legitimacy of a racial classification, this Court can ensure that racial distinctions, so odious to a free society, are not casually imposed upon our citizens.

I do not think I can join a Court opinion that endorses — or can be read reasonably to endorse — some intermediate level of scrutiny for racial classifications. This is where I departed analytically from the "Brennan group" view in Bakke. For me at least, this is not a semantic distinction. Unless I misconceive the "Brennan group's" view as expressed and applied in their several Bakke opinions, it is some general intermediate standard similar to that applied in sex discrimination cases. I recognize — indeed admire — their genuine concern to compensate for the ill effects of past discrimination. I simply disagree as to the proper constitutional standard, and the showing it will
require to justify preferential treatment in our society. Pressures for preferences can come from any group. Indeed, the very statute before us in this case includes orientals - many of whom have enjoyed fantastic success in competition with all other segments of our uniquely pluralistic society. I find it difficult to accord them preferential treatment.

I appreciate your willingness to try to meet suggestions for changes in your opinion. It would indeed be fine to have a full Court opinion. Yet, I cannot in good conscience abandon an analytical approach that I view as required by our prior precedents, and as essential to preserve the essence of the American ideal of equality before the law.

I will, of course, await your final changes before making a decision as to what I can join in your opinion. In
view, however, of the lateness of the hour, I am inclined to go ahead and circulate my memorandum so that other members of the Court - including perhaps the Brothers from whom we have not heard - will have it before them.

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I view it as essential to have such a framework. If this Court could decide every equal protection case brought in the federal system, perhaps we could rely simply on our overall judgment as to when a classification is fair. But the value of carefully formulated standards of review lies in the guidance they offer to federal and state judges who are required to apply our constitutional precedents. By emphasizing the heavy burden that a government must bear to demonstrate the legitimacy of a racial classification, this
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Sincerely,

The Chief Justice

lfp/ss