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Adarand Constructors, Inc. v. Peña: Reflections on an Appearance Before the United States Supreme Court

*William Perry Pendley**

THE SETTING

*Adarand Constructors, Inc. v. Peña, et al.*¹ had its origins in 1969 when President Richard Nixon signed an Executive Order requiring federal agencies to implement what we now call affirmative action. Less than 10 years later, when Congress considered the Public Works Employment Act (PWEA)—a \$4 billion economic stimulus program—Congressman Parren Mitchell (D-MD) offered an amendment to set aside a portion of the program for minority business enterprises. As part of his justification for the non-controversial nature of his proposal, he asserted that his program was one building upon prior administrative practice. In the sponsor's words, "The first point in opposition will be that you cannot have a set-aside. Well, Madam Chairman, we have been doing this for the last 10 years in Government."²

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1. 115 S. Ct. 2097 (1995).

2. 123 Cong. Rec. 5327 (1977).

It may not have been controversial to Congressman Mitchell, but it was controversial to many Americans who thought it violated the Constitution's guarantee of equal protection. Less than a month after the regulations implementing the PWEA were finalized, a facial challenge to the statute's constitutionality was filed in New York City. In 1980, that lawsuit—known as *Fullilove v. Klutznick*—reached the U.S. Supreme Court.³ In an opinion by Chief Justice Warren Burger, the Court upheld the set-aside provision, citing both the limited extent and duration of the program as well as its flexibility.

THE YEAR OF 1989

Nearly a decade after *Fullilove*, three separate events took place that would have a bearing on affirmative action.

First, in the case of *J.A. Croson v. City of Richmond*,⁴ the Supreme Court declared that Richmond's race-based set-aside program was unconstitutional. Although Justice O'Connor's majority opinion was deferential as to what Congress might do regarding racial matters given Congress' unique powers, it was clear that states and local governments could not undertake race-based remedies without meeting two very demanding tests: (1) the program had to serve a compelling governmental interest, and (2) the remedy selected had to be narrowly tailored.

Second, Mountain States Legal Foundation (MSLF) was in the midst of its challenge of the State of Utah's implementation of a federal highway construction program in *Ellis v. Skinner*,⁵ a case that I took over when I came to Denver in 1989 to become MSLF's President and Chief Legal Officer. Litigating on behalf of a highway subcontractor, MSLF took the position that before Utah could implement the 10 percent set-aside adopted by Congress, Utah had to determine that the 10 percent quota was justified in Utah. Since Utah's minority population was only 6 percent, MSLF argued that the 10 percent quota could not be justified.

We saw *Ellis v. Skinner* as falling somewhere between *Fullilove*, and its holding that Congress could utilize race-based remedies, and *Croson*,⁶ and its holding that state and local governments could not use such race-based programs without fact finding. Although we were ultimately unsuccessful in *Ellis v. Skinner*, as we studied *Croson* in preparation for *Ellis*

3. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

4. 488 U.S. 469 (1989).

5. 753 F.Supp. 329 (D.Utah 1990), *aff'd*, 961 F.2d 912 (10th Cir. 1992).

6. 488 U.S. 469 (1989).

we reached an inescapable conclusion: the Supreme Court appeared ready to reconsider the result in *Fullilove*. We decided to find a case that would permit a direct challenge to a congressional race-based program.

Third, in 1989, the Central Federal Lands Highway Division (CFLHD) of the Federal Highway Administration and the U.S. Department of Transportation issued a solicitation for bids to construct nearly five miles of highway along the West Dolores River in Montezuma and Dolores Counties in extreme southwestern Colorado. Subsequently, the winning bidder sought a subcontractor to perform the guardrail portion of the contract. Although Adarand Constructors, Inc., a small, family-owned business located in Colorado Springs, Colorado, operated by Randy Pech, submitted the lowest bid, it was denied the subcontract.

Instead, the guardrail subcontract was awarded to a business certified as a "Disadvantaged Business Enterprise" (DBE) under a federal program that, in this case, provided a \$10,000 bonus to the prime contractor for awarding the contract, not to the lowest bidder, but to the lowest minority bidder. For Randy Pech, the loss of the West Dolores Project was the last straw. He came to MSLF to ask if we would represent him in suing the federal government.

When Randy Pech walked in our door, we realized we had our direct challenge to a federal program. After meeting with Randy and getting to know him, we also realized we had the perfect client—a genuine nice guy who, through no fault of his own, had just finished last. We told Randy we would take his case. We also told him that we were going to lose at the district court; we were going to lose at the court of appeals; but that maybe, just maybe, if we were really lucky, the Supreme Court would hear his case. On August 10, 1990, a year to the day after the CFLHD issued its solicitation on the West Dolores Project, Randy Pech filed his lawsuit.

PLEADINGS BEFORE THE COURT

The prediction we gave to Randy Pech was right. Both the U.S. District Court for Colorado⁷ and the U.S. Court of Appeals for the Tenth Circuit⁸ made short work of our lawsuit. As far as they were concerned, the U.S. Supreme Court had answered our challenge with its decisions in 1980 in *Fullilove* and in 1990 in *Metro Broadcasting Corporation v. FCC*—in which the Court upheld the federal government's policy of

7. *Adarand v. Pena*, 790 F.Supp. 240 (D.Colo. 1992).

8. *Adarand v. Pena*, 16 F.3d 1537 (10th Cir. 1994).

awarding some television broadcast licenses on the basis of race.⁹ Those decisions, held the Tenth Circuit, required application of intermediate, not strict, scrutiny in reviewing a race-based program adopted by Congress. Under that standard, the program passed. We disagreed. We thought Randy Pech's case deserved a closer look.

Contrary to what Chief Justice Burger foresaw regarding the future of race-based decision making by Congress in his opinion in *Fullilove*,¹⁰ the race-based remedy adopted by Congress in 1977 was limited neither in extent nor duration. For people like Randy Pech, Congress' policy of awarding contracts based on race, which began with the adoption of the PWEA in 1977, continued. In 1982, Congress adopted the Surface Transportation Assistance Act (STAA); superseded in 1987 by the Surface Transportation and Uniform Relocation Assistance Act (STURAA); and in turn replaced in 1991 with the Intermodal Surface Transportation Efficiency Act (ISTEA).

Although the Small Business Act (SBA), which had its own affirmative action program, required the President to set aside at least 5 percent of all contracts for "socially and economically disadvantaged enterprises" (DBEs), STAA, STURAA, and ISTEA set the minimum level at 10 percent. In addition, federal agencies were required to provide a "maximum practicable opportunity" for DBEs to participate in government contracts. As a result, the CFLHD set its own DBE goal at between 12 percent and 18 percent of its contracts.

One of the methods the CFLHD utilized to achieve its goals was the Subcontracting Compensation Clause (SCC). Under the SCC, a prime contractor would be awarded a cash bonus of between 1½ and 2 percent of the amount of the contract if at least 10 percent of the work was performed by a certified DBE. It was the SCC provision that was the inducement for the prime contractor in *Adarand* to award the guardrail contract, not to Adarand, but to a DBE. In fact, the prime contractor signed an affidavit stating that, "but for" the SCC bonus payment, the guardrail work would have been awarded to Adarand.

Even more troubling than the bonus payment, which was made on the basis of race, was Congress' definition of "socially and economically disadvantaged." Congress presumed that all "Black Americans, Hispanic Americans, Native Americans, [and] Asian Pacific Americans" were "socially and economically disadvantaged" regardless of their social

9. 497 U.S. 547 (1990).

10. 448 U.S. 448 (1980).

background or economic status.¹¹ In fact, state agencies were instructed, in certifying businesses as DBEs, to “rel[y] on this presumption” and “not [to] investigate the social or economic status of individuals who fall into one of the presumptive groups.”¹²

In *Fullilove*, Chief Justice Burger wrote that although Congress’ program “may press the outer limits of Congressional authority,” there was still “no basis for striking it down.”¹³ In our view, the Congressional program in *Adarand* went beyond the breaking point. Thus, when we filed our Petition for Writ of Certiorari, we asked three questions: (1) whether “strict scrutiny,” rather than “a lenient standard, resembling intermediate scrutiny,” is the proper standard to determine the constitutionality of a race-based program adopted by Congress; (2) whether broad-based societal discrimination, rather than clearly identifiable discrimination perpetrated by a government entity, is a sufficient basis for the adoption of a race-based program; and (3) whether the CFLHD was required to conduct a factual inquiry before it adopted a race-based goal in excess of that approved by Congress.

Much to the surprise of the U.S. Government, whose Brief for the Respondents in Opposition gave our petition the back of the hand—a point of view we sought to refute with our reply brief—on September 26, 1994, the Supreme Court agreed to hear our case.

THE BRIEFING SCHEDULE

After the Court notified us that *Adarand* would be heard, in the telephone call every lawyer dreams of receiving, we were advised that all briefs had to be filed before Christmas. After we filed our Petitioner’s Brief, the Government responded with its Brief for the Respondent, this time taking the matter a little more seriously, as indicated by the heft of the Government’s document.

The Government’s brief devoted substantial attention to an issue it had not raised before: whether *Adarand* had standing to challenge the statute’s presumption that all members of the enumerated racial groups are “socially and economically disadvantaged.” In addition, the brief sought to obfuscate the facts of the case, insisting, contrary to federal law and regulations, that the program turned on “disadvantage” not “race.”

11. 15 U.S.C. § 637(d)(3)(C).

12. 49 C.F.R. Pt. 23, Subpt. D, App. A, at 216 (1992).

13. 448 U.S. at 490.

There were other briefs filed in *Adarand*, by those who wanted to weigh in on one side or the other. Six entities filed *amicus curiae* (or friend of the court) briefs in support of *Adarand*, including three conservative legal foundations, a trade association, a group of fencing subcontractors, and a local chapter of The Federalist Society.

One of my frustrations, as the head of an organization that often files *amicus curiae* briefs, is that those briefs seem to fall into a black hole once printed and sent to the Court. I vowed that, if possible, I would reference supporting *amici* briefs during oral arguments. To that end, I identified aspects of each supporting *amicus* brief to which I could draw the Court's attention. I batted 0.500 in that effort, citing to three of the briefs, one of them twice.

On the other side, there were fifteen *amicus curiae* briefs in support of the U.S. Government. The filing of an *amicus* brief before the Supreme Court is not for the faint of heart; we were told the legal fees for such a filing could reach \$30,000.

MOOT COURT DRESS REHEARSALS

After the briefs were filed, we began preparing for oral arguments now scheduled for January 17, 1995. We were assisted by friends with Pacific Legal Foundation in Sacramento, California, where we traveled just prior to Christmas for an early moot court; and The Heritage Foundation in Washington, D.C., which hosted two moot courts attended by some of the top conservative lawyers in the Nation's Capitol. MSLF attorneys also conducted one final moot court practice the Saturday before the argument.

Perhaps the greatest value of moot court practice is not the anticipation of questions that will be asked, so as to have a ready and rehearsed answer, but the crafting of answers that are concise and to the point. Since each side only has 30 minutes to respond to questions, the shorter and more direct the answers, the more questions that can be answered. (One justice is reputed to have scolded an attorney slow in responding that there were only four possible answers: "yes," "no," "I don't know," "I don't want you to know.")

The best advice I got during moot court practice was that when I reviewed the material I should not dismiss an issue or possible question with an "I know that," but should instead say the answer out loud several times, until it becomes the best and most direct manner of answering the question. For although the facts may be there, the phrasing either isn't or

isn't precise enough for a well-crafted answer to the Court. I drove my wife and sons, and anyone else who was around me at the time, nuts by giving answers aloud, over and over. I hesitate to think what the people I passed on the street thought as I walked by, not only talking to myself, but responding!

Obviously, during the moot court practice we did anticipate some questions that were asked during oral arguments. One was in response to the U.S. Government's primary line of defense: That Adarand should have challenged the DBE status of the company that was awarded the guardrail contract. My response was on two levels: First, a question of public policy, and second, a matter of the real world.

The Constitution's guarantee of equal protection should not rest, I argued, on the backs of men like Randy Pech and his tiny company. When Congress adopts a program, the burden should be upon the U.S. Government to ensure that the program makes distinctions that are constitutionally permissible. At the very least, those who are the beneficiaries of such programs should be required to demonstrate that they possess the necessary qualifications. The Randy Pechs of the country should not be required to prove that a particular DBE is not qualified.

Furthermore, in the real world in which Randy Pech works, he is incapable of challenging the DBE status of his competitors. Neither does he possess subpoena power to obtain the necessary documents nor is there a forum for him to present those documents or other evidence on the record to challenge the findings of state or federal agencies. (This assumes there is an objective standard upon which to declare an entity "socially [or] economically disadvantaged," and there is not.) Even if Randy Pech could have taken the time out from his guardrail business to engage in such a challenge and was successful in decertifying one DBE, he would have to begin the process over again with the next DBE and the one after that, and on and on.

Moreover, had Randy Pech challenged the DBE status of the firm awarded the guardrail subcontract, the government contracting officer would have issued a stop-work order. Thus Randy Pech would have succeeded in infuriating the prime contractor who would find himself with equipment on site and no contract to perform. At the same time, the DBE, accused of a felony—being an illegal DBE—might well file a lawsuit against Pech.

Since the U.S. Government contended that the presumption that all members of the enumerated races are "socially and economically disadvantaged," must be challenged in order for a litigant to have standing.

Our ability to respond effectively as to why *Adarand* did not attempt to rebut the presumption was key to our success. When it was over we concluded that we had anticipated an important series of questions.

There were questions that we thought might be asked but never were. I feared, for example, a question on women business enterprises (WBEs). Although WBEs were not at issue in *Adarand*, I was concerned that the sensitivity of the subject had the potential to result in a major digression during oral arguments.

I was also concerned that I might be asked if *Metro Broadcasting*¹⁴ should be overturned. Although my personal opinion is that *Metro Broadcasting* is a disastrous and insupportable opinion, I did not want to convey the impression that I was before the Court on a public policy foray rather than on behalf of a client seeking narrow relief.¹⁵ Fortunately, the question never came.

Since several of the justices had written on the subject of race-based decision making by Congress, I had planned to quote from a number of justices in support of our position. However, I was advised that it is bad form to refer, by name, to a sitting justice since to do so draws that justice, perhaps unwillingly, into the fray. Nonetheless, I found some of those quotes or points much too good to abandon, especially in the heat of oral arguments. At such times I prefaced them with, "As members of this Court have written in the past"

One additional piece of advice I received occurred at the Friday afternoon moot court session. John Roberts, an old friend and former Deputy Solicitor General, asked me, as I stepped into the meeting, if I had a white shirt. "Yes," I replied. "Is it a button down?" he asked. "Yes, of course," I said. Said he, "You can't wear a button-down shirt in front of the Supreme Court."

I spent the rest of the afternoon searching for a white shirt with a plain collar as well as a laundry that would have my shirt available on Monday, a federal holiday, in time for oral arguments on Tuesday. I subsequently learned that the "prohibition" against button-down collars

14. 497 U.S. 547 (1990).

15. At least one commentator thought that approach to be highly effective: "Not all cases that have the potential for making history are best argued on a grand scale, with soaring rhetoric and sweeping principle. It can be a virtue, sometimes, for a lawyer to make a tightly confined plea, especially if it puts the other side very much on the defensive. William Perry Pendley did that by closely disciplining himself in arguing *Adarand Constructors, Inc. v. Federico Peña*. As a result, he made major trouble for his adversary, U.S. Solicitor General Drew Days III, in one of the most important cases of the Court term." Lyle Denniston, *Short on Content, Long on Precedent*, THE AMERICAN LAWYER, May 1995, at 81.

goes back to the day when Solicitor General Rex Lee appeared before Chief Justice Burger's Court. As the story goes, Mr. Lee had a button-down collar and received a phone call from the Chief Justice following his return from the Court. Ever since, attorneys passing through the Solicitor General's office have been on notice about button-down shirts.

While, on advice of counsel, I did abandon my button-down shirt, I still wore my cowboy boots.

JANUARY 17, 1995

Monday, the day before oral arguments was Martin Luther King Jr. Day, a federal holiday. There was a demonstration outside the Supreme Court over the decision of the Court to hear *Adarand*. I had wanted to take time out from my preparation to walk over and see the event—as a part of all that was happening on our case—but my wife Lis feared that I might be caught on camera or be identified as the attorney arguing the case and it might get ugly. I stayed away.

The morning of the argument, the line formed early outside the Court for public seating. By 6:30 a.m., there were people in line, including members of Randy Pech's family.

Inside, after checking in at the Clerk's Office, we were briefed by the clerk, Mr. William K. Suter. Dressed elegantly in tails, he could not have been more warm and friendly, as was his staff. They did their best to put us at ease, telling us exactly what was going to happen and alerting us to some things that might happen.

Mr. Suter reported, for example, that the Chief Justice sometimes gets out of his chair and steps behind the curtain to walk back and forth to ease his back pain. "Don't worry if he does that during your presentation," we were advised, "He can still hear the argument." I'm just as pleased the Chief Justice didn't leave during my argument, however.

We were also told that each justice has a microphone that has to be activated for the justice to be heard over the loudspeakers. Thus, we might hear the justice's unaided voice and then hear the justice over the sound system. While that didn't happen to me, something else did. Once, when Justice Kennedy began speaking, I did not recognize his voice, and since the sound was coming through the speakers I couldn't tell which justice was asking the question. I had to scan the bench before discovering who it was.

The courtroom was packed. Even former Justice William Brennan, the author of the Court's decision in *Metro Broadcasting*,¹⁶ was there. To the right, among the pillars, were the justices' law clerks. To the left, among the pillars, were the artists with their flip-up binoculars and sketch pads.

Although I had been in that courtroom on many occasions, this time was very different. I expected to be nervous and I was. I had spent weeks preparing: committing to memory every fact of the case, studying endlessly the relevant cases, rehearsing answers to the anticipated questions, and memorizing citations to the record. (One of the best pieces of advice I received was from a journalist. Tim O'Brien of ABC News said, "They may forgive you for not knowing the law—that's their job. But they'll never forgive you if you don't know every single fact of the case. That's clearly your job!")

An appearance before the Supreme Court involves two audiences. Of course there are the nine justices. Unlike any other branch of the federal government—and I have worked with both the Executive and Legislative branches—the Supreme Court is a unique opportunity, not only to be heard by senior officials, but to get a decision, one way or the other. Even if one is able to be heard by a Member of Congress, a Senator, or even an important committee, there are still 534 other Members and Senators as well as thousands of staffers. In the Executive Branch, even a meeting with the head of a department or agency does not assure the decision will leave that office, let alone be agreed to by the other agencies that have veto power.

Once before the Supreme Court, one is assured that those sitting on this, the hottest of all hot courts, will have read and studied the briefs and prepared questions. Within the week, the nine justices, and only the justices, will gather in the Chief Justice's Conference Room to decide the case. (How refreshing for a "principals only" meeting and decision.) Within a few weeks, that decision will result in a written opinion setting forth exactly why the Court ruled as it did. Given the rarity of an appearance before the Supreme Court (only two to three percent of cases seeking Supreme Court review are granted certiorari) and given its importance, every attorney wants to do well and to win.

There is another audience. Seated just between the bar and the justices are attorneys admitted to practice before the U.S. Supreme Court. On most days, they are primarily from Washington, D.C., veterans of many appearances before the Court, or at least thoughtful observers of

16. 497 U.S. 547 (1990).

years, even decades, of oral arguments. These are the folks who can be seen leaving the Court flipping open their cellular telephones to call colleagues across the country to report on the argument just concluded.

No wonder I was nervous, fearful that I would forget some fact, figure, citation, cogent analogy, or carefully crafted phrase during the heat of oral argument. I had one additional reason for nervousness. The night before I had developed a cough that days later became a fullblown episode of the flu. On the walk over to the Court from our hotel with my wife Lis and my sons Perry and Luke, I could feel the scratchiness in my throat and the weakness in my voice. Momentarily I worried that in the midst of oral arguments my voice would be gone. I don't know which made me the more nervous, the fear of the loss of memory or loss of voice! However, once I stepped to the podium and my presentation began, both fears disappeared and my nervousness vanished.

The tension was high in the Courtroom. There are generally two arguments in the morning and two in the afternoon. Since the second follows the first almost immediately, the second set of attorneys are seated at the tables just behind the ones directly before the justices. I would hate to be the second case up. A MSLF attorney noticed one of the attorneys at the second table slowing turning the pages of his three-ring binder as he studied his materials for one last time. Slowly, carefully, and quietly he turned the pages. At one point a page became stuck on one of the rings. He sought gently to unloosen the page, but it would not budge. As he did so his hand began to shake. His colleague, noticing his difficulty, reached over to steady his partner's hand, only to have his hand begin to shake as well.

While I had anticipated the nervousness, I was unprepared for the emotional sense of awe that swept over me as I sat at the table awaiting the entry of the justices. Done studying and reviewing, I looked around the Courtroom, taking it all in, wanting to savor and to remember it. Suddenly, I found myself almost overwhelmed by emotion. Only in America, I found myself thinking, could the son of a railroad man from the Ozarks of Arkansas and a nurse from Appalachia in Kentucky, neither of whom went beyond the sixth grade, be standing before the Supreme Court. I was stirred from my reverie when the Marshal cried out, "Oyez! Oyez! Oyez!"

ORAL ARGUMENTS—ON BEHALF OF THE PETITIONER

After some procedural matters, primarily the swearing in of attorneys admitted to practice before the Supreme Court, including my wife,

Lis, and three MSLF attorneys (Todd S. Welch, Steven J. Lechner, and Joanne Herlihy), the Chief Justice began: "We'll hear argument first this morning in Number 93-1841, *Adarand Constructors Inc., v. Federico Peña, Secretary of Transportation*."¹⁷ In accordance with the instructions of the Clerk, I moved quickly to the podium and was standing there looking across the mere six feet that separated me from the Chief Justice when he said, "Mr. Pendley."

I had prepared several sets of opening remarks. I knew that I had precious little time to speak before the questions began so I wanted to have the maximum impact. However, during the course of moot court practice sessions, each of my openings had been shot down. Finally, one veteran of numerous appearances told me, "You want the Court to realize who you're representing. Your client isn't a huge corporation, but a mom and pop outfit. Let them see who these people are."

That's what I did. It was good that I kept what I wanted to say short. Nine sentences into my opening Justice Scalia began the questioning that never ended. For the record, this is what I said:

Mr. Chief Justice and may it please the Court: Adarand is a small, family-owned corporation that does business in Colorado Springs, Colorado. It is owned by and operated by Randy Pech, his wife Valerie, his mom Ruth, and their friend and Partner, Steve Goeglein.

In the year surrounding the events that led to this action, Adarand's annual average gross receipts were approximately \$900,000, but their average annual net profits were but \$30,000. In fact, in the year before this event, they had a net negative cash flow of \$20,000.

Adarand specializes in the construction of highway guardrails, primarily as a result of the receipt of subcontracts from prime contractors. In 1989, Adarand submitted a bid to do the guardrail work on the subcontract as a subcontractor along 4.7 miles of highway in the San Juan National Forest in extreme Southwestern Colorado.

Although it submitted the lowest bid, and although it has an excellent reputation for doing quality work on a timely basis, its bid was rejected by operation of the statute questioned here, a statute which presumes that all members of certain enumerated racial and ethnic groups are socially and economically disadvantaged.

17. For a transcript of the oral arguments see 1995 WL 61020.

Adarand challenged the constitutionality of the statute both on its face and as applied to him in the loss of this \$20,000 contract.

Prior to an appearance before the Supreme Court, each attorney receives a document from the Court containing both rules of procedures as well as friendly advice and suggestions. In the former category is the instruction to refer to the justices as “Your Honor” or “Justice” but never “judge.” In the latter category is the admonition not to call a justice by name unless certain of the justice’s name. I was certain enough to do so which is a good thing since the official transcript of oral arguments does not contain the name of the justice asking the question.

The Court document also cautions attorneys to bring only one large notebook to the podium, adding, it is always impressive if the attorney steps to the podium with no notes. For the weeks prior to oral arguments I periodically terrified my wife, Lis, by threatening not to take any notes to the podium. As it was I carried two yellow legal pads. I could have just as well left them at the table since I never referred to them.

Another aside in the Court document is the observation that it is always “impressive,” that word again, for counsel to cite, from memory, the pages of the various appendices to which counsel wishes to draw the Court’s attention. That I did do, spending most of one afternoon—during the NFL playoff games—committing to memory the pages of the documents I thought I might be discussing. One thing about the justices on the Supreme Court, when an attorney refers to a page in the briefs or appendices, they reach for the documents, sometimes challenging the attorney’s assertion as to what proposition the cited page supports.

All the justices, except Justice Thomas, had questions for me. One observer, a former member of the Office of the Solicitor General and an old hand before the Supreme Court, paid me the highest compliment, “Your presentation was flawless. It was yours to lose and you didn’t lose it.”

He told me that those appearing before the Supreme Court for the first time usually make one of two mistakes. Either they are, in his words, “bombastic yahoos,” or they are so deferential to the Court that they yield in response to every question until they have nothing left of their case. As to the latter type of mistake, the testing time came for me during some pretty tough questioning by Justice Ginsburg. She and I

clearly disagreed on the nature of the statute challenged in *Fullilove*.¹⁸ Despite her persistent inquiry, I stood my ground. I'm not saying it was easy, but I thought I was right and held firm.

Despite the tension and the tough questioning, the session was not without its humorous moments. At one point, Justice Souter asked, "Did your complaint specify the presumption as being the floor in the statutory scheme, or the clause as being the floor." I was dumbfounded. My mind was reeling. The floor? Did he mean the 5 percent required of all federal agencies, or the 10 percent the CFLHD required to use the SCC, or the 12 to 18 percent of its contracts that the CFLHD sought to award to DBEs? Finally, after mere nanoseconds had passed, I realized any answer I gave would be wrong and would consume precious time. "The—excuse me, Your Honor, the floor as to the—" I mumbled, hoping for clarification.

"No, I—flaw—" Justice Souter responded.

"Oh, flaw," I said.

"The constitutional infirmity. I'm sorry It's my regional accent."

Laughter swept through the Courtroom and the tension that had built up was dissolved with it. When quiet had been restored, I leaned into the microphone, "No, Justice Souter, it's my hearing."

At 25 minutes into my argument, the white light on the podium went on to signal I had 5 minutes left. I wanted to reserve all of that time for rebuttal. Although counsel can place a request with the Clerk for an earlier blinking white light, I had been urged not to do so since in the heat of the moment I might become confused. Frankly, 5 minutes was all I thought I needed. I had also been warned that some justices seem to regard the white light as their signal to ask thoughtful and imponderable two-minute questions. Thus, when the light went on I hurriedly uttered, "Mr. Chief Justice, I reserve the remainder of my time," and slipped into my seat.

ORAL ARGUMENTS—ON BEHALF OF RESPONDENTS

Drew S. Days, III, is the Solicitor General of the United States. He, or a representative of his office, appears before the U.S. Supreme Court on behalf of the United States. For the top graduates from the nation's best law schools who seek positions in the U.S. Government, a position in the Office of the Solicitor General is the number one choice.

18. 448 U.S. 448 (1980).

In addition to the remarkable legal skills available to him Drew S. Days, III, is personally impressive. An honors graduate of Hamilton College in Clinton, New York, he received his LL.B. degree from Yale University. Prior to becoming Solicitor General he was Professor of Law at Yale University School of Law. Most impressive to me was the fact that as Assistant Attorney General for Civil Rights, he had argued and won *Fullilove v. Klutznick*.¹⁹

Yet despite his skills and experience, I believed we had an advantage. Before the Colorado federal district court, we had dealt with a number of attorneys, some from the U.S. Attorney's office in Denver and others from the U.S. Department of Justice. When the matter proceeded to the U.S. Court of Appeals for the Tenth Circuit, an additional set of attorneys became involved. In fact, just prior to oral arguments before the Tenth Circuit, as I stood outside the courtroom awaiting the calling of our case, a woman came running down the hall. She slowed as she approached me and asked, somewhat breathlessly, whether this was the courtroom for *Adarand v. Peña*. I told her that it was and that she had plenty of time. The case had not yet been called.

It turned out she was an attorney from the Appellate Division of the U.S. Department of Justice. Not even on the briefs, she had been tapped the previous day to fly out to Denver to argue the government's position in *Adarand*.²⁰ She was a lot more relaxed than I would have been under similar circumstances. She saw it as no big deal and she was right: the Tenth Circuit quickly brushed our appeal aside.

When the Supreme Court granted *certiorari* in *Adarand*,²¹ the case became the responsibility of the Office of the Solicitor General and an entirely new group of attorneys turned their attention to it. In fact, it was attorneys in the Solicitor's office who developed what became the government's major strategy before the Supreme Court: *Adarand* had no standing because it had not shown that the Gonzales Construction Company was a DBE as a result of race—and thus the statute's presumption—not disadvantage. It was a clever gambit, although one lacking in merit, not to mention the fact that the government had never raised the issue in the lower courts.

To my mind the standing issue demonstrated the advantage that private counsel has even before the Office of the Solicitor General. We had lived and breathed the case for nearly five years. There wasn't an

19. *Id.*

20. 115 S. Ct. 2097.

21. *Id.*

aspect of the case that we didn't know. For the Solicitor General's people, it was just one of scores of cases with which they would have to deal on a very short time frame. They could never know it as well as we did. I took great solace from that fact and also from the fact that, as brilliant and scholarly and experienced as was Drew S. Days, III, he could never have devoted the time to preparing for *Adarand* that I did.

When General Days stepped to the microphone, wearing his tuxedo and carrying his bound notebook, with its large typewritten, triple-spaced text, I turned to a new page on my yellow legal pad and prepared to jot notes for my rebuttal.

As with me, the questioning quickly turned to the other major aspect of the government's case: the government's assertion that the presumption that all members of enumerated minority groups were "socially and economically disadvantaged" was rebuttable.

When Justice Scalia asked if General Days was aware of any instance where a third party (such as *Adarand*) had challenged successfully a DBE's status, the Solicitor General hesitated and looked to his right. Unlike most courtrooms, where co-counsel is nearby, in fact, almost shoulder to shoulder with lead counsel, in the U.S. Supreme Court the grand nature of the courtroom makes for vast distances between the lawyers. Since the counsel table—at which is placed the podium as well as chairs for three attorneys for each side—is nearly as long as the bench where the justices sit, it is impossible to communicate in stage whispers and even the passing of notes is somewhat awkward. Thus the Solicitor General's co-counsel half stood to pass a document to General Days in response to Justice Scalia's question.

"Yes, I am. We have cited in our brief, for example, a challenge" General Days responded.

After a couple of exchanges, Justice Scalia bore in, "Do you have any example where somebody in the position of *Adarand* successfully . . . brought a challenge? Do you know of any?"

"It's very hard, Justice Scalia, to identify that, because"

"You don't know of any," interrupted Justice Scalia. "That's correct," Days admitted.

Chief Justice Rehnquist sought to nail down the answer. Had competing subcontractors ever challenged an entity's DBE status? When General Days began to equivocate, the Chief Justice interrupted, "You can answer that yes or no, General Days." The answer was "No."

PETITION ON REBUTTAL

When I stepped up to the podium, the Chief Justice announced matter of factly, “Mr. Pendley, you have four minutes.”

I had jotted down notes during the Solicitor General’s presentation. I wanted to hit him hard on what I regarded as his substantive misrepresentations or distortions of the record.

It’s funny how the mind plays tricks on your memory. I only remember one set of questions by Justice Stevens—regarding the basis for Gonzales’ DBE certification—but the transcript reveals that there were questions from the other justices as well. Then suddenly the red light was on and it was over. Chief Justice Rehnquist intoned, “The case is submitted.”

THE MEDIA AND ADARAND

Outside the Supreme Court building, Randy Pech and I walked down the stairs toward the knot of reporters gathered in their traditional spot on the far southwest corner of the Supreme Court grounds. Standing shoulder to shoulder before an impressive array of microphones we responded to questions we’d heard hundreds of times before. While still warily on guard—members of the media may be friendly but they are not your friends—there was something relaxing about responding this time. The oral argument was over.

That morning only one questioner was out of line. He asserted twice—it wasn’t really a question—that officials were required to ascertain the economic status of those designated DBEs. Twice I told him they weren’t; that race and race alone determined DBE status.

Generally, the media was good to us, both before and after our appearance before the Supreme Court. There were several reasons. First and foremost, we had an excellent client. Not only did Randy Pech present us with the right case to challenge a federal race-based program, he was the perfect client. Randy is a kind, gentle, soft-spoken, generous man who is extremely articulate regarding why he decided to file his challenge. On the sensitive issue of race, a client like Randy is essential. He made our job in dealing with the media a snap.

Second, we were dealing with a human interest story, the story of how Randy and his wife, Valerie, his mom, Ruth, and his friend Steve Goeglein had sought to build a business from nothing. Like millions of other Americans with a dream, all Randy and the others wanted was to

work hard, to be left alone, and to be given the chance to succeed. Yet they were not left alone. Instead, a federal program adopted by people thousands of miles away had decided that, despite their hard work, despite the fact that they had done nothing wrong, they were going to pay the price for a social program. The media likes such stories, and we had a great one to tell.

Third, something had happened in America in the weeks and months following the Supreme Court's decision—on September 26, 1994—to hear our case. Six weeks after the Court decided to grant *certiorari*, the American people rendered their conservative decision. One of the issues that played a part in the election—according to pundits like David Frum, author of *DEAD RIGHT*—was the matter of affirmative action.²² A short time later the California Civil Rights Initiative—which would compel race-neutral decision making by the nation's largest state and is all but guaranteed a place on the ballot in 1996—was announced. Then commentators from both ends of the political spectrum weighed in against race-based decision making. From the left, Richard Cohen of *THE WASHINGTON POST*, wrote, “[Affirmative action] has outlived its usefulness [I]t violates the American creed that we must be judged as individuals, not on the basis of race or sex”²³ From the right, Pat Buchanan said, “[I]t's time to make law in America what it always should have been in the Land of the Free: color blind. Wasn't that the dream?”²⁴ Finally, five weeks after we appeared before the Supreme Court, President Clinton announced an “intense, urgent review” of affirmative action. As a result we have been blessed with generally favorable media examination of our case.

The only written report in which we might have been cast in a bad light was perhaps inadvertent. In *U.S. NEWS AND WORLD REPORT*,²⁵ a short article appeared the week following oral arguments that contained a photograph of Randy Pech and me with the Supreme Court in the background. It's a great photograph. However, the caption reads, “Pech (left) and lawyer.” My son Perry said, “Dad, they didn't even include your name.” That's not the worst of it. That was the issue whose cover

22. Conference sponsored by Project for the Republication Future on November 11, 1994, in Washington, D.C.

23. Richard Cohen, *Affirmative Action Has Outlived Its Value*, Washington Post Writers Group, *THE DENVER POST*, February 1, 1995.

24. Patrick Buchanan, *Affirmative Action is the Remedy of Yesteryear*, *THE CONSERVATIVE CHRONICLE*, January 20, 1995, at 10.

25. *Laws by Congress and Now for Congress, Affirmative Action Under Seige*, *U.S. NEWS & WORLD REPORT*, Jan. 30, 1995, at 10.

showed Lady Justice being toppled by rats (dressed in suits and ties—lawyers no doubt) with the caption, “How Lawyers Abuse the Law.” Hardly the issue in which to be described as “lawyer.”

THE DECISION—VICTORY ON ALL COUNTS

On June 12, 1995, I was in Washington, D.C., on other business. Knowing that the Supreme Court would announce some decisions—although not necessarily the one in *Adarand*—I walked over and sat down in the Courtroom.

After a number of attorneys were sworn into the Supreme Court bar, Chief Justice Rehnquist called upon several justices in turn to announce various decision of the Court. Much like a would-be attorney’s first day in law school, these men and women at the pinnacle of their legal careers gave a short, concise statement of the facts, the issue involved, the holding of the court, and the reasoning, as well as whether there were other concurring or dissenting opinions.

Then Chief Justice Rehnquist called upon Justice O’Connor to deliver two opinions of the Court, referring to each by number. I half listened to the first. Then, after reading the number of the second case, she called it by name: *Adarand Constructors, Inc. v. Peña*.

After a brief review of the facts, she announced what for me was the most important part of her remarks. The equal protection guarantee, she declared, protects individuals, not groups. She also set forth the three responses of the Court to the use of race by Congress: skepticism, consistency, and congruence. Then she dropped the bombshell: *Metro Broadcasting*,²⁶ decided a mere five years earlier, was overruled. By implication, so was *Fullilove*.²⁷ The bottom line: Congress had to meet the “strict scrutiny” test. When Justice O’Connor was finished, I slipped from the Courtroom to call home, then the office, then our client in Colorado Springs, to report the news every lawyer dreams of conveying, “We won at the Supreme Court.”

THE COURT’S RULING IN ADARAND

In the first paragraph of her opinion for the Court, Justice O’Connor noted that the Court of Appeals had rejected Adarand’s claim that the

26. *Metro Broadcasting Corp., v. FCC*, 497 U.S. 547 (1990).

27. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Government's construction program violates the equal protection component of the Fifth Amendment's Due Process Clause.²⁸ Then she wrote, "We conclude, however, that courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied. We therefore vacate the Court of Appeals' judgment and remand the case for further proceedings."²⁹

After reviewing the "complex scheme of federal statutes and regulations" "implicate[d]" by the "fairly straightforward facts" of the case,³⁰ and after determining that Adarand possessed the requisite standing "to seek forward-looking relief,"³¹ the Supreme Court, reflecting on the difference between the equal protection language of the Fifth Amendment ("No person shall . . . be deprived of life, liberty, or property, without due process of law") and the Fourteenth Amendment ("No State shall . . . deny to any person . . . the equal protection of the laws"), concluded it was "necessary to revisit the issue."³²

That review yielded "three general propositions with respect to governmental racial classifications:"³³

First, skepticism: "[A]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination," "[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect;" "[R]acial classifications [are] 'constitutionally suspect;'" "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." Second, consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification;" all racial classifications reviewable under the Equal Protection

28. *Adarand*, 115 S. Ct. at 2101.

29. *Id.* at 2101-02.

30. 115 S. Ct. at 2102.

31. 115 S. Ct. at 2104. To determine the standing necessary to seek forward-looking relief: "We therefore must ask whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Id.* at 2105. Concluded the Court:

Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

Id.

32. *Id.* at 2106.

33. *Id.* at 2111.

Clause must be strictly scrutinized. And third, congruence: "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."³⁴

Justice O'Connor concluded:

Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.³⁵

Justice O'Connor then turned her attention to what she referred to as the "surprising turn" taken by the Court in its 1990 decision in *Metro Broadcasting*.³⁶ In O'Connor's view, the use, by the *Metro Broadcasting* Court, of "intermediate scrutiny" to review congressionally mandated "benign" racial classifications that serve the "important governmental objective" of "enhancing broadcast diversity" departed from prior Court holdings in two important respects.³⁷

First, it ignored the holding of *Croson* that strict scrutiny must be used to "smoke out" "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics" and to determine that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."³⁸

Second, *Metro Broadcasting* "squarely rejected" the Court's earlier requirement for "congruence between the standards applicable

34. *Id.* (citations omitted).

35. *Id.*, For emphasis, Justice O'Connor repeats Justice Powell's defense of this conclusion: If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.

Bakke, 438 U.S., at 299 (opinion of Powell, J.) (footnote omitted). *Id.*

36. *Id.*

37. *Id.* at 2112.

38. *Id.* (quoting *Croson*, 488 U.S. at 493) (plurality opinion of O'Connor, J.). Justice O'Connor made an interesting choice of the legal scholar quoted for that proposition: "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Drew S. Days III, *Fullilove*, 96 YALE L.J. 453, 485 (1987).

to federal and state racial classifications”³⁹ As a result, *Metro Broadcasting* “undermined” the other two propositions that emerge from the Court’s equal protection cases: “skepticism of all racial classifications, and consistency of treatment irrespective of the race of the burdened or benefited group.”⁴⁰

More importantly, ventured O’Connor, *Metro Broadcasting’s* attack on these three propositions threatens the basic principle of the Fifth and Fourteenth Amendments, that the protection guaranteed is for “*persons*, not *groups*” and that it is a “*personal* right to equal protection of the laws [that may not be] infringed.”⁴¹ All of which led the Court to hold:

[T]hat all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.⁴²

After addressing aspects of the lead dissent filed by Justice Stevens—primarily by offering up portions of Stevens’ powerful attack on race-based decision making in his dissent in *Fullilove* and his concurring opinion in *Croson*—Justice O’Connor turned to the matter of *stare decisis*.⁴³ Concluding that *Metro Broadcasting* “itself departed” from the Court’s prior holdings, and did so “quite recently,” “we cannot adhere to our most recent decision without colliding with an accepted and established doctrine.”⁴⁴ Finally, as to the matter of *stare decisis*, Justice O’Connor noted “[t]here is nothing new about the notion that Congress,

39. 115 S. Ct. at 2112.

40. *Id.*

41. *Id.* at 2112-13.

42. *Id.* at 2113. The Court also effectively reversed *Fullilove*: “Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling.” *Id.* at 2117.

43. *Id.* at 2113-2114. The most devastating portion of Justice Steven’s dissent offered up by Justice O’Connor is the following:

Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.

Fullilove at 533-35, 537 (dissenting opinion) (footnotes omitted).

44. 115 S. Ct. at 2116, 2115. Justice O’Connor referenced criticism by commentators, *id.* at 2115, as well as the Court’s past practice in overturning recent decisions, *id.* This portion of Justice O’Connor’s opinion (Part I-C) was joined by Justice Kennedy.

like the states, may treat people differently because of their race only for compelling reasons.”⁴⁵

To emphasize that the Court’s opinion in *Adarand* is a simple return to “first principles,” Justice O’Connor wrote: “Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”⁴⁶ Yet strict scrutiny does not mean that government is “disqualified from acting in response” to “the practice and the lingering effects of racial discrimination against minority groups in this country”⁴⁷ Strict scrutiny “says nothing about the ultimate validity of any particular law.”⁴⁸ What it does say is that “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”⁴⁹

Noting that the Court’s decision in *Adarand* “alters the playing field in some important respects,” the Court remanded *Adarand* to the lower courts “for further consideration in light of the principles we have announced.”⁵⁰ Justices Scalia and Thomas filed concurring opinions,⁵¹ while

45. *Id.* at 2116.

46. *Id.* at 2117.

47. *Id.*

48. *Id.* at 2114.

49. *Id.*

50. *Id.* at 2118. The Court also saw a need for addressing unresolved questions “concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses,” including: whether a particularized inquiry into the economic disadvantage of a participant is required; whether race-based presumptions apply both to social and economic disadvantage; whether the definition of socially disadvantaged differs between the various Small Business Act programs; and whether any use of a subcontractor compensation clause can survive strict scrutiny, *Id.* at 2118.

51. *Id.* at 2118-2119.

Justice Scalia wrote that the government can never have a “compelling interest” for discrimination on the basis of race to “make up” for past wrongs. While wronged individuals “should be made whole,” under the Constitution, “there can be no such thing as either a creditor or debtor race.” *Id.* at 2118. “In the eyes of government, we are just one race here. It is American,” *Id.* at 2119. (Scalia, J., concurring).

Yet Scalia believes the challenged program will fail even under Justice O’Connor’s view of strict scrutiny. “It is unlikely, if not impossible, that the challenged program would survive I am content to leave that to be decided on remand,” *Id.*

Justice Thomas agreed with the majority’s conclusion that “strict scrutiny applies to *all* government classifications based on race.” Thomas wrote separately to disagree with the premise underlying the dissents of Justices Steven and Ginsburg. Writes Thomas, “Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.” “[T]he paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution [T]he equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society [Since] [t]hese programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences,” *Id.* (Thomas, J., concurring).

Justices Stevens, Souter, Ginsburg and Breyer filed various dissenting opinions.⁵²

THE AFTERMATH OF ADARAND

Media Response

The evening of June 12, 1995, news of the Supreme Court's decision in *Adarand* was the lead story on all three networks. All three reported the decision as a landmark. Obviously, any decision that overturns two earlier Supreme Court rulings and that compels Congress to meet a much higher standard when adopting federal legislation cannot help but receive such a reaction. Add to these factors the always controversial issue of race and the response of the national media is not surprising, although its choice of rhetoric did more to inflame than to inform.

Said Peter Jennings of *ABC World News Tonight*:

We begin tonight with one of the hottest political and social debates in the country today: affirmative action and racial discrimination. The Supreme Court has handed down two enormously important civil rights decisions today [In *Adarand*] the power of the federal government to encourage the hiring of minorities will be quite severely limited.⁵³

Reported Dan Rather of *CBS Evening News*:

The United States Supreme Court delivered a significant roll back of civil rights law enforcement today on two fronts: in the work place and in the class room. The Court set new restrictions on federal affirmative action programs designed to fight job discrimination.⁵⁴

Intoned Tom Brokaw of *NBC Nightly News*:

52. Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined. Justice Souter filed a dissenting opinion in which Justices Ginsburg and Breyer joined. Justice Ginsburg filed a dissenting opinion in which Justice Breyer joined. *Id.* at 2120-2136.

53. Peter Jennings, *ABC World News Tonight*, June 12, 1995.

54. Dan Rather, *CBS Evening News*, June 12, 1995. Mr. Rather's statement ignores the fact that the 250 attorneys in the Civil Rights Division of the U.S. Department of Justice will continue their vigorous enforcement of civil rights laws, including job discrimination.

The fuse that has been burning toward an explosive political confrontation on affirmative action in this country is burning even faster tonight. The U.S. Supreme Court, in a ruling on federal programs designed to help minorities, set new, tougher standards. Those standards make it much more difficult for affirmative action.⁵⁵

The next morning, *Adarand* was the top of the front page story on every major newspaper in the country. THE NEW YORK TIMES headlined: "Justices, 5 to 4, Cast Doubts On U.S. Programs That Give Preferences Based On Race—Debate Is Fueled—Rigorous Criteria Set for Court's Approval of Such Programs."⁵⁶ Joan Biskupic, beneath a front page headline in THE WASHINGTON POST that read, "Court Toughens Standard for Federal Affirmative Action," wrote: "The Supreme Court . . . jeopardized a broad range of federal affirmative action programs with a ruling that set a tough new standard . . ."⁵⁷ THE WASHINGTON TIMES, beneath a headline that read, "Affirmative Action Dealt Blow by Court," reported, "The Supreme Court yesterday imposed strict new limits on politically charged federal affirmative-action programs and required agencies to justify every instance of reverse discrimination."⁵⁸

Within days, national commentators weighed in with their views regarding *Adarand*.⁵⁹ George F. Will, focusing on the concurring opinions in *Adarand*, wrote: "The nation's fundamental law would be improved by incorporating the Scalia-Thomas doctrine that such programs, being starkly incompatible with the equal protection guarantee, cannot be 'improved' to the point of constitutional respectability."⁶⁰ Radio talk show host and nationally syndicated columnist Ken Hamblin did the same: "But even more profound, in my opinion, was Thomas' comment: 'These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences.' Here, here."⁶¹ *Human Events* editorialized: "[C]all it a 'sea change' in how the [Supreme] Court now looks at the power that the

55. Tom Brokaw, *NBC Nightly News*, June 12, 1995.

56. Linda Greenhouse, *Justices, 5 to 4, Cast Doubts On U.S. Programs That Give Preferences Based On Race*, THE NEW YORK TIMES, June 13, 1995, at A6.

57. Joan Biskupic, *Court Toughens Standard for Federal Affirmative Action*, THE WASHINGTON POST, June 13, 1995 at A.

58. Frank J. Murray, *Affirmative Action Dealt Blow by Court*, THE WASHINGTON TIMES, June 13, 1995 at A6.

59. 115 S. Ct. 2097.

60. George F. Will, *Affirmative Action Ruling Settled Nothing*, CONSERVATIVE CHRONICLE, June 28, 1995, at 2.

61. Ken Hamblin, *Letting Go of Special Preferences*, N.Y. TIMES NEWS SERVICE, June 20, 1995.

federal government has to direct the lives of ordinary Americans, especially where race is concerned. [*Adarand*] clearly stunned those who thought the liberal orthodoxy that has ruled the High Court for so many decades would never be overthrown.”⁶² While all thought the decision incredibly important, James J. Kilpatrick went farther: “My own thought is that the *Adarand* decision is the most significant [of the three recent decisions of the Supreme Court regarding race]. It will put an end to all but the most carefully tailored state and federal laws according minorities special preference.”⁶³

Congressional Reaction

The public always leads the politicians. The American public seems to have its fill with policies that permit federal, state and local governmental agencies to make decisions based on race, while unleashing the power of the nation’s largest law firm, the U.S. Government, against those individuals and entities who make decisions on such a basis. The public does not believe people should be able to make decisions based on race. The public simply believes that the government should not either.

Nonetheless, Congress appears slow to respond to the growing national mood that race-based decision making is not only bad public policy but a violation of the equal protection guarantee of the Constitution. While bills to repeal the host of affirmative action programs written into federal law have been introduced in the U.S. Senate and the U.S. House of Representatives, these proposals have not emerged from the committees to which they have been assigned. While some elected officials have been courageous in their advocacy of color-blind legislation, others are demanding that current race-based federal laws not be repealed until they can be replaced with federal programs that provide federal assistance to members of minority groups, albeit in a manner that will survive strict scrutiny. Such half-way measures only delay what should be the inevitable; that is, elimination of all distinctions based on race while reducing government barriers that deny entry to small businesses and aggressively enforcing existing federal laws that prohibit discrimination on the basis of race.

62. *Editorial*, HUMAN EVENTS, June 23, 1995.

63. James J. Kilpatrick, *A judicial buck well passed by the Supreme Court*, CONSERVATIVE CHRONICLE, June 21, 1995.

During the Supreme Court's consideration of *Adarand*, the U.S. Government took the position that the major difficulties encountered by minority enterprises in doing business with the federal government were as follows: obtaining bonding, securing financing, getting paid by the prime contractor on time, and dealing with government paperwork. Obviously these are difficulties faced not just by people of color, but by all small businessmen and businesswomen. These barriers are a function of size, not a function of race. As a result, one of the most effective steps the federal government could take to make it possible for all Americans—including people of color—to participate in federal contracting is to reduce the artificial barriers the government has erected.

Thus Congress should do two things: first, reduce artificial barriers that prevent entry by small businesses, and second, insist upon aggressive enforcement of federal laws prohibiting racial discrimination by the Civil Rights Division of the U.S. Department of Justice. Whether Congress will do so remains to be seen. In the meantime, federal programs that permit race-based decision making by federal officials remain on the books. As a result, the burden of demanding that these programs adhere to the requirements of the equal protection guarantee of the Constitution falls upon private individuals.

A cursory review of the legislative history presented by the U.S. Government in *Adarand* in support of the decision by Congress to adopt the race-based program reveals little more than a collection of statements in support of the legislation by various senators and members of Congress. Only two specific instances of discrimination were set forth—one involving unions in New York, the other involving contracting officials in Chicago.⁶⁴ In short, the legislative history boils down to “We’ve been doing this type of thing for quite some time and we need to keep on doing it since it hasn’t met all of our objectives.” While one could arguably assert that the legislative history contains a “compelling governmental interest,” Congress did absolutely nothing to ensure that the program is “narrowly tailored.”

In its continuing refusal to revisit these programs to determine if they meet the “strict scrutiny” test, Congress has shirked its responsibilities. Those whose equal protection rights have been violated are left with the burden of seeking redress in federal court. As a result, the future of federal race-based programs will be fought out client by client, case by case, courtroom by courtroom. These battles will be very expensive, time-consuming, and burdensome to those who bring

64. Respondents' Brief at 9 n.9, 38 n.33, *Adarand v. Pena*, 115 S. Ct. 2097 (1995).

them, particularly given the intransigence demonstrated by the Clinton Administration in its response to *Adarand*.⁶⁵

The Clinton Administration

Five weeks and two days following oral arguments in *Adarand*, President Clinton announced a government-wide review of affirmative action programs.⁶⁶ It was an early, hopeful sign that, despite the President's political interest in continuing such programs, his Administration would take a thoughtful look at the programs, abandoning some, keeping others.

Such hopes were short lived. Five weeks and two days following the Court's decision in *Adarand*, President Clinton addressed a hand-picked audience—composed of the very organizations that had filed friend of the court briefs in favor of the federal government and against *Adarand*—at the National Archives. During his speech, President Clinton, much to the delight of his audience, embraced affirmative action. His remark to “mend it, don't end it,” was widely interpreted by the media as an indication that President Clinton would not move to the right on the issue of affirmative action. Although he did announce that his Administration's review of the various federal affirmative action programs would continue, the grounds he gave for abandoning those programs were extremely narrow.⁶⁷ More importantly, none of them involved application of the “strict scrutiny” standard adopted by the Supreme Court in *Adarand*.

Meanwhile, federal lawyers continue their aggressive defense of the various affirmative action programs, including the one challenged by *Adarand* in its return to federal district court in Colorado.

65. See, e.g., Brief for the United States, *Dynalantic Corp. v. United States*, No. 95-CV-02301 (D.D.C. filed December 15, 1995), where the Government contends that Congress is entitled to deference in race-based decision making despite the holding of the Supreme Court to the contrary in *Adarand*.

66. Ann Devroy, *Clinton Orders Affirmative Action Review; At Stake: Principles and Political Base*, THE WASHINGTON POST, February 24, 1995, at A1.

67. Clinton gave four standards to be used in evaluating federal affirmative action programs: no quotas, in theory or practice; no illegal discrimination, including reverse discrimination; no preferences for unqualified individuals; and discontinuing a program after its equal opportunity purposes have been achieved. Ann Devroy, *Moving Back to the Liberal Side of the Divide*, THE WASHINGTON POST, July 20, 1995, at A1.

Only one federal affirmative action program has been abandoned. The program, known as the “rule of two,” denied non-minority participation in contracts awarded by the U.S. Department of Defense whenever two minority firms were available to bid on the work. Peter Behr, *Minority Firms: How Big a Hit?; Pentagon Set-Aside Program's Demise Worries Small Contractors*, THE WASHINGTON POST, October 24, 1995, at D1.

For Adarand—Back to Square One

As 1995 drew to a close and Adarand moved toward its sixth year battling the federal government, federal lawyers appear to have been doing some internal battling of their own. Shortly after the return of *Adarand*⁶⁸ to the district court, federal lawyers asked for additional time to study the implication of the Supreme Court's ruling. Adarand's counsel agreed to delay action on *Adarand* until January 5, 1996. Remarkably enough, as that delay came to an end, federal lawyers indicated that they would seek an additional six months for more study. When *Adarand's* counsel declined to agree to such a delay, federal lawyers filed an unilateral request.

That request was denied by federal district Judge John L. Kane who promptly scheduled a conference then adopting an expedited schedule for resolving *Adarand*,⁶⁹ a schedule that requires all briefs filed by June 15, 1996. Judge Kane denied a request by federal lawyers for additional delay should a government budgetary shutdown occur, adding, "I am under a directive from the Supreme Court of the United States, not the Congress of the United States, and I'm not going to delay matters when there's an order from the Supreme Court of the United States, and I'm going to proceed with it."⁷⁰

Although federal lawyers may have had some misgivings about defending the program challenged by Adarand, hence their request for delay, they are defending it now. Federal lawyers, both in the preliminary answers they provided in *Adarand*, as well as arguments they raise in other challenges to federal race-based programs, defend the programs, almost as if *Adarand* was not the subject of a Supreme Court opinion. Ignoring Justice O'Connor's reversal of much of the basis for the Court's decision in *Fullilove*,⁷¹ federal lawyers are defending the adoption by Congress of race-based program using the *Fullilove* Court's deference to Congress regarding actions undertaken by Congress pursuant to Section 5 of the Fourteenth Amendment.⁷² Even more stunning, attorneys representing groups that support this program continue to assert—in the face of a statutory and regulatory regime that restricts the benefits of the challenged

68. *Adarand v. Pena*, No. 90-K-1413 (D.Colo. Jan. 12, 1996).

69. *Id.*

70. Transcript of Hearing at 8, *Adarand v. Pena*, No. 90-K-1413 (D.Colo. Jan. 12, 1996).

71. 448 U.S. 448 (1980).

72. Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, at 10-15, *Dynalantic Corp. v. United States, Department of Defense, et al.*, No. 95-CV-02301 (D.D.C. filed Dec. 15, 1995). Federal lawyers ignore not only Justice O'Connor opinion in their attempt to resurrect the underpinnings of *Fullilove*. They also ignore the fact that the Fourteenth Amendment relates to federal action undertaken to prevent the denial of civil rights by the states. *Id.*

program to racial minorities—that the program is a “disadvantaged,” not a racial, program.⁷³

In the face of such an approach by federal lawyers and those in the Clinton Administration making decisions on the defense of affirmative action programs, a return to the U.S. Supreme Court by *Adarand* is a distinct possibility.

CONCLUSION

One of the great things about appearing before the U.S. Supreme Court, is that one doesn't have to craft great phrases to address the issue before the Court. The best words and phrases have been developed over the years in opinion after opinion by the nation's greatest legal thinkers. Who could improve, for example, on Justice Harlan's plea, in his powerful and prophetic dissent in *Plessy v. Ferguson*, for a “color blind” Constitution.⁷⁴ You can't read these opinions and not be struck by the power of the language and the brilliance of the men and women who crafted them.

Perhaps my favorite quote regarding this case appeared in a footnote in Justice Stewart's dissenting opinion in *Fullilove*. It was particularly fitting in light of the fact that discrimination on the basis of race has been unconstitutional since 1954, has been illegal since 1964, and has been immoral for millions of people for centuries. Nevertheless, there is one place in America where race-based decision making is still permitted: the federal government. Thus, Justice Brandeis' words had particular meaning for me: “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”

Justice Powell once wrote, “The time cannot come too soon when no government decision will be based upon immutable characteristics of pigmentation or origin.”⁷⁵ I hope that day came the day the Supreme Court announced its decision in *Adarand v. Peña*.

73. Brief *Amicus Curiae* of the Coalition for Contracting Equity in support of Defendants, *Dynalantic Corp. v. United States Department of Defense. et al.*, No. 95-CV-02301 (D.D.C. filed Dec. 15, 1995).

74. 163 U.S. 537, 559 (1896).

75. *Fullilove*, 448 U.S. at 516 (Powell, J., concurring).