The Burger Court Opinion Writing Database

Dayton Board of Education v. Brinkman

433 U.S. 406 (1977)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1977

Re: 76-539 Dayton Board of Education v. Brinkman

Dear Bill:

I join either way.

Regards,

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1977

RE: No. 76-539 Dayton Board of Education v. Brinkman

Dear Bill:

As you know, for some time it's been my view in school desegregation cases that we ought defer to dispositions concurred in by District courts and Courts of Appeals. Theirs is a very difficult task that I have come to feel is deserving of the encouragement of our acceptance, unless they have very obviously gone wrong. Because that's my approach, I'm disturbed by the tone of your opinion. I think you are unnecessarily harsh, particularly on the Court of Appeals. Moreover, your reading of the opinions of both courts suggests that there was far less deliberate segregation than I think those courts could find has been imposed or encouraged by the school board. I certainly think that the "cumulative violations" constitute more than "very little" support for the remedial order. Surely, at least they are cogent evidence of the school board's deliberate discriminatory intent, and in that circumstance, actions more subtle than blatant - and perhaps even inaction - would buttress a finding of purposeful discrimination systemwide sufficient to support the remedical order.

In short, I'll try my hand at writing separately, although I'd rather not, and probably won't if you can see your way to remove the chastizing tone.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1977

RE: Dayton Board of Education v. Brinkman, No. 76-539

Dear Bill:

I very much appreciate your willingness to hear me out, but I'd certainly understand why you may conclude that I'm asking too much. I think I can best get across my suggestions for softening the vigor of the criticism of the performances of the District Court and Court of Appeals if I propose concrete wording changes. So here goes:

Page 7, paragraph beginning at the bottom of the page. Rephrase as follows:

> "Judged most favorably to petitioners, then, the District Court's findings of constitutional violations did not, under our cases, suffice to justify the remedy imposed."

Page 11, third line:

> "But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope."

Page 11. Delete first full paragraph, in middle of page. This particularly strikes me as unduly harsh.

Page 13, line 6 of last paragraph. Insert after "did in fact,"

> "perpetuate or increase the consequences of past de jure segregation or otherwise discriminate against minority pupils, teachers or staff."

Page 13, last two words of last line, through page 14, end of carry-over paragraph:

> "...tailor its remedial decree to the harm resulting from those violations. Only if there has been a systemwide impact may there be a systemwide remedy. Keyes, supra, at 213."

I would join if those changes can be made although I'd add a paragraph or so for emphasis.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

✓

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1977

RE: No. 76-539 Dayton Board of Education v. Brinkman

Dear Bill:

I very much appreciate your consideration of my suggestions and fully understand why you'd prefer not to accept some of them. In the circumstances I'll shortly circulate an opinion concurring in the result. Needless to say nothing in your memorandum commits you to incorporate any of my suggested changes.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

No. 76-539 O.T. 1976

From: Mr. Justice Brennan

Circulated: 6/9/77

Recirculated: _____

Dayton Board of Education, et al., Petitioners

v.

Mark Brinkman, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

June ____ 1977

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court today reaffirms the authority of the federal courts "to grant appropriate relief of this sort [i.e., busing] when constitutional violations on the part of school officials are proven. Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973) . . . ." Ante, at 3. In this case, however, the violations actually found by the District Court were not sufficient to justify the remedy imposed. Indeed, none of the parties contends otherwise. Respondents nowhere argue that the three "cumulative violations" should by themselves be sufficient to support the comprehensive, systemwide busing order imposed. Instead, they urge us to find that other, additional actions by the school board appearing in the record should be used to support the result. The United States, as amicus curiae, concedes that the "three-part 'cumulative' violation found by the district court does

Unchanged from typed draft

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

1st DRAFT

Circulated: _____

Recirculated: 6/9/77

SUPREME COURT OF THE UNITED STATES

No. 76-539

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1977]

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The Court today reaffirms the authority of the federal courts "to grant appropriate relief of this sort [i. e., busing] when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973) . . . ." *Ante,* at 3. In this case, however, the violations actually found by the District Court were not sufficient to justify the remedy imposed. Indeed, none of the parties contends otherwise. Respondents nowhere argue that the three "cumulative violations" should by themselves be sufficient to support the comprehensive, systemwide busing order imposed. Instead, they urge us to find that other, additional actions by the school board appearing in the record should be used to support the result. The United States, as *amicus curiae,* concedes that the "three-part 'cumulative' violation found by the district court does not support its remedial order," Brief at 21, and also urges us to affirm the busing order by resort to other, additional evidence in the record. Under this circumstance, I agree with the result reached by the Court. I do so because it is clear from the holding in this case, and that in *Milliken* v. *Bradley,* — U. S. —, — (1977), also decided today, that the "broad and flexible equity powers" of district courts to remedy unlawful school segregation continue unimpaired.

This case thus does not turn upon any doubt of power

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 21, 1977

MEMORANDUM TO THE CONFERENCE

RE: Cases held for Dayton Board of Education v. Brinkman, No. 76-539

Contrary to Bill Rehnquist, I think that remands for reconsideration of the two cases held for Dayton would be inappropriate.

In School District of Omaha v. United States, No. 76-705, the Eighth Circuit, en banc, affirmed the remedial order of the District Court. Bill's hold memo states, "Davis was decided before the most recent CA 8 opinion, but after the previous one, and there is no indication that the CA 8 gave any reconsideration in its most recent opinion to the legal standard it applied previously." But actually the Court of Appeals explicitly stated:

> We have also reviewed the mandate of this Court in light of two recent Supreme Court decisions: Pasadena City Board of Education v. Spangler...; Washington v. Davis.... We find nothing in these opinions that would cause us to revise our earlier opinions. App., p. 173-174.

We have already denied certiorari in this case once before, 423 U.S. 946, when the Court of Appeals first held that "segregation in the Omaha School District was intentionally created and maintained by the defendants." 521 F.2d 530 (1975). The most recent proceedings in the Court of Appeals concerned the proper scope of the remedy for those constitutional violations. The SG contends that the remedy is properly commensurate with the violations. I think the SG is right. Therefore, a remand in light of Washington v. Davis at this point, when the Court of Appeals has already reconsidered its holding in light of that case, and when the central issue in the most recent proceeding was the remedy rather than the violation, would, I think, be inappropriate.

In Brennan v. Armstrong, No. 76-809, (the Milwaukee case), I would find a remand equally inappropriate. As Bill's supplemental hold memo makes clear, the Seventh Circuit did discuss Washington v.

Davis. Writing for the panel, Judge Tone discussed the case at some length, and explicitly stated that the Washington v. Davis question was "the issue in the case at bar." App., p. 13. The Court of Appeals found that the requirements of the case had been satisfied. It was Judge Tone who dissented in the Seventh Circuit in the Indianapolis school case on the ground that Washington v. Davis was not being followed. Our remand for reconsideration in light of Arlington Heights and Washington v. Davis was a vindication of his dissenting opinion. Clearly, Judge Tone understands the significance of Washington v. Davis, and a remand for reconsideration in light of that case would be inappropriate.

A remand of the Milwaukee case in light of Dayton and Milliken also seems to me obviously unsuited to what was actually before the Court of Appeals. The District Court had certified to the Court of Appeals the question of liability, and the necessity for some injunctive remedy. The only District Court order in effect (1) enjoined the School Board "from discriminating" -- a prospective remedy -- and (2) ordered the defendants "to begin forthwith" the formulation of plans which would eliminate the effects of past discrimination. App., p. 141. No question as to the scope of the remedy was before the Court of Appeals because no plan to remedy past discrimination had yet been ordered. When the District Court formulates a remedial decree, it will, of course, be guided by Dayton and Milliken in that task. A remand of the Court of Appeals decision -- which quite properly did not reach the Dayton and Milliken issues -- seems to me wholly unnecessary.

I will vote to deny in both cases.

Sincerely,

Bill

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1977

No. 76-539, Dayton Bd/Education v. Brinkman

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1977

Re: No. 76-539 - Dayton Board of Education v. Brinkman

Dear Bill:

I join.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 1, 1977

Re: No. 76-539 - Dayton Board of Education v. Brinkman

Dear Bill:

Please show me as not participating in the consideration or decision of this case.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 3, 1977

Re: No. 76-539 - Dayton Board of Education v. Brinkman

Dear Bill:

Please join me.

Sincerely,

HAB

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1977

Re: No. 76-539 - Dayton Board of Education
v. Brinkman

Dear Bill:

I agree with the suggestion John has made in the second paragraph of his letter of June 3 to you, and I hope it is possible for you to make that change.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 26, 1977

No. 76-539 Dayton

Dear Bill:

Thank you for the opportunity to take a look at your draft opinion on May 23. I will be glad to join the opinion when it is circulated. Meanwhile, I understand that it is undergoing the usual editing, and I have indicated in pencil some suggested changes. In addition, I make the following observations:

1. Although I agree that the performance of CA6 was eccentric (to say the least), I doubt the wisdom of coming down on it quite so hard. I would not, for example, elevate the conduct of CA6 to the importance of the substantive issue before us. See p. 2, 3. Perhaps you have in mind John's thought that we should give CA6 an opportunity to clarify the findings, rather than require a remand to the District Court. But I believe you make a wholly convincing case for the necessity of more specific findings by the District Court.

2. The draft is not entirely clear as to the sequence, and result, of the various appeals. I suppose you have in mind adding, near the beginning of the opinion, a brief review of the history of this case, stating how it reached us and identifying specifically the issues before us.

3. As you point out, the District Court made only three ultimate findings of constitutional violation: racially imbalanced schools, optional attendance zones, and rescission of the lame-duck school board resolution. These were then described as a "cumulative violation" of the Equal Protection Clause. While this phrase is ambiguous, I believe at least five of us at the Conference thought that only the "optional attendance zones" violation had legal significance. The

mere existence of racially imbalanced schools proves nothing, as this is a condition that exists in every major city in the United States where there is a black or Chicano population. Nor, is the rescission of the board resolution in itself a violation - as CA6 recognized. Thus, on the present record, the only identifiable constitutional violation relates to the optional attendance zones for two or three high schools. Even as to these, there was full freedom of choice, and the zones may well have been created at a time when lower court decisions supported freedom of choice as a permissible remedy. It was not until Green (1968) that this Court clarified its position on this remedy.

In any event, you may wish to consider a narrowing of the focus with the view to concluding that - on the present record and in view of the ambiguity - the only arguable violation is the creation and maintenance of optional zones. On the record before us, there appears to be no justification for any remedial action with respect to other schools in the system. Indeed, if the history of this case were not so confused and if one had greater confidence in exactly what the courts below have found and held, I would vote for a flat reversal, and direct the District Court to confine the remedy to the consequences of the high school zones.

4. You make rather sparing use of the desegregation case authority. There are some views expressed in Swann that may be worth quoting, for example:

> "The task [in formulating appropriate remedies] is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." p. 16.
>
> * * * *
>
> ". . . it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." p. 16.
>
> * * * *
>
> "As with any equity case, the nature of the violation determines the scope of the remedy. In default

> by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." p. 16.
>
> * * * *
>
> ". . . it should be clear that the existence of some small number of one-race, or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law." p. 26.

One can, of course, find just about anything he wants in the rambling, "paste-pot" opinion in Swann. Also, it is necessary to remember that Swann was addressing the traditional segregated school system that prevailed widely in the South. In the case before us, the District Court expressly found - as I recall - that no such system had existed in Dayton for many years, if ever. Thus, the Swann language about a "unitary system" and the Green language about "root and branch" are inapposite.

As the central issue in this case is the appropriateness of the remedy ordered by CA6, I would make quite clear - by reference to what we have said in prior cases - that the nature and scope of the remedy are determined and limited by the constitutional violations found to exist. Of course, by their nature, the remedial powers of a court of equity are broad, but they may not reach beyond the outer boundaries of the violation that invokes equitable relief.

In addition to the language in Swann, this point was addressed in Milliken, and in Potter's opinion in Hills v. Gautreaux. Also, you may find some relevant langauge in the little opinion I wrote on the remand of the Austin School case. You would know better than I whether Pasadena - which you cite - merits quotation.

5. I have dictated a rider for your consideration, that might be the basis for some revision of pages 24 and 25 of the draft. You are summarizing there the reasons for the taking of additional evidence and the making of more specific findings by the District Court. I think there are more fundamental reasons than the mere ambiguity of the phrase "cumulative violation". As indicated above, in view of the almost negligible specific findings of constitutional violation,

we are giving the respondents (the original plaintiffs) the benefit of doubt by allowing the record to be reopened for further evidence and additional findings.

I am sending a copy of this memo to Potter, and will be happy to confer with either or both of you on this or any subsequent draft.

Sincerely,

L Lewis

Mr. Justice Rehnquist

lfp/ss

cc: Mr. Justice Stewart

In view of the confusion at various stages in this case, evident from the opinions both of the Court of Appeals and the District Court, as to the applicable principles and appropriate relief, the case must be remanded to the District Court for the taking of additional evidence and the making of more specific findings.

If the only deficiency in the record before us was the failure of the Court of Appeals to pass on respondents' assignments of error respecting the initial rulings of the District Court, it would be appropriate to remand the case to that court, but we think it evident that supplementation of the record will be necessary. Apart from what has been said above with respect to the use of the ambiguous phrase "cumulative violation" by both courts, the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed requires supplementation of the record and additional findings addressed specifically to the scope of the remedy. It is clear, in any event, that the presently mandated remedy requiring racial balance of every school within 15% is wholly without support in the record before us.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 1, 1977

No. 76-539 Dayton Board v. Brinkman

Dear Bill:

Please join me.

Sincerely,

L. Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 26, 1977

Re: No. 76-539 - Dayton

Dear Lewis:

Herewith are my immediate reactions to your letter of May 26th respecting proposed changes in the draft opinion; I called you a moment ago, but you were temporarily tied up, and since I still do not feel quite up to spending a full day in the office after Conference I had planned to leave early this afternoon. I am therefore sending you this in writing, with the thought that you, Potter, and I can get together for any sort of discussion that is needed at our mutual convenience tomorrow. If the occasion should arise, I will be home at any time after four o'clock today, and would be more than happy to talk about the matter by telephone.

As to paragraphs two and four of your letter, I will have no trouble at all in accommodating them. I had sent the draft to the printer a couple of days ago, after having received Potter's suggestions, in order to avoid the final backup, but will suggest proposed changes in accordance with these paragraphs which will go in a second draft.

With respect to paragraph three, I agree entirely with its thrust, but thought that I had pretty well said just that in the present draft. If it were not for the respondent's contentions which were never considered by the Court of Appeals I, too, could vote for a flat reversal, and direct the District Court to confine the remedy to the consequences of the high school zones.

With respect to paragraph five, I think the substance of your proposal is probably an improvement on mine, and would like to try my hand at some modifications of yours to use as a substitute for my present language on pages 24 and 25.

With respect to paragraph one, I am not nearly so much in agreement as with your comments discussed above. I think that one thing this case has going for it that may attract a substantial number of votes is the wierd conduct of the Court of Appeals for the Sixth Circuit; they could have virtually made this case appeal proof had they made additional findings of fact on appeal, and it is their failure to either do that or to reverse the District Court on points of law that makes their imposition of the system-wide remedy so plainly wrong under our decided cases to which you refer in your paragraph four. I think the suggestion in paragraph four of including additional citations from our cases in this respect is good, but I would be most loath to downplay the substance of the criticism of the Court of Appeals, since so far as the structure of our opinion goes the behavior of that court is one of the main fulcrums.

With respect to your reference in paragraph four to the "root and branch" language from Green, I had no intention of including any such language in my draft, and a fairly cursory check of it confirms my recollection that I had not included any. I did include the elimination of any "vestige" of segregation language from Keyes, but I thought that something such as this was essential in order that we not be accused of completely retreating from prior doctrine in the area.

Sincerely,

Bill

Copy to Mr. Justice Stewart

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 31, 1977

Re: No. 76-539 Dayton Board of Education v. Brinkman

Dear Lewis:

Herewith is a more up to date reaction on my part to your memo of May 26. I have actively had a chance to incorporate several of your suggestions, and I attach a printed draft reflecting them which will be circulated later today.

In response to your paragraph 2, I have added footnote 1 setting forth the procedural history of the case.

I agree completely with the thrust of your paragraph 3, but upon reflection still think that the point is adequately made by the language beginning on the bottom of p.6 and carrying over to p.7. Please let me know if you have something different in mind.

I also agree, as suggested in paragraph 4, that the draft was a bit sparse on quotation from the governing cases. I have attempted to remedy that with a quote from Gautreaux (in which the full Court joined) which incorporates dispositive language from Milliken and Swann. See p.13.

Finally I think your rider proposed in paragraph 5 is an improvement over my language, and I have incorporated it verbatim with the exception of the last sentence which is modified as per Potter's suggested change in the previous draft. See pp. 12-13.

Sincerely,

Bill

Mr. Justice Powell

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: MAY 31 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-539

Dayton Board of Education et al., Petitioners, v. Mark Brinkman et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This school desegregation action comes to us after five years and two round trips through the lower federal courts.[1] Those

[1] This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio, on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. App., at 1. On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan*, 503 F. 2d 684 (CA6 1974).

The District Court then ordered the submission of new plans by the Board and by any other interested parties. App., at 70. On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modified and expanded in an effort to comply with the Court of Appeals mandate. App., at 73. On appeal, the Court of Appeals again reversed as to remedy and directed that the District Court "adopt a system-wide plan for the 1976–1977 school year. . . ." *Brinkman* v. *Gilligan*, 518 F. 2d 853 (CA6 1975).

Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. App., at 99. On March 25, 1976, the details of the plan were approved by the District Court. App., at 110. In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan*, 539 F. 2d 1084 (CA6 1976).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 2, 1977

Re: No. 76-539 - Dayton Board of Education
v. Brinkman

Dear Bill:

If you would be willing to suggest language to carry out the suggestions contained in your note of June 1st, I would certainly give them careful consideration.

Sincerely,

WHR
lfc

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-539 Dayton Board of Education v. Brinkman

Herewith my response to the suggestions of Bill and John for changes in the presently circulating draft. I am most willing to accept two of your suggestions, Bill, but feel I cannot accept the remaining ones without somewhat altering the focus of the opinion. I can fully accept your suggestion, John, and will do so. I will recirculate to include the suggestions which I accept, unless I am advised by someone who has already joined that such inclusion would be objectionable. I do not regard my acceptance of any of the suggestions which I do accept as any sort of a quid pro quo in return for which either of you are committed to join the opinion.

Your suggested wording changes on p. 7 and on p. 11, Bill, are entirely acceptable to me. I cannot, however, go along with the paragraph deletion on p. 11. I thought that one of the consensuses (if you will permit an anglicization of a Latin fifth declension noun) was that much of what is wrong in the present state of the case has been caused by the court of appeals' misperception of its proper role in the case, and the paragraph which you seek to delete attempts to address that problem.

I am not presently inclined to incorporate your first suggested change on p. 13, Bill, not because I necessarily disagree with it, but because it seems to me to contain language which is not clarified or elsewhere addressed in the opinion. The final suggestion on pp. 13-14 I am not

willing to incorporate, since it replaces what seems to me to be a useful reference to the relation of population distribution and "segregation" with another repetition of the more generalized "tailoring of the remedy to the violation" language which appears throughout the opinion.

I agree fully with your proposed revision of the last sentence on the second full paragraph of p. 12, John.

Sincerely,

STYLISTIC CHANGES THROUGHOUT

p. 14

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

2nd DRAFT

From: Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 76-539

Recirculated: JUN 8 1977

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1977]

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—V

PP 7,11,12,14

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUN 9 1977

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–539

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1977]

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This school desegregation action comes to us after five years and two round trips through the lower federal courts.[1] Those

[1] This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio, on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. App., at 1. On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan*, 503 F. 2d 684 (CA6 1974).

The District Court then ordered the submission of new plans by the Board and by any other interested parties. App., at 70. On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modified and expanded in an effort to comply with the Court of Appeals mandate. App., at 73. On appeal, the Court of Appeals again reversed as to remedy and directed that the District Court "adopt a system-wide plan for the 1976–1977 school year. . . ." *Brinkman* v. *Gilligan*, 518 F. 2d 853 (CA6 1975).

Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. App., at 99. On March 25, 1976, the details of the plan were approved by the District Court. App., at 110. In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan*, 539 F. 2d 1084 (CA6 1976).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 13, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-539 Dayton Board of Education v. Brinkman

I have this morning sent to the printer an additional citation to be added on p. 13 of my opinion in this case. At the end of the full paragraph on the page (after "Hills, supra, at 294."), I am adding "See also Austin Independent School District v. United States, ____ U.S. ____, ____ (1976) (Mr. Justice Powell, concurring)."

Sincerely,

WHR

P 13

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUN 13 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–539

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This school desegregation action comes to us after five years and two round trips through the lower federal courts.[1] Those

[1] This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio, on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. App., at 1. On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan*, 503 F. 2d 684 (CA6 1974).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-539 - Dayton Board of Education v. Brinkman

In No. 76-705, School District of Omaha v. United States, the Court is presented with a systemwide desegregation plan which was adopted by the District Court after the CA 8 reversed a finding of no segregative intent and directed formulation of such a remedial plan. The initial District Court opinion of 57 pages extensively reviewed the factual evidence presented, and recognized that there was considerable racial imbalance in school attendance patterns. Applying a legal standard which placed the burden of proving intentional segregative actions on the plaintiffs, and which regarded the natural and foreseeable consequences of the Board's conduct as "neither determinative nor immaterial" but as "one additional factor to be weighed," the District Court concluded that the plaintiffs had not carried the burden of proving a deliberate policy of racial segregation.

On appeal, the CA 8 rejected the legal standard applied below, stating that a "presumption of segregative intent" arises from acts or omissions whose natural and foreseeable result is to "bring about or maintain segregation."

Reviewing the facts as found by the District Court concerning faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of one high school in the district, the CA 8 generally accepted the factual findings but in each case concluded, contrary to the District Court, that there was sufficient evidence to shift the burden of proof to the defendant. Finding that in no instance had the school board carried its rebuttal burden, the CA 8 remanded for formulation of a systemwide remedy. We denied cert. 423 U.S. 946.

On explicit instruction of the CA 8, the District Court promulgated an extensive plan involving, among other elements, the systemwide transportation of students. The CA -8 affirmed. On the petition for certiorari challenging the systemwide plan now in effect, I will vote to grant, vacate, and remand in light of Dayton and Washington v. Davis, 426 U.S. 299, 240 (1976).

While in an individual case a finder of fact may be perfectly entitled to infer intent from the effect of acts, the Court of Appeals did not put its holding on such grounds. Its decision invoking a presumption of law based on "natural and foreseeable consequences" is, I believe, inconsistent with the spirit of Washington v. Davis, which stated that the burden of proving discriminatory intent rests on the plaintiffs. Davis was decided before the most recent CA 8 opinion, but after the previous one, and there is no indication that the CA 8 gave any reconsideration in its most recent opinion to the legal standard it applied previously. Dayton calls into question the propriety of the Court of Appeals itself prescribing a systemwide remedy even assuming that several specific types of violations were correctly found.

In No. 76-809, Brennan v. Armstrong, the Milwaukee school case, the District Court found that the school board

had engaged in intentional segregative conduct, notwithstanding its own observation that the actions found to be segregative in effect were adequately explained as aspects of the implementation of a consistent neighborhood school policy. It reasoned that it was "hard to believe that out of all the decisions made by school authorities . . ., mere chance resulted in there being almost no decision that resulted in the furthering of integration." In particular, the District Court discussed the segregative effects of Board actions relating to district boundaries, site selection, busing policy, open transfers, and faculty assignment. It enjoined certain conduct having segregative effects, requested proposals for a systemwide remedy, and certified for interlocutory appeal the question of whether there had been a constitutional violation.

On review, the CA 7 noted that there was, within the District Court opinion, "an unexplained hiatus between specific findings of fact and conclusory findings of segregative intent." It also stated, though, that the District Court is "entitled to a presumption of consistency," and that "while arguably no individual act carried unmistakable signs of racial purpose, it was not unreasonable to find a pattern clear enough to give rise to a permissible inference of segregative intent."

This case was argued to the Court of Appeals on June 2, 1976, and decided by them on July 23, 1976. Washington v. Davis, supra, was handed down on June 7, 1976. While one cannot say that the decision of the Court of Appeals cannot be reconciled with Washington v. Davis, it is certainly arguable that it might have reached a different result had it had the"benefit" of that decision at the time of its decision. Washington v. Davis is nowhere mentioned in the opinion of the Court of Appeals.

Although the District Court, as noted above, called for plans for a systemwide desegregation remedy, the Court of Appeals gives no consideration whatever to the issue of whether such a remedy is justified on the assumption that the findings of the District Court were to be upheld. Since the District Court certified its entire order for interlocutory appeal, the scope of the remedy which it proposed was necessarily before the Court of Appeals. The Court of Appeals, however, without discussing this question at all, simply concludes its opinion by stating:

> "Since we conclude that the District Court was not clearly erroneous in finding segregation in the Milwaukee school system caused by official conduct undertaken with segregated intent, we affirm the holding that the Milwaukee public school system is unconstitutionally segregated."

The third question presented in the petition for certiorari certainly raises the question of whether a systemwide remedy was justified even if the District Court's findings and conclusions were to be upheld. Again, from our perspective here I do not think it can be said that the Court of Appeals could not, consistently with Dayton, have affirmed the District Court's order for a systemwide remedy. But since the Court of Appeals did not even discuss this issue, and since it affirmed the order of the District Court without having the benefit of our decisions in either Dayton or Milliken, I recommend that the petition for certiorari be granted, and the judgment of the Court of Appeals be vacated and remanded for reconsideration in the light of Washington v. Davis, Dayton, and Milliken.

Sincerely,

WWW

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

S1B

June 21, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-539 - Dayton Board of Education v. Brinkman (Supplemental Memo)

The memorandum on cases held for Dayton Board of Education v. Brinkman is inaccurate in one respect. On page 3, in discussing the Milwaukee case, it states that Washington v. Davis is not mentioned in the CA 7 opinion upholding the District Court finding as to segregative intent. In fact, the CA 7 did discuss Washington v. Davis. See App., at 13.

I nonetheless remain of the view expressed in the memo that a grant, vacate, and remand for reconsideration in light of Dayton, Milliken, and Washington v. Davis is appropriate. Not only did the court fail to correctly construe the requirement of the Davis case that discriminatory intent be proven; Dayton itself sheds additional light on the nature of the proof of intent which is necessary to support the sort of system-wide remedy required by the CA 7. Earlier this Term, we remanded the Indianapolis school case for reconsideration in light of Davis and Arlington Heights, notwithstanding the Court of Appeals' awareness of Davis at the time it rendered its decision. 45 U.S.L.W. 3508 (Jan. 25, 1977).

Sincerely,

WHR

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

F

STB

June 22, 1977

SECOND SUPPLEMENTAL MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-539 - Dayton Board of Education v. Brinkman

Thinking that we would all welcome an increase in the rate of paper flow, I take the liberty of responding to Bill Brennan's criticism of my recommendations as to disposition of the hold cases. As to the Omaha case, I have nothing further to add to my initial memorandum.

As to Brennan (the Milwaukee case), I do not think the question can be broken down as easily into a simple division between "liability" and "remedy" as Bill's memorandum suggests. In Dayton, we stated that the "duty of both the District Court and of the Court of Appeals" was to first determine whether there was any conduct of the school board "which was intended to, and did in fact, discriminate against minority pupils." In Brennan the District Court clearly found there was. But in Dayton, we went on to observe:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and

> only if there has been a system-wide impact may there be a system-wide remedy." Fourth draft, pages 13-14.

The District Court here made various findings of segregated acts on the part of the Milwaukee School Board, but so far as I can tell never made the second inquiry mandated by Dayton before the formulation of the remedy. It is not at all clear from the District Court's opinion that the District Court is aware of the requirement that it make such an inquiry. Its opinion may fairly be read as requiring a system-wide remedy without a finding of a system-wide violation:

> "That responsibility [of the Special Master], simply stated, is to develop a plan for the desegregation of the Milwaukee public school system, and to submit that plan to the Court for its consideration." App., at 136.
>
> * * *
>
> "This Court fully recognizes that the action it has taken today and ruling that the Milwaukee school system is unconstitutionally segregated may well be disputed by those who are parties to this suit. . ." App., at 137.

The District Court's certification under 28 U.S.C. § 1292(b), which appears at page 139 of the appendix, certainly contemplates appellate review of the "decision and order" beginning at page 22 of the appendix and concluding at page 139 thereof.

Since petitioners do raise the second step Dayton inquiry in their third question presented, and since the Court of Appeals did not address that inquiry at all, I think the grant, vacate, and remand which I have proposed is well justified.

Sincerely,

WM

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 76-539 Dayton Board of Education v. Brinkman

Potter has suggested that in view of Bill's opinion dissenting from the vote to grant, vacate, and remand in Omaha, and John's opinion dissenting from a similar vote in Brennan, I write a short proposed per curiam summarizing the conclusions in my hold memorandum in these cases. I will do so, and try to circulate it this afternoon.

Sincerely,

WEB

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 3, 1977

Re: 76-539 - Dayton Board of Educ. v. Brinkman

Dear Bill:

On the whole, I think your opinion has handled a rather delicate situation extremely well. However, I did have a reaction somewhat comparable to Bill Brennan's because I am also rather sensitive to the problem of the District Judge on the firing line. If you make the changes, at least in substance, that he has proposed, I will join the opinion.

I had one other sentence that troubled me that I would like to mention purely as a suggestion. It is the last sentence in the first full paragraph on page 12 beginning "In view of the confusion . . . ." I tried my hand at a somewhat more moderate revision, and frankly could not improve upon the sentence. However, I wonder if we want to require additional evidence to be taken in all events. Perhaps it would be wiser to end by remanding "to the District Court for the making of more specific findings and, if necessary, the taking of additional evidence."

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

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

76-539 - Dayton Bd. of Educ. v. Brinkman

From: Mr. Justice Stevens

Circulated: JUN 14 1977

Recirculated: _____

MR. JUSTICE STEVENS, concurring.

With the caveat that the relevant finding of intent in a case of this kind necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board, see Washington v. Davis, 426 U.S. 229, 253-254 (Stevens, J., concurring), I join the Court's opinion.

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 21 1977

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–539

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1977]

MR. JUSTICE STEVENS, concurring.

With the caveat that the relevant finding of intent in a case of this kind necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board, see *Washington* v. *Davis*, 426 U. S. 229, 253–254 (STEVENS, J., concurring), I join the Court's opinion.