TO: Mike
FROM: Lewis F. Powell, Jr.

DATE: Dec. 9, 1985

MEMORANDUM

After reviewing your second draft of December 8, I have some second thoughts as to whether we may be trying to say too much in a case that best may be disposed of by saying less. I make the following suggestions somewhat tentatively, as I think all that you have written has merit. But I am not even sure that Justice O'Connor, much less Justice White, would agree.

1. Despite your sound idea of implying that public schools are in a special category, I think we should leave this suggestion until we see what is said in dissent. I therefore would omit from the full paragraph beginning on page 9 through the paragraph that ends on page 11. This omission will leave the remainder of Part II without requiring substantial change.

2. We end Part II by stating there are "two prongs" to affirmative action analysis: The "purpose" prong, and the "means" prong. I find Part III a bit
confusing because the two prongs are not clearly discussed separately.

Part III-A initially addresses the "purpose" prong. Perhaps it would be clearer if the first paragraph commencing on page 12 stated that the Court of Appeals, relying on the reasoning of the District Court, identified two state interests thought to satisfy the "purpose" prong: (i) the need for role models, and (ii) the interest in remedying societal discrimination. In addition, respondents argue for the first time here that an additional state interest is the need for "a diverse faculty". Would it be clearer, Mike, if Part III addressed separately but consecutively each of these three alleged state interests? You have excellent answers for each one but my impression is that the draft does not deal with each separately and in turn. For example, after talking about the role model justification on pages 12-16, the first full paragraph on page 16 seems to focus primarily on "societal discrimination", but again on page 17 we go back to the role model theory.

I am dictating this as I read. As I now reread the draft a second time, I see that you are not viewing the role model theory as a different or separate state
interest from the perceived need to remedy societal discrimination. Although not clearly stated, the idea is that because of this discrimination students had been deprived of role models. Indeed, you say this in the last sentence beginning on page 13. When read in this light, perhaps my initial reaction as to the organization of Part III is not justified.

3. As I continue to read the draft, you conclude the discussion of the "purpose" prong on page 20. The last paragraph on that page is an incomplete introduction to a discussion of the second prong, namely, that the means are not narrowly tailored. I suggest that we commence Part IV at this point. The first sentence could state in substance that even if there were evidence or persuasive argument that a substantial state interest was served by the reverse racial classification in this case, respondents are not entitled to prevail because the means chosen to achieve the asserted state interests are not appropriate under constitutional standards. (I would like to avoid repetitious use of the word "tailored").

After an introductory paragraph, we would move to the first full paragraph on page 23. This would eliminate at this point what you now have on pages 21 and 22.
4. If we leave the paragraph on page 21 in the opinion, we invite at least two Justices to argue for a remand. I am inclined to omit the paragraph from the text and put something like the following in a footnote:

"Respondent's belatedly argue that the layoff provision was necessary to remedy prior faculty employment discrimination in the Jackson School District. Before a remedial government purpose can attain constitutional significance, a factual determination must have been made by the appropriate governmental entity that there was purposeful discrimination. In this case, despite the fact that Article XII has spawned a full decade of litigation and at least three separate law suits, no such finding ever has been made. On the contrary, in Jackson II the Board expressly denied the existence of employment discrimination. J.A. 33. In these circumstances, we can give no credence to this belated and unsupported argument."

5. Also, I suggest that the first full paragraph on page 22 be put in a footnote earlier in the opinion at
some appropriate place. It seems to me to be misplaced near the end of our opinion, and disrupts the flow of our analysis. I certainly want to use John Stevens' quote from his Fullilove dissent.

6. I think your discussion of the "means" issue, pp. 23-29, is excellent. I would end the opinion with the single sentence I suggest on page 29. There is no need for further repetition.

L.F.P., Jr.

ss
Asian-American Political Muscle

By JOANNE JACOB

Hand-working and family-oriented, Asians have been very successful in the U.S. in a very quiet way. They are called, somewhat patronizingly, the "model minority"—seen in elite colleges and scientific professions, but not heard from.

Now, as the numbers are growing, Asian-Americans are beginning to build and flex their political muscles. And, unlike other ethnic groups who lean to the Democrats, the right arm may be as powerful as the left.

Except in Hawaii, Asian-Americans have not been very important politically, even in cities with large Asian populations. However, that may be changing:

• Last spring Michael Woo became the first Asian-American to win a seat on the Los Angeles City Council, representing a predominantly white "Vaginal" district.

• Next year, Tim Hsieh has a good chance of becoming only the second Asian-American ever elected to the San Francisco Board of Supervisors.

• Philippine-born Irene Natividad scored another kind of first this year when she was elected president of the National Women's Political Caucus.

• Tiep D. Nguyen, a Republican lawyer from San Jose, may become the first Vietnamese-born American to run for Congress if he decides to challenge Democratic Rep. Ross Perot for under-represented minorities—blacks and Hispanics—will mean fewer places for Asians to give them a voice and demand the recognition other minority groups have received.

In addition, the enormous tide of immigration has far surpassed the Asian-American population—1.4 million in 1970 to 5.1 million today. It is expected to reach 10 million by the year 2000. This means some 15.5% of California's population is expected to be Asian ancestry.

Both parties are therefore wooing Asians, offering different visions of their role in U.S. society. Republicans see them as middle-class Americans—small-business owners, professionals with conservative family values and a strong tradition of self-help. Democrats see them as an ethnic minority group needing special protection.

White Chinese and Japanese-Americans traditionally have tended to register as Democrats, the political balance is shifting. Asian-Americans in California are now evenly split between the two major parties, and 64% say they voted for Ronald Reagan in 1984, according to a study by the California Institute of Technology political-science professors. Co-author Bruce Cain has some advice for the Republican Party: "Go after the Asian community.

In particular, Republicans (and worried Democrats) see more than 70,000 Southeast Asian refugees, most of them fervently anti-Communist, as the "new Cuba." (Cuban voters in Miami) showed their growing political clout this year by electing the city's first Cuban mayor.

"We are an open party, the natural party for Vietnamese citizens," says Bob Walker, the executive director for the Republicans Party in San Jose and surrounding Santa Clara County. Republicans have

Programs for low-income, poorly educated minority groups don't make much sense for a group with a higher median family income than whites, lower unemployment and a higher percentage of college graduates.

had considerable success in registering new citizens of Asian ancestry as they leave wartime services. The vote for this year's elections was 12.5% of the registered eligible electorate, according to a study by the California Institute of Technology political-science professors. Co-author Bruce Cain has some advice for the Republican Party: "Go after the Asian community.

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December 13, 1985

Re: 84-1340 - Wygant v. Jackson Board of Education

Dear Lewis:

I shall await Thurgood's dissent.

Respectfully,

Justice Powell

Copies to the Conference
Dear Sandra:

Your letter of December 19 - though disquieting when I first received it - is in fact quite helpful. This is to supplement our telephone talk in which I think some of the points were clarified.

The first paragraph of your letter identifies areas of agreement, and it seems to me that these are at the heart of a proper analysis in an affirmative action case. I write now to comment on specific concerns that you identified. I agree that faculty diversity (mentioned in Section III-B) well may be a legitimate state interest. In this particular case the type of diversity approved in the 1972 agreement makes little sense. The diversity argument apparently was not raised below, and was not considered by the DC or CA6. Accordingly, I think we need not address it, and I will omit discussion of it.

You express concern about some of what I said in Section III-C in which I considered respondent's argument that the layoffs were part of a plan to remedy prior discrimination by the Board. As I noted in Section III-A, rem­ edying prior discrimination by the Board could be a suf­ ficiently important government interest to justify a proper affirmative action plan.

Confusion arises because there are many different types of plans for increasing the number of minority employ­ ees in a work force, whether of a private or public employ­ er. All of these tend to be called "affirmative action plans". [See enclosed Post editorial of 8/16/85]. It is entirely appropriate - and I so advised clients - to adopt a goal that in effect would give prior consideration to minor­ ities in filling vacancies or as new positions open up. Adoption of a "goal" or purpose of attaining a more balanced workforce should not invariably exclude whites. Special skills may be needed or other reasons may properly require deviation from the plan. I have reservations about arbi­ trary "fixed quotas" - even when there are no forced lay­ offs. But we need not get into this. The central point - as you have observed - is that under a "goal" type plan no one
is laid off to provide jobs for minorities or is otherwise directly discriminated against.

Where a plan is adopted that does penalize existing employees or that requires that they be laid off, as in this case, the plan must be justified as a means of remedying prior discrimination by the employer - not merely general societal discrimination. When such a plan is challenged in court it is necessary that such discrimination be proved unless it has been found to exist in some other authoritative way.

Where there is a determination of prior discrimination, the question then becomes whether the remedy adopted is legitimate. As we have discussed, the language in prior equal protection cases (usually cases not involving affirmative action plans) has been framed in terms of "narrowly tailored." This language is not as descriptively accurate in this case as in some others. But the term has acquired a "secondary meaning," and I would hesitate to abandon its use entirely. What we really intend is that the means employed in this case are impermissible even to accomplish a legitimate state interest.

What I have said above does not specifically address each of the points made in your letter. I have focused on my understanding of your primary concerns. I enclose a revised draft that I believe will accord with your views. The draft has a number of errors that I have marked. The Atex system is partially down.

Although you sent copies of your letter of the 19th to Byron and Bill, I am inclined to make the clarifying changes in my opinion before going directly to either of them. It is particularly important to have Byron with us, as his "join" is essential to the Court opinion that is so highly desirable.

If you have further suggestions I will be glad to consider them. I will not recirculate until I hear from you.

Sincerely,

Justice O'Connor

lfp/ss
December 13, 1985

Re: No. 84-1340—Wygant v. Jackson Bd. of Education

Dear Lewis:

In due course I shall circulate a dissent in this one.

Sincerely,

T.M.

Justice Powell

cc: The Conference
December 16, 1985

Re: 84-1340 - Wygant v. Jackson Board of Education

Dear Lewis:

Please join me.

Sincerely,

Justice Powell

cc: The Conference
December 17, 1985

No. 84-1340

Wygant v. Jackson Board of Education

Dear Lewis,

I'll await the dissent.

Sincerely,

[Signature]

Justice Powell

Copies to the Conference
December 19, 1985

PERSONAL AND CONFIDENTIAL

Re: 84-1340 Wygant v. Jackson Board of Education

Dear Lewis:

I have reviewed your thorough and well-crafted draft in this case and find myself generally in agreement with your reasoning. I agree that Swann v. Charlotte-Mecklenburg Board of Education, which you quoted from at Slip op. 6, undermines the Board's "role model" justification for maintaining a racial balance of minority teachers directly proportional to minority students. But isn't other language in Swann even more directly on point, such as the following passage?

If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. 402 U.S., at 24.

Justice Powell
Dear Lewis,

I have read your draft in Wygant with great interest. It is an important and challenging case. I am in agreement with you on a number of aspects of your opinion, although we may differ in some important respects. I agree with you that the strict standard of review set forth in Part II is the proper one for review of all types of race based action by the state, including affirmative action. I also agree that "societal" discrimination is a concept which is incapable of definition or limitation, and, thus, remediation. A state's interest in remedying such societal discrimination therefore cannot be deemed sufficiently important to pass constitutional muster under strict scrutiny. I also agree with you that the use of a role-model theory to justify a hiring goal based on the number of minority students in the school population was improper. Lastly, I agree that the layoff plan in this case imposes disproportionate harm on the rights and interests of some of the nonminority employees and fails to pass muster under the requirement that the employer's plan be narrowly tailored to effectuate its remedial purpose.

Let me now mention some areas of possible difficulty which I have with your approach. First is the diversity interest discussion in Part IIIB. I am not at rest on this but am inclined to think there is a legitimate state interest in promoting racial diversity in public school faculties. The point was raised belatedly by the respondents in this case and need not be addressed or resolved in this case, and I am not prepared to join an opinion which rejects that goal as not sufficiently important to meet the test you propose. Your draft states that this question is left open, but footnote 5: interprets Bakke in such a way that it may preclude reliance on such an interest.

Second, and more importantly, Part IIIC concludes that if the Board's purpose in adopting the layoff provision was to remedy prior discrimination, "a factual determination..."
must have been made, either by the Board or by a court, that
the Board engaged in purposeful discrimination." I suppose
that for the same reason you leave open the previous
question, you could leave open the question of what findings
are necessary. I do not think Hazelwood School District,
which was concerned with the proper basis of comparison for
purposes of statistical evaluation of a Title VII "pattern
or practice" employment discrimination suit, embodies a
holding that the Fourteenth Amendment requires that past
discrimination be proven before a state employer may
institute a voluntary affirmative action program. Such a
requirement may put us in the anomalous position of creating
a severe disincentive to voluntary compliance by public
employers with Title VII and the civil rights laws. Also,
the Court would be saying that what private employers may do
voluntarily to comply with Title VII, public employers are
constitutionally forbidden to do.

Congress itself has made findings concerning the
problem of employment discrimination in public employment to
justify imposition of Title VII requirements on public
employers. See H.R. Rep. No. 92-238 (1971). In enacting
the 1972 amendments, Congress intended that the same Title
VII principles be applied to public and private employers
The Court has indicated in the past that the constitutional
requirements congressional action must meet to pass muster
under the Fourteenth Amendment are more tolerant than those
controlling in cases where the actions of other governmental
actors are at issue. Pullilove v. Klutznick, 448 U.S. 448
(1980). Perhaps, in light of Congress' findings and its
enactment of the 1972 amendments to Title VII, it is
appropriate to conclude that a public employer's voluntary
undertaking to correct a racial disparity in its work force,
which it has a substantial, demonstrable basis for believing
constitutes a prima facie violation of Title VII, is in fact
a remedial measure.

My inclination, then, is to believe that if a
state employer has a substantial basis for believing that it
is in prima facie violation of Title VII, either by virtue
of its own investigation or that of some other public agency
charged with enforcement of such laws, its efforts to remedy
the problem will constitute an important state interest.
Regardless of any differences of opinion we may have
regarding the magnitude of the state's interest in this
context or regarding what findings must be made and by
whom, I think we are in accord concerning the requirement
that the state employer's plan be narrowly tailored to
effectuate its remedial purpose. To pass muster, the plan
must be a temporary measure clearly intended to eliminate
the violation, not to maintain racial balance. The plan also cannot impose disproportionate harm on the interests of, or unnecessarily trammel the rights of nonminority employees.

I'm not quite sure where this leaves us. I intend to continue to work on the problem and to try to articulate my views more fully if necessary. I can at least concur in the judgment and perhaps join parts of the opinion as well. Byron may have other ideas about all of this and I am sure we all want to reach as much common agreement as we can.

Sincerely,

[Signature]

Justice Powell

cc: The Chief Justice
Justice White
Justice Rehnquist
December 19, 1985

84-1340 -
Wygant v. Jackson Board of Education

Dear Lewis,

I doubt that I shall join your proposed opinion in its present form and as of now intend to write separately concurring in the judgment. Meanwhile, I await the dissent.

Sincerely yours,

Justice Powell

Copies to the Conference
Re: No. 84-1340, Wygant v. Jackson Board of Education.

Dear Lewis:

I shall, of course, await the dissent in this case.

Sincerely,

[Signature]

Justice Powell

cc: The Conference
December 20, 1985

84-1340 Wygant v. Jackson Board of Education

Dear Chief:

Thank you for your note, and suggestion.

I am finding it difficult to put a Court together in this case, as could have been anticipated from the Conference discussion. You have seen Byron's note saying he will await the dissent. There is no possibility of a Court without him.

Also, I have had extended discussions, and an exchange of letters, with Sandra. Even she and I are not yet together. But I am still working on the case, as I think it is of vital importance for this Court to afford some guidance with respect to affirmative action programs.

I will keep you advised.

Sincerely,

The Chief Justice

lfp/as