The Burger Court Opinion Writing Database

Franks v. Bowman Transportation Co.

424 U.S. 747 (1976)

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

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAR 5 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-728

Harold Franks and Johnnie Lee, Petitioners, *v.* Bowman Transportation Company, Inc., et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1976]

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I concur in the judgment in part and generally with MR. JUSTICE POWELL, but I would stress that although retroactive benefit-type seniority relief may sometimes be appropriate and equitable, competitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination. An award such as "front pay" could replace the need for competitive-type seniority relief. See, *ante*, at 29, n. 39. (Majority opinion.) Such monetary relief would serve the dual purpose of deterring the wrongdoing employer or union—or both—as well as protecting the rights of innocent employees. In every respect an innocent employee is comparable to a "holder-in-due-course" of negotiable paper or a bona fide purchaser of property without notice of any defect in the seller's title. In this setting I cannot join in judicial approval of "robbing Peter to pay Paul."

I would stress that the Court today does not foreclose claims of employees who might be injured by this holding from petitioning the District Court for equitable relief on their own behalf.

2nd DRAFT

12-22-75

SUPREME COURT OF THE UNITED STATES

No. 74–728

Harold Franks and Johnnie Lee, Petitioners, *v.* Bowman Transportation Company, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, may be awarded seniority status retroactive to the dates of their employment applications.[1]

Petitioner Franks brought this class action in the United States District Court for the Northern District of Geogia against his former employer, respondent Bowman Transportation Company, and his unions, the International Union of District 50, Allied and Technical Workers of the United States and Canada and its local, No. 13600,[2] alleging various racially discriminatory em-

[1] Petitioners also alleged an alternative claim for relief for violations of 42 U. S. C. § 1981. In view of our decision we have no occasion to address that claim.

[2] In 1972, the International Union of District 50 merged with the United Steelworkers of America, AFL–CIO, and hence the latter as the successor bargaining representative is the union respondent before this Court. Brief for Respondent United Steelworkers of America, AFL–CIO and for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae*, at 5.

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

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

January 29, 1976

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 1/29/76

Recirculated: _____

MEMORANDUM TO THE CONFERENCE

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

I have considered Lewis' view expressed in his concurring and dissenting opinion that a distinction, in matter of remedy, should be drawn between "benefit seniority" and "competitive seniority." With all respect to Lewis' characteristic thoughtful and reasoned view, I must disagree. The following states my reasons, which I shall incorporate at appropriate places in a recirculation of the circulated opinion.

1. I submit that Lewis does not adequately treat with and fails successfully to distinguish, post, at n. 12, the standard practice of the National Labor Relations Board granting retroactive seniority relief under the National Labor Relations Act to persons discriminatorily refused employment or discriminatorily discharged in violation of the Act. Since NLRA is the remedial model for Title VII, my circulation relies heavily on its interpretation, which I understood to be the

W.J.B. - I have gone over your memorandum of January 29. I would go no further than your suggestions at the end of the memorandum.

HAB.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 3/4/76

P.P. 15, 16, 18, 19, 25-29

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–728

Harold Franks and Johnnie Lee, Petitioners, *v.* Bowman Transportation Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, may be awarded seniority status retroactive to the dates of their employment applications.[1]

Petitioner Franks brought this class action in the United States District Court for the Northern District of Geogia against his former employer, respondent Bowman Transportation Company, and his unions, the International Union of District 50, Allied and Technical Workers of the United States and Canada and its local, No. 13600,[2] alleging various racially discriminatory em-

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[2] In 1972, the International Union of District 50 merged with the United Steelworkers of America, AFL–CIO, and hence the latter as the successor bargaining representative is the union respondent before this Court. Brief for Respondent United Steelworkers of America, AFL–CIO and for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae*, at 5.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 11, 1976

MEMORANDUM TO THE CONFERENCE

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

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

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

W.J.B. Jr.

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

FN 42 Accordingly, contrary to the argument of the dissent, to no "significant extent" do we "[strip] the district courts of [their] equitable powers." post. at ____. Rather our holding is that, in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. To do otherwise would be to shield "inconsisten[t] and capri[cious]" denial of such relief from "thorough appellate review." Albemarle Paper Co., 422 U.S., at 416.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 2/13/76

pp. 16, 18, 26, 27, 29-30, 31

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-728

Harold Franks and Johnnie Lee, Petitioners, *v.* Bowman Transportation Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, may be awarded seniority status retroactive to the dates of their employment applications.[1]

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[1] Petitioners also alleged an alternative claim for relief for violations of 42 U. S. C. § 1981. In view of our decision we have no occasion to address that claim.

[2] In 1972, the International Union of District 50 merged with the United Steelworkers of America, AFL-CIO, and hence the latter as the successor bargaining representative is the union respondent before this Court. Brief for Respondent United Steelworkers of America, AFL-CIO and for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae*, at 5.

STYLISTIC CHANGES
p.p. 15, 18, 24-26, 28-30

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 3/11/76

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-728

Harold Franks and Johnnie Lee, Petitioners, *v.* Bowman Transportation Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, may be awarded seniority status retroactive to the dates of their employment applications.[1]

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[1] Petitioners also alleged an alternative claim for relief for violations of 42 U. S. C. § 1981. In view of our decision we have no occasion to address that claim.

[2] In 1972, the International Union of District 50 merged with the United Steelworkers of America, AFL-CIO, and hence the latter as the successor bargaining representative is the union respondent before this Court. Brief for Respondent United Steelworkers of America, AFL-CIO and for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae*, at 5.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

~~4/5/76~~ April 12, 1976

Memo is
15 pgs. long

MEMORANDUM TO THE CONFERENCE

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

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

In only one of the petitions do the central legal issues presented track those disposed of in Franks. Certain of the other petitions do contain legal issues resolved in Franks, but other independent and important legal issues are also raised. The opinion in Franks, dealing most directly with questions concerning the remedy of retroactive seniority once a Title VII violation is established, did not dispose of questions of Title VII liability where the operation of the seniority system itself is alleged to be the illegal discriminatory conduct. Nor does Franks deal with problems of proof concerning the identities of individual discriminatees -- for purposes of awarding retroactive seniority or any other remedy -- in instances where no formal job or

WB

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 30, 1976

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

Dear Bill,

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

P.S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 13, 1976

74-728 - Franks v. Bowman Transportation Co.

Dear Bill,

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

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 29, 1975

No. 74-728 -- Harold Franks and Johnnie Lee v. Bowman Transportation Company, Inc., et al.

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

V

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 23, 1975

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

Dear Bill:

Please join me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 29, 1976

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

Dear Bill:

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

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 16, 1976

MEMORANDUM TO THE CONFERENCE

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

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

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

422 U.S. 405 (1975), but it will provide needed -- and desirable -- guidance to both the District Courts and Courts of Appeals.

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

T.M.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 17, 1976

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

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 29, 1975

No. 74-728 Franks and Lee v. Bowman

Dear Bill:

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

I agree that retroactive seniority may be an appropriate equitable remedy under § 706(g), depending upon the circumstances. As CA5 held that it could never be a remedy, I agree with you that CA5 must be reversed. But I differ as to what § 706(g) requires.

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

The noncompetitive aspects of seniority are quite different. These include automatic across-the-board pay increases, the vesting of pension benefits, entitlement to specific periods of vacation, and the like. The employer bears the burden of these aspects of seniority and innocent employees are not penalized.

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

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

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

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-728

Harold Franks and Johnnie Lee, Petitioners, *v.* Bowman Transportation Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree that this controversy is not moot, and that in the context of a duly certified class action the "capable of repetition, yet evading review" criterion discussed last Term in *Sosna* is only a factor in our discretionary decision whether to reach the merits of an issue, rather than part of the Art. III "case or controversy" requirement. I therefore concur in Part I of the Court's opinion.

I also agree with Part II of the opinion insofar as it determines the "thrust" of § 703 (h) of Title VII to be the insulation of an otherwise bona fide seniority system from a challenge that it amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination. *Ante,* at 12. Therefore, I concur in the precise holding of Part II, which is that the Court of Appeals erred in interpreting § 703 (h) as a bar, in every instance, to the award of retroactive seniority relief to persons discriminatorily refused employment after the effective date of Title VII. *Ante,* at 13.

Although I am in accord with much of the Court's discussion in Parts III and IV, I cannot accept as correct its basic interpretation of § 706 (g) as virtually requiring a district court, in determining appropriate equitable

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 4, 1976

No. 74-728 Franks v. Bowman Transportation

MEMORANDUM TO THE CONFERENCE:

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

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

Lewis

L.F.P., Jr.

ss

pp 3, 6, 8, 10, 12, 13, 14, 15, 16, 17, 18, 19

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT Recirculated: FEB 10 1976

SUPREME COURT OF THE UNITED STATES

No. 74-728

Harold Franks and Johnnie Lee, Petitioners, *v.* Bowman Transportation Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 12, 1976

No. 74-728 Franks v. Bowman

MEMORANDUM TO THE CONFERENCE:

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

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

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

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

Bill's observation that our opinions now "don't seem to differ to any great extent" is especially puzzling. His opinion:

(1) Creates an explicit presumption where none is indicated by the language of § 706(g), its history or the purposes of the Act.*

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

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

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

L.F.P.

L.F.P., Jr.

*Bill's proposed new footnote 42 reiterates a "presumption in favor of rightful place seniority relief. . . ."

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

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

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

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

√

1, 4, 8, 11, 14, 16

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: MAR 16 1976

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–728

Harold Franks and Johnnie Lee, Petitioners, v. Bowman Transportation Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

I agree that this controversy is not moot, and that in the context of a duly certified class action the "capable of repetition, yet evading review" criterion discussed last Term in *Sosna* is only a factor in our discretionary decision whether to reach the merits of an issue, rather than an Art. III "case or controversy" requirement. I therefore concur in Part I of the Court's opinion.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1976

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

Dear Lewis:

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

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference