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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-999

TITLE UNITED STATES, Petitioner V. PHILLIP PARADISE, JR., ET AL.

PLACE Washington, D. C.

DATE November 12, 1986

PAGES 1 thru 44

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THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

V. : No. 85-999

PHILLIP PARADISE, JR., ET AL. :

- -x

Washington, D.C.

Wednesday, November 12, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 o'clock a.m.

APPEARANCES:

CHARLES FRIED, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

J. RICHARD COHEN, ESQ., Montgomery, Alabama; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in Number 85-999, United States against Phillip Paradise.

General Fried, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES FRIED, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIED: The first decree, the first litigated decree in this case in 1972 focused on discrimination in hiring and found that the Alabama state troopers had indeed been engaging in discrimination. Promotions were mentioned only in passing in that decree in general terms forbidding all discrimination in promotions.

In 1975, Judge Johnson appeared to assume that the one for one hiring quota he imposed in '72 and reaffirmed in 1975 would not need to be carried forward to promotions, that it would work itself out. As he said that time, "The Court did not order promotional quotas. Rather it set a hiring quota."

Promotions were only focused on in any decree of the Court in the 1979 consent decree. That consent decree provided, and it was voluntarily entered into by all parties, including the Alabama department and the

United States, that promotions to corporal should proceed according to procedures fair to all, racially neutral, with little or no adverse impact on blacks, and in conformity with the 1978 Uniform Guidelines on Employee Selections.

Shortly thereafter the department proposed and all parties agreed that there be a batch of promotions to corporal which batch included four black and six white troopers. There were no promotions to corporal thereafter until the batch involved in the present proceedings.

In 1981, after a certain amount of delay and further prodding by both the United States, the plaintiffs, and the Court, the department did come up with a promotion procedure, including a written exam and the use of factors such as seniority and evaluations.

The plaintiffs, Paradise, and the United States, had concerns that this procedure would in fact have an adverse impact. But it was agreed by all that the procedure would go forward, the exam would be administered, and then would look and see what the numbers were. In the event the numbers were just dreadful and the promotions did not go forward according to that procedure, there would have been no blacks promoted according to the procedure if it had run its

course.

Therefore, and here I read from the joint appendix, Page 91, the plaintiffs, respondents here, stated that the department, and I am quoting here, "in apparent recognition of the adverse impact" of the 1981 procedure offered to make the next batch of promotions to corporal in such a way that 20 percent of those promoted would be black troopers.

The plaintiff respondents rejected this offer and began this proceeding to enforce the consent decree. In that proceeding the plaintiffs again offered to make four of the 15 promotions promotions of black candidates. That was rejected by the plaintiffs and by the District Court, which instead imposed the one for one hiring quota in question in this case, stating that it would remain in effect not just for that particular batch of promotions, but until the higher ranks of the department reflected the 25 percent goal of the hiring quota or acceptable procedures had been worked out as per the consent decree.

QUESTION: When was that, General Fried?

MR. FRIED: That was in 1983. Now, in the event the one for one hiring quota was used only that one time, it was never used again. The next batch of promotions to corporal proceeded on a three black

trooper for nine or ten white trooper basis in '84/'85, and to date the promotion procedures have not yet been validated as job related according to the Uniform Guidelines.

There is, in our view, a single issue on certiorari here and that is whether the 1983 one for one promotion quota imposed by the District Court comports with the equal protection guarantees of the Constitution, and we take as our point of departure the law as laid down by this Court in the Sheetmetal Workers case. First, when --

QUESTION: General Fried, before you get into the main thrust of your argument, could I just ask you if you accept the constitutional validity of the one for one hiring quota.

MR. FRIED: That is not before us, and it certainly is a matter which would require considerable inquiry and we would want --

QUESTION: Do you have a position on that?

MR. FRIED: We would want to look at it. I could not --

QUESTION: You mean you haven't looked at that question yet?

MR. FRIED: Of course we have. Of course we have, but I would not want to pronounce on it without

looking at the circumstances and opening them up again because in the light of what this Court said in the Sheetmetal Workers case any such order must be subject to the strictest scrutiny and must be shown to be driven by a compelling purpose.

I would be very loathe to speculate and certainly to make --

QUESTION: Well, the government does not challenge that at this point.

MR. FRIED: It does not challenge it.

QUESTION: All right.

MR. FRIED: It is not an issue in the case.

QUESTION: Well, it was an issue in the case at one time.

MR. FRIED: But it is not an issue in this proceeding because there was no -- certiorari was not sought nor was it granted on that issue.

QUESTION: I see.

MR. FRIED: All we have before us is the one order of a one for --

QUESTION: Do you think there is a constitutional difference between a one for one promotion quota and a one for one hiring quota?

MR. FRIED: Certainly. Certainly, there is a difference. There is a difference because a hiring

quota, as this Court pointed out, has a more diffuse effect. The hiring quota has its burden, and there is a burden, which is why it is troublesome, but nevertheless it has a burden on a whole undifferentiated population of persons applying for a job. A promotion quota works on a distinct cohort, people who have worked together, who know each other, and who have embarked on a career with certain expectations, so there is indeed a difference between the two, but we do not have the hiring quota before us.

Now, the Sheetmetal Workers case established that, first of all, if there is to be action, state action, and that doesn't matter whether it is legislative, executive, or judicial, which uses a racial classification, there must be a compelling state interest or at least an important state interest.

Second, this racially preferential means to the end must be shown to have a close fit to the end, and the term that we prefer and that seems to capture the idea is that of narrow tailoring which the Court has used on many occasions.

And finally, there has to be a most searching inquiry to determine whether this hand in glove relation between means and ends actually obtains. The end in view in this case in respect to the action which is

before this Court cannot really be disputed because it is designated by the very style of the proceedings out of which the disputed order emerged.

These were proceedings to enforce the consent decree, and therefore the end in view of the decree was to enforce the 1979, 1981 consent decrees that promotions go forward on procedures fair to all without an adverse impact on black candidates and in conformity with the 1978 Uniform Guidelines, and the only question before this Court is whether the one for one order imposed in 1983 was indeed narrowly tailored to that end.

Now, narrow tailoring, of course, is a very factual inquiry, and yet it cannot be the case that a court or any other governmental actor can simply run the term "narrow tailoring" up the flagpole and then continue to do whatever it is he wanted to do. It is meant to be a break on ill-considered or unnecessary recourse to race by the courts or by anyone else.

QUESTION: Mr. Fried, may I inquire whether you think that the fact that the order was made conditional on the adoption of a neutral promotion policy and plan is a factor to be considered in whether it was narrowly tailored or not?

MR. FRIED: It is absolutely crucial that it

was conditional. In our view it is dispositive.

QUESTION: Well, was this order conditional on the adoption of a neutral promotion?

MR. FRIED: It was said to be, Justice O'Connor, but the one time on which it was imposed, which was in 1983, the police department was offering to go forward with promotions on a four black, eleven white schedule, so there was no adverse impact by definition on that case. Nevertheless, it was imposed. It was never imposed again, and yet in --

QUESTION: Has there been a neutral plan adopted? Do we assume that there has been one ever adopted or not?

MR. FRIED: The procedures currently used by the department cannot in any significant way be distinguished today from those which were in place at the time the department acted and offered to do its four for eleven promotion.

QUESTION: How do we know whether a neutral plan has been adopted? Is that something that was to be submitted to the Court for its approval?

MR. FRIED: There has as yet, and this is cited in our brief, there has as yet been no, no system which has been validated under the Uniform Guidelines, and this is why the idea that the decree was conditional

and so it doesn't really matter seems to us not to work because what happened before the decree in 1979 immediately after the consent decree was signed, the department promoted four black troopers, six white troopers.

In the proceedings the department offered to promote four black troopers and eleven white troopers. After this 1983 conditional decree the department promoted three black troopers and nine or ten white troopers. At no time and still to date has there been a validated promotion procedure , and therefore the conditionality of the 1983 decree strikes us as being something of a mystery, because we --

QUESTION: May I ask whose fault it is that there hasn't been a validated plan? Has the Court been dragging its feet and not looking at it, or has the department not submitted one, or what?

MR. FRIED: Well, the department has adopted a number of plans, but a validated plan, Justice O'Connor, is a difficult and complicated thing to do. Judge Johnson recognized that all the way back in 1975. The Uniform Guidelines, which are the standard for validation, state in turns that a selection procedure which has no adverse impact generally does not violate Title 7. This means that an employer may usually avoid

the application of the guideline by use of procedures which have no adverse impact.

Here, the department continuously since 1979 has made promotions to corporal by a formula which by definition had no adverse impact, so the Guidelines don't actually and would not usually be implied. It is a kind of belt and suspenders idea that was being used here.

QUESTION: General Fried, what is the meaning of the term "adverse impact" as you have just used it?

MR. FRIED: The meaning of the term "adverse impact," Mr. Chief Justice, is that the numbers that the procedure produces do not depart by more than four-fifths from the pool of persons applying for the job, roughly speaking. That is the so-called four-fifths rule. And in this respect the department has met or exceeded the four-fifths rule in every promotion it has made since the consent decree.

QUESTION: I need a little more help. Could you spell out what it means, "not depart by more than four-fifths?"

MR. FRIED: Yes. If you have a trooper force at the entry level seeking promotion to corporal and that trooper force is, let us say, 25 percent black, it has now reached 25 percent, it wasn't quite there yet in

1983, but it was supposed to be a 25 percent so let's say it's 25 percent black. Then the four-fifths rule requires that the number of promotions that you make not depart from that 25 percent.

QUESTION: One out of four.

MR. FRIED: One out of four. By more than four-fifths. Now, as I say, in each instance the department has done better than that, and what is ironic, Justice O'Connor, in relation to your question, is that after the 1983 decree, the proportions were actually marginally worse. They were slightly worse than what the department offered before it got socked with that 1983 decree.

So, the conditionality is, as I say, a bit of a mystery.

QUESTION: But it is confusing to me, still. Presumably if the department had a validated plan this order would evaporate.

MR. FRIED: Well, it has in fact evaporated because it has never been imposed again. There have been -- there was one batch of promotions which took place the next year to corporal, and the numbers, as I say, were slightly worse than what the department had offered, and there was still not a validated plan, and everybody was happy, so as I say it is a bit of a

mystery, but it is a mystery which I think can be cleared up in part by realizing that validating a promotion procedure, particularly when you are dealing with small numbers and upper level jobs, is a particularly difficult thing to do.

The Uniform Guidelines focus on things like demonstrations of job-relatedness of various criteria, which demonstrations have to be testified to by industrial psychologists and things of that sort. Well, that is extraordinarily hard to produce, and that is why many employers prefer to simply go to the language which I read. If there is no adverse impact you don't need to use the Guidelines.

Now, in the Sheetmetal Workers case the Court made quite clear that before you can use a racially preferential criterion you have to show that the means is narrowly tailored, and Justice Powell made the point that you can't find out whether something is narrowly tailored without asking, as compared to what? The phrase which is often used is "least restrictive alternative."

And we submit that the one for one quota imposed by the Court was not narrowly tailored as compared to the four for eleven promotion schedule offered by the department, and the numbers involved are,

of course, small, and yet we believe there is a very large principle involved here, which is what brings us to the Court, because the four for eleven which the department offered and offered in good faith as its prior and subsequent promotions after the 1979 consent decree showed, the four for eleven schedule has some rationale. It is in strict compliance with the consent decree's requirement that there be no adverse impact.

The one for one quota imposed by the Court, on the other hand, has no rationale whatever. It is wholly arbitrary.

QUESTION: But, General Fried, you can certainly say the one for one is in strict compliance with the requirement that there be no adverse impact. It goes too far in your view, I know, but that is all you have said about the four for eleven so far, is that it has no adverse impact. You can say the same thing about the one for one.

MR. FRIED: Well, the question that you are inviting me to speculate on was whether the police department and the Justice Department should in fact have signed onto the consent decree they did consent to. But the understanding of that consent decree and the use of the terms "adverse impact" would indicate that the four for eleven is what constitutes

compliance.

One for one is a wholly arbitrary proportion which bears no relation to anything.

QUESTION: You say that the four for eleven bears a relationship to the percentage of blacks in the private force who are trying to be corporal, 25 percent.

MR. FRIED: That is correct. It at least is tied to something. Now, we could, in another day and in another case, wonder whether that is a good idea. That is not this case and it is not the issue on which this Court granted certiorari. And our point is that if you are asking, was the one for one quota narrowly tailored I am simply asking the Court to compare it to the alternative, and the alternative was one which obviously trammeled less on the white competitors for these promotions and moreover at least had some rationale, represented something, and what we don't understand is what the one for one quota represented.

QUESTION: General Fried, can I just ask this kind of basic question? This narrowly tailored principle that you say should apply to remedial decrees entered by Courts after finding a history of racial discrimination, has the Court ever said that a decree, a remedial decree must be narrowly tailored as opposed to

a plan that the department itself might work out or legislation or something like that? You think it is clear the same standard applies to what the judge does to correct a proven violation of law and what a businessman or the department might do on its own?

MR. FRIED: Well, before I answer that question completely I must say that in respect to promotions this was to enforce a consent decree. Here we have the enforcement of a consent decree.

QUESTION: But we do have a history of violations of the statute, as I understand it.

MR. FRIED: We have the 1972 and 1975 litigated decrees. That is correct. It would seem that when a court imposes a remedy an argument can be made that there is a more stringent requirement upon the Court than when the parties --

QUESTION: Is that the message, for example, of the Swann case, that they should do no more than absolutely necessary to correct it, the school desegregation? It is the same sort of problem, isn't it?

MR. FRIED: I don't see the Swann case as authorizing a District Court to roam at large creating racial balances or using racial clarification --

QUESTION: Well, no, of course, it shouldn't

roam at large. It should try to tailor its decree.

MR. FRIED: That's correct.

QUESTION: But has this narrowly tailored language ever been found in cases describing the duty of a District Judge to correct a violation of law? Generally I thought the presumption was the other way, that he could perhaps do a little more than if there had been no proven violation of law.

MR. FRIED: He can do a little bit more except where the little bit more trammels upon innocent parties who are not themselves violators of law, so I have always assumed that the narrow tailoring requirement --

QUESTION: There were a lot of white school children who weren't violating any laws who had --

MR. FRIED: But neither were either white or black school children being deprived of an education, while here white troopers are being deprived of a promotion that they might otherwise have, so there is a very large difference.

I would like to just mention one possible justification.

QUESTION: But just to be clear, you don't have any cases where a judicial decree has been compelled to follow this kind of formula you are suggesting?

MR. FRIED: I rather understood the Sheetmetal Workers case to make that point. If you put together the various opinions, that is how I read the Sheetmetal Workers case. Indeed, the Court of Appeals in the Sheetmetal Workers case had a one for one quota rather like Judge Myron Thompson's quota here, and threw it out as, and I quote here, "not sufficiently narrowly tailored." So it didn't even begin --

QUESTION: But your point, point, as I understand it, is not that a one for one quota is always impermissible, but rather that the particular facts of this particular case it was excessive relief.

MR. FRIED: Yes, as compared to the alternatives.

QUESTION: Sort of an abuse of discretion.

MR. FRIED: As compared to the -- it had no sufficient rationale.

QUESTION: So we are really not deciding any general principle, but rather whether this particular relief was appropriate in this particular case.

MR. FRIED: When you come up with the numbers one for one, you have to have a reason for the numbers one for one. Judge Thompson said that as a matter of fact if the plaintiff had asked that all the promotions were black he would be inclined to do that, too, so it

strikes us as a wholly arbitrary number just pulled out of a hat. Now, it is said --

QUESTION: Do you think, Mr. Fried, that possibly the judge was just tired of waiting for a neutral promotion plan and it was an in terrorem sort of an order?

MR. FRIED: Oh, I am sure he --

QUESTION: What did we have here?

MR. FRIED: I am sure he viewed it that way but it is very odd if that is what it was because it is a little bit like spanking a child who is being good to show him you really mean it and you are ready to spank him when he is bad, because on this occasion the department was offering to promote in a way that had no adverse impact, and subsequently when they still didn't have a validated plan the one for one quota was no longer imposed, so it was a sword of Damocles, but I suppose the point of the sword of Damocles is that it hangs, not that it falls.

QUESTION: Was it within the power of the Court to demand and insist on the adoption of a neutral promotion plan that was validated?

MR. FRIED: Well, it is within its power, I suppose, but it has as yet shown -- it has yet to show that it considers that to be such an important thing,

given the fact that the department seems to be promoting without an adverse impact.

QUESTION: There are other in terrorem remedies available if the Court simply -- assuming that some in terrorem action was justified, the Court could have done something other than this.

MR. FRIED: Indeed.

QUESTION: It is not even narrowly tailored for that purpose, you would say, I guess.

MR. FRIED: It is not -- you are punishing a child when he is being good to show him you are ready to punish him when he is bad, and you are not even punishing that child, you are punishing his little friend across the street.

QUESTION: Let me ask this, General Fried. You said earlier that in fact the one for one requirement has evaporated. I think that is the word you used. Then what are we arguing about it for?

MR. FRIED: Because on this occasion a promotion was ordered by a court on a basis which we consider to be profoundly illegal, and the fact that it happened to a few people only once doesn't change that fact. This is a bad way for things to go forward, and this Court in terms of what it has said before, we believe, should make that quite plain.

Now, the issue is not moot because those who would have been promoted but for Judge Thompson's order would be entitled to back pay, compensatory seniority, things of that sort. So the issue is not moot. It is very focused. That is an advantage. It means we can look at narrow tailoring and really see what we have. We don't have the whole world to roam about in.

If I may, I would like to reserve the balance of my time for rebuttal. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, General Fried.

We will hear now from you, Mr. Cohen.

ORAL ARGUMENT OF J. RICHARD COHEN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. COHEN: Chief Justice, and may it please the Court, at the time the one for one promotion requirement was entered in this case three alternative remedies had already failed. The first remedy was imposed in 1970 in a case called United States v. Frazier. It was a remedy imposed against the Department of Personnel, one of the defendants in this case. It was a simple injunction, an injunction that enjoined it from discriminating.

Because the Department of Personnel administers the Alabama merit law, the injunction

applied across the board to all Alabama state agencies. In 1972 the District Court found that at least as far as the state troopers were concerned the injunction had been ignored.

In the face of such a blatant violation it ordered, among other things, the one for one hiring requirement. The District Court hiring requirement stays into effect or lasts until 25 percent of the trooper force as a whole is black. It is not limited to the entry level rank because the judge felt that the defendant's discrimination could not be so neatly characterized as being limited to hiring.

QUESTION: You disagree then with the Solicitor General, Mr. Cohen, as to whether the 1972 decree dealt with promotions?

MR. COHEN: Yes. In 1979, in spite of the fact that the 1972 decree was designed to provide an impetus to promote blacks, not a single black had been promoted. This time, however, the parties provided a solution, a consent decree that was entered by the District Court. It was a partial decree. It did not disturb the prior orders that had been entered in the case. Instead, it provided a mechanism by which blacks could finally advance within the ranks of the Alabama state troopers.

In 1983 the District Court found that the third remedy had failed miserably. The Alabama state troopers were still without any acceptable promotion procedures, and according to the District Court it did not appear that they would have any such procedures in the near future. The Solicitor General writes to this Court that there was no history of recalcitrance by the time 1983 came, that the Department of Public Safety, the Alabama state troopers had made a generous offer of 20 percent in -- right prior to the enforcement action beginning in 1983.

These statements don't stand scrutiny. The 20 percent offer to which the Solicitor referred was not intended to be an offer that recognized that the decree had -- that the promotion procedure had an adverse impact. It was designed to instead temporarily postpone the day of reckoning. As a matter of fact, when the plaintiffs brought the point out in the District Court that the 20 percent offer had been made, the defendants objected and said it was a confidential settlement offer.

The Solicitor also indicates that the system that was adopted after the consent degree was entered was no different than the system that was in place prior to the adoption of the Court's December 15, 1983,

order. That is false. The offer on the table was a one-time proposal, a one time proposal to promote eleven whites and four blacks. It was a proposal that was -- the numbers were generated, I suppose, as an attempt to modestly comply with the requirement that there be no adverse impact, but the numbers were not generated by any sort of procedure or any sort of selection procedure that was in place. The numbers to which the Solicitor points after the promotion order was entered were numbers that came about through the department's attempt to come up with promotion procedures that complied with its requirements under the decree.

The department represents that the promotion procedures comply with the decree, and the promotion procedures that they have adopted are far different than the promotion procedures that they had at the time the order was entered.

QUESTION: Mr. Cohen, let me try to understand what it is you argue that the Court could do. The Solicitor General has said that granting, even granting what you have said, that the department has been in violation, wilful violation, that where a race conscious remedy is imposed, according to the Solicitor General it has to be narrowly tailored.

Now, you are contesting that it has to be

narrowly tailored. You would say one for one is okay. I presume you would also say that all promotions must be of blacks as opposed to whites. would that have been okay?

MR. COHEN: No, Your Honor.

QUESTION: Why not?

MR. COHEN: That is not what we proposed in the District Court. I think there would be a significant difference. If all the promotions had gone to blacks, then it would have been the case that white state troopers would have had to perhaps wait an awfully long time in order to have another chance to even compete for promotional opportunities. The District Court's order, on the other hand, leaves white troopers with the opportunity to compete at worst for at least half of the promotional opportunities or the promotion positions available.

QUESTION: What about four to one?

MR. COHEN: Excuse me? I am so sorry.

QUESTION: What about four to one, four blacks for one --

MR. COHEN: I think that four to one would have been excessive given the District Court's experience. The one for one --

QUESTION: What are you measuring -- what is

the measure of what the ratio would be? The Solicitor General has suggested a measure. That is, the measure is what is necessary to bring the promotion into conformance with what the adverse impact stancards would be. What is your measure?

MR. COHEN: I think the District Court had to carefully balance the competing interests at stake, on the one hand the need to enforce the Department's consent decree obligations, and on the other hand the need to minimize any burden imposed on whites. The Court chose the one for one requirement for essentially two reasons.

The one for one requirement had existed at the hiring level for quite some time. The requirement had proven effective. It had also proven to be manageable. In addition, the District Court looked to this Court's opinion in Webber, an opinion that's -- albeit in a different context, to see what type of burden, or to seek guidance on what type of burden could be permissibly imposed.

The one for one promotion requirement that the District Court did impose also was far better suited to the situation that confronted it for two reasons. First, it compensated the beneficiaries of the department's consent decree commitments for the

department's delay.

Secondly, it provided a mechanism designed to ensure that the intolerable situation that confronted the District Court would not reoccur. If the department -- if the department had simply been enjoined to do what it was supposed to do all along, there would be no incentive to end its footdragging.

Now, the Solicitor does suggest that there were a variety of nonracial alternatives that the District Court could have imposed. For example, he mentions contempt or threatening the department with the prospect of taking over its operations through the appointment of an administrator. Whether these types of procedures would have served the purpose of the District Court order in ensuring future compliance with the consent decree is a matter, of course, where opinions might differ.

Nevertheless, two points are clear. The District Court entered its order only after carefully reviewing the failure of prior orders in this case to make the Alabama Department of Public Safety finally promote black troopers.

Secondly, none of the so-called plentiful nonracial alternatives that the Solicitor General puts forward here were ever presented to the District Court.

Not a single one of them. Now, this Court should not underestimate the ingenuity of litigants to think of new nonracial alternatives after the fact given that the District Court here had a firm basis and a reasoned basis for adopting its race-conscious remedy.

Sanctioning the Solicitor General's approach here would mean that litigation like this would never come to an end. Defendants with an egregious record of discrimination would have incentives to delay, and appellate courts, not having the benefit of the parties before it or familiarity with the record will always be required to second guess District Court judgments. In addition --

QUESTION: Wouldn't we have to second guess them all the time if the tailoring standard that we adopt is the one that you have suggested, which I don't -- I don't entirely understand. The only reason you say one for one is the magic number is because they had used one for one at the hiring level.

MR. COHEN: No.

QUESTION: Why is that the magic number then, as opposed to two to one, or three to one, four to one?

MR. COHEN: The District Court had competing interests at stake. The matter of choosing a ratio, there can't be any type of mathematical precision to it,

as this Court has recognized on many occasions. The District Court's choice of one for one was by no means arbitrary.

QUESTION: Why not? What did it rest on?

MR. COHEN: Because it had proven effective and manageable in the past. Second, the District Court --

QUESTION: At the hiring stage.

MR. COHEN: That's correct.

QUESTION: But as we pointed out in our opinions, hiring is quite different from promotion in the effect that is wrought upon the individuals that are harmed.

MR. COHEN: There is a difference, and the Court in Sheetmetals, of course, pointed out once or twice, I think that it was not dealing there with a burden that was imposed on existing employees. Nevertheless, the Court has not adopted any sort of per se rule that says that no race conscious orders can be entered at the promotion level.

QUESTION: No, but it makes you think that if one for one is good at the hiring stage it is not necessarily good, in fact, is likely not to be good at the promotional stage.

MR. COHEN: There are a number of other

purposes that the District Court's one for one order serve. Again, the District Court's one for one order was designed to provide a mechanism to ensure future compliance. It was designed to give the department --

QUESTION: It was in terrorem, in effect? It was a mechanism, a you see it, to compel the department to come up with a neutral plan? Is that how you see it?

MR. COHEN: Justice O'Connor, I don't know if the term in terrorem aids the analysis. The order was definitely designed to compel the Department of Public Safety --

QUESTION: Did it relate to the number of qualified blacks in a pool for promotion?

MR. COHEN: The order was carefully crafted in that regard. It said that the one for one requirement never would operate in the absence of objectively qualified blacks. The record before this Court indicates that the department has been allowed to make promotions to the lieutenant and the captain's level and promote only whites because the Court and the parties have accepted its representation that at least for now and because of its prior history of discrimination there are no black troopers in the ranks of the Alabama state trooper force that are objectively qualified.

So, the order has built-in safeguards to ensure that no unqualified troopers --

QUESTION: But the order on its face did not relate to the number of qualified people available. It was only because it was qualified that it would survive then?

MR. COHEN: The order would not survive if it mandated the promotion of numerous unqualified persons. I don't disagree. The one for one requirement was not pegged. It did not -- was not explicitly related to the percentage of black persons that took the corporal's examination in 1981. That's correct.

In addition to not requiring the promotion of anyone who was unqualified, the one for one requirement does not compel any unnecessary promotions. It is a limited remedy, a conditional one. It applies only in the event that the department fails to abide by its obligations, and then only in the event that blacks do not represent 25 percent of the troopers at a given rank.

The order here only has a minimal impact on the interests of white troopers.

QUESTION: What promotions had been made just prior to the -- between the time of the consent decree and the entry of this one on one order? Had there been

any?

MR. COHEN: Yes, in February of 1980, ten coporals were promoted, six whites and four blacks, pursuant to a side agreement entered simultaneously with the decree. In addition, white troopers had been promoted among the upper ranks, for example, from corporal to sergeant, from sergeant to lieutenant, lieutenant to captain, captain to major.

So while the department was continually promoting persons in its upper ranks --

QUESTION: Do you think that side agreement over -- was to generous to whites, that six-four?

MR. COHEN: I am not sure. I don't -- at the time that it was entered into it obviously appeared to be a good deal.

QUESTION: From the time of the consent decree until the one on one order was entered you can't say that there were any whites who were promoted who really didn't -- shouldn't have been promoted?

MR. COHEN: There were no whites who were promoted from the position of corporal other than the ten persons promoted at the time right after the consent decree was entered.

QUESTION: You said from the position of corporal. Did you mean to the position?

MR. COHEN: Yes. Thank you, Chief Justice.

Again, I would point out, however, that the 1979 consent decree was designed -- it was not the first time that the issue of promotion had come up in this case. Of course, black troopers in 1972 never had the luxury of being discriminated against at the level of promotion. There were no black troopers, and it wasn't because the Department of Public Safety just happened to be using a test that was not validated and happened to screen all of them out. It happened to be the case -- it happened because it operated a pervasive system of discrimination.

Because of that, Judge Johnson in 1972 applied the 25 percent figure to the trooper force as a whole. He explained in 1979 that the reason he did that was to provide an impetus to promote blacks. Justice Powell's opinion in Wygant, for example, indicates that the school board there perhaps to serve its interests could have chosen something more narrow, something that had less of an impact. They could have chosen a hiring quota rather than the layoff procedure that it did employ.

Well, in this case the hiring quota has already been implemented and it has proven ineffective to provide an impetus to the department to promote

blacks. Because of that the parties entered into their consent decree commitments and in 1983 those commitments were the ones that the District Court found that the department had not fulfilled.

QUESTION: Mr. Cohen, would a flexible goal of promotions geared to the number of qualified blacks available for promotion have been a more appropriate narrowly tailored remedy, do you think?

MR. COHEN: No, it would not, for two reasons.

QUESTION: And why not?

MR. COHEN: Just like the eleven to four proposal, the eleven to four one-time offer that the District Court rejected in 1983, a proposal that simply reiterated the department's consent decree commitments would have done nothing to compensate for the department's delay and it would not have provided some sort of mechanism to compel the department to comply with its obligations in the future.

In addition to only having --

QUESTION: Would tying it with a fine or contempt citation for delay have solved that problem, do you think?

MR. COHEN: Justice O'Connor, it is impossible to say in retrospect whether or not that would have

worked. The District Court here did have a firm basis for ruling that some sort of race conscious order was required. Previous orders had proven to be ineffective. The alternative of putting the director of public safety in jail, for example, until he changed his ways may have worked. One could never know.

QUESTION: Or fines? Or fines? It gets a little expensive.

MR. COHEN: Yes, Your Honor, but it also puts the District Court in the position of perhaps licensing discrimination for a price. The Department of Public Safety here has routinely paid the plaintiff's attorney's fees, and that has not deterred it from continuing to fail to meet its obligations.

QUESTION: Why is the one on one order any more effective?

MR. COHEN: Your Honor, it is more effective in two ways. One, if the department again delays there is a built-in mechanism to make up for it. Two --

QUESTION: Why is that enforceable?

MR. COHEN: Excuse me? I did not understand your question.

QUESTION: Based on your notion the Court could never enforce anything.

MR. COHEN: Your Honor, I regret to say that I

do not understand your point.

QUESTION: Well, you say the one on one order is all right and that it is effective.

MR. COHEN: It has been effective. That is correct.

QUESTION: That is because the department is obeying it.

MR. COHEN: It is -- it is not obeying the one for one requirement. It is promoting persons pursuant to procedures, employment procedures that would --

QUESTION: Well, nevertheless, nevertheless it is implementing the one on one requirement.

MR. COHEN: It is not promoting persons on a one to one basis. Up to this point since this order was --

QUESTION: Well, in any event this court's order is being lived up to.

MR. COHEN: This court's order is being lived up to.

QUESTION: I mean the District Court's order.

MR. COHEN: That's correct. However --

QUESTION: Well, why wouldn't a ten and five or a twelve and six, some other specific promotion scheme, why couldn't it have been employed, just like the one on one?

MR. COHEN: Your Honor, there is no question but that in the choice of a particular ratio a District Court has to use its best judgment. This does not mean that the appellate courts or this Court should acquiesce in whimsical orders. What it does mean, however, is that District Courts should have and need to have a reasoned basis for entering the orders that they do.

In this case, given the history of this defendant, given the alternatives that were proposed, the District Court did have a reasoned basis.

QUESTION: Is there any reason to believe that an order simply prohibiting promotions until a validated plan was adopted would have been any less effective than this? Suppose the court had just said that. Until you have a plan, no promotions. I can't be assured that the promotions will be on a nondiscriminatory basis, and therefore you don't do them until you have a validated plan.

MR. COHEN: Of course, that would require the District Court to decide promotions from where, for example. The District Court here did by its 1979 consent decree enjoin promotions to corporal other than the ten made pursuant to the side agreement until such time as the defendant lived up to its obligations under the decree, so an order similar to the one that Your

Honor is mentioning was entered in this case.

The defendant put forward a procedure that would have guaranteed that every promotion go to a white person. It tried to justify this result by pointing to the results of its unvalidated hiring tests, and so I think the record is clear that there is no reason to believe that the type of order that Your Honor is suggesting would have worked in this case.

The District Court's order had a limited impact on white troopers in two other important respects. Because the District Court's order only applies in the absence of procedures for determining merit, it cannot be meaningfully said that the one for one requirement disrupts legitimate expectations based on merit.

Secondly, although the government has much to say about the role of seniority in promotions in general it does not contest the fact that seniority played a trivial role here. At bottom the government's claim rests on the argument that persons have a right to be considered for promotion on the basis of merit rather than on the basis of the color of one's skin.

This argument, of course, in the context of this case merely restates the question, because the one for one requirement only applies in the absence of

procedures for determining merit, the government's argument is simply a reiteration of that, that the promotion order here, like any race-conscious remedy, draws a distinction on the basis of race.

This Court has made it clear that such distinctions can sometimes be drawn. It was properly drawn in this case.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.

Mr. Fried, do you have something more, General Fried? You have three minutes left.

ORAL ARGUMENT OF CHARLES FRIED, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. FRIED: Thank you, Mr. Chief Justice.

It is important to recall that no promotions to corporal took place after the 1979 consent decree except according to proportions which clearly indicate no adverse impact on blacks.

Second, Mr. Cohen speaks of delay. There is no indication in the record that had there been a validated procedure there would have been some larger number of promotions to corporal and therefore some possibly larger number of blacks promoted to corporal. There is no reason to believe that any more persons

would have been promoted to corporal on some other system under some other circumstances, so --

QUESTION: General, why wasn't -- why weren't validated procedures adopted?

MR. FRIED: Because procedures of this sort are extraordinarily difficult to validate in terms of showing, demonstrating that they are job-related.

QUESTION: Over all this time?

MR. FRIED: Over all this time. Yes, Your Honor.

QUESTION: How long -- how long --

MR. FRIED: They still have not done it. They still have not done it.

QUESTION: Well, it sounds to me like you say it is just too impossible. It can never be done.

MR. FRIED: The procedures that -- I think my point could be illustrated by comparing the procedures before the 1983 procedures and those that are in place now and which the plaintiffs find satisfactory. The procedures in place now are a combination of administered examinations, seniority, and elements of that sort plus a interview process, in other words, a combination of objective and subjective factors.

QUESTION: I take it you would say it would be sufficient compliance with the decree to say, well, we

just, we find it too hard to adopt some -- get some procedures validated, so we are just going to offer -- the department will just offer to do the eleven and four or twelve and six or something that will not have any adverse impact on blacks. We will just do that forever. We will just come in, Judge, and say, we have made this offer, and impose it on the defendants.

MR. FRIED: They are constantly fine tuning, if you like, monkeying with the procedures to have them produce this result more or less automatically.

QUESTION: Shouldn't your answer be yes, that would be perfectly all right?

MR. FRIED: Well, it would not be -- it would not have an adverse impact on blacks, and those --

QUESTION: It wouldn't live up to the decree to get some procedures.

MR. FRIED: It would not live up to the decree, but that aspect of the decree is slightly mystifying. It is a sort of a belt and suspenders thing, because the only reason that you want to have those procedures is to guarantee that there not be an adverse impact.

QUESTION: And you say that the -- you argue that a one on one rather than eleven and four is an exorbitant remedy for failure to adopt some validated

procedures.

MR. FRIED: When you are not having an adverse impact on your protected group. Thank you.

QUESTION: May I just ask one last question? I take it that if the no adverse impact is an acceptable standard, it would have been permissible here to have a three for one ratio for the future.

MR. FRIED: The no adverse impact is the standard of the consent decree which we as well as the other parties signed, and it is not in question in this case.

QUESTION: I understand that, but do I understand correctly what you are saying if you translate it to numbers is that a three for one hiring quota would have been permissible.

MR. FRIED: That's exactly what was offered to the District Court.

QUESTION: I am not asking you -- your view is, that would be permissible, right?

MR. FRIED: It would have been permissible because we offered it and the Justice Department raised no objection.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, General Fried.

The case is submitted.

(Whereupon, at 11:01 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

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BY Paul A. Richardson

(REPORTER)