MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob Comfort    DATE: June 27, 1978
RE: The File in Regents v. Bakke, No. 76-811

This is a brief explanation of what I've tried to do with the file in this case, in order to render it intelligible to someone not intimately connected with the developments in the case. The file is divided into seven folders, each containing a different category of material. Each is labeled with a Roman numeral and a short caption to identify its contents. These folders are as follows:

I Correspondence. This folder contains all correspondence among Members of the Conference in this case, including all substantial memoranda circulated prior to the assignment of the judgment announcement to you, with the exception of the printed memoranda you circulated to the Conference. The short correspondence is in the usual reverse chronological order, while the substantial memoranda are collected and labeled in chronological order.

II Intra-Chambers Memoranda. This one contains all extant the memos, in chronological order, between you and myself or you and all the clerks relating to this case.

III Memos to Conference. This folder contains, in chronological order, the various printed drafts of the Memoranda that you sent the Conference on this case last fall.

IV Drafts — Memos to the Conference. This folder contains the various editions of the typed drafts of the memorandum to the Conference that finally circulated in November. Since they reveal the thought processes that went into the final product, they could prove extremely interesting to later researchers.

V Opinions — LFP, Jr. In this folder are the various drafts, in chronological order, of the opinions that you circulated to the Conference after the announcement of the judgment was assigned to you.
VI Opinions -- Other Justices. This one contains, separately for each Justice and in chronological order, the various drafts of the opinions circulated by each of the other Justices after the assignment of the judgment announcement.

VII Articles, Excerpts, Clippings. Finally, this folder contains all the newspaper articles and editorials we clipped this year, in chronological order. Also in this folder, in no particular order, are xerox copies of legal articles and other miscellaneous pieces you considered at one point or another. These could prove interesting as sidelights on the sources you considered while the case was before you.

This method of organizing the file seemed logical to me, but if you prefer some other organizing principle, I'll be glad to reorganize it.

I've placed a copy of this memo in the file itself.
June 27, 1977

Mr. Justice:

Here is a short -- though I think probably longer than necessary -- annotated bibliography on the DeFunis/Bakke question. For the most part it stays on the straight and narrow, with only one or two eclectic choices. Of the things I have included, I think you would want to read yourself at least:

O'Neil, Discriminating Against Discrimination (1975).
Symposium, 75 Colum.L.Rev. 483 (1975).

Willy
This is a compendium of articles by Bob O'Neil; Karst and Horowitz; and Gellhorn and Hornby. The only arguments not fully articulated in other articles I have already summarized are those of Gellhorn and Hornby, who suggest that due process rights of notice, right to rebut evidence, etc., be extended to law school applicants. This need not detain you.

Graglia is a law professor at Texas; Bell was in 1970 a black lecturer on law at Harvard. This exchange is instructive in that it reveals the strong emotions that the DeFunis/Bakke question arouses, and the striking paucity of legal precedent to guide the Court in *** addressing the question. Both Graglia and Bell are primarily concerned with whether affirmative action "works," though their criteria for working appear to be fairly far apart. The exchange also reveals -- at least as of 1970 -- the great shortage of data with which to evaluate the success of affirmative action programs.
Nagel is a professor of Philosophy at Princeton. His article is interesting if you have a speculative turn of mind, but I think it will not be particularly helpful to you in deciding Bakke. Nagel's basic notion is that the varying schedule of rewards in our society is inherently unjust whenever the differential in reward exceeds a minimum, fairly modest, level. This is true for Nagel regardless of the basis upon which the the reward is given. Thus, for Nagel, someone's intelligence should not give him any greater claim to status and money than should the color of his skin. This would mean that what is commonly, and comfortably called the "merit" system of admission to law school and of subsequent professional awards is itself unjust. Nagel's rather hedged conclusion from all this is:

"If, therefore, a discriminatory admissions or appointments policy is adopted to mitigate a grave social evil, and it favors a group in a particularly unfortunate position, and if for these reasons it diverges from a meritocratic system for the assignment of positions which is itself not required by justice, then the discriminatory practice is probably not unjust." at 362.

Kaplan, a Stanford Law Professor, was one of the first to point out in a systematic way the difficulties with granting special treatment to blacks, or to other minorities. Kaplan focusses on three substantive areas: (1) employment preferences; (2) benign housing quotas designed to keep housing projects from becoming overwhelmingly black; and (3) measures to reduce de facto school segregation. Though Kaplan does not address directly the question of affirmative action admission programs, his discussion is relevant at many points.

Though agreeing that there are many arguments in favor of special treatment for blacks, Kaplan is basically against it. His arguments include:

(1) Affirmative action programs in employment can yield less efficient work if blacks are put into positions that would otherwise be filled by genuinely more competent whites. This argument has an obvious application to admissions to law and medical schools.

(2) Cost to those displaced by beneficiaries of the special programs. To the extent that blacks are preferred at the expense of lower middle class whites, or other relatively unprivileged class, racial tensions are likely to be exacerbated.

(3) Difficulty of confining special programs to blacks. While blacks -- because of their prior slavery -- have the most obvious claim to some sort of compensatory justice, other minority groups will be able to argue strongly for similar preferences.

(4) Weakening of the government as an "educative force." Kaplan argues that the color-blindness as an essential principle in our society will be greatly jeopardized if the government supports affirmative action programs that are obviously not color-blind. He argues that "constant education in color-blindness is essential." at 380.

Brest, a Stanford law professor, examines in a variety of contexts the "antidiscrimination principle," defined as "the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected." at 1. In the narrow area of affirmative action in admissions or hiring, Brest would apply the following test:

"[W]here the objective and immediate effects are to benefit minority persons, it seems inappropriate to subject the practice to the demanding criteria of the suspect classification standard. It should suffice for a policy maker to conclude that the probable benefits outweigh the harms, that the benefits cannot readily be gained by other than race-dependant means, and that the program is designed to minimize its possible adverse consequences." at 19.
This symposium is good, but not extraordinary. I have summarized three articles from it:


Griswold writes, in a short article, in favor of preferential admissions. He argues that it is impossible to eliminate factors of personal choice and judgment by admission committees, and contends that race should be allowed to enter into a decision to admit minority students. Griswold points out that an integrated law school will give a better education to white law students because of the greater exposure to minorities, and that an integrated bar will more effectively serve the legal needs of minorities. Griswold says the constitution is not color blind; it merely forbids invidious discrimination.


Lavinsky, Chairman of the National Law Committee of B'nai B'rith, expounds the position of B'nai B'rith. He contends that racial preferences are unconstitutional. Lavinsky would be willing to accept admissions programs giving special consideration to all disadvantaged applicants, but only so long as such consideration is racially neutral.


Greenawalt argues: (1) that there should be an "intermediate" level of constitutional scrutiny of benign racial classifications and (2) that "racial preferences for minority groups can be sustained as permissible ways to redress injustices and to promote genuine social equality." at 560.

This article is a thoughtful, but not brilliant cataloguing of the values served by preferential admissions programs. He argues in favor of such programs under three headings: (1) the government should redress past injuries to blacks; (2) ordinary admission criteria do not adequately reflect the abilities of black applicants to become good lawyers; and (3) there is value in integrating law schools and the legal profession because this will help break down stereotypes and will hold raise the aspirations of young blacks.

This is an interesting symposium. Partly because it appears in a non-prestige law journal, the writing is somewhat more accessible than usual. Many of the articles deal directly with the reality of how preferential admissions programs operate and how they appear to the minority students who are their beneficiaries. I recommend that you skim through the entire symposium. I summarize the high points of only one article, by Clyde Summers, then a Yale and now a Penn. law professor.


Summers considers the constitutional arguments plastic enough to support or strike down preferential admission programs. He therefore discusses whether such programs are prudent. He concludes that, on the whole, they are not.

1) Summers contends that the effect of vigorous recruitment and affirmative action admission programs is to raise great numbers of minority law students above their optimum level. That is, Harvard, et al., skim off the top of the special admits, down to the level of student that requires special dispensation to be admitted to those schools, even though the same students would be admitted under normal criteria at good second-rank schools. At Harvard, those special admits are usually inferior students, whereas they would be solidly in the middle of or even at the top of their classes at the second rank schools; yet these students have been skimmed off by Harvard and are therefore unavailable to the second rank schools. This same skimming phenomenon operates all the way down the ladder of law schools, with the result that virtually all law schools with affirmative action programs have substantial numbers of minority students who cannot easily keep up with their classmates.

2) Summers argues that this is destructive in that (a) it discourages and undermines the confidence of the minority students so that they frequently do not perform up to their potential; and (b) it tends to incite into white students the notion that minority students are generally inferior. Summers finds both of these results bad.

Sandalow, a Michigan law professor, has probably done the best job of anyone writing on the DeFunis issue, but it strikes me as does much of the other literature on the topic -- a cataloguing of the societal values to be served, and a rather perfunctory legal analysis.

Sandalow argues in favor of racial preferences in admissions as follows:
(1) Race is undeniably an important factor in our lives; color blindness is simply not possible, and perhaps not desirable in most contexts of daily life.
(2) Underrepresentation in the bar is an important factor, for ethnic representation should be promoted as a means of increasing the quality of representation of minority group members.
(3) Race is an important factor in itself, and should be considered as such rather than just as a proxy for other qualities. (This point is aimed at Posner.)
(4) Minorities in law school classes improve understanding and communication in the school, and improve the quality of education for all students.
(5) Our society desires to create a substantial middle class from minority groups, and preferential admissions will help by creating more minority professionals.

Sandalow argues that the only effective means of increasing minority admissions in schools is to look at race specifically. Looking to underlying claims of underprivileged and the like will mean that many whites who fit those categories will be admitted under these programs. This would mean that if the end goal is to admit x number of minority students, more special admissions will have to be made, and the number of "merit" students will decline still further. Sandalow does not like this, arguing that the goal has been and should be the admission of minority students, not merely students who fill the criteria of economic, cultural or in other deprivation.

In the end, Sandalow offers two summary arguments in favor of preferential admission policies:
(1) At this point, the Court would be wise to allow considerable play in decisions by non-judicial bodies that deal with this very difficult national problem.
(2) Preferential admission programs "offer hope of ameliorating the nation's most enduring problem." at 703.

In a word, Ely thinks that it is not "suspect" for a majority to discriminate against itself. On that theory, Ely has no trouble sustaining race-based preferential admissions programs, since the white majority is discriminating against itself rather than against a minority. (As usual, Ely takes quite a few pages to get across this fairly simple idea.)

Posner opposes affirmative action admission programs. He proposes, and then rejects, several rationales for racial preferences:

1. **Test scores and college grades are not good predictors of law school performance:** Posner answers that if this is true, then ignoring the examinations because of perceived cultural bias would not advantage minorities; rather, according to Posner, it would be merely ignoring an inaccurate method of sorting out qualified candidates.

2. **Race can be used as a surrogate for other characteristics, such as cultural or economic underprivilege, since there is a high correlation in our society between blacks and such deprivation:** Posner responds that this is "efficient" in the sense that it saves a lot of looking at underlying characteristics in which the school is presumably interested, but Posner thinks that this is not sufficient justification.

3. **Racially proportionate representation in law school and the profession is a goal:**
   - **(a) amends for past discrimination:** Posner dislikes this because the beneficiaries and the penalized are not the same as the original beneficiaries and the penalized.
   - **(b) placing minorities in a position they would have occupied had there been no discrimination in the past:** Posner responds that there is no guarantee that there would have been x% black lawyers even without past discrimination.
   - **(c) improving professional service to the minority group:** Posner says there is no guarantee that the minority lawyers will, in fact, serve their group.
   - **(d) role models for young blacks:** Posner says that the beneficial effect of this is conjectural, and as far as role models go, a black is already a Justice of the Supreme Court.

Posner argues that using race as a method of distinguishing among law school applicants is constitutionally improper, whether justified on efficiency or other grounds. He contends that admission committees should look to the underlying characteristics of underprivilege rather than to the racial status which tends to correlate with these characteristics. Posner looks at the problem without seeing race as relevant per se. Race itself, for Posner, does not seem to be cognizable as an indicium of hardship overcome, in addition to poverty, etc. Further, Posner does not seem to consider important the long-range economic and cultural improvement of underprivileged minority groups, and the symbolism of such efforts for improvement, to be important.

O'Neil's book recounts, more or less in layman's language, the DeFunis case and the policy and legal arguments involved. He strongly favors preferential minority admission programs.

Chapter 5, "The case for preferential admissions":

O'Neil argues under four headings in favor of preferential admissions:

1. Adverse effects of minority underrepresentation in the legal and medical professions. O'Neil does not seriously address Posner's point (1974 S.Ct.Rev. 1) that minorities are not guaranteed to represent minorities, and that more direct ways of ensuring adequate medical and legal services for minorities may exist.

2. Traditional entrance criteria exclude minorities disproportionately in comparison with their numbers in the population. O'Neil points out that while LSAT scores disproportionately exclude blacks, they appear somewhat to over-predict blacks' performance in law school. That is, if a black and a white have equal LSAT scores, all other things being equal, the white is more likely to do well in law school. O'Neil concludes that while tests and entrance requirements are not "discriminatory," they are "exclusionary"; he suggests that this by itself is not enough to count in favor of preferential admissions. But note that this cannot stand in a vacuum; for prior disadvantage and discrimination may account for poorer minority results on the entrance criteria.

3. Compensation for the effects of past discrimination.

4. Desire to the university represent the larger microcosm of the society in its make-up. This argument includes some discussion of the desire to have a large enough black or minority group in a school to reduce feelings of isolation among minority students, in addition to the more conventional argument that the presence of black students helps to educate white students about the black experience and viewpoint.

Chapter 7, "The case against preferential admissions":

O'Neil notes the arguments under three headings:

1. Impact on the structure of the law: To uphold preferential admission programs would necessitate undermining the long-held and frequently announced tenet that the constitution is color-blind.

2. Effect on non-minority groups who are excluded. O'Neil notes that the white excluded are marginal admissions prospects in any event, which for him appears to undercut the strength of this argument.
(3) Effects on members of the minority group. Is the law school diploma of a minority graduate cheapened by the existence of a preferential admission program?

Note that O'Neil has been extremely prolific on this topic. I have come across five articles by him in law reviews, and I am sure there are more. Of his law review articles, I think his best is O'Neil, "Preferential Admissions: Equalizing Access of Minority Groups to Higher Education," 80 Yale L.J. 699 (1971).
Supreme Court of the United States  
Washington, D.C. 20543  

Chambers of  
Justice Lewis F. Powell, Jr.  

June 27, 1978  

Confidential  

Bakke  

Memorandum to the Conference:  

On June 21 I circulated a draft of my proposed announcement of the judgment in this case.  

I now circulate a revised draft. I have embodied comments received, as well as added a summary of my own views.  

It is a bit difficult to refer - with brevity - to the various authors and "joiners" of the several opinions. I would particularly welcome - from each of you - any change that you may wish me to make. I would appreciate receiving any suggestions you may have no later than this afternoon.  

As I am a "chief" with no "indians", I should be in the rear rank, not up front!  

L.F.P.  

L.F.P., Jr.
June 27, 1978

RE: 76-811 - Regents of the University of California v. Bakke

Dear Lewis:

Is this shortened version of the paragraph we submitted on June 21 acceptable?

"The Chief Justice, and Justices Stewart, Rehnquist and Stevens have concluded that the only question before us is whether Bakke was unlawfully excluded from the California Medical School because of his race, and that Congress has answered that question in Title VI. They would affirm the judgment of the Supreme Court of California without addressing the question whether race may ever be considered as a factor in an admissions program."

Thanks for your patience.

Respectfully,

Mr. Justice Powell

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Rehnquist

P.S. For your convenience, I have enclosed a copy of our June 21 letter.
RE: No. 76-811 Board of Regents v. Bakke

Dear Lewis:

My suggestion was the following, although perhaps you'll think of a better place to put it:

Insert in dashes after the words "bifurcated ones"
the following: If a state or the District of Columbia, insofar as the California Supreme Court's judgment orders that respondent Bakke be admitted to Davis Medical School, and insofar as that judgment prohibits the University from establishing race-conscious programs in the future considering race as a factor in admissions.

Sincerely,

Bill

Mr. Justice Powell
CONFIDENTIAL

MEMORANDUM TO THE CONFERENCE:

This is how our opinion day schedule appears as of now. I will advise you of changes as soon as they are known:

Wednesday, June 28, 1978

- 76-811 - Bd. of Regents, Univ. of Calif. v. Bakke - LFP
- 77-747 - Allied Structural Steel Co. v. Spannaus - PS
- 77-653 - Swisher v. Brady - WEB

No!

Thursday, June 29, 1978

- 77-369 - Furnco Construction Co. v. Waters - WHR
- 76-709 - Butz v. Economou - BRW
- 76-1560 - United States v. U. S. Gypsum Co. - WEB

(MORE)
Friday, June 30, 1978 (Very Tentative)*

77-528 - FCC v. Pacifica Foundation - JPS
77-285 - California v. United States - WHR
77-510 - United States v. New Mexico - WHR
76-6997 - Lockett v. Ohio - WEB
76-6513 - Bell v. Ohio - WEB

Absent dissent we will proceed.

*Pacifica (77-528), Lockett (76-6997), and Bell (76-6513) may not clear the hurdle for Friday

cc: Mr. Cornio
1. Form of mandate

Bob - work with Clerk's office on drafting mandate so we can consider it at tomorrow's conference.

Language in opening paragraph to afford some guidance.

2. Each party pays own costs. (Bobka - yes. Resp. should not have any)

3. Agreed not to grant any motion to suspend mandate. (Such a motion will certainly be filed).
4. Stay Order - entered 11/15/76

Order reads "pending decision of this court."

Disposition of the case by this Court:

Johnes will have an order entered dissolving the Stay."
TO: LFP, Jr.
FROM: Bob

I went over the form of the judgment and mandate in Bakke with Frank Lorson and Evelyn Limstrong in the Clerk's Office. The procedure is for them to prepare the judgment and have you sign it, then to prepare the mandate by tracking the language in the judgment.

They are going to prepare a judgment for your signature the first thing tomorrow morning. It will follow the language of the headnote holding almost verbatim. After you have signed the judgment, they will prepare the mandate to echo it.

As to costs, permitting each party to bear its own costs will mean that Bakke pays nothing.