MEMORANDUM

TO: Phil Jordan
FROM: Lewis F. Powell, Jr.

DATE: January 12, 1976

No. 74-728 Franks and Lee v. Bowman

I have reviewed with interest and admiration your draft in the above case. In the absence of authority in point, your draft reflects a splendid exercise in "mental muscle". I agree with your basic analysis and organization. As you will see, I have done some editing and have drafted two or three riders, one rather long one. I wanted to make my position somewhat stronger than you felt free to express it. I think we are right, and the role of a dissenter is similar to that of an advocate. I do not wish, obviously, to advance irrational or unsound arguments. But where there is room for rational doubt, we should resolve it strongly in favor of our position.

Now, a few specific comments and questions:

1. I would think that you might find, without any great expenditure of time, a quotation or two from this Court defining equitable relief and emphasizing the importance of the element of discretion.

2. As I read Albemarle, "make-whole" is only of the purposes of Title VII identified by the Court. Justice Brennan,
after quoting Albemarle correctly near the beginning of his opinion, thereafter characterizes "make whole" as the purpose. In the text of our draft, we have noted that another purpose is the prophylactic one. Perhaps we could add a note indicating that the Court's opinion, after genuflecting briefly, to the duality of purposes, thereafter focused only on one.

3. We come pretty close to implying that a company never has any interest in the awarding of competitive-type seniority. In this case, in view of the concession of counsel, we are on safe ground. Perhaps this is so in most cases, but as you pointed out in your bench memo a company may well have an interest in retaining skilled, proven employees rather than replacing them with employees who must be trained, and whose fidelity and ability remain to be proved. In Bowman's trucking business, I doubt that this mattered very much. I suppose anyone who can drive an automobile can be taught to drive a truck without vast effort. I do think, however, that we should put a footnote at some appropriate place indicating that in some cases the employer may have an interest, although one far less likely to be economically significant than bumping an employee down the seniority ladder.

4. There may well be some repetition within the text, and in the footnotes as compared with the text. A certain amount of repetition contributes to emphasis, but we don't want too much.
5. The draft now uses the phrase "employer or union" as being the wrongdoer. Although the union may be the wrongdoer in some circumstances, it is usually the employer. In any event, the prophylactic impact of both backpay and benefit-type seniority fall on the employer. I would be inclined to put a note in the early part of our opinion to the effect that in some circumstances the union also may be the wrongdoer. Then, throughout the text, I think I would refer only to the employer.

***

I apologize for handing this back to you in its "messy" condition. Sally and Gail will be glad to recopy any parts of this that you think necessary. So far as I am concerned, I am content for you - with such further editing as you think appropriate - to go ahead with a Chambers Draft.

L.F.P., Jr.
December 29, 1975

No. 74-728  Franks and Lee v. Bowman

Dear Bill:

You will not be surprised, in light of what I said at the Conference, that I have some problems with your circulated opinion. Subject to further study, I may well be able to join Parts I and II. I have substantial difficulty with Part III, however, and in due time I will circulate a dissent.

I agree that retroactive seniority may be an appropriate equitable remedy under § 706(g), depending upon the circumstances. As CAS held that it could never be a remedy, I agree with you that CAS must be reversed. But I differ as to what § 706(g) requires.

We are dealing with equitable remedies left to the sound discretion of a district court. This compels, as I view it, at least a balancing of the equities. In this case it requires consideration of the distinction between "competitive-type seniority" and "benefit-type seniority". The former type of seniority determines (i) which workers are to be "laid off" when the work force is being reduced; (ii) which workers are to be "bumped" down the seniority list, thereby deferring expected promotion; (iii) entitlement to priority with respect to overtime and shift assignments; and the like. These competitive consequences of retroactive seniority usually will not affect the employer, who is presumably the wrongdoer, and thus will not further the deterrent purposes of Title VII recognized in Albemarle. On the other hand, competitive-type seniority vitally affects the innocent employees who may be laid off, not promoted, or relegated to undesirable overtime and shift assignments. I have never understood equity to place the burden of righting a wrong upon the shoulders of innocents.
The noncompetitive aspects of seniority are quite different. These include automatic across-the-board pay increases, the vesting of pension benefits, entitlement to specific periods of vacation, and the like. The employer bears the burden of these aspects of seniority and innocent employees are not penalized.

Since the equities were not weighed in the present case, I would remand to the District Court with appropriate instructions. I would not lay down any mandatory criteria, but would identify the distinction between competitive and noncompetitive seniority and say that in "doing equity", a district court must consider this distinction and other relevant facts and circumstances.

I cannot believe that the Congress, in assuring equity "to the extent possible" for victims of discriminatory employment practices, intended to impose inequities upon innocent employees. The situation is quite different where the impact of the remedy falls only upon the offending employer.

In view of the press of other matters, it may be a while before I can write. I therefore have indicated above (as I tried to do at the Conference) a brief summary of my thinking.

Sincerely,

Mr. Justice Brennan

1fp/sa

cc: The Conference
January 28, 1976

Re: No. 74-728 - Franks v. Bowman Transportation Co.

Dear Lewis:

Please join me in your opinion, concurring in part and dissenting in part.

Sincerely,

[Signature]

Mr. Justice Powell

Copies to the Conference
January 28, 1976

Re: No. 74-728 - Franks v. Bowman Transportation Co.

Dear Lewis:

Please join me in your opinion, concurring in part and dissenting in part.

Sincerely,

Mr. Justice Powell

Copies to the Conference
Re: No. 74-728 -- Harold Franks and Johnnie Lee v. Bowman Transportation Company

January 29, 1976

Dear Bill:

I have gone over your memorandum of January 29. I would go no further than your suggestion at the end of that memorandum.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference
January 30, 1976


Dear Bill,

I have delayed responding to your proposed opinion in this case, because, after reading Lewis' memorandum of December 29, I wanted to await his separate opinion. Now that he has circulated it, my problem has become harder, not easier. In short, I think there is a great deal to be said for each of your respective positions that you have both so well articulated. My present thinking, however, is to adhere to my Conference position as it is reflected in your proposed opinion, although I shall wait to see your revisions before finally joining you.

P.S.

Mr. Justice Brennan

Copies to the Conference
February 4, 1976

No. 74-728 Franks v. Bowman Transportation

MEMORANDUM TO THE CONFERENCE:

In view of the changes which Bill has made in his opinion, I will respond with certain changes in my concurring and dissenting opinion.

It may be a few days before I can have this in your hands.

L.F.P., Jr.
MEMORANDUM TO THE CONFERENCE

RE: No. 74-728 Franks v. Bowman Transportation Co.

I am making a few small revisions in light of Lewis' most recent circulation.

I must say Lewis seems to have made a full scale retreat from his original position that rightful place "competitive" seniority could rarely if ever be an appropriate remedy. Thus our opinions don't seem to differ to any great extent. I am making this clear in a new footnote at the end of the opinion, a copy of which is attached.

W.J.B. Jr.
FN 42 Accordingly, contrary to the argument of the dissent, to no "significant extent" do we "[strip] the district courts of [their] equitable powers." post. at __. Rather our holding is that, in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. To do otherwise would be to shield "inconsistent[ ] and capricious[ ]" denial of such relief from "thorough appellate review."

Albemarle Paper Co., 422 U.S., at 416.
MEMORANDUM TO THE CONFERENCE:

This case is becoming a bit like a "shuttlecock", but I certainly don't want Bill Brennan to have the last "hit". Bill says that (1) I have made "a full scale retreat", and (2) "our opinions don't seem to differ to any great extent.

If Bill really thinks there is no material difference, it would clarify the situation for everyone - and especially for the lower courts - if Bill were to join my opinion. He would be most welcome. Or, as an alternate, I cheerfully make my opinion available as a substitute for Part III and Part IV of his opinion.

But in all candor, I view our opinions and positions as irreconcilable. If Bill will identify any language that evidences a "full scale retreat" I will forthwith remove it.

Bill's memo describes my "original position" as being "that rightful place 'competitive' seniority could rarely if ever be an appropriate remedy". This is a serious misunderstanding of my position. In Part IV of my first draft I did say that a "rational argument can be made . . . that a presumption should exist against the retroactive granting of competitive-type seniority." P. 13. The next sentence added: "But we need not go so far, certainly at this time." The remainder of Part IV made crystal clear my view that § 706(g) requires a district court to balance the equities free from any presumption imposed by this Court.

Bill's observation that our opinions now "don't seem to differ to any great extent" is especially puzzling. His opinion:
(1) Creates an explicit presumption where none is indicated by the language of § 706(g), its history or the purposes of the Act.*

(2) Recognizes no meaningful distinction, in terms of equitable relief, between benefit-type seniority and competitive-type seniority.**

(3) Relies on NLRB cases (see, e.g., his footnote 35) that, if viewed as Bill reads them, would foreshadow a total disregard of any equities that favor innocent employees.***

In summary I just do not believe Bill's opinion could be read by a district court as ever allowing, as I think § 706(g) requires, a balancing of equities that would consider the fairness of displacing incumbents. The entire thrust of his opinion is precisely to the contrary.

L.F.P., Jr.

*Bill's proposed new footnote 42 reiterates a "presumption in favor of rightful place seniority relief..."**Apart from expressly announcing a presumption that circumscribes the discretion vested by § 706(g), Bill's opinion is replete with statements that will be accepted by district courts as virtually compelling a retroactive grant of both types of seniority. At p. 25, for example, his opinion states:

"Accordingly, we find untenable the conclusion that this form of relief [retroactive seniority] may be denied merely because the interests of other employees may thereby be affected."

The quotation that follows this statement makes the same point. (See, p. 26).

***As pointed out in my second draft, the NLRA framework actually supports my argument that this Court should eschew presumptions in this area.
February 13, 1976

74-726 - Franks v. Bowman Transportation Co.

Dear Bill,

As you know, this case is not an easy one for me. Although you and Lewis are not so far apart as you were at the outset, differences between you certainly still remain. With lingering doubts, I join your fine opinion.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference
MEMORANDUM TO THE CONFERENCE

Re: No. 74-728 -- Franks v. Bowman

I have read with interest the exchange of memoranda and revised opinions between Bill Brennan and Lewis, and, while I understand the concerns that motivate Lewis, I think Bill has the better of the argument. Most of the factors that Lewis points to as calling for the exercise of discretion by the District Court are abstract in nature and will recur in virtually every retroactive seniority case. If this is so and the District Courts are given no guidance as to how to begin the balancing process, we not only invite disparate results on substantially identical fact patterns, but also provide no basis for upsetting such results on appeal -- a result we all agree is undesirable. To avoid this, it is entirely appropriate for this Court now to weigh those factors that are abstract and recurring in light of the intent of Congress, and to create a presumption, rather than leaving the District Courts free to re-evaluate them in every case.

I believe that Bill's analysis of Title VII, its legislative history and purpose, the NLRA precedents, and the burdens placed respectively on the "innocent" employee and the discriminatee convincingly demonstrates that the presumption should be in favor of "rightful place" seniority for all proved victims of unlawful discrimination. The presumption, of course, only tells the District Court how the typical case should be resolved, while leaving the Court with full discretion to deal with unusual factors in an equitable manner. Not only is the creation of this presumption in accord with our traditional supervisory rule and consistent with past Title VII decisions, Albemarle Paper Co. v. Moody.
422 U.S. 405 (1975), but it will provide needed -- and desirable --
guidance to both the District Courts and Courts of Appeals.

These Title VII cases are both complex and controversial,
and my general disposition is to proceed in them one step at a
time. In this case we deal only with identifiable individuals who
actually applied for jobs and were discriminated against in
violation of Title VII, and leave for another day the knotty problems
of quotas, non-identifiable discriminatees, and discrimination
claimed by those who were deterred from ever applying for jobs.
I think Bell's thoughtful opinion demonstrates the advantages of the
step-by-step approach, and takes the right step for this case.

T. M.
February 17, 1976

Re: No. 74-728 - Franks, et al. v. Bowman Transportation Co., Inc.

Dear Bill:

Please join me.

Sincerely,

[Signature]

Mr. Justice Brennan

cc: The Conference
MEMORANDUM TO THE CONFERENCE

RE: CASES HELD FOR FRANKS V. BOWMAN, NO. 74-728

There are 18 petitions for certiorari currently being held for Franks. Each of the 18 petitions arises out of one of the 8 decisions (or set of related decisions) below. Some general comments are appropriate before considering the individual cases.

In only one of the petitions do the central legal issues presented track those disposed of in Franks. Certain of the other petitions do contain legal issues resolved in Franks, but other independent and important legal issues are also raised. The opinion in Franks, dealing most directly with questions concerning the remedy of retroactive seniority once a Title VII violation is established, did not dispose of questions of Title VII liability where the operation of the seniority system itself is alleged to be the illegal discriminatory conduct. Nor does Franks deal with problems of proof concerning the identities of individual discriminatees -- for purposes of awarding retroactive seniority or any other remedy -- in instances where no formal job or
transfer application was filed. Franks does, however, dispose of issues concerning order and burden of proof for purposes of remedy in class action situations: once a pattern and practice of discrimination is established, the burden is on the defendant to rebut the inference of specific discrimination vis-a-vis identifiable class members for purposes of defeating an award to the individual of any individual remedy determined to be generally appropriate for the class.

The possibly cert-worthy issues not disposed of by Franks and raised by one or more of the cases may be categorized as follows:

I. Liability Issues

A. Union Liability: Whether there is an affirmative duty on the union, under either Title VII or § 1981, to negotiate a remedial collective bargaining agreement in the presence of the effects of past employment discrimination in which the union is not shown to have been a participant. In the context of certain of the petitions, the question is whether the union has the duty to negotiate a company-wide seniority system to ameliorate the effects of past (either pre- or post-Title VII) employer hiring and transfer discrimination in certain company departments.

B. Employer liability for a facially neutral seniority system which perpetuates the effects of pre-Title VII
employment discrimination. Following a distinction drawn by several lower courts, the issue may be divided into the following:

1. Departmental seniority systems perpetuating the effects of pre-Title VII departmental discrimination by discouraging minority transfer into those departments.

2. Company-wide seniority systems perpetuating the effects of pre-Title VII discrimination in hiring, as by a "last hired/first fired" provision in a layoff situation.

C. Interrelationships between Title VII liability and liability under § 1981. For example, if § 703 (h) of Title VII precludes a judgment of Title VII liability in the situation described in Section I (B) (2) above, may liability nevertheless be premised upon § 1981?

II. Evidentiary Issues

A. Whether statistical evidence alone is sufficient to make out a prima facie case of employment discrimination under Title VII or § 1981.

B. Other issues concern the burden of proof and quantum of evidence sufficient to meet it in varying situations. For
example, in the case of the alleged "deterred" discriminatee, who failed to file a formal job or transfer application knowing such a step to have been futile under then-existing company policy, who has the burden of proof (once a general pattern of discrimination is established) as to which individuals seeking individual remedies were in fact discriminatees (e.g., is some objective evidence of a prior desire for a job or transfer required, is the alleged discriminatee's testimony concerning a prior desire sufficient, or is the burden on the employer to rebut an inference of discrimination?). A variation on the above obtains in situations where an award of retroactive seniority is determined to be appropriate for the class generally. The issues become from what date should the retroactive seniority begin to run for "deterred" discriminatees, and who has the burden of proof.

III. Remedial Problems

A. Quotas for future hiring. Involved here is the propriety of a court order requiring that a certain proportion of all future hiring be done from the minority group against whom past employment discrimination has been shown, apart from specific individuals proven to have been discriminatees.
B. Quotas for seniority systems. Involved here is whether a quota system in favor of minority discriminatees may be superimposed over a facially neutral seniority system, designed to remedy the effects of past employment discrimination toward the group generally but not shown to have affected the specific individuals protected by the quota: e.g., a quota system for blacks/women overriding the operation of a last hired/first fired seniority system in a layoff situation. This issue may arise in situations where post-Title VII employment discrimination is proven against the minority group generally. However, in instances where the past employment discrimination (other than the operation of the seniority system) is only Pre-Title VII, this question of remedy is bound up with, if not identical to, the question of liability.

C. Questions concerning the propriety of punitive damage awards in suits under Title VII or § 1981 for employment discrimination.

D. Questions concerning the propriety of "front pay" or "hold harmless" injunctive remedies respecting the problem of competitive status seniority as between discriminatees and other employees. This question was explicitly left open in [text].
Supplemental Memo on Holds for Franks v. Bowman

TO: Justice Powell
FROM: Phil Jordan

Keep in Frank's file

The cert pool memos and Justice Brennan's hold memo probably give you enough information on which to base your votes. I wanted to give you this short memo with my own thinking on each case, more or less as a "check" for your own thinking.

(1) No. 74-1064 Waters v. Wisconsin Steel Works
No. 74-1350 Bricklayers v. Waters

These two petitions arise from the same CA7 judgment. The employees' petition, No. 74-1064, is a clear DENY: that was your original view of the petition, and Justice Brennan votes the same. You might note, however, that Justice Brennan (p. 6) considers the issue of § 703(h) in this context cert-worthy in a proper case. I consider the issue foreclosed by the discussion in Franks: this is a bona fide seniority system, Title VII does not reach back to pre-Title VII discrimination.

I also believe No. 74-1350 is a DENY.

Brennan notes (p. 7) that these petitions should be held if cert is granted in Nos. 75-182 & 75-465 (Jersey Central). I agree, since the 703(h) issue is in both cases. I will suggest vacating and remanding the Jersey Central petitions, however (infra), so my final recommendation as to these two petitions is DENY both.
Brennan discusses these at pp. 10-12 of his memo. Carl did the cert pool memo on these, and it is excellent. Brennan will vote to vacate and remand in light of Franks, and I agree. Although both EEOC and the SG want cert granted, there are too many problems: it is unclear exactly which employees CA3's opinion covered (see Carl's memo at 8-9 & n.6), and CA3 is sure to clarify that in light of the discussion of § 703(h) in both of the Franks opinions. Thus, although this is a big case, and obviously an important one for the government, I recommend VACATE AND REMAND.

There are so many problems with this case—perhaps jurisdictionally out of time, interlocutory stage, etc.—and the case is so uncertworthy after Franks, anyway, that it is a clear DENY. That was your original thinking, and also Brennan's vote.

Brennan refers to this case as "conceptually difficult" (p. 8), and your original thought was that the case was so peculiar to the news handlers in New York that it probably is not certworthy for that reason. I wholeheartedly agree with you,
and recommend that you vote to **DENY**.

Brennan will **vote to hold this petition for No. 75-260, McDonald v. Sante Fe Transp. Co.,** to be argued next sitting. His reasoning seems to be that this petition involves whites suing under Title VII, and No. 75-260 presents the issue of whether whites **can** sue under Title VII. I do not believe the case is a hold. First, the answer to the issue in *McDonald* is sure to be affirmative, that whites **can** sue, but that won't make this case any more certworthy. Second, it looks to me like these petitioners were allowed to sue and simply lost on the merits; thus, the issue of **whether** whites can sue does not seem to be presented. The question of who can invoke Title VII is **not** a jurisdictional issue (as I noted in my memo in No. 75-260, this is **not** a "standing" issue), so if **it's** not raised the Court doesn't have to consider it. Therefore, if this case were held and then vacated on the basis of *McDonald*, I honestly don't think the parties or the court below--or I--would have any idea why it was done! To repeat, I recommend a vote to DENY. (Note that, according to the cert pool memo, at p. 4, part of CA 2's reasoning on the merits was that Title VII "applied only to minorities." I don't quite understand why CA 2 bothered with addressing petitioners' claims at all, if CA 2 thought this. Perhaps, because this premise is part of CA 2's reasoning, the case could be held for No. 75-260. It's still so peculiar, however, that I still recommend a **DENY.**
This case has lots of issues, but none of them are certworthy in the context of this case. The only possible exception is the "quota" issue, but that is certworthy only if you desire to hold that quotas can never be imposed—and I don't think the Court would hold that. Brennan (p. 14) states that he will vote to hold for Nos. 75-636 & 75-672 (T.I.M.E.--DC), which he will vote to grant. As noted below, either T.I.M.E.--DC or the Rodriguez trilogy should be granted, and both present the issue that appears in this case and merits its being held (conversion of company seniority into departmental seniority for a "one-shot" transfer, absent proof of prior application for transfer). Such a hold could not hurt, so I recommend that you vote to HOLD for whichever of those cases is granted.

These are the three sets of petitions on which Block has prepared extensive and excellent pool memos. I just don't have any-
thing useful to add to his memos. You will remember that Block prepared a "supplemental memorandum" (found with Nos. 75-636 & 75-672) in which he corrected his oversight about the effect of Franks on the application of McDonnell-Douglas to class actions, and also summarized his recommendations. Referring to that summary, which begins on p. 3, I agree with his recommendations. This means granting the first three petitions in the Rodriguez trilogy, holding the T.I.M.E.-DC petitions for the decisions in Rodriguez (almost identical issues), and also holding the Sabala petitions for Rodriguez (because of the similar issues of union liability for "lock-in" effects of a collective bargaining agreement).

If none of these cases is granted, then all should be vacated and remanded for reconsideration in light of Franks. The reason is that all involve burden of proof problems similar to that dealt with in Franks—i.e., do McDonnell-Douglas criteria apply in class actions—and it appears that at least in the Rodriguez and Sabala cases, CAS goofed by not allowing the employer to rebut a prima facie case of discrimination.

Justice Brennan is going to vote to grant T.I.M.E.-DC and hold Rodriguez for it, instead of the other way around. He claims he wants to do that because the SG will be a party in T.I.M.E.-DC, but I think his reason is different. I don't think he wants the Court to take Rodriguez because it involves the issue of whether statistics alone can support a finding of a prima facie case of discrimination. The lower courts generally hold that statistics alone are enough, and Justice Brennan would like to leave the lower courts alone so they can keep on doing so.
I believe the issue should be considered by this Court, and thus Rodriguez should be granted instead of T.I.M.E.-DC. The SG can participate as an amicus, of course. The only issue presented by T.I.M.E.-DC that is not in Rodriguez is the question of whether the seniority that is applied in an intra-company transfer can extend back to pre-Title VII period. The parties don't even raise the issue, because lower courts are unanimous, or virtually so, in holding that it can extend back. The Court could ask them to brief it, of course, but I agree with both Block (supplemental memo at 4) and with Brennan (pp. 15-16) that the issue is not certworthy due to its decreasing importance the further we get from the enactment of Title VII.

In sum, I recommend that you vote to GRANT the Rodriguez cases (with the omissions recommended by Block), and to HOLD both T.I.M.E.-DC and Sabala.