Re: 85-999 - United States v. Paradise

December 12, 1986

Dear Bill:

Unfortunately I will not be able to join your circulating draft. I am particularly distressed by the assumption that seems to pervade the entire draft that standards developed in cases like Wygant should be applied in reviewing a judicial decree entered in response to a proven violation of law.

Voluntary race-conscious decisions by employers, both public and private, are presumptively unlawful. When an employer seeks to justify such decisions on the ground that they are designed to remedy past discrimination, the "Court has consistently held that some elevated level of scrutiny is required" (see your circulating draft at page 14). But no such requirement has ever been imposed on federal judges who are fashioning equitable remedies for proven violations of the law. As I read it, your opinion seems to assume that the employer "is entitled to stand before the Court in the same position as one who has never violated the law at all," International Salt Co. v. United States, 332 U.S. 392, 400 (1947).

In my opinion, the burden of demonstrating that the relief granted by the district court is excessive rests squarely on the law violator—not on the victim of the wrongdoing. The basic question is whether the relief granted by the federal court represents an abuse of discretion or is punitive rather than remedial in character. I cannot subscribe to an opinion that assumes that the rules that limit race-conscious decision-making by presumptively innocent
employers apply equally to federal judges who have a duty to remedy flagrant and persistent violations of the law.

Respectfully,

Justice Brennan

Copies to the Conference
December 12, 1986

Re: No. 85-999-United States v. Paradise

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference
Dear Bill:

I have just completed carefully reading the first draft of your opinion in this case. It has been a pleasant Saturday morning exercise for me. Your opinion is thorough and persuasively written.

Subject to relatively minor changes in textual language, and my concern about subpart III-D, I will be happy to join your entire opinion. With respect to the language changes, I am having my clerk mark up a copy of your draft that I will send with this note. I do not think any of these will create a problem in view of the basic similarity of our views.

My concern about subpart III-D is substantive. This subpart - except for the quote from CA5 - consists of only three paragraphs. The important purpose of the paragraphs is to show that the burden on innocent third parties is not substantial. I agree with this, and differ only as to your reliance on the argument that because some whites have been benefited from the Department's discrimination, the burden on individual white troopers is not particularly significant under equal protection analysis.

I do not think it is necessary for us to say this. I also have considerable doubt as to whether it would be wise to do so. We are talking only about innocent employees, many of whom may have shared the views expressed on behalf of the City of Birmingham (see amicus brief) that the Department's discriminatory policy was shameful. Also, it is probable that some of these employees may have prepared themselves for promotion by extra study or special diligence as troopers. This could be true of troopers who had children to educate and who needed an increase in income.

I could join a briefer subpart III-D that makes the argument in the first paragraph in your present draft. Un-
like layoffs — that I would never tolerate — the potential burden with respect to promotions is problematic as to any particular trooper. The burden is not as "diffused" as it is where job applicants — rather than present employees — are implicated. But it is diffused both in time and as to whom it may affect adversely. Moreover — and I do not believe your draft emphasizes this sufficiently — the basic limitation of being "qualified" remains. Thus qualified whites simply have to compete with qualified blacks. To be sure, as long as the "mathematical" requirements exist, there will be some advantage to blacks. But again, as you properly emphasize this should be temporary and is subject to amelioration by action of the Department itself.

If you prefer to leave III-D substantially as it is written, I will join all of your opinion except that part. If you make revisions along the lines I suggest, I will gladly join your entire opinion. I probably would write a very brief concurring opinion, but this would be supportive of your basic views.

Sincerely,

Justice Brennan

1fp/ss
MEMORANDUM

TO: Bob  DATE: December 15, 1986
FROM: Lewis F. Powell, Jr.

85-999 Paradise

In line with our discussion at lunch on Saturday, unless you have a Court opinion to write I suggest that you consider what anticipatory writing you can undertake.

I will, of course, be interested in Justice Brennan's reaction to our proposed changes. When you hear from him, call me at the Kahler Hotel. As I probably will be having tests throughout the day, the best time to call would be between 5:30 and 7:30 Washington time. The Clinic closes up at 6:00 p.m., Washington time (5:00 p.m., out there), and so I am likely to be in my room until Jo and I go out for dinner.

As we have discussed, I will probably want to write a brief opinion that summarizes my view in my own language. I would emphasize, perhaps more explicitly than Justice Brennan has the similarity between Paradise and the case last Term that I think of as Local 28 (from New York). In Paradise, as in that case, there was a flagrant and long time disregard of court orders.

When you call, I will, of course, want to know which cases have been assigned to us and which of you will prepare initial drafts for me. As you now know, if we are
going to circulate all of our assigned opinions before the January assignments are made (probably January 24 or 26), I will need the clerks' drafts by the first of the year whenever this is feasible. We will have a long Conference on January 9, with a long discuss list. Also, I will be preparing for the January arguments. I would appreciate your sharing these thoughts as to a time schedule with your co-clerks.

L.F.P., Jr.

ss
MEMORANDUM

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

DATE: December 15, 1986

In line with our discussion at lunch on Saturday, unless you have a Court opinion to write I suggest that you consider what anticipatory writing you can undertake.

I will, of course, be interested in Justice Brennan's reaction to our proposed changes. When you hear from him, call me at the Kahler Hotel. As I probably will be having tests throughout the day, the best time to call would be between 5:30 and 7:30 Washington time. The Clinic closes up at 6:00 p.m., Washington time (5:00 p.m., out there), and so I am likely to be in my room until Jo and I go out for dinner.

As we have discussed, I will probably want to write a brief opinion that summarizes my view in my own language. I would emphasize, perhaps more explicitly than Justice Brennan has the similarity between Paradise and the case last Term that I think of as Local 28 (from New York). In Paradise, as in that case, there was a flagrant and long time disregard of court orders.

When you call, I will, of course, want to know which cases have been assigned to us and which of you will prepare initial drafts for me. As you now know, if we are
going to circulate all of our assigned opinions before the January assignments are made (probably January 24 or 26), I will need the clerks' drafts by the first of the year whenever this is feasible. We will have a long Conference on January 9, with a long discuss list. Also, I will be preparing for the January arguments. I would appreciate your sharing these thoughts as to a time schedule with your co-clerks.

L.F.P., Jr.
Dear Bill,

I shall await the dissent.

Sincerely yours,

Justice Brennan

Copies to the Conference
December 17, 1986

No. 85-999 United States v. Paradise

Dear Bill,

As soon as I can get around to it, I will circulate a dissent in this case.

Sincerely,

[Signature]

Justice Brennan

Copies to the Conference
Re: No. 85-999 - United States v. Paradise

Dear Bill,

I will await the dissent in this case.

Sincerely,

Justice Brennan

Copies to the Conference
December 18, 1986

85-999 United States v. Paradise

Dear Bill:

Please join me in your opinion for the Court.

I may write a brief concurring opinion, and may not get to this before we go to Richmond for Christmas.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference
December 19, 1986

85-995 United States v. Paradise

Dear Bill:

You will receive with this note, a copy of my "Join" note that should give you the first Court decision in which five of us have agreed in an affirmative action case.

I send congratulations, and also my warm thanks for making the changes that I thought were necessary.

I may write a few pages in a concurring opinion. It will not in any way detract from your excellent opinion.

Sincerely,

Justice Brennan

1fp/ss
January 6, 1987

United States v. Paradise

Dear Bill:

Here is a 1st draft of a brief concurring opinion in this case.

I think it is entirely consistent in every respect with your fine opinion for the Court. Unless you have suggestions, I will circulate this.

Sincerely,

Justice Brennan

1fp/ss
Re: No. 85-999, United States v. Paradise

Dear Bill:

I am pleased to join your recirculation of December 17.

Sincerely,

Justice Brennan

cc: The Conference
January 29, 1987

Re: 85-999 - United States v. Paradise

Dear Sandra:

Please join me in your dissent.

Sincerely,

Justice O'Connor

cc: The Conference
Dear Bill:

Thank you for your note of December 31. I had forgotten your mistakes in Bakke.

Of course, the point is hardly one of vast importance. Also, a good deal has been written since Bakke by both of us, and now we seem to be fully in accord as to the applicable principles — at least in cases similar to Johnson and Paradise.

I am writing a brief concurring opinion in this case, and will be glad for you to take a look at it before it is circulated. My little opinion is not necessary, but as I have written in each of our previous affirmative action cases I want to keep my record intact.

I will add a brief note simply to the effect that the "school cases", though broadly relevant, are different from the subsequent affirmative action cases cited in your opinion. No one has been denied the right to go to school. Apart from the possible inconvenience of being bused, the children suffered no detriment. But busing had prevailed in many if not most school districts for decades prior to Swann.

Sincerely,

Justice Brennan

lfp/ss
December 31, 1986

United States v. Paradise, No. 85-999

Dear Lewis,

I have run into a difficulty. In light of the following from my opinion in Bakke, 438 U.S. 265, 366 n. 41 (1978), don't you think I had better let well enough alone?

"Our cases cannot be distinguished by suggesting as our Brother POWELL does, that in none of them was anyone deprived of 'the relevant benefit.' Ante, at 304. Our school cases have deprived whites of the neighborhood school of their choice; our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations; and UJO deprived the Hassidim of bloc-voting strength. Each of these injuries was constitutionally cognizable as is respondent's here."

Sincerely,

[Signature]

Justice Powell
February 19, 1987

Re: 85-999 - United States v. Philip Paradise

Dear Sandra:

I would be pleased to join your dissent in the above case.

Sincerely,

Justice O'Connor

Copies to the Conference
85-999 United States v. Paradise (Bob)

WJB for the Court 11/17/86
   1st draft 12/11/86
   2nd draft 12/17/86
   3rd draft 1/30/87
   4th draft 2/2/87
   5th draft 2/6/87
   Joined by TM 12/12/86
   LFP 12/18/86
   HAB 12/19/86

JPS concurring in the judgment
   1st draft 12/29/86
   2nd draft 1/6/87
   3rd draft 1/13/87
   4th draft 1/21/87
   5th draft 2/6/87
   6th draft 2/12/87

LFP concurring
   1st draft 1/7/87
   2nd draft 2/17/87

SOC dissenting
   1st draft 1/28/87
   2nd draft 2/20/87
   Joined by CJ 1/29/87
   As 2/19/87

BRW dissenting
   1st draft 2/19/87
   2nd draft 2/20/87

BRW awaiting dissent 12/16/86

SOC will dissent 12/17/86

LFP may write concurring opinion 12/18/86

AS awaiting dissent 12/18/86

SDO with WHR dissenting
   3rd draft 2/10/87
High Court Backs Basing Promotion on a Racial Quota

Justices Split 5-4

Temporary Use Allowed in Alabama Because of Severity of Case

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, Feb. 25 — A sharply divided Supreme Court, rejecting the Reagan Administration position, ruled today that judges may order employers to use strict racial quotas temporarily in promotions as well as hiring to counter severe past discrimination against blacks.

By 5 to 4, the Court upheld a federal district judge's orders in 1983 and 1984 requiring Alabama to promote one black state trooper for each white state trooper, assuming qualified blacks were available, until the state could develop a promotion procedure acceptable to the judge.

The decision reinforced and partly expanded three major rulings last year in which the Court rejected the Administration's broad attack on all use of racial preferences to remedy past job discrimination and approved use of temporary, limited hiring preferences.

Case on Jobless Benefits

In other major cases decided today, the High Court ruled that states may not deny unemployment benefits to employees who are dismissed for refusing to work on their Sabbath and upheld an Ohio law that puts the burden of proof on criminal defendants who contend they acted in self-defense. (Page A31.)

In its affirmative action decision, the Court made clear for the first time that courts, at least in extreme cases, may order racial preferences in promotions as well as in hiring, and may use highly specific numerical "catch-up" quotas to bring an employer's work force quickly into line with the percentage of qualified members of minority groups in the available labor pool.

Reagan Appointees Dissent

The majority also said a court order requiring that black employees be promoted ahead of whites with higher test scores, like a hiring preference, did not have so severe an impact on the whites as would a requirement that whites be laid off before less senior blacks.

The decision also confirmed speculation that President Reagan's naming William H. Rehnquist as Chief Justice last summer and appointing Antonin Scalia as an Associate Justice would not swing the Court dramatically toward the Administration's position on affirmative action.

Both men dissented today, as expected, siding with the Administration view that the quota order was not a good remedy for the discrimination. But this did not represent a change in the overall voting lineup.

Mr. Rehnquist, as an Associate Justice, consistently opposed affirmative action preferences. While Warren E. Burger, who retired as Chief Justice last summer, was less consistent in opposing affirmative action, he sided with the Administration in all three of last year's cases.

Solicitor Called It Arbitrary

In the Alabama case, Solicitor General Charles Fried had assailed the one-for-one promotion quota as "profoundly illegal" and "wholly arbitrary." The Court upheld it in light of the Alabama state trooper force's long history of racial discrimination and resistance to court orders. The state had totally excluded blacks from the force until it was forced to hire some by a 1972 court order.

Deborah Burston-Wade, spokesman for Assistant Attorney General William Bradford Reynolds, head of the Justice Department's Civil Rights Division, said the decision was not surprising after last year's rulings and "didn't break any new ground."

Justice William J. Brennan Jr.'s opinion, which was joined by only three other Justices, rejected arguments by the Administration and the dissenters that the one-for-one quota was not "narrowly tailored" enough to pass muster under the standards the Court laid down last year.

"Astonishing" View Cited

He termed "astonishing" what he called Mr. Fried's suggestion that after years of unfulfilled promises by the state that it would adopt procedures to comply with court orders, "in 1983 the district court was constitutionally required to settle for yet another promise."

Mr. Fried said through a spokesman today that he was disappointed with the ruling and agreed with the dissenters.

Civil rights groups hailed the decision in the case, United States v Paradise, No. 83-999.

For Mr. Fried's view: "What has happened in the past is well known."

In a concurring opinion, said that the state "had engaged in persistent violation of constitutional rights and repeatedly failed to carry out court orders."
High Court Upholds Racial Quota for Promotions

Berry Goldstein, a lawyer for the NAACP Legal Defense and Educational Fund, stressed the majority's rejection of "rigid limitations on affirmative action."

He said the decision showed that Mr. Fried had been wrong in asserting that last year's rulings meant racial preferences could "hardly ever" be used.

Justice Brennan, citing last year's decisions, said "it is now well-established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination."

"Race-Conscious Relief" Needed

He added that "the pervasive, systematic and obtuse discriminatory conduct of the department created a profound need and a firm justification for the race-conscious relief ordered by the district court."

Justice Brennan's 34-page opinion was joined by Justices Thurgood Marshall, Harry A. Blackmun and Lewis F. Powell, Jr.

Justice Powell in a concurring opinion that the state "had engaged in persistent violation of constitutional rights and repeatedly failed to carry out court orders" and that the one-for-one promotion quota had been enforced by the district court on only one occasion, when it ordered the promotion of eight blacks and eight whites to the rank of corporal in 1984.

He added that unlike affirmative action plans requiring layoffs of whites before less-senior blacks, which a majority of the Court disapproved last year as imposing a harsh burden on white employees, the district court's promotion quota "does not disrupt seriously the lives of innocent individuals."

even though the promotions of some white troopers would be delayed.

Justice John Paul Stevens concurred in the decision but did not join Justice Brennan's opinion. He stressed that Federal courts had broad discretion to order racial preferences in cases in which past discrimination had been proved.

Justice Stevens's opinion seemed to endorse judicial use of affirmative action to remedy past discrimination, even more broadly than did Justice Brennan's opinion.

Citing the Court's endorsement of "broad and flexible" judicial authority to remedy constitutional violations in the context of school desegregation cases, Justice Stevens said judicial authority to remedy job discrimination should be equally broad.

Unlike affirmative action plans voluntarily adopted by state and local governments, Justice Stevens said, those imposed by Federal judges need not be "narrowly tailored to achieve a compelling governmental interest."

Rather, they need only be within "the bounds of "reasonableness."

O'Connor Writes Dissent

Justice Sandra Day O'Connor dissented, joined by Chief Justice Rehnquist and Justice Scalia.

Justice Byron White dissented separately.

Justice O'Connor, like Mr. Fried, argued that even though Alabama was guilty of an "egregious history of discrimination," the lower court's quota was not sufficiently "narrowly tailored" and was unduly burdensome on innocent white troopers seeking promotions.

She faulted the district court for imposing "a racial quota without first considering the effectiveness of alternatives," such as imposing "stiff fines or other penalties" on the Alabama Department of Public Safety until it adopted adequate procedures for promotion of blacks.

"The one-for-one promotion quota used in this case far exceeded the percentage of blacks in the trooper force, and there is no evidence in the record that such an extreme quota was necessary," Justice O'Connor wrote.

About 25 percent of the people qualified to be state troopers were blacks. Justice Brennan said temporary use of the 50 percent "catch-up" quota for promotions was justified to speed the day when blacks would occupy something like 25 percent of the department's upper positions.

Pressure on Department Sought

He said the promotion quota was "narrowly tailored" to the legitimate goals of eliminating the effects of past discrimination, "inducing the department to implement a promotion procedure that would not have an adverse impact on blacks," and eliminating the effects of the department's long delay.

The lower court had found the procedures previously adopted by the department inadequate because they included examinations on which blacks had scored much lower on average than whites.

Justice Brennan also termed the quota "flexible in application" because it applied only to the extent that qualified black troopers were available and the department "needed to make promotions, and because it would be lifted whenever the department adopted adequate procedures of its own.

Its 5-4 decision on an Alabama case rebuffs the Administration.