Courtus Interruptus: One Lawyer's Experience in the Life of the Law

by David B. Rubin

On June 27, 1997, at about 11 a.m., I called my office from a payphone in downtown Washington, D.C., to check for messages. I was sightseeing with some old law school friends and our families just after the end of the school year. Two years earlier, I had embarked on a solo practice after 18 years with the one firm I'd been with since I passed the bar, and was still uneasy being away for even short periods of time. Standing there in shorts and a tennis shirt, trying to hear over the traffic and not lose sight of my eight-year-old son, Max, I learned from my secretary that the U.S. Supreme Court that morning had granted *certiorari* in *Board of Education of the Township of Piscataway v. Taxman,* a Title VII case out of the Third Circuit that I had been handling for a longstanding school board client. The board had laid off a white teacher in favor of an African-American teacher to preserve racial diversity on the faculty of a large suburban high school.[1] Some surprising twists and turns in the case already had raised some eyebrows in political and legal circles. Little did I know that the biggest surprise was yet to come.

But first, some background. In 1989, Sharon Taxman, a white teacher at Piscataway High School, filed a Title VII charge of reverse discrimination with the Equal Employment Opportunity Commission. The facts of the case were simple and straightforward. Facing a decline in pupil enrollment, the superintendent of schools recommended that the school board eliminate a teaching position in the high school's 10-member business education department. Under New Jersey law, teachers are laid off based strictly on seniority. Here, there was a tie between the two most junior members of the department: Taxman, who was white, and Debra Williams, who was black.

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School boards are allowed to break seniority ties through any reasonable means. Historically, Piscataway used random selection, but in this case Williams was the only minority member of the department. She was also one of only 14 African-Americans out of 176 professional staff at the high school. Complicating matters was the fact that both teachers were, on balance, equally qualified. The board, mindful of the benefits of a diverse teaching force, and with no basis for breaking the seniority tie other than flipping a coin, kept Williams and laid off Taxman to preserve racial diversity and the perceived educational benefits it offered.

The Bush Administration, at the time, was looking for a test case to press its conservative affirmative action agenda in the federal courts, and in January 1992, the Justice Department filed a complaint in *United States v. Board of Education of the Township of Piscataway* in U.S. District Court in Newark, accusing the board of violating Taxman's rights under Title

VII. The case was assigned to (then) District Judge Maryanne Trump Barry. Taxman intervened in the case through her personal counsel, New Jersey Education Association attorney Stephen Klausner, and asserted a separate claim under the New Jersey Law Against Discrimination. Steve and I had been cordial adversaries for 15 years in dozens of disputes between school districts and their employees, and at first it looked like this was just another case.

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After sizing up the facts and the law, however, I realized from the start that the case was unwinnable unless I could persuade Judge Barry to go out on a limb. The Supreme Court's Title VII cases allowed consideration of race in employment decisions as a narrowly tailored remedy for prior discrimination, or to redress a significant disparity between a minority group's presence in an employer's workforce and their availability in the relevant labor market.[2] But Piscataway's commendable record of minority hiring did not fit this profile and, more to the point, the board's purpose had nothing to do with redressing employment discrimination. The Court had not yet ruled on other non-remedial purposes like promoting the educational benefits of a diverse faculty, but some members of the Court had hinted that non-remedial use of race might be acceptable under Title VII and Equal Protection,[3] and the concept had been recognized in some lower court opinions.[4] Still, no case had squarely ruled on the point either way, and I needed to persuade Judge Barry to go further than any court had gone before.

To make matters worse, the case involved a layoff. The courts looked less favorably on layoffs than initial hiring decisions, since they often deprived employees of vested seniority rights and other property interests while the pain of rejection in an initial hiring situation was diffused among a pool of applicants who never had the job. Fortunately for us, no seniority rights had been violated in our case, and it was agreed that since the board otherwise would have flipped a coin, neither employee ever stood a probability of keeping her job.

After discovery was complete, both sides moved for summary judgment. Judge Barry was satisfied that the board was only "trying its best to make the best of a very unhappy situation,"[5] but was unpersuaded by my legal arguments, and on September 10, 1993, granted partial summary judgment on liability to the government. As for my invitation to push the legal envelope, the judge commented that it was "sheer speculation as to whether the Court may one day extend its reading of Title VII to encompass a race-conscious affirmative action plan in the absence of a manifest imbalance in the workforce because of a desire to achieve faculty diversity."[6] Following a short trial on damages,[7] a final judgment was entered in early 1994.

The dates are important. By this time President George Bush had departed from the scene, and President Bill Clinton had been in power for over a year. Several times during the trial court proceedings I half-kiddingly asked the government's counsel, Steven Schlesinger, whether the new administration backed the conservative legal positions his office was advancing, and was assured that his superiors still regarded the board's action as a classic case of reverse discrimination. I filed a notice of appeal to the Third Circuit, fully expecting a vigorous defense of the government's victory, but political developments were underway in Washington that would dramatically shape the course of the litigation in the months ahead.

Shortly after taking office, President Clinton encountered stiff opposition to his nomination of University of Pennsylvania Law School Professor Lani Guinier to head the civil rights section of the Justice Department. Conservatives dubbed her a "quota queen," and after a tumultuous political battle her nomination was scrubbed. In her place, he nominated Deval Patrick, a former litigator with the NAACP Legal Defense and Education Fund, Inc., and a partner in a prominent Boston firm, who promised to be a vigorous advocate for civil rights but was perceived as a more moderate alternative to the last nominee.[8]

Patrick had been at the Justice Department for only a few months by the time I filed my brief on appeal. I attempted to construct a persuasive argument that the diversity theory was consistent with Supreme Court precedent going back to the Court's 1978 decision in *Regents of the University of California v. Bakke*,[9] and that its application to the composition of a high school faculty was given credence by Justice Sandra Day O'Connor in her swing vote concurring opinion in the Court's 1986 decision in *Wygant v. Jackson Board of Education*.[10]

In *Wygant*, the Court struck down a race-based layoff of public school teachers under 14th Amendment strict scruti-

ny, rejecting the role model theory (black students need black teachers) advanced by the school board in that case. Justice O'Connor wrote that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest[,]" and cautioned that the "role model" theory, invalidated in that case, "not be confused with the very different goal of promoting racial diversity among the faculty."[11] The Court did not pass on the diversity argument in that case because it was not raised in the lower courts, and no case had squarely resolved the issue since. I attempted to persuade the court of appeals to make explicit what seemed to have been implicit in *Bakke* almost 20 years earlier.

Shortly before the government's brief was due, I received a call from an attorney in the Justice Department's appellate section seeking my consent to extend their briefing deadline. I listened in stunned silence as she explained that the government had determined on further consideration that its earlier position in the case had been erroneous, Judge Barry's decision was incorrect, my client had been in the right all along, and the government now wanted to switch sides and support our appeal. By the time I regained consciousness, the news media had obtained the story, and a predictable firestorm of protest from conservative politicians and commentators ensued.

Aside from the political fallout, serious ethical questions were raised about the propriety of the government altering its legal position in a pending case after having established a confidential relationship with a complainant-victim.[12] But President Clinton, with the mid-term congressional elections looming, publicly supported Patrick's decision: "As long as it runs both ways, or all ways," he told reporters, "I support that decision. That is, [if] there are other conditions in which ... there were only one white teacher on the faculty in a certain area, and there were two teachers [who] were equally qualified, and the school board ... decided to keep the white teacher also to preserve racial diversity."

At first, it appeared the government intended to remain a party to the case but file a brief supporting the board. On reflection, they concluded that the less embarrassing course was to withdraw as a party and file their brief as an *amicus*. The court of appeals allowed them to file a brief, but left it to the merits panel to decide how to treat this unusual turn of events.

The government's brief was a ringing endorsement of the board's position:

> Upon review of the position we took below, we have concluded that the United States advocated — and the district court adopted — too limited a view of the permissible scope of lawful affirmative action under Title VII. .... [W]e believe that the judgment of the district court is inconsistent with the Supreme Court's pronouncements regarding the scope of lawful affirmative action measures, and if allowed to stand will have a harmful effect upon the ability of employers to voluntarily adopt and implement affirmative action provisions.
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> In this case, the Board's voluntary adoption of affirmative action measures to ensure faculty diversity within the business education department of the high school is consistent with furthering voluntary compliance with Title VII. It is a flexible, rarely-invoked, locally devised response to Piscataway's interest in integrating the ranks of its school teachers....[13]

The ethical questions were of more concern to Taxman's counsel once the government, who had been carrying the laboring oar in the litigation, yanked its coattails out from under him and his client. As for me, it was pretty lonely on my side of the counsel table up to that point, and I appreciated the company.

The case was scheduled for argument before the court of appeals in Philadelphia for January 24, 1995. It was no surprise that our panel, Judges Carol Los Mansmann, William D. Hutchinson and Theodore A. McKee, devoted the first portion of the argument to the government's change of course before reaching the merits of the appeal. A packed courtroom looked on as David Flynn, the appellate section chief of the civil rights division, was taken to task by Judge McKee, whose comments from where I sat appeared to reflect the sentiments of his colleagues:

> ... [I]t was a bit unseemly — I guess is the word that comes to mind. This is a lawsuit and I understand the dynamics behind it and I understand the practical political universe and why it happened but, nevertheless, given the obligations that attorneys have, I guess not to the client here, because in a sense you are the attorney and the client. But it is the Government — it is a suit that was brought by the agency of the Government asking for a certain relief. The District Court gave you, as I read it, exactly the relief that you asked for and it's almost as though you had scripted — I'm not suggesting you did — but it's almost as though you had scripted the opinion, because the opinion basically gives the E.E.O.C. what it asks for. Having won the very relief you had asked for at your own insistence, you then turned around and say, No, what we got from the District Court, that we asked her for, and suggested that she ought to give us, was wrong. And it just strikes me for being very unseemly, and again I apologize for that word, it's the only word that comes to mind.[14]

Then it was time for Taxman's attorney and me to address the merits. Experienced appellate advocates know better

than to read too much into the judges' questions, but when the argument was over, I was fairly confident I had Judge McKee's vote, equally confident I did not have Judge Mansmann's, and not optimistic about Judge Hutchinson's. One thing I knew for sure was that this panel would not be speaking with one voice when it rendered its decision.

The Third Circuit prides itself on speedy decisions. Ten months later, before a decision was issued and well beyond the circuit's typical turn-around time, we learned that Judge Hutchinson had died of cancer. Under the court's practice, the panel could have issued a decision if the two remaining members were in agreement. My first clue as to where they were headed was a phone call from the clerk's office advising that the case was being scheduled for reargument. Chief Judge Dolores Sloviter was selected at random to take Judge Hutchinson's place on the panel, and we appeared once more on November 25, 1995. Judge Sloviter promised to make up for lost time:

> Let me say our court is a very fast court. We're the I think it's the last couple of years have been the fastest in the country in disposition, average disposition. This is a very long time for our court. I hope we will not repeat that in this case, whatever the outcome should be, so, you know, for the whole court, I apologize ....[15]

But all hope of a swift disposition went out the window when another call came in from the clerk's office a few months later, advising that the court on its own motion was setting the case down for reargument *in banc,* a rare event when no panel decision had even been issued.

On May 14, 1996, over two years after our appeal was filed, Klausner and I appeared once more for what was to be a most unusual argument. As the 13 active judges of the court took their seats before another packed courtroom, tension was in the air. The Clinton Administration had retreated from the case as a litigant, and was attempting to stake out a more centrist position on race. But the 1996 presidential campaign was now underway, affirmative action was still a hot-button issue, and Sharon Taxman had become a household name. Early in the questioning, Judge Stapleton inadvertently let slip that a majority of the three-judge panel had voted our way, but that was little comfort as I knew that the circuit had grown increasingly conservative during the Reagan-Bush years and I would have a tough sell before the court as a whole.

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It was quite apparent during the argument that the members of the court already had strong opinions on the issues at hand, and were speaking to each other through us. Take, for example, this exchange with Judges Morton Greenberg and Timothy Lewis:

> JUDGE LEWIS: .... I heard it said that one person's diversity is another person's discrimination, and I'm asking you to respond directly to that point.
>
> MR. RUBIN: Well, it is. ... [O]ne person's diversity is another person's discrimination.
>
> JUDGE GREENBERG: That's the straightest answer I ever heard to a question. You can imagine who made that statement.[16]

On August 8, 1996, the court affirmed Judge Barry's decision by a vote of 8 to 4, with a majority opinion, one concurrence and four separate dissents.[17] The majority opinion laid down a rule of law far broader than necessary for Taxman to win her case, effectively forbidding consideration of race in any employment decision, including hiring, transfers, promotions or layoffs, except for remedial purposes within the four corners of *Weber* and *Johnson.* Faced with a broad, unfavorable precedent, a substantial monetary judgment and an even greater counsel fee claim in the offing, the board determined to pursue its last avenue of appeal — a petition for *certiorari* to the Supreme Court.

I knew the odds of the Court accepting this or any other case were slight. There was no clear split in the federal circuits on the precise issue involved, making our chances even more remote. Still, the case remained the focal point of the nation's ongoing dialogue over affirmative action, even finding its way into the 1996 presidential debates:

> SENATOR DOLE: I first want to say the President didn't quite give you all of the stuff on the quotas, because the Justice Department had what we called the Piscataway case up in New Jersey. It's pretty clear that was a quota case, and just because one teacher was white and one black and they had the same qualifications, you know they decided who would

stay there. It shouldn't be that way. Now, the President can say well he wants to mend it, not end it. There are 168 federal programs that allow quotas. He ended one.[18]

I was also struck by a remarkable coincidence. Fifteen years earlier, I had come within two votes of arguing before the Court in another case involving Piscataway High School. In *Board of Education of Piscataway Township v. Caffiero,*[19] the New Jersey Supreme Court affirmed the constitutionality of a statute holding parents of three students strictly liable for a vandalism spree at the high school in 1976. The parents appealed to the U.S. Supreme Court, but the Court granted my motion to dismiss for want of a substantial federal question, over the objection of Justices Brennan and Stevens, who would have noted probable jurisdiction and set the case down for argument.

As that case was winding down, yet another case involving Piscataway High School was working its way toward the Supreme Court. In 1980, a vice principal discovered drug paraphernalia during a search of a Piscataway High School student's handbag. That search, and the juvenile delinquency prosecution that followed, gave rise to the landmark case of *New Jersey v. T.L.O.,*[20] where the Court adopted the reasonable suspicion standard for 4th Amendment review of search and seizure issues in the public schools. As I began work on my *cert.* petition, I wondered whether history was about to repeat itself.

My objective was to demonstrate, in as few words as possible, that the case presented an important unresolved issue worthy of consideration by the nation's highest court. After many rewrites, I came up with this introduction:

> A sharply divided Court of Appeals for the Third Circuit held that petitioner Board of Education of the Township of Piscataway (Board) violated Title VII of the Civil Rights Act of 1964, as amended, when it considered race as a "plus factor" to preserve diversity among its high school faculty. In a decision as sweeping as the Fifth Circuit's recent Fourteenth Amendment ruling in *Hopwood v. State of Texas,* 78 F. 3d 932 (5th Cir. 1996), *reh. denied, cert. denied,* ___ U.S. ___ (1996), the court rejected the teaching of *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), and brought to an end the long-settled expectation of academic officials that race may be given limited consideration in their good faith efforts to offer an educationally enriching experience for our Nation's youth.
>
> The central question before this Court, on a stipulated record "so stripped of extraneous factors that it could well serve as the question for a law school moot court," ... (Sloviter, C.J., dissenting), is whether Title VII compels this result where no seniority or other vested rights have been disturbed, no less qualified minority employee has been given preferential treatment, and no employee had more than an even chance of keeping a job.[21]

I presented the case as the lightening rod in a stormy national debate over whether Title VII permits school officials to consider race in employment decisions to foster a diverse learning environment.[22]

The administration, no longer a party, had hoped to distance itself from the case, but that was not to be. On January 21, 1997, the Court invited the government to express its views on whether *cert.* should be granted, once again putting the administration's feet to the fire. It had been widely reported that Acting Solicitor General Walter Dellinger, who had been serving as the head of the Office of Legal Counsel when Patrick announced the government's earlier change in position, disagreed with Patrick's decision,[23] and I awaited with interest the government's next move.

In June, shortly before the Court's term ended, the government filed a brief challenging the correctness of the ruling below, but encouraging the Court to deny *cert.*:

> By holding that Title VII prohibits all nonremedial affirmative action in employment, the court of appeals incorrectly decided an issue of broad national significance. This case, however, is not an appropriate vehicle for resolving that issue. Petitioner's assertion of an interest in fostering diversity in a single department of a high school and petitioner's use of race in a layoff decision to further that interest make this an unrepresentative case of non-remedial affirmative action. This Court should await a case that presents the question of the validity of nonremedial affirmative action in a more typical Title VII context.[24]

As one commentator observed, the president was "in the awkward position of encouraging the high court to leave in place a ruling the administration doesn't agree with."[25]

Nevertheless, over the government's objection, the Court determined this was one case it could not let get away, and granted *cert.* on the final day of its 1996-97 term, setting the stage for a high-stakes showdown on affirmative action. As *The New York Times* reported, "the White House is in an uncomfortable place: it must develop a legal position in a high-profile case at the same time the President is trying to conduct a peaceful, nonpolarizing national dialogue on race."[26]

Presidential politics were not my concern. I had a brief to write and an argument to prepare for. I had considerable appellate experience in New Jersey, but knew I needed the guidance of a

Supreme Court regular. Several of the groups supporting our position put me in touch with Eric Schnapper, a professor at the University of Washington School of Law in Seattle, who served for 25 years as an assistant counsel to the NAACP Legal Defense and Educational Fund, Inc. Eric had handled more than 70 cases in the Court, and offered his services *gratis*. We never met face to face, but over the summer we worked together by phone and fax, turning out a brief we felt stood the best chance of success.

Our strategy was first to attack the broad rule laid down by the court of appeals, that Title VII prohibited consideration of race in any employment decision, not just layoffs, except as a narrowly tailored remedy for prior discrimination or manifest under-representation; any purposes not tied to remediating the effects of prior employment discrimination were out. We'd been kicking around some hypos from hell that we hoped would give even the conservative members of the Court pause before endorsing such a broad rule, when a newspaper headline handed us a real-life situation just a few days before our brief was due.

On August 19, 1997, a Haitian immigrant was brutally beaten in Brooklyn by several police officers shouting racial epithets. The attack was reportedly witnessed by other New York City police officers at the 70th Precinct station house where most of the events occurred. In response, the New York City Police Commissioner announced that he had decided to transfer more black police officers into the troubled 70th Precinct to calm a volatile situation and inspire more community confidence in the department.[27] Since the action was not taken to address any racial imbalance in the New York City Police Department, under the Third Circuit's ruling this commonsense decision would be a *per se* violation of Title VII.

Our strategy was first to attack the broad rule laid down by the court of appeals, that Title VII prohibited consideration of race in any employment decision, not just layoffs, except as a narrowly tailored remedy for prior discrimination or manifest under-representation; . . .

We also pointed out that, as construed by the Third Circuit, Title VII would prohibit the Nation of Islam or the Ku Klux Klan from preferring blacks or whites in hiring policy-making staff. This, we argued, could not be the law.

Step two was to propose a rule narrow enough to secure five votes for reversal, or at least a remand. We argued that education presented unique concerns, and that where the benefits of racial diversity were amply demonstrated in scholarly research, academic officials should be granted the sort of latitude contemplated by Justice Powell in *Bakke* to use race as a "plus factor," at least where no seniority rights were violated and no less-qualified employee was given preferential treatment.

As the summer wore on and the Court's new term approached, the media attention intensified. *The New York Times* described the case as "the centerpiece of the new term, doing more to galvanize debate over affirmative action than any Presidential speeches or commissions."[28] Only twice before had the Court considered the scope of permissible affirmative action under Title VII.[29] In *Bakke,* the Court had considered whether diversity among students was a sufficiently compelling state interest to justify consideration of race in graduate school admissions under the Constitution. The Court at the time was evenly divided, with a separate opinion from moderate conservative Justice Powell determining the Court's position. The *Bakke* decision struck down the quota system involved in that case, but Justice Powell's opinion had for 20 years kept affirmative action alive by affirming student diversity in higher education as a lawful purpose for race-based decision-making. Justice O'Connor now occupied a position on the Court similar to Justice Powell's, and the standing joke among all the attorneys on both sides of our case was that everyone's brief might as well have begun, "Dear Justice O'Connor."

Anxious for a human interest angle to the story, the media began to focus on the two teachers involved,[30] and an unfortunate sideshow unfolded as Williams, affronted by the public perception that she was retained because of her race, held a press conference to claim that her credentials were superior to Taxman's because she had a master's degree while Taxman did not (although Taxman was certified to teach a broader range of courses when the two were hired).[31] Shortly afterward, an Associated Press (AP) news dispatch quoted Williams as saying, "You don't get nothing in this world for an advanced degree." Williams denied making the statement, and eventually sued the AP for defamation.[32] But, the story triggered an avalanche of hurtful letters and comments directed at Williams and the school district that employed her.

As the flood of *amicus* briefs poured in, we again awaited the government's brief as rumors abounded that it was

considering yet another change in position. After successfully suing the board in the district court for violating Title VII, then enthusiastically supporting the board's position before the court of appeals, the government filed a brief arguing that the board's action was once again illegal:

> The court of appeals erred in holding that Title VII precludes *all* non-remedial, race-conscious employment decisions. This case, however, does not provide a suitable vehicle for resolving that extraordinarily broad issue. The court of appeals' judgment should be affirmed on the ground that petitioner's layoff decision unnecessarily trammeled respondent's interests, and the broader question should be reserved for a case in which the employer's use of race is more representative of the kind of actions taken by state and local governments and by private employers nationwide.[33]

Argument was set for January 14, 1998, but before the Court's term began, there was already some behind-the-scenes maneuvering in the works that would bring the case to an abrupt halt. Shortly after the briefs were filed in August, the leaders of some of the nation's most prominent civil rights groups met in secret at a hotel near Dulles Airport and devised a plan to force a settlement of the case — a case to which they were not parties and over which they had to that point exercised no control.[34] I knew something was up when I received a voicemail message from Reverend Jesse Jackson on September 25, 1997, asking me to call him to discuss the case. In a lengthy conversation later that evening, he urged me to explore a settlement of the case with my adversary, pledging his assistance in marshaling the funds necessary to make it happen.

Over the next week, I was besieged with phone calls and letters from others in the national civil rights movement, all urging settlement. This one, from the president of the National Bar Association, was my favorite:

> Our profession does not long remember the losing advocate, no matter how masterful the oral argument, in the sea change of constitutional law. The black lawyers who championed Homer Plessy's case before the Court in 1896 are now little-noted. John Davis, advocate for the segregation principle in *Brown v. Board of Education,* lost much of his reputation along with the southern case for separate-but-equal schools. The Texas Attorney General's Office in *Roe v. Wade* became the butt of academic humor as they lost the abortion case to 26-year old Sarah Weddington.
>
> There are defining questions of law decided more by the historical pendulum and judicial ideology than brilliant argument in every generation. Because *Piscataway* squarely raises the constitutional race question of our time with troubled facts and an even less promising bench, we strongly urge a settlement with the plaintiff today so that the spirit of *Bakke* might live on in education tomorrow.

Since the days when Thurgood Marshall pursued his strategy of desegregating schools, the NAACP Legal Defense Fund and similar groups carefully picked the cases they wished to litigate, the losses they wished to appeal and the lawyers who would advance their position, all in keeping with a carefully scripted game plan for the orderly development of civil rights law. The message from these groups to us was clear: The Court would likely use this case to gut the infrastructure of affirmative action nationwide, not just in employment but in college and graduate school admissions, and the nine members of this local school board and their attorney owed it to the nation to see that this did not occur. The more subtle message embedded in the lofty rhetoric was that private litigants with no connection to these liberal advocacy groups, and lawyers concerned more with arguing their first case in the Supreme Court than safeguarding the hard-won gains of the civil rights movement, had no business controlling cases that could turn into unguided missiles, putting at risk decades of progress.

I represented a client, not a movement, and frankly, needed no advice on whose interests I was duty bound to protect. But even so, two new factors deserved the board's serious consideration. When we appealed the case initially to the court of appeals, we enjoyed the public support of the civil rights section, the attorney general and the president. Now, the United States was once again our opponent, and the solicitor general's views carried substantial weight before the Court. The board also had the prospect of substantial assistance in relieving itself of the financial burden of the judgment. How much assistance I wasn't sure, but I owed it to my client to find out.

Over the next few weeks, discussions were held in strictest confidence with leaders of the Black Leadership Forum, an umbrella group of civil rights organizations, whose representatives conducted themselves in a highly professional manner and with appropriate discretion. The judgment against the board was about $186,000, but we knew that the counsel fee demand would be far more than that. By November, the forum had raised $300,000, which it put at our disposal. The board pledged an additional sum of money, which was well within the amount it had set aside in its budget for unsatisfied judgments, but probably not enough to settle the case. I still had not broached the issue of settlement with the other side, and would not until the forum's contribution was placed in escrow with a New

Jersey law firm I asked to serve as the go-between. Once I got word the check had cleared, I picked up the phone, called Taxman's attorney and immediately got to work.

Since it was far from certain that we would ever reach a figure that would settle the case, and the school board members were divided on whether to settle at all, my preparation for the oral argument continued. I made it my business to visit the Supreme Court on as many argument days as I could, and a gauntlet of moot courts was scheduled to toughen me up for what would surely be the most challenging argument of my career. My settlement negotiations with the forum (getting them up) and Taxman's attorney (getting him down) continued in secret, between press interviews about our upcoming appearance before the Court. Finally, over a drink at a Middlesex County Bar Association meeting at Forsgate Country Club on November 19th, Taxman's attorney and I shook hands on a total package of $433,500, subject to the approval of the board at a regularly scheduled meeting the next evening. A total of $308,500 would come from the forum, and $125,000 from my client. The board emerged from closed session the following night and voted by a narrow margin to approve the settlement. The president read a prepared statement to a hushed audience, and the case was over.

The settlement triggered a round of criticism from conservative commentators even greater than the one that attended the government's original flip-flop three years earlier, but there were sighs of relief in the civil rights community. Opponents of affirmative action accused the board of taking a "bribe" and "cheating the Supreme Court out of an opportunity to rule on an important principle."[35] The civil rights groups who subsidized the settlement were criticized for "placing the route to the Supreme Court on the open market."[36] Senator Orrin Hatch noted "the extraordinary lengths with which liberal civil rights organizations have gone to prevent the Supreme Court from ruling on the Piscataway case plainly serves as an acknowledgment that racial preferences are presumptively unconstitutional under current case law."[37] Amidst the media frenzy, an order dismissing the *writ of certiorari* was quietly entered on the Court's docket, and the case slipped into oblivion.

In the wake of the settlement, legal scholars have continued to ponder the ethical and tactical considerations raised by outside groups paying off litigants in public interest cases to avoid unfavorable precedent.[38] Many law schools continued to use the briefs for their moot court competitions. A team of professors even went to the trouble of ghostwriting two sets of Supreme Court opinions in the style of the individual justices, just to see how the case would have turned out. In one version, the board prevailed; in the other, we lost.[39] And interest groups on both sides of the affirmative action debate began taking bets on which would be the next case to make it to the Court's agenda.

For a few years, I often would be asked what it felt like to come so close to arguing a politically charged landmark case before the nation's highest court, only to have it settle on the courthouse steps. I'd jokingly say it was like courtus interruptus. Honestly, I would have liked one of those fancy pens they leave for you at your seat. I don't think they sell them in the gift shop. Beyond the excitement of handling a truly challenging and important case are the real lessons learned from this unique chapter in my legal career. By far the most important for me is that in a case with important public interests at stake, a lawyer must never forget who his or her client is. This case was settled because it served both parties' interests to do so. That outside interests with their own agenda put the resources in place to facilitate the settlement did not change this essential fact. In the end, the system worked.

This April, the Supreme Court will hear arguments in *Grutter v. Bollinger,* the University of Michigan admissions case. The diversity theory that eluded review in *Piscataway* will once again come before the Court, and the orderly development of the law will continue. As for me, on the day I finished writing this article, I was sitting in the bleachers at Piscataway High School of all places, watching my older son, Jordan, wrestle in the county tournament. Max, now 14, and a middle school wrestler himself, was sitting beside me cheering his brother on. Justice Holmes said that experience is the life of the law. I remembered that day in Washington six years ago, and everything that happened in this case before and since, and thought to myself, what an experience it was.

Endnotes

1. *Taxman v. Board of Education of the Township of Piscataway,* 91 F. 3d 1547 (3d Cir. 1996)(*in banc*).
2. *See United Steelworkers of America v. Weber,* 443 U.S. 193 (1979); *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616 (1987).
3. *See, e.g., Johnson v. Transportation Agency,* 480 U.S. 616, 642, 646 (1987)(Stevens, J., concurring); *see also* addressing similar issue under Fourteenth Amendment Equal Protection, *Wygant v. Jackson Board of Education,* 476 U.S. 267, 286, 288 (1986)(O'Connor, J., concurring); *Id.* at 315 (Stevens, J., dissenting); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 512, n.2 (1989)(Stevens, J., concurring).
4. *See, e.g., Britton v. South Bend Community School Corporation,* 819 F. 2d 766, 773, n.1 (7th Cir. 1987)(*in banc*)(Flaum, Bauer, C.J., concur-

ring)(providing faculty diversity could be a compelling government interest under Equal Protection).

5. Transcript of proceedings in *United States v. Board of Education of the Township of Piscataway,* January 5, 1993, at T:19-16 to 18.
6. *United States v. Board of Education of the Township of Piscataway,* 832 F. Supp. 836, 848 (D.N.J. 1993).
7. By the time of the summary judgment motion, Taxman had been called back to fill a vacancy at the high school. She was awarded $134,014 for two years of back pay, fringe benefits and prejudgment interest, and another $10,000 for emotional suffering under the New Jersey Law Against Discrimination.
8. *See* "The Education of Deval Patrick," *Business Week,* December 12, 1994 at 92.
9. 438 U.S. 265 (1978).
10. 476 U.S. 267 (1986).
11. 476 U.S. at 286, 288.
12. *See* Richard Pliskin, "Justice Flip-Flops in Bias Suit," *New Jersey Law Journal,* August 15, 1994, at 1; Tim O'Brien, "Pushing the Race Button," *New Jersey Law Journal,* September 12, 1994 at 1; Iver Peterson, "Justice Dept. Switches Sides in Racial Case," *The New York Times,* August 14, 1994, at 37; Iver Peterson, "Justice Officials Clarify Stand in Race-Based Dismissal Case," *The New York Times,* September 22, 1994, at B6; "Affirmative Action Without Fear," *The New York Times,* September 19, 1994 (editorial), at A16.
13. Brief of the United States as *amicus curiae,* at 11, 36-37.
14. Transcript of January 24, 1995, oral argument, T:6-20 to T:7-18.
15. Transcript of November 29, 1995, oral argument, T:28-8 to 17.
16. Transcript of oral argument, May 14, 1996, T:67-1 to 15.
17. Judge Sarokin, who sat for the *in banc* argument, retired before a decision was issued.
18. Transcript, October 16, 1996, presidential debate.
19. 86 N.J. 308, *appeal dismissed,* 454 U.S. 1025 (1981).
20. 469 U.S. 325 (1985).
21. Petition for a *writ of certiorari,* at 1.
22. *See, e.g.,* Edley, *Not All Black and White* (Hill and Wang 1996) at 199-201; Eastland, *Ending Affirmative Action* (Basic Books 1996) at 110-115; Editorial, "Affirmative Action Without Fear," *The New York Times,* September 19, 1994, at A16; Hentoff, "Fired For Being White," *The Washington Post* Op-Ed, October 5, 1996, at A23; Cohen, "Reverse Racism or Common Sense?," *The Washington Post* Op-Ed, October 7, 1994, at A25. *Id.* at 13.
23. Eastland, Terry, "They Went Piscataway," *The American Spectator,* April 1997, at 64.
24. Brief for the United States as *amicus curiae,* at 8.
25. Joan Biscupic and Peter Baker, "Administration Shifts Stand On Diversity Case," *The Washington Post,* June 6, 1997, at A01.
26. Greenhouse, "Justice, Ending Their Term, Agree to Hear a Big Affirmative Action Case," *The New York Times,* June 28, 1997, at 9.
27. *The New York Times,* "Officers Helping Reform Haiti's Police Are To Be Sent Home to Brooklyn", p. A22, August 22, 1997.
28. Greenhouse, "A Case on Race Puts Justice O'Connor In A Familiar Pivotal Role," *The New York Times,* August 3, 1997.
29. See Weber, 443 U.S. 193; *Johnson,* 480 U.S. 616 (1987).
30. Brett Pulley, "A Reverse Discrimination Suit Upends Two Teachers' Lives," *The New York Times,* August 3, 1997, at A1.
31. Kathy Barrett Carter, "Teacher in Court Test Sees a Matter of Degree," *The Star Ledger,* September 24, 1997, at 1.
32. Williams claimed she suffered humiliation from the public perception that she was not as educated as she contended. The suit was eventually dismissed. *Williams v. Associated Press, et al,* 2001 WL 1346730, 29 *Media L. Rep.* 2231 (App. Div. 2001).
33. Brief of United States as *amicus curiae* Supporting Affirmance, at 7.
34. Steven A. Holmes, "A Dilemma Led to a Deal Over Hiring Tied to Race," *The New York Times,* November 23, 1997, at 37.
35. J. Scott Orr, "Affirmative Action Buys Some Breathing Room," *The Star-Ledger,* November 23, 1997, at 13.
36. Nat Hentoff, "Escaping from the Supreme Court," *Village Voice,* December 30, 1997, at 22.
37. "Settlement Ends High Court Case On Preferences," *The New York Times,* November 22, 1997, at B4.
38. *See, e.g.,* Lisa Estrada, "Buying the Status Quo on Affirmative Action: The Piscataway Settlement and Its Lessons About Interest Group Path Manipulation," 9 *Geo. Mason U. Civ. Rts.* L. J. 207 (1999); Leandra Lederman, "Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?," 75 *Notre Dame L. Rev.* 221 (1999); Elizabeth Hull, "Out On A Lonely Limb: The Piscataway Board of Education's Fight For Educational Diversity," 2000 *L. Rev. M.S.U.-D.C.L.* 407 (2000).
39. Ann C. McGinley, Michael J. Yelnosky, *"Board of Education v. Taxman*: The Unpublished Opinions," 4 *Roger Williams University Law Review* 205 (1998).

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