

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 19, 1986

United States v. Paradise, No. 85-999

Dear John:

As you correctly observe, I do believe that some elevated form of scrutiny is appropriate even when a district judge orders race-conscious relief in response to a proven violation of law. However, in my opinion in this case, I intended to state that there was no need to decide upon "the appropriate constitutional analysis," (draft at p. 15), because the relief ordered would survive even strict scrutiny. I read your memorandum as suggesting that a different analysis, namely abuse of discretion, is required. Would it, in part, meet your concern if I were to make clearer that I do not intend to say that strict scrutiny is the proper standard in such cases, but rather that, even were strict scrutiny to apply, this relief would pass muster?

Sincerely,



Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 19, 1986

85-999 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,

A handwritten signature in cursive script, appearing to read "Lewis".

Justice Brennan

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 23, 1986

Re: 85-999 - United States v. Paradise

Dear Bill:

Thanks for your note. While I appreciate your proposal to reserve the question of whether strict scrutiny is indeed the proper standard with which to evaluate the District Court's order in this case, I continue to view that standard as wholly inapplicable to an order entered to correct the effects of racially discriminatory conduct by a State in violation of the Constitution. Therefore I think you really will have to make some fairly important structural changes in your analysis before I would be able to join your opinion. I am particularly troubled by the suggestion that a court fashioning a decree ought to be treated as merely one subcategory of governmental body engaging in race-conscious classification. See your opinion at p. 14. In my view, cases like Wygant and Fullilove are virtually irrelevant in this case; we should begin, as the unanimous court did in Swann, with the proposition that the chancellor's duty to grant equitable relief in this case is basically the same as in any other case in which a violation of law has been proved. Since the violation here involved an improper racial classification, there simply is no alternative to removing its effects except to use some form of race-conscious relief. Furthermore, the notion that a federal judge's remedial order can somehow violate the Equal Protection Clause of the Fourteenth Amendment simply baffles my prior understanding that the Amendment only applied to State action. Even if you view the problem from the position of a State, its officials' compliance with a federal court order surely could not constitute a violation of the Fourteenth Amendment.

Perhaps it would be best if I set forth my views separately. If you then think that we have a common ground and that you will be able to revise your opinion to suggest that the appropriate standard is the one identified in Swann, for example, perhaps I could join.

Respectfully,

JPS / lcm

Justice Brennan

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 29, 1986

United States v. Paradise, No. 85-999

Dear John:

I do appreciate your note. However, I guess it would be best if you set forth your views separately. I don't think I'll make any changes.

Happy New Year!

Sincerely,

Bill

Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

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,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 31, 1986

85-999 United States v. Paradise

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,

Lewis

Justice Brennan

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 6, 1987

85-999 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

lfp/ss