The Burger Court Opinion Writing Database

Columbus Board of Education v. Penick

443 U.S. 449 (1979)

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

April 30, 1979

MEMORANDUM TO THE CONFERENCE:

Re: 78-610 Columbus Board of Education v. Penick

I will vote to affirm in this case.

Regards,

WEB

Too bad. The principles (new ones & inconsistent with Dayton I & Milliken) applied by CA 6 are the same in both cases. The C.J. should have voted the same way in both.

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

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1979

Re: 78-610 - Columbus Bd. of Education v. Penick

78-627 - Dayton Bd. of Education v. Brinkman

Dear Byron:

I will await the other writings in both of these cases.

Regards,

WED

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1979

Re: (78-610 - Columbus Bd. of Educ. v. Penick
(
(78-627 - Dayton Bd. of Educ. v. Brinkman

Dear Potter:

I join your opinion covering both these cases.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

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

From: The Chief Justice

Circulated: JUN 25 1979

Recirculated: _____

Columbus Board of Education
v.
Penick

No. 78-610

Mr. Chief Justice Burger, concurring in the judgment.

I perceive no real difference in the legal principles stated in the dissenting opinions of MR. JUSTICE REHNQUIST and MR. JUSTICE POWELL on the one hand and the concurring opinion of MR. JUSTICE STEWART in this case on the other; they differ only in their view of the District Court's role in applying these principles in the finding of facts.

Like MR. JUSTICE REHNQUIST, I have serious doubts as to how many of the post-1954 actions of the Columbus Board of Education can properly be characterized as segregative in intent and effect. On this record I might very well have concluded that few of them were. However, like MR. JUSTICE STEWART, I am prepared to defer to the trier of fact because I find it difficult to hold that the errors rise to the level of "clearly erroneous" under Rule 52. The

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: _____

Recirculated: JUN 26 1979

printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-610

Columbus Board of Education et al., Petitioners, *v.* Gary L. Penick et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I perceive no real difference in the legal principles stated in the dissenting opinions of MR. JUSTICE REHNQUIST and MR. JUSTICE POWELL on the one hand and the concurring opinion of MR. JUSTICE STEWART in this case on the other; they differ only in their view of the District Court's role in applying these principles in the finding of facts.

Like MR. JUSTICE REHNQUIST, I have serious doubts as to how many of the post-1954 actions of the Columbus Board of Education can properly be characterized as segregative in intent and effect. On this record I might very well have concluded that few of them were. However, like MR. JUSTICE STEWART, I am prepared to defer to the trier of fact because I find it difficult to hold that the errors rise to the level of "clearly erroneous" under Rule 52. The District Court did find facts sufficient to justify the conclusion reached by MR. JUSTICE STEWART that the school "district was not being operated in a racially neutral fashion" and that the Board's actions affected "a meaningful portion" of the school system. *Keyes* v. *School District, No. 1,* 413 U. S. 189, 208 (1973). For these reasons I join MR. JUSTICE STEWART's opinion.

In joining that opinion, I must note that I agree with much that is said by JUSTICES REHNQUIST and POWELL in their dissenting opinions in this case and in *Dayton.* I agree especially with that portion of MR. JUSTICE REHNQUIST's opinion

(2)

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 16, 1979

RE: No. 78-610 Columbus Board of Education v. Penick

Dear Byron:

I agree.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 27, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 78-610 (A-89): Columbus Board of Education, et al. v. Gary L. Penick, et al.

I would vote to issue mandate or, in the alternative, to vacate Bill Rehnquist's stay.

W.J.B., Jr.

PJB

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

1ST DRAFT

From: Mr. Justice Stewart

Columbus Board of Education v. Penick, No. 78-610

Dayton Board of Education v. Brinkman, No. 78-627

Circulated: 18 JUN 1979

Recirculated: _____

MR. JUSTICE STEWART, concurring in the result in No. 78-610 and dissenting in No. 78-627.

My views in these cases differ in significant respects from those of the Court, leading me to concur only in the result in the Columbus case, and to dissent from the Court's judgment in the Dayton case.

It seems to me that the Court of Appeals in both of these cases ignored the crucial role of the federal district courts in school desegregation litigation[1] -- a role repeatedly emphasized by this Court throughout the course of school desegregation controversies, from Brown v. Board of Education II, 349 U.S. 294,[2] to Dayton Board of Education v. Brinkman I, 433 U.S. 406.[3] The development of the law concerning school segregation has not reduced the need for sound factfinding by the district

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–610 AND 78–627

Columbus Board of Education et al., Petitioners,
78–610 *v.*
Gary L. Penick et al.

Dayton Board of Education et al., Petitioners,
78–627 *v.*
Mark Brinkman et al.

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

[June —, 1979]

MR. JUSTICE STEWART, concurring in the result in No. 78–610 and dissenting in No. 78–627.

My views in these cases differ in significant respects from those of the Court, leading me to concur only in the result in the *Columbus* case, and to dissent from the Court's judgment in the *Dayton* case.

It seems to me that the Court of Appeals in both of these cases ignored the crucial role of the federal district courts in school desegregation litigation[1]—a role repeatedly emphasized by this Court throughout the course of school desegregation controversies, from *Brown* v. *Board of Education II*, 349 U. S. 294,[2] to *Dayton Board of Education* v. *Brinkman I*, 433 U. S.

[1] Rule 52 (a), Federal Rule of Civil Procedure, reflects the general deference that is to be paid to the findings of a district court. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." See *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395.

[2] "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of

4-9

The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 20 JUN 1979

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–610 AND 78–627

Columbus Board of Education et al., Petitioners,
78–610 *v.*
Gary L. Penick et al.

Dayton Board of Education et al., Petitioners,
78–627 *v.*
Mark Brinkman et al.

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

[June —, 1979]

MR. JUSTICE STEWART, concurring in the result in No. 78–610 and dissenting in No. 78–627.

My views in these cases differ in significant respects from those of the Court, leading me to concur only in the result in the *Columbus* case, and to dissent from the Court's judgment in the *Dayton* case.

It seems to me that the Court of Appeals in both of these cases ignored the crucial role of the federal district courts in school desegregation litigation[1]—a role repeatedly emphasized by this Court throughout the course of school desegregation controversies, from *Brown* v. *Board of Education II*, 349 U. S. 294,[2] to *Dayton Board of Education* v. *Brinkman I*, 433 U. S.

[1] Rule 52 (a), Federal Rule of Civil Procedure, reflects the general deference that is to be paid to the findings of a district court. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." See *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395.

[2] "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of

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

From: Mr. Justice White

Circulated: 16 MAY 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–610

Columbus Board of Education et al., Petitioners, *v.* Gary L. Penick et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

The public schools of Columbus, Ohio, are highly segregated by race. In 1976, over 32% of the 96,000 students in the system were black. About 70% of all students attended schools that were at least 80% black or 80% white. 429 F. Supp. 229, 240 (SD Ohio 1977). Half of the 172 schools were 90% black or 90% white. 583 F. 2d 787, 800 (CA6 1978). Fourteen named students in the Columbus school system brought this case on June 21, 1973, against the Columbus Board of Education, the State Board of Education, and the appropriate local and state officials.[1] The second amended complaint, filed on October 24, 1974, charged that the Columbus defendants had pursued and were pursuing a course of conduct having the purpose and effect of causing and perpetuating the segregation in the public schools, contrary to the Fourteenth Amendment. A declaratory judgment to this effect and appropriate injunctive relief were prayed. Trial of the case began a year later, consumed 36 trial days, produced a record containing over 600 exhibits and a transcript in excess of 6,600 pages, and was completed in June 1976. Final arguments

[1] A similar group of plaintiffs was allowed to intervene, and the original plaintiffs were allowed to file an amended complaint that was certified as a class action. 429 F. Supp. 229, 233–234 (SD Ohio 1977).

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 4. 6. 9. 10. 11. 12. 14

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

From: Mr. Justice White

Circulated: _____

Recirculated: 5-21-79

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-610

Columbus Board of Education et al., Petitioners, *v.* Gary L. Penick et al. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

The public schools of Columbus, Ohio, are highly segregated by race. In 1976, over 32% of the 96,000 students in the system were black. About 70% of all students attended schools that were at least 80% black or 80% white. 429 F. Supp. 229, 240 (SD Ohio 1977). Half of the 172 schools were 90% black or 90% white. 583 F. 2d 787, 800 (CA6 1978). Fourteen named students in the Columbus school system brought this case on June 21, 1973, against the Columbus Board of Education, the State Board of Education, and the appropriate local and state officials.[1] The second amended complaint, filed on October 24, 1974, charged that the Columbus defendants had pursued and were pursuing a course of conduct having the purpose and effect of causing and perpetuating the segregation in the public schools, contrary to the Fourteenth Amendment. A declaratory judgment to this effect and appropriate injunctive relief were prayed. Trial of the case began a year later, consumed 36 trial days, produced a record containing over 600 exhibits and a transcript in excess of 6,600 pages, and was completed in June 1976. Final arguments

[1] A similar group of plaintiffs was allowed to intervene, and the original plaintiffs were allowed to file an amended complaint that was certified as a class action. 429 F. Supp. 229, 233–234 (SD Ohio 1977).

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

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6

From: Mr. Justice White

Circulated: _____

3rd DRAFT

Recirculated: 22 MAY 1979

SUPREME COURT OF THE UNITED STATES

No. 78–610

Columbus Board of Education et al., Petitioners, *v.* Gary L. Penick et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

The public schools of Columbus, Ohio, are highly segregated by race. In 1976, over 32% of the 96,000 students in the system were black. About 70% of all students attended schools that were at least 80% black or 80% white. 429 F. Supp. 229, 240 (SD Ohio 1977). Half of the 172 schools were 90% black or 90% white. 583 F. 2d 787, 800 (CA6 1978). Fourteen named students in the Columbus school system brought this case on June 21, 1973, against the Columbus Board of Education, the State Board of Education, and the appropriate local and state officials.[1] The second amended complaint, filed on October 24, 1974, charged that the Columbus defendants had pursued and were pursuing a course of conduct having the purpose and effect of causing and perpetuating the segregation in the public schools, contrary to the Fourteenth Amendment. A declaratory judgment to this effect and appropriate injunctive relief were prayed. Trial of the case began a year later, consumed 36 trial days, produced a record containing over 600 exhibits and a transcript in excess of 6,600 pages, and was completed in June 1976. Final arguments

[1] A similar group of plaintiffs was allowed to intervene, and the original plaintiffs were allowed to file an amended complaint that was certified as a class action. 429 F. Supp. 229, 233–234 (SD Ohio 1977); App. 50.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 19, 1979

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 78-610 — Columbus Board of Education v. Brinkman, and No. 78-627 — Dayton Board of Education v. Penick

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No. 78-671 — Delaware Board of Education v. Evans, and No. 78-672 — Alexis I. DuPont School District v. Evans.

This litigation has been before the Court on a number of previous occasions. We summarily affirmed a three-judge court's finding of constitutional violation, and more recently we denied certiorari though three of us would have GVR'd in light of Dayton I. The most recent stage of the litigation dealt with the appropriate remedy; the single-judge DC took the fact of inter-district violation as established previously. Th DC ordered consolidation of 11 districts, extensive reassignmen of students, and various types of ancillary relief. The CA 3 affirmed, and both it and the DC stated their belief that the relief went no further than the violation established. Petrs seek to challenge the original finding of violation; they argue that the scope of our earlier summary affirmance is unclear. They also contend that the lower courts erred in requiring them to disprove current segregative effect.

Unless we wish to reexamine the earlier three-judge court finding that the consequences of pervasive inter-district violations continued into the present, I believe that the judgment below is consistent with the approach taken in Dayton II and Columbus. I will vote to deny.

6, 7, 16
fns renumbered

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

4th DRAFT

From: Mr. Justice White

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 25 JUN 1979

No. 78-610

Columbus Board of Education et al., Petitioners, *v.* Gary L. Penick et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit,

[May —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

The public schools of Columbus, Ohio, are highly segregated by race. In 1976, over 32% of the 96,000 students in the system were black. About 70% of all students attended schools that were at least 80% black or 80% white. 429 F. Supp. 229, 240 (SD Ohio 1977). Half of the 172 schools were 90% black or 90% white. 583 F. 2d 787, 800 (CA6 1978). Fourteen named students in the Columbus school system brought this case on June 21, 1973, against the Columbus Board of Education, the State Board of Education, and the appropriate local and state officials.[1] The second amended complaint, filed on October 24, 1974, charged that the Columbus defendants had pursued and were pursuing a course of conduct having the purpose and effect of causing and perpetuating the segregation in the public schools, contrary to the Fourteenth Amendment. A declaratory judgment to this effect and appropriate injunctive relief were prayed. Trial of the case began a year later, consumed 36 trial days, produced a record containing over 600 exhibits and a transcript in excess of 6,600 pages, and was completed in June 1976. Final arguments

[1] A similar group of plaintiffs was allowed to intervene, and the original plaintiffs were allowed to file an amended complaint that was certified as a class action. 429 F. Supp. 229, 233-234 (SD Ohio 1977); App. 50.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 16, 1979

Re: No. 78-610 - Columbus Board of Education v. Gary L. Penick

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 28, 1979

Re: No. 78-610 - Columbus Bd. of Education v. Penick

Dear Byron:

Please join me.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1979

78-610 Columbus Bd. of Educ. v. Penick

Dear Bill:

Please join me in your dissenting opinion, which I think correctly states the principles that have guided the Court in these cases until today.

I may write briefly. If I do, I will send it out wihtin the next couple of days.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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: 22 JUN 1979

No. 78-610 Columbus Bd. of Education v. Penick

No. 78-627 Dayton Bd. of Education v. Brinkman

MR. JUSTICE POWELL, dissenting.

I join the dissenting opinions of MR. JUSTICE REHNQUIST and write separately to emphasize several points. The Court's opinion in these two cases is profoundly disturbing. It appears to endorse a wholly new constitutional concept applicable to school cases. The opinion also seems remarkably insensitive to the now widely accepted view that a quarter of a century after Brown, the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country. In expressing these views, I recognize, of course, that my Brothers who have joined the Court's opinion are motivated by purposes and ideals that few would question. My dissent is based on a conviction that the Court's opinion creates bad constitutional law and will be even worse for public education - an element of American life that is essential, especially for minority children.

I

MR. JUSTICE REHNQUIST's dissent demonstrates that the Court's decision marks a break with both precedent and principle. The Court indulges the courts below in their

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

changes throughout

From: Mr. Justice Powell

Circulated: 27 JUN 1979

1st PRINTED DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 78-610 AND 78-627

Columbus Board of Education et al., Petitioners,
78-610 *v.*
Gary L. Penick et al.

Dayton Board of Education et al., Petitioners,
78-627 *v.*
Mark Brinkman et al.

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

[June —, 1979]

MR. JUSTICE POWELL, dissenting.

I join the dissenting opinions of MR. JUSTICE REHNQUIST and write separately to emphasize several points. The Court's opinion in these two cases is profoundly disturbing. It appears to endorse a wholly new constitutional concept applicable to school cases. The opinion also seems remarkably insensitive to the now widely accepted view that a quarter of a century after *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country. In expressing these views, I recognize, of course, that my Brothers who have joined the Court's opinion are motivated by purposes and ideals that few would question. My dissent is based on a conviction that the Court's opinion creates bad constitutional law and will be even worse for public education—an element of American life that is essential, especially for minority children.

I

MR. JUSTICE REHNQUIST's dissent demonstrates that the Court's decision marks a break with both precedent and prin-

Stylistic changes Throughout

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

2nd DRAFT

Circulated:

SUPREME COURT OF THE UNITED STATES

Recirculated: 28 JUN 1979

Nos. 78–610 AND 78–627

Columbus Board of Education et al., Petitioners,
78–610 *v.*
Gary L. Penick et al.

Dayton Board of Education et al., Petitioners,
78–627 *v.*
Mark Brinkman et al.

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

[June —, 1979]

MR. JUSTICE POWELL, dissenting.

I join the dissenting opinions of MR. JUSTICE REHNQUIST and write separately to emphasize several points. The Court's opinions in these two cases are profoundly disturbing. They appear to endorse a wholly new constitutional concept applicable to school cases. The opinions also seem remarkably insensitive to the now widely accepted view that a quarter of a century after *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country. In expressing these views, I recognize, of course, that my Brothers who have joined the Court's opinions are motivated by purposes and ideals that few would question. My dissent is based on a conviction that the Court's opinions condone the creation of bad constitutional law and will be even worse for public education—an element of American life that is essential, especially for minority children.

I

MR. JUSTICE REHNQUIST's dissents demonstrate that the Court's decisions mark a break with both precedent and prin-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 16, 1979

Re: No. 78-610 - Columbus Board of Education v. Penick; and No. 78-627 - Dayton Board of Education v. Brinkman

Dear Chief:

You have asked me to write a dissent in the Dayton case, in which you, Potter, Lewis, and I voted to reverse. Lewis and I voted to reverse in the Columbus case, while you and Potter, as I recall, voted to affirm. Byron has now circulated a proposed opinion for the Court in Columbus, and Bill Brennan has also assigned him the opinion for the Court in Dayton. On the basis of my Conference discussion, and reading Byron's proposed Court opinion, I do not believe that I could write a dissent in Dayton which would be consistent with Byron's opinion affirming the judgment of the Court of Appeals for the Sixth Circuit in Columbus. I wonder, therefore, whether perhaps either you or Potter should undertake the dissent in Dayton; I anticipate writing in both case in dissent, Lewis having asked me to do so in the Columbus case on behalf of himself and me.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 78-610 - Columbus Board of Education v. Penick; and No. 78-627 - Dayton Board of Education v. Brinkman

In order to expedite the bringing down of these cases, I am circulating herewith one Xerox copy of my dissenting opinion in Columbus at the same time as another is being sent to the printer. I anticipate the filing of a short dissenting statement in Dayton along the same lines as set forth in the enclosed Columbus dissent.

Sincerely,

WHR

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: 19 JUN 1979

Recirculated: _____

Re: No. 78-610 Columbus Board of Education v. Penick

The school desegregation remedy imposed on the Columbus school system by this Court's affirmance of the Court of Appeals is as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system. Pursuant to the District Court's order, 42,000 of the system's 96,000 students are reassigned to new schools. There is like reassignment of teachers, staff and administrators, reorganization of the grade structure of virtually every elemen-

STYLISTIC CHANGES THROUGHOUT
pp. 17, 18-19, 26, 33

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: 28 JUN 1979

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–610

Columbus Board of Education et al., Petitioners, *v.* Gary L. Penick et al. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

The school desegregation remedy imposed on the Columbus school system by this Court's affirmance of the Court of Appeals is as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system. Pursuant to the District Court's order, 42,000 of the system's 96,000 students are reassigned to new schools. There are like reassignment of teachers, staff, and administrators, reorganization of the grade structure of virtually every elementary school in the system, the closing of 33 schools, and the additional transportation of 37,000 students.

It is difficult to conceive of a more serious supplantation because, as this Court recognized in *Brown* v. *Board of Education,* 347 U. S. 483, 493 (1964) (*Brown I*), "education is perhaps the most important function of state and local government"; indeed, it is "a vital national tradition." *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 410 (1977) (*Dayton I*); see *Milliken* v. *Bradley,* 418 U. S. 717, 741–742 (1974); *Wright* v. *Council of the City of Emporia,* 407 U. S. 451, 469 (1972). That "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process," *Milliken, supra,* does not, of course, place the school system beyond the authority of federal courts as

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 17, 1979

Re: 78-610 Columbus Board of Education
v. Penick

Dear Byron:

Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference

HA

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

78-610

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

July 27, 1979

Re: A-89 - Columbus Board of Education
v. Penick

Dear Chief:

Confirming my telephone conversation with Byron, I agree that we should grant the petition to vacate the stay and to issue the mandate forthwith.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

✓ Read to HAB 7/31.
Left (per HAB).
Wanda

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

July 31, 1979

Re: 78-610 (A-89) - Columbus Board of Education v. Penick

Dear Harry:

When Byron talked to me on the telephone late on the afternoon of Friday, July 27, I understood him to indicate that he had been unable to reach either you or Bill Rehnquist and that the order should show that neither of you participated. On the basis of that information, I so instructed Mike Rodak. On reflection, it obviously would have been better practice for me to check with your chambers, and am sorry that I failed to do so.

As a partial remedy, I have requested Frank Lorson to amend the order when it is entered in the Journal to show that only Bill Rehnquist was not participating.

Sincerely,

Mr. Justice Blackmun