AFFIRMATIVE ACTION—One-For-One Promotions of Qualified Black and White Employees Is Permissible as an Interim Measure to Remedy the Present Effects of Past Discrimination—*United States v. Paradise*, 107 S. Ct. 1053 (1987).

After more than fifty years, the discriminatory employment practices of the Alabama Department of Public Safety were put to rest on February 25, 1987, in *United States v. Paradise*.[1] In order to understand the implications of the case, one must be familiar with the past practices of the Alabama Department of Public Safety and the ensuing litigation.

The National Association for the Advancement of Colored People (NAACP) instituted this action against the department in 1972, alleging a pattern and practice of racial discrimination in the department's hiring of state troopers.[2] Phillip Paradise intervened on behalf of a class of black plaintiffs.[3] Upon finding a discriminatory practice,[4] the court ordered the department to hire one black trooper for each white trooper hired until blacks constituted approximately twenty-five percent of the trooper force.[5] The department was also enjoined from using racially discriminatory practices in its promotion procedures.[6] The decision was affirmed on appeal.[7] In 1975 the district court reaffirmed its 1972 order and enjoined the department from further delay.[8]

The specific issue of discriminatory promotion practices was resolved in a partial consent decree[9] after the parties returned to district court in fur-

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1. *See* United States v. Paradise, 107 S. Ct. 1053 (1987).

2. N.A.A.C.P. v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972).

3. *Id.* at 705.

4. *Id.* Plaintiffs proved defendant's "blatant and continuous pattern and practice of discrimination" in its hiring of troopers and personnel. *Id.* In the thirty-seven-year history of the department, there had never been a black trooper. *Id.* The only blacks ever hired were non-merit-system laborers. *Id.* As District Judge M. Johnson, Jr., aptly stated: "This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment." *Id.*

5. *Id.* at 706.

6. *Id.* The department was enjoined from discriminating on the basis of race or color with respect to all personnel actions—not only promotion, but also recruitment, examination, appointment, training, and retention. *Id.*

7. N.A.A.C.P. v. Allen, 493 F.2d 614 (5th Cir. 1974).

8. United States v. Paradise, 107 S. Ct. at 1059. The Supreme Court cited District Court Judge Johnson in *Paradise v. Dothard*, Civ. Action No. 3561-N (M.D. Ala. 1975), who found that "defendants have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired." *Id.*

9. United States v. Paradise, 107 S. Ct. at 1060. In the decree the department agreed to develop within one year a fair promotional procedure which would have " 'little or no adverse impact upon blacks seeking promotion to corporal.' " *Id.* The partial consent decree also compelled the department to adhere to the 1978 Uniform Guidelines on Employee Selection Proce-

ther litigation over the lack of promotions of blacks to corporal.[10] Five days after the approval of the consent decree, the defendant requested a clarification of the 1972 hiring order, and the district court reiterated that the order applied to *all* ranks of troopers.[11] Although the 1979 consent decree allowed the department only one year[12] to develop a fair promotional procedure, the proposed procedure was not submitted to the district court until April, 1981.[13] After objections by the plaintiffs,[14] the parties entered into a second consent decree in which the department agreed to implement the proposed procedure with the understanding that its results would be reviewed for adverse impacts on blacks.[15] If the parties were thereafter unable to agree on a procedure, one would be formulated by the district court.[16]

Upon further disagreement between the parties,[17] the plaintiffs returned to the district court in April, 1983, requesting that the department be required to promote blacks in the same fashion as they had been hired, one for one, until the department implemented a valid promotional plan.[18] Upon a finding of adverse impact,[19] the department proposed to promote fifteen persons, four of whom were black, to the rank of corporal.[20] Although the United States did not object to this ratio, the class represented by Paradise did.[21] The plaintiffs requested that fifty percent of the promotion positions be filled by blacks in order to compensate for the department's delay in formulating valid promotional procedures.[22] Again, because of the disagreement between the parties, the court was "required by the 1979 and 1981

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dures, 28 C.F.R. § 50.14 (1978). *Id.* In pertinent part the purpose of these guidelines is to assist employers in complying with federal laws which prohibit employment practices which discriminate on the grounds of "race, color, religion, sex, and national origin." 28 C.F.R. § 50.14 I § 1 (1978).

10. United States v. Paradise, 107 S. Ct. at 1060.

11. Paradise v. Shoemaker, 470 F. Supp. 439, 440 (M.D. Ala. 1979) (emphasis added).

12. *See supra* note 9 and accompanying text.

13. United States v. Paradise, 107 S. Ct. at 1060.

14. *Id.* Both the United States and the class of blacks represented by Paradise objected on the grounds that the procedure had not been validated and also on the grounds that if the procedure were found to have an adverse impact on blacks, its use should not be permitted. *Id.*

15. *Id.* at 1060-61.

16. *Id.* at 1061.

17. *Id.*

18. Paradise v. Prescott, 580 F. Supp. 171, 172 (M.D. Ala. 1983). Pursuant to the 1981 consent decree, upon the parties' disagreement, the court was compelled to determine whether the promotion procedure had an adverse impact on blacks. *Id.* at 173. The court found such an impact and, in compliance with the 1981 decree, ordered the defendants to file a plan to promote fifteen candidates to corporal "in a manner that [would] not have an adverse racial impact." *Id.* at 175.

19. *See supra* note 18 and accompanying text.

20. United States v. Paradise, 107 S. Ct. at 1062.

21. *Id.*

22. *See* Paradise v. Prescott, 585 F. Supp. 72, 72-75 (M.D. Ala. 1983).

Decrees to fashion a promotion procedure."[23]

The court agreed with plaintiffs' reasons for objecting[24] and granted plaintiffs' request for one-for-one promotion so long as qualified black candidates were available and the number of blacks in the corporal ranks was less than twenty-five percent.[25] The order would also be terminated if the department developed an acceptable promotion procedure.[26] The one-for-one promotion order was affirmed on appeal.[27] The U.S. Supreme Court *held*: the requirement that qualified employees be promoted on a one-black-for-one-white basis is permissible as an interim measure to remedy the present effects of past discrimination. *United States v. Paradise*, 107 S. Ct. 1053 (1987).

Justice Brennan delivered the plurality opinion, which was joined by Justices Marshall, Blackmun, and Powell.[28] The Court justified the relief granted by noting that it was "amply justified, and narrowly tailored to serve the legitimate and laudable purposes of the District Court."[29]

The Court recognized that few people would doubt that racial minorities have been subjected to serious discrimination throughout our country's history.[30] But in *Wygant v. Jackson Board of Education*,[31] a case upon which this decision was based, the United States Supreme Court determined that societal discrimination alone does not justify an affirmative action plan.[32] There must be a finding of prior discrimination to warrant such a

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23. United States v. Paradise, 107 S. Ct. at 1062.

24. Paradise v. Prescott, 585 F. Supp. at 74.

> On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black*. Of the 25 captains, *there is still not one black*. Of the 35 lieutenants, *there is still not one black*. Of the 65 sergeants, *there is still not one black*. Of the 66 corporals, *only four are black*. Thus, the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.

Id.

25. *Id.* at 76.

26. *Id.*

27. Paradise v. Prescott, 767 F.2d 1514 (11th Cir. 1985).

28. United States v. Paradise, 107 S. Ct. at 1057.

29. *Id.* at 1074.

30. *See* Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1848 (1986).

31. *Id.*

32. *Id.*

remedy.[33] When such a finding has been made, "affirmative race-conscious relief as a remedy for past discrimination" may be necessary "to dissipate the lingering effects of pervasive discrimination."[34] No such finding was made in *Wygant*.[35]

Less than two months after the *Wygant*[36] decision was handed down, a more compelling factual situation came before the Court. In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*.[37] the Court further developed the position that under appropriate circumstances and upon a finding of past discrimination the court may order "preferential relief benefitting individuals who are not the actual victims of discrimination . . . ."[38] Writing for the plurality, Justice Brennan defined affirmative action not as a make-whole remedy for individual victims of discrimination, but rather as a remedy to "dismantle prior patterns of employment discrimination and to prevent discrimination in the future."[39] Given these two recent decisions, the Court in *Paradise* agreed that an affirmative action plan was warranted.[40]

The Department of Public Safety urged that, because its discriminatory practices related only to initial hiring, a remedy relating to promotional procedures was not justified.[41] In response to this argument, the Court stated, "Discrimination at the entry-level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by nonminorities."[42] Illustrative of this position was the lower court's finding that there had been no black troopers at *any* rank in the thirty-seven-year history of the department.[43] If the department had com-

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33. *Id.*

34. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C., 106 S. Ct. 3019, 3034 (1986).

35. *See* Wygant v. Jackson Bd. of Educ., 106 S. Ct. at 1848.

36. *Id.* at 1842. Although the factual findings did not warrant affirmative action in May of 1986, in July of 1986 a more compelling factual pattern was presented in *Sheet Metal Workers'*.

37. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C., 106 S. Ct. 3019 (1986).

38. *Id.* at 3054.

39. *Id.* at 3049. Justice Brennan further defined affirmative action as a remedy available to a class as a whole. *Id.* Individuals themselves need not prove that they were victims of discrimination. *Id.*

40. United States v. Paradise, 107 S. Ct. at 1080 (O'Connor, J., dissenting). Justice O'Connor's dissenting opinion was joined by Chief Justice Rehnquist and Justice Scalia. *Id.* (O'Connor, J., dissenting). Justice White also wrote a dissenting opinion, agreeing with much of what Justice O'Connor wrote. *Id.* (White, J., dissenting). In her dissenting opinion Justice O'Connor recognized that the government had a "compelling interest in remedying past and present discrimination by the Department . . ." and that the court unquestionably had the authority to fashion an affirmative action plan "designed to end the Department's egregious history of discrimination." *Id.* (O'Connor, J., dissenting).

41. *Id.* at 1065.

42. *Id.*

43. Paradise v. Shoemaker, 470 F. Supp. at 442 (emphasis added).

plied with the initial court order in 1972, it is highly probable that blacks would have reached the upper ranks long before it was necessary for the Court to create an acceptable promotional procedure.[44] The Court not only had a compelling interest in remedying violations of the fourteenth amendment,[45] it also sought to enforce society's interests in "compliance with the judgments of federal courts."[46]

Although the justices agreed that an affirmative plan was warranted, they disagreed as to the appropriateness of the remedy ordered by the lower court.[47] Justices Brennan, Marshall, Blackmun, and Powell affirmed the remedy as being narrowly tailored and highly flexible as required by *Sheet Metal Workers'* and *Wygant*;[48] Justice Stevens rejected the idea that the remedy was required to be narrowly tailored once a violation of the fourteenth amendment was shown;[49] Justice White argued that the district court had "exceeded its equitable powers in devising a remedy . . .";[50] and Justices O'Connor and Scalia, and Chief Justice Rehnquist, asserted that the remedy granted was not narrowly tailored as required by *Wygant* and *Sheet Metal Workers'*.[51]

The plurality noted that several factors were considered in holding that the remedy was narrowly tailored.[52] Those factors included the necessity, flexibility, and duration of the relief, its impact on third parties, the relationship between numerical goals and the relevant labor force, and the availability of workable alternatives.[53]

The Court noted that the one-for-one promotions were necessary given the department's past delay in complying with the several court orders.[54] The department's own promotional proposal ignored the injury which resulted from its numerous delays.[55] The remedy also was very flexible in that it only applied when promotions were necessary, it could be waived if no blacks qualified for the position, and it would last only until the department

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44. United States v. Paradise, 107 S. Ct. at 1065-70.
45. *Id.* at 1066.
46. *Id.*
47. *See supra* note 40 and accompanying text.
48. United States v. Paradise, 107 S. Ct. at 1067.
49. *Id.* at 1077.
50. *Id.* at 1080 (White, J., dissenting).
51. *Id.* at 1080-82 (O'Connor, J., dissenting). Justice O'Connor argued that "the District Court had available several alternatives that would have achieved full compliance with the consent decrees without tramelling on the rights of nonminority troopers." *Id.* at 1082 (O'Connor, J., dissenting).
52. *Id.* at 1067.
53. *Id.*
54. *Id.*
55. *Id.* at 1068. "Thus, adoption of the Department's proposal would have fallen far short of the remedy necessary to eliminate the effects of the Department's past discrimination, would not have ensured adoption of a procedure without adverse impact, and would not have vitiated the effects of the defendant's delay." *Id.*

came forward with its own acceptable promotional procedure.[56]

Further, the remedy "did not impose an unacceptable burden on innocent third parties."[57] Citing the concerns noted in *Sheet Metal Workers'* and *Wygant*, the Court held that the procedure did not pose an "absolute bar" to the promotion of whites, nor did it require the layoff and discharge of white employees.[58]

At the time the remedy was granted, blacks comprised twenty-five percent of the relevant labor force.[59] Although the government urged that the fifty-percent requirement was totally unrelated to the available labor force, the Supreme Court upheld the quota, stating that the government's argument "ignores that the 50% figure is not itself the goal; rather it represents the speed at which the goal of 25% will be achieved."[60] Because of the dilatory tactics employed by the department in the past, some promptness in achieving an acceptable number of blacks in the upper ranks was justified.[61]

Finally, the Court recognized that choosing the appropriate remedy to redress discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court,"[62] and concluded that the trial court was in the best position to determine whether alternative remedies would have been as effective in putting an end to the department's long and egregious history of discriminatory practices.[63] Given the department's history of noncompliance with court orders, it is unlikely that any alternative would have been appropriate. To implement any of the remedies suggested by the dissent would only allow the department to continue to enjoy the effects of its past practices. The strong measures taken by the district court were properly upheld.[64]

Reiterating much of what Justice Brennan had written, Justice Powell found the remedy to be sufficiently narrow.[65] Powell agreed with the district court's claim that the remedy was based upon "realistic expectations" and that the promotion requirement would probably be a "one-time occurrence."[66]

Justice Stevens also concurred in the judgment; but, basing his opinion upon the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg*

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56. *Id.* at 1070.
57. *Id.* at 1073.
58. *Id.*
59. *Id.* at 1057.
60. *Id.* at 1071.
61. *Id.* at 1071-72.
62. *Id.* at 1073 (quoting Powell's concurring opinion in Fullilove v. Klutznick, 448 U.S. 448, 508 (1980)).
63. *Id.* at 1074.
64. *Id.*
65. *Id.* at 1075.
66. *Id.* at 1076.

Board of Education,[67] he disagreed that the remedy was required to be narrowly tailored. *Swann*, a 1971 case regarding desegregation in the North Carolina schools, held that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[68] Justice Stevens therefore urged that the district court had broad discretion in fashioning a remedy.[69] Although Justice Stevens recognized that the chosen remedy might necessarily inconvenience some whites, due to the fact that the district court would unavoidably take race into consideration, that inconvenience was justified by the necessity of breaking down the discriminatory system.[70]

Justice O'Connor's dissenting opinion recognized the need to put an end to the "Department's egregious history of discrimination."[71] She did not agree, however, that the district court had fulfilled its obligation to create a remedy which was narrowly tailored.[72] Justice O'Connor asserted that the quota was implemented not to eradicate the present effects of past discrimination but rather to compel the department to comply with the previous court orders.[73] She also claimed that the quota was not related to the relevant work force, and therefore necessarily impaired the rights of the white troopers.[74] Justice O'Connor admonished the plurality for failing to consider available alternatives, and claimed it had not properly balanced the interests involved.[75] Because she believed that the district court had available to it remedies which would have worked less hardship on the non-minority troopers, Justice O'Connor did not agree that the remedy met the "narrowly tailored" standard, and sought to strike it down.[76]

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67. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

68. *Id.* at 15.

69. United States v. Paradise, 107 S. Ct. at 1077-78.

70. *Id.* at 1079. In *Swann* the Court stated, "But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 28.

71. United States v. Paradise, 107 S. Ct. at 1080 (O'Connor, J., dissenting).

72. *Id.* at 1080-82 (O'Connor, J., dissenting).

73. *Id.* at 1081 (O'Connor, J., dissenting). The Justice argued that because the order would be imposed only until the department came forward with a workable plan, it could not be truly designed to eliminate the effects of past discrimination or it would have remained in effect. *Id.* (O'Connor, J., dissenting).

74. *Id.* (O'Connor, J., dissenting).

75. *Id.* at 1082 (O'Connor, J., dissenting). Justice O'Connor suggested that appointing a trustee to develop a satisfactory promotion procedure, or finding the department in contempt and imposing large fines or penalties, would have been successful in compelling the department to comply with the earlier court orders. *Id.* (O'Connor, J., dissenting).

76. *Id.* (O'Connor, J., dissenting).

In sum, the United States Supreme Court has reaffirmed[77] its position that a pattern and practice of racial discrimination calls for an affirmative action plan to remedy the present effects of such a practice. The plan does not necessarily have to limit itself to merely benefitting actual victims of discrimination; it can apply to a class as a whole. *Paradise* can be seen as a warning to employers who are guilty of past discriminatory practices that the courts of this nation will not tolerate ongoing attempts to take advantage of the effects of those wrongful practices.

Mary S. Bernabe

77. *See supra* notes 31, 35.