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Pretender in Paradise

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PRETENDER IN *PARADISE*

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I was thirty-one years old and had been at the Southern Poverty Law Center for only two months when the legendary Morris Dees walked into my office and delivered the news: The Supreme Court had decided to hear our case against the Alabama State Troopers. The lawyer who had been handling it most recently was leaving the Center. Morris wanted to know if I was up for taking it over. Having been at the Center for such a short time and having never appeared in a case of any kind before any appellate court, I said the only sensible thing: "Of course!" The date was July 7, 1986, and the case was *United States v. Paradise.*[1]

The stakes were high. We had won an affirmative action order in the lower courts that required the Troopers—an organization with a notorious history of racism—to promote one black trooper for each white trooper promoted until fair tests were developed. Now, the United States Justice Department—under the leadership of unsympathetic Reagan Administration officials—was telling the Supreme Court that it should reverse the order, undoing the progress that had been made in opening the ranks of the Troopers to black people.

The case presented a novel question. The Supreme Court had ruled that affirmative action orders were acceptable under certain circumstances when it came to hiring. But the Court also had ruled that affirmative action orders were probably never acceptable when it came to lay-offs. Promotions fell somewhere in between. How would the Court see it?

Great lawyers and great organizations offered advice. The problem was they offered too much advice. Moot courts were

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1. 478 U.S. 1019 (1986) (granting certiorari); *see also* 480 U.S. 149 (1987).

helpful, but also discouraging. I could see it on the faces of the pretend judges: I wasn't doing very well.

The afternoon before the big day, I practiced my argument on my seven-year-old daughter and one of her friends. Big mistake. It wasn't that they asked tough questions. It was the look on their faces. Because they didn't understand a word I was saying, their expressions didn't bear any relationship to what was coming out of my mouth. It all gave me the feeling that I was spouting nonsense. I couldn't help wondering whether the Court would soon have the same feeling.

After getting little sleep, I was in a bit of a fog the next morning. Eventually, I found myself in the courtroom kibitzing with my opponent—the Solicitor General himself, Harvard professor Charles Fried. "Oh, I do this sort of thing every day, Chuck," I pretended.

Then the moment was upon me. "Oyez, oyez, oyez. . . ." I stood up, the Justices came in, they sat down, I sat down. Suddenly this weird feeling came over me: I realized that I knew the "stand-up, sit-down" routine from doing it a million times in trial courts. Despite the difference in the setting and the stakes, I felt quite at home.

For me, the defining point in the argument came during an exchange with Justice White. He asked me a question—directed a comment at me, really—that I just didn't understand. The moment presented me with a terrible dilemma. Should I start babbling and hope that I'd say something responsive? Or should I announce in front of the world that I just didn't get it, thereby confirming that I had no business being there in the first place?

I paused for a moment and then calmly said, "Your honor, I regret to say that I do not understand your point." It was no big deal. Justice White simply rephrased what he was trying to say. More than one person came up to me afterwards to say that they didn't know what he was getting at either.

In his review of the argument for his "Courtly Manners" column in *The American Lawyer*, Lyle Denniston said that I had been "skilled and well-prepared."[2] But the real verdict came later when the Court announced its decision. We swamped 'em

2. Lyle Denniston, *Court Confronts Quotas in Two Bias Cases*, 9 Am. Law. 143, 143 (Jan./Feb. 1987).

five to four. Looking back on the whole experience, I know that I should have given up the argument to a more experienced hand. But I can't help but be glad that I didn't. Winning, of course, makes this easy to say.