The Burger Court Opinion Writing Database

Palmer v. Thompson

403 U.S. 217 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

May 13, 1971

Re: No. 107 - Palmer v. Thompson

Dear Hugo:

I have now reviewed this case for a second time and conclude that we should affirm. It is a hard case and close but as I read the record and our prior holdings a reversal would require us to go beyond anything yet decided. I am not prepared to do that.

I may add a brief comment.

Regards,

WEB

Mr. Justice Black

cc: The Conference

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: The Chief Justice

Circulated: MAY 13 1971

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1971]

Mr. Chief Justice Burger, concurring.

I concur with Mr. Justice Black, generally for the reasons stated by him, but add a brief comment.

The elimination of any needed or useful public accommodation or service is surely undesirable and this is particularly so of public recreational facilities. Unfortunately the growing burdens and shrinking revenues of municipal and state governments may lead to more and more curtailment of desirable services. Inevitably every such constriction will affect some groups or segments of the community more than others. To find an Equal Protection issue in every closing of public swimming pools, tennis courts, or golf courses would distort beyond reason the meaning of those important constitutional guarantees. To hold, as petitioner would have us do, that every public facility or service, once opened, constitutionally "locks in" the public sponsor so that they may not be dropped (see Note, Mr. Justice Blackmun's *concurring opinion*), would plainly discourage the expansion and enlargement of needed services in the long run.

We are, of course, not dealing with the wisdom or desirability of public swimming pools; we are asked to hold on a very meagre record that the Constitution *requires* that public swimming pools, once opened, may

70-107

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

CHAMBERS OF
THE CHIEF JUSTICE

Dear Harry I hope you will consider some "muting" of the first + last pages of your #107 Concurrence. I suppose this is because I am always uncomfortable—

and I think most readers are — with our speaking too much of the difficulties of close cases.

Perhaps I carry it too far in not even concessions as to the closeness of a hard case. I hope you will "settle" for a simple statement that you find it a close & hard case and then move into page 2 or on at least with your (1) on page 1. Regards WCB

Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

JAN 1970

Circulated:

Recirculated:

1

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1971]

Memorandum of Mr. Justice Black.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking an injunction to forbid such practices. After hearings the District Court granted a judgment declaring the enforced segregation denied equal protection of the laws but it declined to issue an injunction.[1] The Court of Appeals affirmed, and we denied certiorari.[2] The city proceeded to desegregate its public parks, auditoriums, golf course, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which it owned. A number of Negro citizens of Jackson then filed this suit to force the city to reopen the pools and

that

[1] *Clark* v. *Thompson*, 206 F. Supp. 539 (SD Miss. 1962). ~~Hold.~~

[2] 313 F. 2d 637 (CA5 1963), cert. denied 375 U. S. 951.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

Circulated: _____

Recirculated: JAN 11 1971

SUPREME COURT OF THE UNITED STATES

No. 107.—OCTOBER TERM, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1971]

Memorandum of MR. JUSTICE BLACK.

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[2] 313 F. 2d 637 (CA5 1963), cert. denied 375 U. S. 951.

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

February 16, 1971.

Dear Harry,

Re: No. 107 - Palmer v. Thompson

I have your note asking if "there is a contrary implication to the affirmance here in Bush v. Orleans Parish School Board, 187 F. Supp. 42, 45, affirmed, 365 U. S. 569." I joined in that affirmance and I can assure you that if I had ever entertained an idea that any part of the decision in that case would stand for the principle that the United States Constitution compels a State to tax its citizens to run public schools, I would never have voted to affirm the judgment. I cannot believe, for instance, that if the State of Minnesota should decide for any reason, good or bad, that the State no longer wanted to run public schools but depend on some other method of educating its people, that you or I would hold that a majority of the lifetime judges of this Court could compel the State to operate public schools. And certainly the same rule would apply with more force to a situation where for any reason a State through its legislature decided not to tax its people to operate swimming pools. There is no closeness or troublesomeness whatever in this case for me because I agree with the counsel who answered your question that if the judgment here is reversed the city will be "locked in" and must continue to operate swimming pools so long as a majority of our Court declines to let them free themselves from that burden.

Sincerely,

Hugo L. Black

Mr. Justice Blackmun

cc: Members of the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

Circulated: FEB 24 1971

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, *v.* Allen C. Thompson, Mayor, City of Jackson, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1971]

Memorandum of Mr. Justice Black.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking an injunction to forbid such practices. After hearings the District Court granted a judgment declaring that the enforced segregation denied equal protection of the laws but it declined to issue an injunction.[1] The Court of Appeals affirmed, and we denied certiorari.[2] The city proceeded to desegregate its public parks, auditoriums, golf course, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which it owned. A number of Negro citizens of Jackson then filed this suit to force the city to reopen the pools and

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[2] 313 F. 2d 637 (CA5 1963), cert. denied 375 U. S. 951.

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1971]

Memorandum of Mr. Justice Black.

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[2] 313 F. 2d 637 (CA5 1963), cert. denied 375 U. S. 951.

Hylster
Chicago

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

MAY 18 1971

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioners, *v.* Allen C. Thompson, Mayor, City of Jackson, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1971]

Mr. Justice Black announced the judgment of the Court and delivered an opinion in which Mr. Justice Harlan and Mr. Justice Stewart join.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking an injunction to forbid such practices. After hearings the District Court granted a judgment declaring that the enforced segregation denied equal protection of the laws but it declined to issue an injunction.[1] The Court of Appeals affirmed, and we denied certiorari.[2] The city proceeded to desegregate its public parks, auditoriums, golf course, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which

[1] *Clark* v. *Thompson,* 206 F. Supp. 539 (SD Miss. 1962).
[2] 313 F. 2d 637 (CA5 1963), cert. denied 375 U. S. 951.

PP 1, 3 L
+
Stylistic changes

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Black, J.

Circulated:

No. 107.—October Term, 1970

Recirculated: MAY 26 1971

Hazel Palmer et al., Petitioners, v. Allen C. Thompson, Mayor, City of Jackson, et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1971]

Mr. Justice Black delivered the opinion of the Court.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking an injunction to forbid such practices. After hearings the District Court granted a judgment declaring that the enforced segregation denied equal protection of the laws but it declined to issue an injunction.[1] The Court of Appeals affirmed, and we denied certiorari.[2] The city proceeded to desegregate its public parks, auditoriums, golf course, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which it owned. A number of Negro citizens of Jackson then filed this suit to force the city to reopen the pools and

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[2] 313 F. 2d 637 (CA5 1963), cert. denied 375 U. S. 951.

WD

TM

Stylistic Changes Throughout

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

Circulated: JUN 11 1971

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioners, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 14, 1971]

Mr. Justice Black delivered the opinion of the Court.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking an injunction to forbid such practices. After hearings the district court entered a judgment declaring that enforced segregation denied equal protection of the laws but it declined to issue an injunction.[1] The Court of Appeals affirmed, and we denied certiorari.[2] The city proceeded to desegregate its public parks, auditoriums, golf course, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which it owned. A number of Negro citizens of Jackson then filed this suit to force the city to reopen the pools and

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[2] 313 F. 2d 637 (CA5 1963), cert. denied 375 U. S. 951 (1963).

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

11th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

2-22-71

[February —, 1971]

Mr. Justice Douglas, dissenting.

Jackson, Mississippi closed all the swimming pools owned and operated by it, following a judgment of the Court of Appeals in *Clark* v. *Thompson,* 313 F. 2d 637, which affirmed the District Court's grant of a declaratory judgment that three Negroes were entitled to the desegregated use of the city's swimming pools. 206 F. Supp. 539, 542. No municipal swimming facilities have been opened to any citizen of either race since that time; and the city does not intend to reopen the pools on an integrated basis.

That program is not, however, permissible if it denies rights created or protected by the Constitution. *Buchanan* v. *Warley,* 245 U. S. 60, 81. I think that the plan has a constitutional defect; and that is the burden of this dissent.

Hunter v. *Erickson,* 393 U. S. 385, *Reitman* v. *Mulkey,* 387 U. S. 369, and *Griffin* v. *County School Board,* 377 U. S. 218, do not precisely control the present case. They are different because there state action perpetuated ongoing regimes of racial discrimination in which the State was implicated.

In *Griffin,* the State closed public schools in one county only, not in the others, and meanwhile contributed to the support of private segregated white schools. 377 U. S., at 232. That, of course, was a continuation of seg-

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

4, 8

12th DRAFT

From: Douglas, J.

Circulated: _____

Recirculated: 2-25

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1971]

Mr. Justice Douglas, dissenting.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2, 6

13th DRAFT

From: Douglas, J.

Circulated: ____

Recirculated: 3-3

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1971]

Mr. Justice Douglas, dissenting.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

14th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

From: Douglas, J.

Hazel Palmer et al., Petitioners, v. Allen C. Thompson, Mayor, City of Jackson, et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Circulated: 1/20/71

[May —, 1971]

Mr. Justice Douglas, dissenting.

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January 7, 1971

Re: No. 107 - Palmer v. Thompson

Dear Hugo:

I entirely agree with your Memorandum, and hope it will turn out to be an opinion for the Court.

Sincerely,

J.M.H.

Mr. Justice Black

CC: The Conference

May 26, 1971

Re: No. 107 - Palmer v. Thompson

Dear Hugo:

I agree with your recirculation of today.

Sincerely,

J. M. H.

Mr. Justice Black

CC: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 18, 1971

RE: No. 107 - Palmer v. Thompson

Dear Byron:

As I urged you last week, I do hope you will turn your Memorandum into an opinion. It fully expresses my view of both how the case should be decided and how that decision should be supported.

Sincerely,

W.J.B. Jr.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 5, 1971

No. 107 - Palmer v. Thompson

Dear Hugo,

I agree with your memorandum in this case.

Sincerely yours,

P.S.

Mr. Justice Black

Copies to the Conference

March 2, 1971

Re: No. 107 - Palmer v. Thompson

Dear Thurgood:

Since you are writing in this case and since you inquired about my views the other day, it occurred to me that it might be useful to you if I set down my position. Hence, the enclosed.

Sincerely,

B.R.W.

Mr. Justice Marshall

cc: Conference

No. 107 - Palmer v. Thompson

Memorandum of Mr. Justice White.

I agree with my Brother Black that the central purpose of the Fourteenth Amendment is to protect Negroes from invidious discrimination. Consistently with this view, I had thought that official policies forbidding or discouraging the joint use of public facilities by Negroes and whites were at war with the Equal Protection Clause. Our cases make it unquestionably clear, as Brother Black agrees, that such policies may not be implemented by maintaining separate facilities for the two races. It is also my view, but apparently not his, that a State may not have an official stance against desegregating public facilities and implement it by closing those facilities in response to a desegregation order.

Let us assume that a city has been maintaining segregated swimming pools and is ordered to desegregate them. Its express official response is that desegregation is contrary to the city's policy and that the facilities are being closed rather than to operate them on a desegregated basis. To me it is beyond cavil that on such facts the city is adhering to an unconstitutional policy and is implementing it by abandoning the facilities. It will not do in such circumstances to say that whites and Negroes are being treated alike in that both are denied use of public services. The fact is that closing the pools is an expression of existing official policy that Negroes are unfit to associate with whites. The Equal Protection Clause is a hollow promise if it does not forbid such official

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 5, 1971

Re: No. 107 - Palmer v. Thompson

Dear Thurgood:

Please insert the enclosed footnote in my memorandum in this case.

Sincerely,

B.R.W.

Mr. Justice Marshall

Copies to the Conference

No. 107 Palmer v. Thompson

Fn 15a, to be inserted after the discussion of Bush v. Orleans Parish School Board at page 17 of Memorandum of Mr. Justice White.

15a. I cannot agree with my Brother Black's attempt to discount the significance of Bush. First, the action taken in Bush in no sense depended on our conclusion in Brown that the provision of public education was an especially important state function. Had that been the case, and had recreational facilities somehow been considered less essential, the Court should have accepted the argument made by some states that Brown not be extended to recreational facilities. This we did not do. See Dawson, supra, and Holmes, supra. Similarly, if such a distinction was at all tenable, the extension of the "all deliberate speed" approach to desegregating public facilities might have been appropriate. But this argument was also emphatically rejected. See Watson, supra, at 529-530. When a public agency furnishes a service -- regardless of whether or not it is an "essential" one -- it must act in a nondiscriminatory manner with regard to that service.

Second, even accepting Mr. Justice Black's characterization of public schools as "important," there is much in our previous decisions to contradict his implication that providing swimming pools and other public recreational facilities is not a significant state function. In Evans v. Newton, 382 U.S. 296, 302 (1966), the Court

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 3-22-71

No. 107.—October Term, 1970

Recirculated: _____

Hazel Palmer et al., Petitioners, *v.* Allen C. Thompson, Mayor, City of Jackson, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1971]

Memorandum of Mr. Justice White.

I agree with my Brother Black that the central purpose of the Fourteenth Amendment is to protect Negroes from invidious discrimination. Consistent with this view, I had thought official policies forbidding or discouraging joint use of public facilities by Negroes and whites were at war with the Equal Protection Clause. Our cases make it unquestionably clear, as Brother Black agrees, that a city or state may not enforce such a policy by maintaining officially separate facilities for the two races. It is also my view, but apparently not his, that a State may not have an official stance against desegregating public facilities and implement it by closing those facilities in response to a desegregation order.

Let us assume a city has been maintaining segregated swimming pools and is ordered to desegregate them. Its express response is an official resolution declaring desegregation contrary to the city's policy and ordering the facilities closed rather than continued in service on a desegregated basis. To me it is beyond cavil that on such facts the city is adhering to an unconstitutional policy and is implementing it by abandoning the facilities. It will not do in such circumstances to say that whites and Negroes are being treated alike because both are

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 26, 1971

Re: No. 107 - Palmer v. Thompson

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

Copies to Conference

May 26, 1971

Re: No. 107 - Palmer v. Thompson

Dear Hugo:

There are some other matters I wish to pursue in this case and although the quest may be fruitless, I hope you will permit the case to go over another week.

Sincerely,

B.R.W.

Mr. Justice Black

cc: Conference

1, 2-4, 7, 8, 13, 22, 27, 29-31 ! minor Stylistic changes throughout

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: White, J.

Circulated: _____

Recirculated: 6-8-71

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioners, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1971]

Mr. Justice White, with whom Mr. Justice Brennan and Mr. Justice Marshall join, dissenting.

I agree with the majority that the central purpose of the Fourteenth Amendment is to protect Negroes from invidious discrimination. Consistent with this view, I had thought official policies forbidding or discouraging joint use of public facilities by Negroes and whites were at war with the Equal Protection Clause. Our cases make it unquestionably clear, as all of us agree, that a city or State may not enforce such a policy by maintaining officially separate facilities for the two races. It is also my view, but apparently not that of the majority, that a State may not have an official stance against desegregating public facilities and implement it by closing those facilities in response to a desegregation order.

Let us assume a city has been maintaining segregated swimming pools and is ordered to desegregate them. Its express response is an official resolution declaring desegregation to be contrary to the city's policy and ordering the facilities closed rather than continued in service on a desegregated basis. To me it is beyond cavil that on such facts the city is adhering to an unconstitutional policy and is implementing it by abandoning the facilities. It will not do in such circumstances to say that whites and Negroes are being treated alike because both are

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 21, 1971

Re: No. 107 - Palmer v. Thompson, Mayor

Dear Hugo:

I cannot agree with your memorandum. If it becomes an opinion for the Court I will have to prepare a dissent.

Sincerely,

T. M.

Mr. Justice Black

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 11, 1971

Re: No. 107 - Palmer v. Thompson

Dear Byron:

I have gone over your Memorandum in the above case. I have discontinued any effort on my part to write in this case. The reason is that I am in thorough agreement with your Memorandum, and would gladly join it as an opinion.

At this time I have one suggestion only. It might be wise to consider adopting the language of the last footnote in Judge Wisdom's opinion which states as follows:

> "We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution."

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

2nd DRAFT

From: Marshall, J.

Circulated: MAY 19 1971

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1971]

Mr. Justice Marshall, dissenting.

While I am in complete agreement with the opinions of Justices Douglas and White, I am obliged to add a few words of my own.

First, the majority and concurring opinions' reliance on the "racially equal effect upon all citizens" of the decision to discontinue all public pools is misplaced. As long ago as 1948 in *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), this Court held:

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

In short, when the officials of Jackson, Mississippi, in the circumstances of this case, detailed by Mr. Justice White, denied a single Negro child the opportunity to go swimming simply because he is a Negro, rights guaranteed to that child by the Fourteenth Amendment were lost. The fact that the color of his skin is used to prevent others from swimming in public pools is irrelevant.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

From: Marshall, J.

Circulated:

Recirculated: MAY 26 1971

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1971]

Mr. Justice Marshall, with whom Mr. Justice Brennan joins, dissenting.

While I am in complete agreement with the opinions of Justices Douglas and White, I am obliged to add a few words of my own.

First, the majority and concurring opinions' reliance on the "racially equal effect upon all citizens" of the decision to discontinue all public pools is misplaced. As long ago as 1948 in *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), this Court held:

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

In short, when the officials of Jackson, Mississippi, in the circumstances of this case, detailed by Mr. Justice White, denied a single Negro child the opportunity to go swimming simply because he is a Negro, rights guaranteed to that child by the Fourteenth Amendment were lost. The fact that the color of his skin is used to prevent others from swimming in public pools is irrelevant.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

4th DRAFT

From: Marshall, J.

Circulated: _____

Recirculated: 6/4/71

SUPREME COURT OF THE UNITED STATES

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1971]

Mr. Justice Marshall, with whom Mr. Justice Brennan and Mr. Justice White join, dissenting.

While I am in complete agreement with the opinions of Justices Douglas and White, I am obliged to add a few words of my own.

First, the majority and concurring opinions' reliance on the "racially equal effect upon all citizens" of the decision to discontinue all public pools is misplaced. As long ago as 1948 in *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), this Court held:

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

In short, when the officials of Jackson, Mississippi, in the circumstances of this case, detailed by Mr. Justice White, denied a single Negro child the opportunity to go swimming simply because he is a Negro, rights guaranteed to that child by the Fourteenth Amendment were lost. The fact that the color of his skin is used to prevent others from swimming in public pools is irrelevant.

February 12, 1971

Re: No. 107 - Palmer v. Thompson

Dear Hugo:

I wonder whether there is a contrary implication to the affirmance here in Bush v. Orleans Parish School Board, 187 F. Supp. 42, 45 (E. D. La. 1960), affirmed, 365 U.S. 569. There seems to be a suggestion there that the closing of all schools would be an impermissible move on the part of the state. I suspect the case can be distinguished from this one, but I would be interested in your own reaction.

Sincerely,

HAB

Mr. Justice Black

February 12, 1971

Re: No. 107 - Palmer v. Thompson

Dear Hugo:

I have read with great interest the memorandum you have circulated.

This case, for me, is one of the most troublesome ones of the 1970 Term. Perhaps it should not be troublesome, but I seem to see persuasive arguments on each side. For the moment, as I advised you on the day following our conference, my inclination is to join you in the proposed affirmance. I am particularly impressed by the fact that Jackson did quickly integrate its other facilities, and I am disturbed by the concession made by counsel, in answer to my inquiry at oral argument, that if we reverse, the city will be "locked in" and can never close its pools for economic reasons even of the highest gravity.

Please regard this vote as tentative. Mr. Justice Marshall has proposed a dissent. I would like to give that and any other dissenting opinion due consideration before casting a final vote.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference

HAB

April 29, 1971

Re: No. 107 - Palmer v. Thompson

Dear Hugo:

In my note of February 12 to you, I indicated that this case was most troublesome for me. I still think it is very close. I do not know whether it is important. After studying the two dissents which have been circulated, I have decided to write separately and, thus, not formally join your opinion. My separate writing is being circulated today.

Sincerely,

HAB

Mr. Justice Black

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

Circulated: 4/29/71

Recirculated: _____

No. 107.—October Term, 1970

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1971]

Mr. Justice Blackmun, concurring.

For me, this is perhaps the most excruciatingly difficult case of the present Term. I frankly admit that I find myself close to dead center. In isolation the litigation may not be of great importance; it could have, however, significant implications.

The dissent of Mr. Justice White rests on a conviction that the closing of the Jackson pools was racially motivated, at least in part, and that municipal action so motivated is not to be tolerated. That dissent builds to its conclusion with a detailed review of the city's and the State's official attitudes of past years.

Mr. Justice Black's opinion, for a plurality of the Court, stresses, on the other hand, the facially equal effect upon all citizens of the decision to discontinue the pools. It also emphasizes the difficulty and undesirability of resting any constitutional decision upon what is claimed to be legislative motivation.

After unduly long and uncomfortable struggle, I remain impressed with the following factors: (1) No other municipal recreational facility in the city of Jackson has been discontinued. Indeed, every other service—parks, auditorium, golf courses, zoo—that once was segregated, has been continued and operates on a nonsegregated basis. One must concede that this was effectuated initially under pressure of the 1962 declaratory judgment of

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

pp. 1-3

2nd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 107.—October Term, 1970

Recirculated: 5/3/71

Hazel Palmer et al., Petitioner, v. Allen C. Thompson, Mayor, City of Jackson, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1971]

Mr. Justice Blackmun, concurring.

Cases such as this are "hard" cases for there is much to be said on each side. In isolation this litigation may not be of great importance; however, it may have significant implications.

The dissent of Mr. Justice White rests on a conviction that the closing of the Jackson pools was racially motivated, at least in part, and that municipal action so motivated is not to be tolerated. That dissent builds to its conclusion with a detailed review of the city's and the State's official attitudes of past years.

Mr. Justice Black's opinion stresses, on the other hand, the facially equal effect upon all citizens of the decision to discontinue the pools. It also emphasizes the difficulty and undesirability of resting any constitutional decision upon what is claimed to be legislative motivation.

I remain impressed with the following factors: (1) No other municipal recreational facility in the city of Jackson has been discontinued. Indeed, every other service—parks, auditorium, golf courses, zoo—that once was segregated, has been continued and operates on a nonsegregated basis. One must concede that this was effectuated initially under pressure of the 1962 declaratory judgment of the federal court. (2) The pools are not part of the city's educational system. They are a general municipal service

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

pp. 1, 3

3rd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 107.—OCTOBER TERM, 1970

Recirculated: 5/26/71

Hazel Palmer et al., Petitioner, *v.* Allen C. Thompson, Mayor, City of Jackson, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1971]

MR. JUSTICE BLACKMUN, concurring.

I, too, join MR. JUSTICE BLACK's opinion and the judgment of the Court.

Cases such as this are "hard" cases for there is much to be said on each side. In isolation this litigation may not be of great importance; however, it may have significant implications.

The dissent of MR. JUSTICE WHITE rests on a conviction that the closing of the Jackson pools was racially motivated, at least in part, and that municipal action so motivated is not to be tolerated. That dissent builds to its conclusion with a detailed review of the city's and the State's official attitudes of past years.

MR. JUSTICE BLACK's opinion stresses, on the other hand, the facially equal effect upon all citizens of the decision to discontinue the pools. It also emphasizes the difficulty and undesirability of resting any constitutional decision upon what is claimed to be legislative motivation.

I remain impressed with the following factors: (1) No other municipal recreational facility in the city of Jackson has been discontinued. Indeed, every other service—parks, auditorium, golf courses, zoo—that once was segregated, has been continued and operates on a nonsegregated basis. One must concede that this was effectuated initially under pressure of the 1962 declaratory judgment of the federal court. (2) The pools are not part of the city's educational system. They are a general municipal service