The Complete Oral Arguments of the Supreme Court of the United States A Retrospective 1969 Term through 1979 Term

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ORIGINAL

In the

Supreme Court of the United States

EARL FULLILOVE, et al., Petitioners, --vs-- JUANITA M. KREPS, Secretary of Commerce of the United States, et al.,	)	No. 78-1007

Washington, D. C.
November 27, 1979

Pages 1 thru 52

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IN THE SUPREME COURT OF THE UNITED STATES

H. EARL FULLILOVE ET AL., Petitioners	:	
v.	:	No. 78-1007
JUANITA M. KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES, ET AL.	:	

Washington, D. C.

Tuesday, November 27, 1979

The above-entitled matter came on for argument at 10:08 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT G. BENISCH, ESQ., Colleran, O'Hara & Kennedy, P.C., 1461 Franklin Avenue, Garden City, New York 11530; on behalf of the Petitioners.

ROBERT J. HICKEY, ESQ., Kirlin, Campbell & Keating, 1150 Connecticut Avenue, Washington, D.C. 20036; On behalf of the Petitioners.

DREW S. DAYS, III, ESQ., Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Fullilove v. Juanita Kreps, the Secretary of Commerce.

Mr. Benisch, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT G. BENISCH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BENISCH: Mr. Chief Justice, and may it please the Court:

This is a case of first impression and, indeed, of national importance. We are called upon today for the first time to deal with the question of the constitutionality of a mandatory racial quota imposed by Congress in a public works funding Act. This is not a case dealing with employment discrimination or discrimination on the part of unions in the construction industry.

The question is whether or not Congress can enact an outright racial quota and, if so, under what circumstances. The Act we are concerned with is the Local Public Works Employment Act where under (2) $4 billion was appropriated for local public works funding throughout the country in order to assist what was at the time a flagging construction industry. Just prior to the passage of this appropriations bill Representative Mitchell proposed an amendment to the

bill which provided in substance that any grantee receiving funds other than the Act must assure the Secretary that at least 10 percent of those monies would be set aside and appropriated solely for the use of minority business enterprises as defined in the Act.

QUESTION: Mr. Benisch, does it make any difference in your argument whether Congress was acting under its authority to tax and spend or whether it was acting under its authority to enforce the 14th Amendment?

MR. BENISCH: I think, Your Honor, in looking at the legislative history and record here it makes a great deal of difference to observe what Congress was about when it passed the Local Public Works Employment Act. In other words, it was not dealing in the area of civil rights legislation such as it might have been doing when it passed the Civil Rights Act of 1964.

QUESTION: Did Congress in this particular Act make any findings as to discrimination in the employment area?

MR. BENISCH: I submit, Your Honor, none whatsoever, and that is the first prong to my argument, that indeed an examination of the legislative record and history discloses that there was absolutely no finding made whatsoever in the record or even in the discussions, of found discrimination on the part of the non-minority business community in the

construction industry.

Now, it is -- I think it is critical to note at the outset here that in its recent decision this Court in Personnel Administrator of Massachusetts v. Feeney held that a racial classification regardless of purported motivation is presumptively invalid and can be upheld only upon a showing of extraordinary justification.

I submit that with that presumption of invalidity in mind it is therefore incumbent on the Government in this action to rebut that presumption because we are dealing purely and simply with a racial classification required across the board and mandatory.

Now, we submit here that neither the Government nor the courts below have cited any authority which rebuts the presumption and validity of that racial classification.

For purposes of my argument here today, petitioners will concede that if the racial classification or the amendment to the Act were to pass what has become known as the strict scrutiny test, it might be held that the presumption is rebutted.

Now, the strict scrutiny test has two prongs, as we know. The first is there must be a compelling governmental interest behind the passage of the Act or the legislation in question; and, secondly, the means used or the mechanism must be the least intrusive or onerous available.

Now, as to the compelling Government --

QUESTION: Why can't Congress just spend the money it raises by taxation in the manner it deems best?

MR. BENISCH: Your Honor, the spending power, the cases have held that Congress cannot spend the taxpayers' money which is collected on a nondiscriminatory basis. Congress can't spend it in a discriminatory manner. But without getting cute about it, if you will, I am simply saying that whatever Congress does with respect to monies or any passage, it must do in a constitutional manner.

QUESTION: No one doubts that. But do you think that Congress is under the same strictures when it simply grants money as it is when it regulates private industry in a constitutional sense?

MR. BENISCH: I most certainly do. In other words, I don't think that the subject matter of the legislation affects in any way the constitutionality of the Act being passed. In other words, whether Congress is acting under its spending powers, whether it is acting under its civil rights powers, or whatever, whatever it does must be done in -- pursuant to the Constitution. That is, it cannot violate the Fifth Amendment and it cannot -- it must act in accordance with the strictures and prescriptions of the Constitution.

We submit that in this case Congress -- there is no indication that Congress has acted in accordance with the

Constitution; and, in fact, we believe that it has violated Article 5 of that Constitution.

QUESTION: When you speak of Congress' civil rights powers, under what provision of the Constitution do you classify that?

MR. BENISCH: Well, there would be the 13th Amendment, Your Honor, and those amendments that have become known as the Civil War Amendments.

QUESTION: When Congress appropriates money for aid to South Korea, for example, under what clause of the Constitution do they -- does it act?

MR. BENISCH: When it appropriates money for South Korea?

QUESTION: For aid to South Korea.

MR. BENISCH: Well, it is under its spending powers. And I believe that what we are faced with here is their having been er drafted on a funding bill, an 11th hour after thought; and when we look at the legislative record we have the sponsor's statement as follows: We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses. Yet, when it comes down to giving those minority businesses a piece of the action the Federal Government is sorely remiss.

Now, the purpose of the amendment as proposed by Mr. Mitchell was to give the minority business community a

share of the action.

Now, Congress sat down, it was appropriating $400 million, and it said, $400 million for minority business enterprises is not going to hurt anybody and we ought to give them a piece of the action.

QUESTION: Let me go back to the aid to Korea again for a moment, to a hypothetical problem.

You said that is under the tax and spending power. There are also foreign policy considerations and national defense considerations. It is an amalgam of a number of considerations, is it not?

MR. BENISCH: That would be true.

QUESTION: Is that not true in this area?

MR. BENISCH: Your Honor, the key word here is "racial classifications." In other words, we have an amalgam here, or perhaps an amalgam. But one of the ingredients or one of the facets of this Act that we are dealing with today is the imposition of a mandatory racial classification quota. Now, that fact alone puts this case in a completely unique position to my knowledge to date. I have not -- I am not aware of any prior Act of Congress which engendered a mandatory racial classification across the board. It is not a good faith effort, it is mandatory.

And I think, Your Honor, that is the key distinction in this case.

The decisions of the court below indicate that Congress perhaps could have taken note of historical discrimination in the construction industry in the context of this passing this Act and therefore pass what it considered to be a remedial statute.

QUESTION: What is a "take note of the historical discrimination in the construction industry"?

MR. BENISCH: The courts below indicated that; yes, Your Honor.

QUESTION: Well, do you think that there was?

MR. BENISCH: Your Honor, we are dealing here -- and this is not slicing the meat that thin. We are dealing here --

QUESTION: How about my question: Do you think there was an historical -- was there historical discrimination in the--

MR. BENISCH: In the construction industry Your Honor, I don't believe so with respect to non-minority businesses discriminating against minority businesses -- even the entrepreneur --

QUESTION: Let us assume there had been that kind of discrimination in the construction industry and it was all over the Congressional Record --

MR. BENISCH: Yes.

QUESTION: -- hearings in some other legislation.

And people in Congress you assume knew about it.

MR. BENISCH: Are you saying in the legislative record to the Act, Your Honor?

QUESTION: No, I said in another -- you suggest that in this Act they would have to specifically take note of those facts and say that this is the reason we are passing this Act.

MR. BENISCH: That is so, Your Honor. I am saying this: that if --

QUESTION: That if they had done that you would suggest that at least the first leg of the strict scrutiny test would be satisfied?

MR. BENISCH: No, I wouldn't in this regard, if I may answer that.

I believe that under this Court's decision in Bakke that there must be, where you have a racial classification, there must be some findings -- made findings made by the legislative body in order to support the legislation in question. That is the racial classification. And I am referring specifically to the following language of Justice Powell's opinion: We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations.

After such findings have been made, the governmental interest in preferring members of the injured group at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case the extent of the injury and the consequent remedy will have been judicially, legislatively or administratively defined.

Also, the remedial action usually remains subject to continuing oversight to insure that it will work the least possible harm to other innocent persons competing for the benefit.

Without such findings of constitutional or statutory violations, it cannot be said that the Government has any greater interest in helping one individual than in refraining from harming another. Thus, the Government has no compelling justification for inflicting such harm.

QUESTION: Mr. Benisch --

MR. BENISCH: Sir?

QUESTION: I didn't persuade anyone to agree with me.

MR. BENISCH: I do.

QUESTION: Thank you very much.

QUESTION: At what stage, Mr. Benisch, --

MR. BENISCH: Sir?

QUESTION: At what stage must these findings be made, including the judicial findings that were referred to

in --

MR. BENISCH: At what stage of the passage of the Act?

QUESTION: No. At what stage in his spectrum, the judicial findings could not be made at the time of passage of the Act, of course, could they?

MR. BENISCH: I have no challenge of that, yes. But the legislative findings are what we are dealing with.

QUESTION: But the language you read from Justice Powell's opinion referred to legislative or judicial findings, did it not? I am just --

MR. BENISCH: Well, but it was talking there -- it was talking across the board. In other words, depending upon the body that was acting, it was in accordance with judicial -- Congress and its administrative --

QUESTION: I am suggesting a judicial firding could be made then only in the context of a judicial proceeding such as a school desegregation case where the proceeding is initiated in the judicial branch.

MR. BENISCH: I am submitting that where there is a challenge mounted to the particular activity or action passed by Congress, for example, that a judicial finding could be made; and that is what we are asking for here. If a finding be made that Congress has made -- has in fact made no findings sufficient to support the racial classification involved in

the amendment to the Act.

Yes, sir.

QUESTION: Is it your view that you would expect the Congress the sort of detailed findings that one normally expects a court or an administrative body to make?

MR. BENISCH: No, I don't believe Congress would have to make the detailed findings, for example, such as findings of fact might require on a trial. Congress can paint with a broad brush.

But I submit it cannot tar an entiere industry with an even broader brush in order to pass a racial classification. Abd that is what it has done here. It has tarred the entire construction industry with the reputation attributed to Title 7 actions which, for the most part, dealt with union discrimination against workers. We are here dealing with businesses against businesses. And there has been no finding whatsoever of discrimination in that area.

QUESTION: Mr. Benisch, what sort of findings would justify this statute; would they have to found that the Government was guilty of discrimination against minority business enterprises or that there was private discrimination? What are the kinds of findings that you think would have saved the statute, in your view?

MR. BENISCH: I believe, Your Honor, that a finding for example -- take it at the basic level -- a finding that

there had been a perceived pattern and practice of discrimination on the part of non-minority businesses in the construction industry to exclude from participation non-minority -- minority businesses.

QUESTION: Do you really think the statute would be valid if there were such a finding?

MR. BENISCH: If there were would be, Your Honor, because we are not saying -- I am not arguing here today that Congress has no power perhaps to enact remedial legislation or that racial quotas are per se invalid.

QUESTION: What if there had been a finding that there had been previous discrimination against Presbyterians, could Congress say that at least 10 percent of this money must now go to Presbyterians?

MR. BENISCH: If you consider the rights of Presbyterians to be a constitutional --

QUESTION: The First Amendment and the equal protection clause of the Fifth is involved.

MR. BENISCH: I understand.

QUESTION: Here we have only the equal protection component of the Fifth.

MR. BENISCH: That is correct.

QUESTION: Not the First.

MR. BENISCH: That is correct.

Now, we are talking here of -- we are talking,

we are talking of findings. And I submit to the Court that we have --

QUESTION: What is your answer to Mr. Justice Stewart's question?

MR. BENISCH: I am very sorry, I have misplaced - I have --

QUESTION: As I understood your answer to Brother Stevens, you said that this legislation would be valid if there were certain findings. And my question just indicated rather some amazement at your answer.

MR. BENISCH: Yes.

In other words, if Congress had made -- had conducted hearings and had made a determination that indeed there was this pattern and practice of discrimination on the entrepreneurial level, I submit that it might be -- it might rebut the presumption.

QUESTION: Against Presbyterians?

MR. BENISCH: In this case I am speaking of?

QUESTION: Yes.

MR. BENISCH: If it was Presbyterians, if it -- if Presbyterians were viewed by Congress to be a minority which was entitled to protection, yes. If you want to substitute Presbyterians from minority business enterprises, I see nothing wrong with it.

QUESTION: You don't think the religion clauses are

any problem?

MR. BENISCH: Well, the fact there is a separation between church and state would be a consideration. But I believe that the fact you are Presbyterian doesn't mean that you are not entitled to equal protection. And if you have been discriminated against I think you are entitled to some remedial legislation.

QUESTION: Mr. Benisch, supposing that you have a change of Administration and the Republicans came into power and they they had hearings and they decided in the prior Administration there had been a disproportionate amount of public monies spent by -- for Democratic contractors who contributed to the Democratic Party. So you said that the remedy to that situation all of the next appropriated funds shall go to Republican contractors. Would that be constitutional --

MR. BENISCH: I don't --

QUESTION: -- findings, if this was discrimination in the past?

MR. BENISCH: I don't believe so, Your Honor.

QUESTION: Why not?

MR. BENISCH: We are dealing here with findings which relate to and deal with compelling governmental interest and I don't think that a Democrat, Republican is a compelling governmental interest such as racial discrimination might

be.

QUESTION: Why less so in the context of Justice Stevens' question than in the racial context?

MR. BENISCH: Well, Congress has perceived, and I think it is indeed well known that racial discrimination is violative of the Constitution.

QUESTION: Well, by hypothesis --

MR. BENISCH: Yes, sir.

QUESTION: -- Justice Stevens' question, as I took it, took Congress to perceiving that discrimination between Republicans and Democrats was violative of the Constitution.

MR. BENISCH: Well, I would not be prepared to concede that point. You haven't got in that regard --

QUESTION: You don't even need findings in my case. You just pass a statute and say, let's give all this money to Republicans.

MR. BENISCH: Well, you haven't -- I think --

QUESTION: Does that raise a constitutional question?

MR. BENISCH: If you -- I think it might -- the Congress may be mis-using its spending powers.

QUESTION: Well, if it is, then if they did that for four years and they said we had better remedy what we did in the past, we will now give it to the Democrats. That would

not be legal.

You can't have it both ways. It raises no constitutional question, there is no constitutional question. You don't need any findings or anything. If it does raise a constitutional question, why can't you remedy the past constitutional error by correcting it in the future?

MR. BENISCH: Your Honor, my point was that the initial funding for the Republicans in your example would not have been proper; it would have been a mis-use of the spending powers.

QUESTION: Right.

MR. BENISCH: The remedy therefore to make up and help the Democrats will simply be compounding the wrong.

QUESTION: I don't understand why, if you are just equalizing things.

MR. BENISCH: Well, the cure is as bad as the ill in this -- in that example.

QUESTION: But you conceded in this case that you are not as bad a deal.

MR. BENISCH: In this case, yes, the cure is, because we are not ... with a situation in this case where Congress has acknowledged and perceived a violation of the Constitution on the entreprenourial level in the construction industry. It simply is a piece of the action for the minority business enterprises. That is what it is. Let's spread some

of this money around. That is not sufficient to support a racial quota, in my opinion.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Benisch.

MR. BENISCH: Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Hickey.

ORAL ARGUMENT OF ROBERT J. HICKEY, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HICKEY: Yes, Your Honor.

Mr. Chief Justice, and may it please the Court:

As my co-petitioner counsel mentioned at the start of his argument, this case is of historical importance, it is of practical importance, and it does not come to this Court without antecedents.

Only 25 years ago this Court in the Dunn decision, Brown v. Board of Education, condemning a theory of separate but equal. Today we are asked to say that quotas are good. What are quotas? Essentially it is a form of sufferatism. You are carving out a people, a group, and saying that they need special treatment, or should receive special treatment.

QUESTION: We do that with students in schools who cannot speak English, do we not?

MR. HICKEY: I agree, Your Honor, that that has been done to remedy certain problems. But we start with the theory -- and I think that is where we all must start -- the

theory is that separatism based on race is bad, unless there is a competling reason for some remedy. You have to focus on it. We go back beyond Brown. We go back 65 years to a case Truax v. Raich, in fact in some way someone could say is identical to this situation, although feom a lawyer's viewpoint you could easily distinguish any case. But Truax is an interesting case because 65 years ago a statute was passed, a statute which for employers in a particular State a requirement was imposed upon them that if they had five or or more employees, 80 percent of their employees had to be native Americans. Twenty percent could be anything.

A resident alien suit, this Court struck it down on the grounds that it denied that individual a fundamental right to engage in business.

Now, what we have done here is reverse the quota. Instead of having 80 percent for native Americans we have turned it around and given 10 percent for blacks, the Spanish-speaking, Orientals, Alaskans. Why? Why this statute?

Well, looking at the 10 percent, you talk about a statute that is infringing upon the rights of a particular class, of giving rights. It is interesting to note a few things about the statute. It talks of 10 percent nationwide. Why 10 percent? Why not 4 percent, which is the number of black contractors in the United States? Why not

17 or 25 percent in New York, or 2 percent in Arizona? Why are women and other minorities excluded? Why are Orientals included? The Government in this case two years ago in Bakke came to this Court and said there is no discrimination against Orientals. In the very brief they filed in this case, the appendix gives all the statistics regarding Whites, Hispanics, and doesn't show any discrimination against Orientals, the picking and choosing and no explanation.

But go further, they use terms like "Spanish speaking." They are not saying Hispanics. They are saying Spanish speaking. Even the Government in other contexts have dropped that word because, even though I didn't do very well in school in languages, I could be Spanish speaking. And the Government dropped it in other contexts because of that. It was used for that purpose. Even if you took a term like "Hispanic," there is no explanation as to who is Hispanic. The Government in other contexts have said Portugese from Portugal are not Hispanics, but Portugese from Brazil up.

We have all of these questions, but no answers. I am not saying there can't be answers, but when you get down to a question like Indians, this Court in previous terms has considered who is and who is not an Indian, different kinds of Indians, tribal Indians, Indians living off and on reservations at different times. Despite the stereotype you see on television, if you see an Indian walking down the street

in Washington without any tribal head dress, you could not segregate him out from the populous.

QUESTION: Well, I suppose an indian from India would have --

MR. HICKEY: And that also, the statute does not evey say what Indians they are talking about.

There is also a little interesting thing that there is a set-aside of 2-1/2 percent for work done on tribal lands. Is that 2-1/2 percent above the 10 percent, is it 2-1/2 part of the 10 percent?

I raise these questions to show that this was a hastily drawn statute, extremely hastily drawn. Basic definitions were left out, groups were included without any reason, groups were excluded without any reason at all.

QUESTION: Do you suggest that we hold the statutes unconstitutional because they are badly drawn?

MR. HICKEY: I think -- I would love to answer as a practicing attorney, but I am too realistic to believe otherwise.

I think when you talk about creating a statute in an area like race, I think it is incumbent upon the legislature to take the added time to draw a carefully drawn statute so everyone knows what they are talking about.

QUESTION: Has there only been one round of this?

MR. HICKEY: This is the first round of this. This was added on (2) of the Act, so this is the first round.

QUESTION: But has Congress done it more than once?

MR. HICKEY: Congress unfortunately has done it more than once but has not come up to the Supreme Court.

QUESTION: That may be, but Congress has done it twice, hasn't it?

MR. HICKEY: Congress as far as using definitions --

QUESTION: How about the set aside -- how often has it enacted a set aside?

MR. HICKEY: Well, it has a small business set aside, it has had that for a number of years.

QUESTION: Has this set aside we are talking about only been enacted once?

MR. HICKEY: 1977. That is when it was first enacted.

QUESTION: And it is still going on, the funds are still going out?

MR. HICKEY: Well, that is the point, the funds are still going out.

QUESTION: Have there been some more monies appropriated?

MR. HICKEY: There is still monies being paid out. There are various levels of a construction job, as one

part of a job is completed another job takes its place and the jobs are still going on. These are massive projects. They are still going on throughout the country.

The thing here is this:

QUESTION: Are you suggesting that the failure to identify the Indians as American Indians, if that is what Congress meant, or the inclusion of Orientals as to whom no prejudice may perhaps be shown nor discrimination, is a fatal flaw in the whole legislation?

MR. HICKEY: In this legislation it is. When you are talking about some legislative findings in drafting a statute, when you add in an area classification based on race, let us assume everything else is okey about it, which we disagree, I think at a minimum you have to explain to the people who are going to be subject to that statute who is in fact covered by it. I think that is a minimum. I think -- and it is not in here. There is no definitions of any of these terms.

But going back to another item, the question was raised as to the fact that whether there was a sort of general discussion, general findings of discrimination in the construction industry, absent the legislative history in this particular Act. And the answer is, "No." They talk about discrimination, voting, employment, there is nowhere any finding under any other Act, of discrimination in the

construction industry.

Now, if there were that, just remember who we are talking about. We are not talking about the general contractor. He is the one at the bottom getting the work. The discrimination has to be by the Federal Government and the State grantees, the local grantees.

There is no finding anywhere. I find it somewhat strange that the Government is here on this case because to accomplish what they would want, they would have to convince you that they in fact have discriminated, they, the Government, this is a governmental program.

QUESTION: Well, does the Governmental grant-in-aid to local and State and municipal governments, so they claim I suppose, if there is one, is that those governmental entities have discriminated?

MR. HICKEY: The Federal Government pulls the strings.

QUESTION: Yes.

MR. HICKEY: And if the States discriminate, it is because the Federal Government allows it. There is not even --

QUESTION: My point is, it is not even going to allow it.

MR. HICKEY: That is right, and it hasn't allowed it and it hasn't occurred. Nowhere in there, and this is a

minimum finding I would think, that the Federal Government either has discrminated itself or allowed the States to discriminate in its programs.

QUESTION: Mr. Hickey, have we ever held the Federal statute unconstitutional because Congress didn't make appropriate findings?

MR. HICKEY: Unfortunately, I would say "No." And, on the other hand, I can't say that the Court really has faced this issue. I think the Court has talked about it, it talked about it in the Hampton case and it has I think talked about it, indirectly or impliedly in other cases, but when you are talking about an issue of a classification based on race or a national origin or a denial of a fundamental right, I don't know if this Court has ever really faced it. This is what you are being asked to face today.

QUESTION: In Katzenbach v. Morgan, certainly the opinion relied upon the fact that Congress had made findings, did it not?

MR. HICKEY: Oh, I think that the reverse is definitely true, it is that the Court has sustained action legislation on the basis of findings made by them. That isn't what we have today.

QUESTION: Would a finding that general contractors who obtained Government contracts have traditionally discriminated against subcontractors been sufficient to support the statute?

MR. HICKEY: I would say not, because discrimination is not at that level, discrimination is on the Federal Government and the State level government.

But, again, there was no findings in this litigation --

QUESTION: To comply with the 10-percent requirement if the State gave a contract to a general who assured the State that at least 10 percent of the money delivered to subs would be minority business enterprise?

MR. HICKEY: That is why we are here today, we believe that is a violation of the 14th Amendment. That would be discrimination, that is our very purpose.

QUESTION: What is involved here, the 5th or the 14th Amendment?

MR. HICKEY: The 5th through the 14th Amendment.

QUESTION: What do you mean, "the 5th through the 14th"?

MR. HICKEY: The due process equal protection clause is extended from the 14th through the 5th Amendment to the --

QUESTION: Federal Governmental action?

MR. HICKEY: Right. And we also have a --

QUESTION: And the Federal Governmental action is subject only to the 5th Amendment; is that right?

MR. HICKEY: We do have both, Federal and State, in

this case. The State people are joined --

QUESTION: In Bolling v. Sharpe, which was the companion case to Brown v. Board of Education, the Court held that there was an equal protection component of the 5th Amendment.

MR. HICKEY: You said that in the Loving case as well.

QUESTION: Right.

But, so what is involved, the 5th?

MR. HICKEY: And the 14th. Both the 5th as to the Federal Government and the 14th as to the State grantees.

QUESTION: The claim is that the Federal Government is compelling the States to violate the 14th?

MR. HICKEY: That is correct, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Days.

ORAL ARGUMENT OF DREW S. DAYS, III, ESQ.,

ON BEHALF OF THE DEPARTMENT OF JUSTICE

MR. DAYS: Mr. Chief Justice, and may it please the Court:

The petitioners have conceded that if the NVE provision at issue here was enacted by Congress to remedy past discrimination and if it was properly tailored to achieve that objective, then this Court has to determine as did the two courts below that this statute is not in contravention of the Constitution or Federal statute.

QUESTION: Well, then, I think you are correct that your brothers did concede that. But of course that doesn't bind us, does it?

MR. DAYS: Well, no, it doesn't, Your Honor.

QUESTION: To decide this case, even if they conceded their whole case away.

MR. DAYS: Well, I simply want to call the Court's attention to what matters are at issue between us.

I think that as a threshold observation, as this Court has indicated in some of its questioning, we are talking not about a State legislature, we are not talking about a city council, we are talking about the Congress of the United States, that as this Court has recognized has special has special competance to make findings with respect to the effects of identified past discrimination and to take appropriate remedial measures.

QUESTION: What authority do you rely on for that, General Days?

MR. DAYS: Well, there are several provisions of the Constitution, it seems to me, that the Congress can rely

QUESTION: I thought you said there were cases in this Court that had noted that.

MR. DAYS: Well, the Bakke decision I think goes into some discussion of the role of the Congress with respect to addressing discrimination.

QUESTION: In which opinion?

MR. DAYS: Justice Powell's opinion, I think goes into that in most detail but of course South Carolina v. Katzenbach --

QUESTION: The one distinctive feature of his opinion was that no one single one of these colleagues --

MR. DAYS: Well, nevertheless, I think that some of the things he said in his opinion deserve to be considered by litigants before this Court and by the Justices of the Court. I think there can be no contravention that Congress does have this unique authority. We have seen it in South Carolina v. Katzenbach, and a host of other decisions with respect to voting, employment, housing. I think that it is beyond cavil that there is that competence.

QUESTION: Are you saying that if a State had made similar findings under its police power and enacted exactly the same law, it would have stood on a region footing in the congressional enactment?

MR. DAYS: Yes, I think so. I wouldn't say that it would thereby be inferring, because it was enacted by a State legislature. But I think we have to recognize the unique competence of the United States Congress to address these issues.

QUESTION: Do you distinguish the Congress from the legislature of the States where for the most part the

States do not make findings; is that not true?

MR. DAYS: I am not an expert in that regard, Mr. Chief Justice. But I think that as a matter of fact most State legislatures have very short terms, they act in summary fashion with respect to legislation, and legislative records are not made in the traditional sense.

QUESTION: But the functions are precisely the same, are they not?

MR. DAYS: Yes, they are.

QUESTION: We have not let the absence of findings by a State legislature impede sustaining the State's acts, have we?

MR. DAYS: That is correct, Mr. Chief Justice, and I think that is because this Court has recognized that legislatures' functions are different from court and administrative bodies. They are representative democracy at its best; they are responding to the experiences of the members of the legislature, hearings that they may have had held, their conversations with their constituents, and bringing all of that information to bear over time with respect to problems that are of concern to that particular State or locality.

Now, that is the same process that the United States Congress follows. The fact that we have committees making records, holding hearings, making certain findings from

time to time, it seems to me does not get to the core of the constitutional power of Congress to act without those types of findings and without the detail that I think that Petitioners assert is required under these circumstances.

QUESTION: Let's assume for a moment that this section of the statute had dealt only with Orientals and no findings of any kind were made. Would you still view that the statute was valid?

MR. DAYS: Yes, I would, Your Honor.

QUESTION: What would be the basis for assuming, as my statement would require that you do, that Orientals have been discriminated against in the United States -- all Orientals.

MR. DAYS: Well --

QUESTION: Anywhere in Asia I suppose would be included by the term.

MR. DAYS: Well, let me make a preliminary point, Mr. Justice Powell, and that is that Mr. Hickey is wrong in saying that there were no definitions of the minorities included in the provision, 131, of the appendix. In guidelines that were issued by the Economic Development Administration, there were definitions of minorities that were included under this provision.

QUESTION: Was it authorized to make those definitions by the Act?

MR. DAYS: The Act did not explicitly authorize Economic Development Administration to make the definitions but the definitions have drawn from determinations that have been used in the Government at least since 1971 with respect to these groups. In other words, the groups included in the Act, the groups that had been mentioned in a number of actions by administrative agencies, and I think recognized by the Congress.

But to get back to your question, Mr. Justice Powell, on Asian-Americans I would direct the Court's attention to the brief of the Asian-American Legal Defense Fund because I think it goes into more detail than did our brief with respect to the history of discrimination against Asian-Americans in the country. Certainly Congress has dealt with discrimination against Asian-Americans in the Voting Rights Act, most recently in 1975.

QUESTION: I think my question assumed as a fact that Congress had not legislated as it has for example in title VII and the Voting Rights Act with respect say to other minority citizens. Let's assume you had a clean slate. Congress decided all of a sudden it was going to do something for the Orientals, but made no findings.

MR. DAYS: I would have to rely upon the competence of the Congress --

QUESTION: Yes.

MR. DAYS: -- to make those determinations. It would not be required to go into detail.

QUESTION: So your basic position is that it is unnecessary to have anything in the Congressional Record that would support a discriminatory statute enacted by the Congress.

MR. DAYS: Yes, that is our position; but I don't think we need to be pushed to that ultimate --

QUESTION: Well, I agree with that. I am just seeing how far you would go.

QUESTION: Mr. Days, Suppose the Government's statute were infirm,because of the inclusion of Orientals there is no record. Suppose that is hypothetically the conclusion of a court --

MR. DAYS: Yes, sir.

QUESTION: -- that it cannot judicially notice the fact of discrimination against Orientals or Aleuts or Indians, because they haven't specified American Indians, would that necessarily mean that the entire statute would fall?

MR. DAYS: No, Mr. Chief Justice.

But let me say something, because I -- this line of questioning I find very disturbing with respect to Asian-Americans. I feel that perhaps in our brief we did not give the type of attention to the history of discrimination against Asian-Americans that was deserved. I think that there is

more than ample evidence in our history in the decisions of this Court to justify this Court concluding that Congress was acting intelligently and constitutionally in including Asian-Americans within the ambit of this particular statute. And I want this record of the United States position before this Court to reflect that.

QUESTION: Well, what if Congress had said included among the other people to whom the set-aside was to be benefited, Norwegian Americans. And one could only conclude that its action was totally irrational as opposed to your statement that it was acting rationally in the Oriental American, because Norwegian American contractors were very successful and they probably had gotten more than their share of that business.

Would that make this statute different in constitutional terms?

MR. DAYS: If Norwegians were involved?

QUESTION: American citizens of Norwegian ancestry.

MR. DAYS: Yes.

Well, I think that it would perhaps create more difficulty but I don't think as a constitutional matter it would be distinguishable. In other words, when we are talking about racial classifications we are not urging upon this Court that the Court should close its eyes to the extent to

which certain types of classifications have been used invidiously in this country.

QUESTION: But you are not talking just about racial classification. Spanish-speaking is not a racial --

MR. DAYS: Well, when I use the term "racial," I am also referring to certain types of ethnic identifications that have been used in this country for purposes of invidious discrimination.

QUESTION: More fundamentally, General Day, would this case by different if the statute had said that at least 85 percent of this money had to be spent for -- on business enterprises that were owned and operated by white people?

MR. DAYS: If Congress made that determination. Again, I think that an action of the Congress would come to this Court with a special character.

QUESTION: So if the statute had so provided you think the constitutional question would be indistinguishable from the one now before us?

MR. DAYS: I think that in terms of the competence of Congress to make these determinations it would not be any different. I think in terms of the role of Congress with respect to the Civil War Amendments one would have to ask whether in providing this type of benefit to non-minorities Congress was acting in the consistent pattern of the last 20 years or so.

QUESTION: I suppose, in effect, that is what this -- that is pretty close to what this statute does provide. It provides that 90 percent --

MR. DAYS: That is correct.

QUESTION: But if the wording were that way, do you think the question -- the constitutional question would be the same?

MR. DAYS: Let me say that in terms, again, of the competence of Congress to make these determinations it would --

QUESTION: You would just give complete deference to Congress, as I understand your argument.

MR. DAYS: I would not give a complete deference, no.

QUESTION: Well, where wouldn't you; in what hypothetical case?

MR. DAYS: I think the competence of Congress to act under the 13th and 14th Amendments has to be placed in the proper context.

QUESTION: The 14th amendment binds only the States.

MR. DAYS: Well, it binds the States but Congress has the authority under Section 5 to not only deal with discrimination by the States but also to prevent discrimination in the future by the State.

QUESTION: Perpetuating the 14th Amendment.

MR. DAYS: That is right.

QUESTION: Have we ever upheld a case where Congress enacted a statute pursuant to the enforcement powers granted under the 14th Amendment where there weren't congressional findings?

MR. DAYS: Well, I think that if one looks at Oregon v. Mitchell and also the Katzenbach v. Morgan case that you mentioned, it depends on one means by "findings."

QUESTION: Weren't there findings or declarations that the Congress finds such and such -- maybe boiler plate, but nonetheless findings?

MR. DAYS: Well, precisely, Your Honor, think that the Congress makes determinations from time to time and it has to be viewed as a continuing institution. In Oregon v. Mitchell I don't believe that there were specific findings that there had been discrimination against minorities in areas other than the South. In other words, no full record made.

But I think what this Court said was Congress could, based upon what it already knew about discrimination flowing from the use of literacy tests, could conclude that banning literacy tests could ultimately serve the purposes that the 14th Amendment was designed to reach.

QUESTION: Getting back to the question about the

statute, it gave -- 85 percent of the business would go to white contractors. Isn't it significant that Congress never had to pass such a bill?

MR. DAYS: I think it is significant, Mr. Justice Marshall. It supports the wisdom of the framers of the 13th and 14th Amendments and the 15th Amendment, the Civil War Amendments that, given the history of our country, it would not be likely that the majority would have to come to its own defense, that those statutes were designed to --

QUESTION: Such a statute would be valid, a statute that in words placed a requirement that 85 percent of the business go to whites? That is a quite different statute, even though practically it may work out the same. If you say that the blacks shall be eligible for only 15 percent of the business, you would support that statute, I don't think you have considered your answer very carefully.

MR. DAYS: Well --

QUESTION: Would you say that statute would be constitutional?

MR. DAYS: No, I think my answer -- the answer is "No." But what I was trying to point --

QUESTION: Well, it wasn't just debating a question. It seems to me quite a fundamental question in this case.

MR. DAYS: Well, my answer was in two parts.

QUESTION: It was "Yes" and now it is "No."

MR. DAYS: No, I don't think that is what I have said, Mr. Justice Stewart. What I said was when we are talking about the competence of Congress to make certain determinations. The fact that there are not full findings on the record with respect to a certain type of discrimination and the need to remedy that presumptively invalid. But when we are looking at the authority of the Congress to act and we are looking at the 13th and 14th Amendments, we are looking at the 5th Amendment and the duty of Congress to insure that Federal funds are not used in a way that either creates or perpetuates discrimination, wherever it happens to occur in this country. Then it seems to me a statute that has to do with providing and insuring that 85 percent of the benefits go to the whites would raise some serious constitutional questions.

QUESTION: Don't you think this case does?

MR. DAYS: I do not.

QUESTION: I know which side of the questions you are on, but --

MR. DAYS: Well, it raises serious --

QUESTION: These questions are not frivolous.

MR. DAYS: It raises serious constitutional questions and I assume that is why the case is before this Court. But I think that when we are talking about Congress desiring to benefit minority contractors by providing 10 percent of a

$4 billion program, when we are talking a Federal contract program that involves over $100 billion and we are talking about one program that lasts for a year --

QUESTION: I read all that material in your brief, General Days and I didn't know if you are talking -- if this kind of a de minimis argument or an argument that your brothers on the other side lack standing, or what is it?

MR. DAYS: No, the argument is simply with respect to the nature of the remedy. This Court I think has expressed the view that when racial classification --

QUESTION: You can't be just a little bit pregnant, you know. If it is wrong, it is wrong.

MR. DAYS: Well, I think it is simply -- I think it is an equitable question that in looking at what Congress has done it is not irrelevant that it has limited the thrust and scope of this program, as it did. I don't think the constitutionality of the statute stands or falls on that --

QUESTION: Precisely the same case, that a separate statute that said $200 million shall be appropriated and be spent entirely for minority business enterprises. And the reason we are doing it is we want to remedy past discrimination and we want to have more minority participation in the economy in the future. They said it in words. Why would that be a different case?

MR. DAYS: Well, it wouldn't be a different --

QUESTION: So the fact that it is 10 percent is really irrelevant, isn't it?

MR. DAYS: I don't think it is irrelevant, I don't think it is dispositive.

QUESTION: I took your treatment in the briefs Mr. Days, to be that Congress, among other broad powers, has the right to experiment with certain types of remedial legislation.

MR. DAYS: Well, that is correct; and I think what this record reflects is that Congress has over at least the past ten years experimented with different approaches to try to improve the conditions --

QUESTION: Do you think Congress has the power to experiment by saying that 50 percent of this $400 billion or $200 billion shall go to Methodist subcontractors?

MR. DAYS: Well, I think that again one has to look at the situation in context. Clearly, if there has been a history of systematic discrimination against Methodists, then Congress has the right to experiment to determine how to get at that particular issue. It is a 14th Amendment violation if States have been discriminating. It would be a 5th Amendment violation if the Congress used funds in a way that supported the continuation of that discrimination.

But, that is not the case we are talking about, Mr. Justice Rehnquist.

QUESTION: Well, I had a feeling that you are kind of saying that maybe at an extreme this case would be bad but, since it is only 10 percent and it is a fairly small amount of the total proportion, Congress can kind of experiment and tailor the thing.

MR. DAYS: Not at all. My position is that were Congress to decide to extend this for 5 years or 10 years based upon the history of discrimination against blacks, that too would be constitutional.

QUESTION: What if it were to decide that it was a 100-percent set-aside, not a 10-percent set-aside?

MR. DAYS: I think that would be constitutional.

QUESTION: That wouldn't?

MR. DAYS: That would be constitutional.

QUESTION: Mr. Days, you have referred several times to the 13th Amendment.

MR. DAYS: Yes.

QUESTION: How does that help this particular statute?

MR. DAYS: Well, clearly with respect to blacks --

QUESTION: Yes.

MR. DAYS: -- victims of discrimination and incidents of slavery, the 13th Amendment provides an additional basis for this legislation.

QUESTION: How about the other categories of

minorities?

MR. DAYS: Well, I think that while this Court has not addressed itself specifically to that issue, if one looks at Santa Fe Railroad case and the fact that whites were deemed to have been protected by 1981, one might argue that other groups that could show a history of discrimination in this country might benefit under the 13th Amendment. I am not prepared to make that argument today.

QUESTION: The 13th Amendment uses the term "slavery." Are you thinking about slavery of Orientals in Asia, or where?

MR. DAYS: Well, let me just stay, Mr. Justice Powell, with the position that it clearly can be used by Congress to reach discrimination against blacks.

QUESTION: You have the 5th and the 14th. I just wondered why you refer to the 13th.

MR. DAYS: Well, I think that as the amicus brief that was filed by a minority contracting organization, goes into that in some detail, as does the brief of the Legal Defense Fund. I think there is ample evidence to support this extension.

QUESTION: Would you leave that argument to that?

MR. DAYS: Well, I think we have made the argument that the 13th Amendment does apply, Section 2 --

QUESTION: No, no. You purport to rely on the 15th,

but you leave that argument to your brief, too, don't you?

MR. DAYS: Yes. I think that when we talk about the 15th Amendment we are simply talking about the competence --

QUESTION: The electoral franchise, which really isn't involved here.

MR. DAYS: Excuse me?

QUESTION: The electoral franchise is really not involved here, is it?

MR. DAYS: Our purpose for mentioning the 15th Amendment is to support the argument of the special and unique competence of Congress. That is the only reason it is involved.

I think, Your Honors, that what this case comes down to is the fact that the petitioners by saying that there is no legislative record in this case with respect to the MB provision are first wrong, because there is evidence. There was evidence in this record that in the hearings with respect to (2) there was testimony of discrimination against minorities, that the money had not been distributed adequately with respect to minorities, there were claims of discrimination against minority contractors. And on the floor of the House and the Senate, the debates I think reflect this understanding by Congress, that there was not only evidence in the record of this particular legislation but evidence with respect to other attempts by the Congress to deal with the disadvantaged

position of minority business enterprises.

The approach that Congress took to achieve this end -- that is the 10-percent set-aside -- was appropriately tailored, in our estimation. One has to remember that this bill was designed to pump large amounts of money into the economy very quickly. Applications had to be approved in 60 days and the projects had to be under way in 90 days. Congress therefore had to adopt measures that would be appropriate under these circumstances.

We think that the 10-percent set-aside was reasonable in light of the 17 percent population of minority groups in this country, the fact that we are talking about one program extending for one year. And despite what the Petitioners say, there is no evidence that there was any intent to stigmatize non-minority contractors and non-minority persons by the legislation.

QUESTION: Would the constitutional question be different if the set-aside had been 25 percent, which is stated in the minority?

MR. DAYS: It would not have been different.

Again --

QUESTION: I think you indicated it wouldn't be different if it were 100 percent.

MR. DAYS: That is right. That is right.

QUESTION: I agree.

MR. DAYS: I think that as we argue in our brief the extent to which there might be other alternatives utilized by Congress in this situation, they had been tried by the Congress. There was the Small Business Administration Act, there were legislative attempts to deal with minority investment, there was an attempt to deal with bonding for minority businesses. And what Congress concluded -- and I think this is reflected in the debates on the minority business enterprise legislation -- that those have simply not worked; despite everything Congress had attempted to do, minority businesses still remained a very small minority of those involved in the construction business and were getting less than one percent of the Federal contract dollar.

Insofar as the Petitioners have argued that the minority business enterprise provision violates title VI, I think what we have here is legislation that in the same document dealt with discrimination based upon sex. In other words, Congress was thinking in title VI terms at the same time that it enacted the minority business enterprise provision.

We think that these two provisions, that is the minority business enterprise provision and title VI, can operate in tandem, and there is no antagonism between those particular pieces of legislation.

QUESTION: Could women come in and say that the

statute was under-inclusive because it failed to include them in the set-aside?

MR. DAYS: Well, they certainly could, Mr. Justice Rehnquist. But I think that the statute was -- demonstrates the extent to which Congress was trying to reach several problems at the same time with respect to --

QUESTION: Could they successfully do so?

MR. DAYS: I don't think so. I think that this is an area where Congress is not required to deal with the entire problem at one time. It can deal with what it regards is the most egregious problems at first and then move toward addressing other problems as it gains more experience with resolving the other problems. I don't think that there is any requirement that Congress deal with the entire problem at the same time.

QUESTION: Could it have simply dealt with Oriental contractors and not with black or Spanish-speaking contractors?

MR. DAYS: I believe it could have.

When one looks at the minority business enterprise provision, what one sees is the culmination of years of concern by the Congress with the unique plight of minority business enterprises. If we look at the general background, what we see is a Congress that for 20 years has been trying to deal with various forms of discrimination based upon race or ethnic origin. What we see is a Congress that has attempted one

approach and where it has found that that approach has not achieved the objective that was desired, seeking other approaches.

And the voting rights area I think is a perfect example, starting with the 1957 Voting Rights Act and moving up to the 1965 Voting Rights Act, and then amending that Act in 1975. We see that in the Employment Discrimination legislation in 1964 dealing with private discrimination in employment; and then in 1972, dealing with discrimination by State and local government and by the Federal Government. This search has also been true with respect to minority business enterprises, starting with more general good faith requirements and then moving to this particular provision that constitutes a minority set-aside or a 10-percent division.

QUESTION: If we put to one side just for the moment the justification as remedy for past discrimination, do you think the set-aside could be justified on the theory that Congress might have thought it good for the economy and the community as a whole to have greater minority participation in the construction industry, entirely apart from past discrimination?

MR. DAYS: I think that Congress could do that. I don't think we have to make --

QUESTION: You haven't made that argument.

MR. DAYS: We haven't made that argument, because

I don't think it is necessary.

QUESTION: That would justify the statute even though your opponent describes it as a "piece of the action" theory.

MR. DAYS: Well, Mr. Justice Stevens, it is really very difficult to write on a clean slate when we are talking about minority business enterprises in this country.

QUESTION: Well, I don't know much about discrimination against -- we have talked about other groups: Aleuts, for example, and you know there are some that there may not have been a history, there may just have been a failure to participate. And I am asking you whether you think the Congress could address the problem of the failure to participate even if there is nothing invidious about the history.

MR. DAYS: I think so. Under the 5th Amendment I think Congress has a very broad authority to insure that Federal funds are not used in a discriminatory manner or somehow supports discrimination that is out in the world.

QUESTION: So one of the problems about resting entirely on past discrimination is that the beneficiaries of the legislation may well be people quite different from those who have suffered the most through history.

MR. DAYS: I think that is correct, and that is why I am perfectly comfortable making the argument that you suggest, that the power of the Congress goes beyond remedying specific

identifiable discrimination.

But that is not this case. We think that this case can stand very fully on evidence of past discrimination and it may not be necessary for this Court to reach that particular consideration in the context of this record in this case.

QUESTION: Do you think there has been past invidious discrimination against the Aleuts?

MR. DAYS: Well, Your Honor, I could not expatiate for a very long time on that particular issue. But I think that for people who are familiar with the Alaskan area and the Aleutian Islands area, and certainly there are Representatives in the Congress from that area and there have been considerations by other Government agencies in the Executive branch, that is a reasonable conclusion. I see nothing in the record or anywhere else that would rebut the assumption there was discrimination against those --

QUESTION: It is basically up to Congress, then, who is going to be included?

MR. DAYS: That is right. It is its unique competence to make these types of broad determinations beyond what accord any administrative body --

QUESTION: It evalutes the past invidious discrimination or failure to get a piece of the action?

MR. DAYS: Yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentleman. The case is submitted.

(Whereupon, at 11:13 o'clock, p.m., the case in the above-entitled matter was submitted.)

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