

ARTICLE

SUPREME COURT LAW CLERKS' RECOLLECTIONS OF *BROWN V. BOARD OF EDUCATION II*

GORDON B. DAVIDSON
DANIEL J. MEADOR
EARL E. POLLOCK
E. BARRETT PRETTYMAN, JR.

INTRODUCED AND MODERATED BY JOHN Q. BARRETT[†]

INTRODUCTION

On May 17, 1954, the Supreme Court of the United States announced two landmark decisions: *Brown v. Board of Education of Topeka*¹ and its companion case, *Bolling v. Sharpe*.² In *Brown*, which was a grouping of four separate state cases,³

[†] Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). Introduction © 2005 by John Q. Barrett. I am grateful to the roundtable discussants for their participation, editing and helpful comments; to Dr. Ophelia DeLaine Gona (daughter of the late Rev. J.A. DeLaine, who commenced the *Briggs v. Elliott* litigation attacking school segregation in South Carolina, see *infra* note 3) and the Honorable William T. Coleman, Jr. (a former law clerk to Justice Felix Frankfurter who later worked as a NAACP attorney on the *Brown* litigation) for their presence at this roundtable, lectures at companion events, recollections, and interest; to the Jackson Center and the Supreme Court Historical Society for cosponsoring the roundtable; and to law students Eleni Zantias, Jennifer N. Thomas, and Jessica Duffy for their research and transcribing assistance.

¹ 347 U.S. 483 (1954).

² 347 U.S. 497 (1954).

³ The four state cases that were consolidated and decided together in *Brown* were *Brown et al. v. Board of Education of Topeka et al.* [Kansas], No. 1; *Briggs et al. v. Elliott et al.* [South Carolina], No. 2; *Davis et al. v. County School Board of Prince*

and in *Bolling*, a case originating in the federal government's District of Columbia, the Supreme Court unanimously rejected its prior precedent⁴ and struck down as unconstitutional all state and federal laws requiring the racially segregated education of public school students. In the ringing words of Chief Justice Earl Warren's opinion, the Court concluded

that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws⁵

Last year, fifty years after *Brown* and *Bolling*, numerous events and publications commemorated the golden anniversary of those landmarks.⁶ While many of the perspectives on *Brown* that were voiced and written then are celebratory, some are not.⁷ The critical perspectives, focusing on all that has not happened since 1954 to achieve true racial equality in the United States, often target *Brown* itself for taking its path rather than some alternative.

In large measure, less-than-celebratory perspectives on *Brown v. Board of Education* are focused on the course and outcome of litigation that did not conclude, but in fact really

Edward County, Virginia, et al., No. 4; and *Gebhart et al. v. Belton et al.* [Delaware], No. 10.

⁴ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵ *Brown*, 347 U.S. at 495. *Brown* and its companion cases involving state laws were decided under the equal protection clause of the Fourteenth Amendment. Because that provision applies only to states, *Bolling*, the companion federal case, was decided under the due process clause of the Fifth Amendment. See *Bolling*, 347 U.S. at 499–500.

⁶ See, e.g., Pub. L. No. 107-41, 115 Stat. 226 ("To establish a commission for the purpose of encouraging and providing for the commemoration of the 50th anniversary of the Supreme Court Decision in *Brown v. Board of Education*.") (signed Sept. 18, 2001); George W. Bush, *President Signs Brown v. Board of Education Anniversary Commission: Statement by the President* (released Sept. 19, 2001), www.whitehouse.gov/news/releases/2001/09/print/20010919-16.html; George W. Bush, *President Speaks at Brown v. Board of Education National Historic Site* (released May 17, 2004), www.whitehouse.gov/news/releases/2004/05/print/20040517-4.html; see also Pub. L. No. 102-525, 106 Stat. 3438 ("To provide for the establishment of the *Brown v. Board of Education* National Historic Site in the State of Kansas and for other purposes.") (1992).

⁷ See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004).

began, on May 17, 1954. The *Brown* and *Bolling* decisions identified a new constitutional requirement—the Constitution prohibits racially segregated education—but they did not decree a remedy for the segregated school systems that then existed. Instead, the Supreme Court ordered, in *Brown* itself, that the school segregation cases be put back on its docket for further argument and requested further briefing regarding the kind of decree the Court should issue.⁸

One year later, after additional briefing by parties and amici, lengthy oral arguments, and extensive work and judicial deliberations within the privacy of the Supreme Court, the Justices decreed on Tuesday, May 31, 1955, again unanimously, that the Court was remanding the cases to the trial courts that had heard them originally for those courts to fashion local desegregation decrees.⁹ This decision has come to be known as *Brown II*. It is best remembered, and often attacked, for a four-word phrase that perhaps invited, and thus encouraged, governmental delay in desegregating schools and racist resistance to that process. In *Brown II*, we recall, the Supreme Court ordered the lower courts, on remand, to go about ending segregated school systems “with all deliberate speed.”¹⁰

On May 18, 2005, just two weeks before the 50th anniversary of the *Brown II* decision, the Robert H. Jackson Center in Jamestown, New York,¹¹ and the Supreme Court Historical Society assembled for a group discussion four attorneys who had been Supreme Court law clerks during that momentous Term of the Court. These men, Gordon B. Davidson, Daniel J. Meador, Earl E. Pollock, and E. Barrett Prettyman, Jr., had been, fifty and more years earlier, involved to varying degrees in the Supreme Court’s work, and privy to various Justices’ thoughts, as first *Brown I* and then *Brown II* were being decided. After leaving their Supreme Court clerkships in the summer of 1955, these men built distinguished careers in different cities and generally did not see each other or keep in

⁸ *Brown*, 347 U.S. at 495–96 & n.13.

⁹ *Brown v. Bd. of Educ.*, 349 U.S. 294, 299–301 (1955) (“*Brown II*”).

¹⁰ *Id.* at 301.

¹¹ The Robert H. Jackson Center is dedicated to the life, work, words, and legacy of Justice Jackson (1892–1954). See www.roberthjackson.org. He was one of the nine Justices serving on the Supreme Court as it considered and decided *Brown* and *Bolling* during the Court’s October Terms 1952 and 1953. Jackson died on October 9, 1954, prior to the *Brown II* oral arguments.

touch. Although they were interviewed individually over the years about *Brown*, these former law clerks had not, until this discussion, gathered as a group to share, compare, and assemble their recollections of *Brown*, and especially *Brown II*. The result, on May 18th of this year and now in this publication,¹² is a detailed discussion that describes from the inside what the Supreme Court decided and how the Justices got there in *Brown II*, the culmination of the *Brown v. Board of Education* landmark.

This Jackson Center/Supreme Court Historical Society roundtable discussion among *Brown II* law clerks is the second half of a pair of proceedings. In 2004, the Jackson Center hosted a similar discussion among four attorneys who had worked as law clerks to Justices during the Supreme Court's October Term 1953 and thus were involved, again in varying degrees, in the process that culminated in *Brown I*.¹³ Two participants in that

¹² The participants in the May 18, 2005, discussion lightly edited their remarks for this publication.

¹³ See John David Fassett, Earl E. Pollock, E. Barrett Prettyman, Jr. & Frank E.A. Sander, *Supreme Court Law Clerks' Recollections of Brown v. Board of Education*, 78 St. John's L. Rev. 515 (2004) (introduced and moderated by John Q. Barrett).

Former Supreme Court law clerks who worked for justices during the Terms of various segregation cases have published these additional recollections of clerkship experiences: Daniel J. Meador, *Justice Black and His Law Clerks*, 15 ALA. L. REV. 57 (1962–63) [hereinafter Meador, *Justice Black and His Law Clerks*]; Daniel J. Meador, *Mr. Justice Black: A Tribute*, 57 VA. L. REV. 1109 (1971); Interview by Mortimer Schwartz with William W. Oliver, former law clerk to Chief Justice Warren (May 17, 1972), *WORKING IN THE SUPREME COURT: COMMENTS ON COURT, BROWN DECISION, WARREN AND OTHER JUSTICES*, in EARL WARREN: THE CHIEF JUSTICESHIP (Regional Oral History Office, The Bancroft Library, University of California/Berkeley) (law clerk to Chief Justice Vinson, O.T. 1952, and then to Chief Justice Warren, O.T. 1953); Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U. L.Q. 817, 822 (1979) [hereinafter Gunther, *Some Reflections on the Judicial Role*] (law clerk to Chief Justice Warren, O.T. 1954) (discussing *Brown II*); Gerald Gunther, *Another View of Justice Harlan—A Comment on Fried and Ackerman*, 36 N.Y.L. SCH. L. REV. 67, 68 (1991) [hereinafter Gunther, *Another View of Justice Harlan*] (identifying a Harlan contribution to the Court's *Brown II* opinion); JOHN D. FASSETT, *NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY* 555–80 (1994) [hereinafter JOHN D. FASSETT, *NEW DEAL JUSTICE*] (law clerk to Justice Reed, O.T. 1953); JACK FASSETT, *THE SHAPING YEARS: A MEMOIR OF MY YOUTH AND EDUCATION* 133–46 (2000); www.law.yale.edu/outside/html/Alumni_affairs/alumniwkend_av03.htm (video of an October 31, 2003, panel discussion, *Yale Law School Alumni Supreme Court Clerks During the Brown Era*, featuring Charles A. Reich (law clerk to Justice Black, O.T. 1953), Frederick M. Rowe (law clerk to Justice Clark, O.T. 1952), William D. Rogers (law clerk to Justice Reed, O.T. 1952), Ernest Rubenstein (law clerk to Justice Clark,

discussion, Earl Pollock and Barrett Prettyman, also participated in the discussion presented here because, during 1954–55, the Term of *Brown II*, each was in his second year as a Supreme Court law clerk.

BROWN V. BOARD OF EDUCATION IN THE SUPREME COURT

To orient the reader to the relevant events and to preview particular topics that are addressed in the roundtable discussion that follows, this introduction now offers a general chronology of the path of *Brown v. Board of Education* in the Supreme Court during the years 1952–1955.¹⁴

The school segregation cases first came to the Supreme Court in the October Term 1952. The Court, then led by Chief Justice Fred M. Vinson, heard oral arguments in the cases over three days that December. When the Justices met subsequently in conference, although no definitive vote was taken, it was apparent that the Court was divided. The Justices ultimately decided not to decide the cases in that Term. Instead, on June 8, 1953, the Court ordered the parties to file additional briefs addressing specific questions—including, with significance to the Court’s ultimate decision two years later in *Brown II*, two detailed, compound questions about remedies that the Court might order in the event it declared school segregation unconstitutional—and it set the cases for reargument the following fall.¹⁵

On September 8, 1953, the trajectory of the school segregation cases changed dramatically when Chief Justice Vinson, a Kentucky native who seemed to be committed to reaffirming the constitutionality of racial segregation, suddenly died. At that time, the next Supreme Court Term was imminent,

O.T. 1953), Raymond S. Troubh (law clerk to Justice Burton, O.T. 1953), and James R. Wimmer (law clerk to Justice Minton, O.T. 1953)); Charles A. Reich, *Deciding the Fate of Brown*, 7 GREEN BAG 2D 137 (2004); and John D. Fassett, *A Plea for the Demise of a Stubborn Myth*, in BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT 117, 117–49 (Clare Cushman & Melvin I. Urofsky eds., 2004).

¹⁴ For much more detailed information on the history of the *Brown* cases in their localities of origin, as developing litigations and in the Supreme Court, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (rev. & expanded ed. 2004), and Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1 (1979).

¹⁵ See *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953) (per curiam).

so President Eisenhower, who had been in office for less than ten months, acted quickly to fill the vacant Chief Justiceship. The president announced on Wednesday, September 30, that he was making a recess appointment of the Governor of California, Earl Warren, to serve as Chief Justice. Warren thus was serving in that judicial office only five days later when the Court began its new Term. Under his leadership, and benefiting from his personal warmth and political skills, the Court quickly developed new spirit and cohesion. It also, at Chief Justice Warren's explicit instruction, began to treat the school segregation cases as strictly confidential matters that were to be discussed only among and by the Justices themselves.

On December 7, 8, and 9, 1953, the Supreme Court heard reargument in the five cases. Beginning later that week and continuing over the next months, the Justices regularly discussed the cases in their private conference, on paper, and in small conversations among themselves,¹⁶ but they took no votes to decide them. As Chief Justice Warren recalled *Brown* in his memoirs, the Justices,

conscious of its gravity and far-reaching effects, decided not to put the case to a vote until we had thoroughly explored the implications of any decision. As a result, we discussed all sides dispassionately week after week, testing arguments of counsel, suggesting various approaches, and at times acting as "devil's advocates" in certain phases of the case . . .¹⁷

On January 11, 1954, President Eisenhower formally nominated Chief Justice Warren for appointment to the office that he already held as a recess appointee, and on March 1 the

¹⁶ See, e.g., F.F. [Justice Frankfurter] memorandum, "Dear Brethren," Jan. 15, 1954, at 1 (circulating "considerations [that] have arisen in me in regard to the fashioning of a decree . . . with the thought that sometimes one's thinking, whether good or bad, may stimulate good thoughts in others"), in Earl Warren Papers, Manuscript Division, Library of Congress ("EW LOC") Box 571. Frankfurter's five pages of thoughts about possible judicial decrees that would implement a Court decision against school segregation recognized the limits of judicial power and, for the first time in this context, invoked the now-famous phrase "all deliberate speed":

Not even a court can in a day change a deplorable situation into the ideal. It does its duty if it gets effectively under way the righting of a wrong. When the wrong is a deeply rooted state policy the court does its duty if it decrees measures that reverse the direction of the unconstitutional policy so as to uproot it "with all deliberate speed." *Virginia v. West Virginia*, 222 U.S. 17, 20 [(1911)].

Id. at 2.

¹⁷ EARL WARREN, *THE MEMOIRS OF EARL WARREN* 2 (1977).

Senate unanimously confirmed this nomination. Only then did the Justices, in conference, actually, formally decide that they would strike down school segregation.¹⁸ Warren, who was strongly of that view and had solid support from a majority of his colleagues, assigned the opinion-writing responsibilities to himself. He drafted short opinions in *Brown* and *Bolling* and then, through in-person discussions with colleagues, assembled a unanimous Court to hold school segregation unconstitutional. On May 17, 1954, Chief Justice Warren announced the Court's 9-0 decisions declaring state and federal school segregation laws and systems to be unconstitutional.

The May 1954 decisions were not, of course, completed adjudications. At the same time that the Court decreed school segregation to be unconstitutional, it also deferred ordering any remedial action. Instead, the Court again restored the cases to its docket for the coming Term and asked the parties to file new briefs addressing the question of remedy. The Court specifically asked the parties to address whether its holding that school segregation was unconstitutional required a decree "that Negro children should forthwith be admitted to schools of their choice," or whether the Court could use its equitable powers to permit gradual adjustment from segregated to desegregated school systems.¹⁹ As to the latter issue of the Court potentially exercising equitable powers to bring segregation to an end gradually, the Court also asked the parties to brief:

- (a) should this Court formulate detailed decrees in these cases;

¹⁸ In his memoirs, Chief Justice Warren wrote that the Court's actual vote in conference to hold school segregation unconstitutional occurred in February 1954. *See id.* at 2, 285. No contemporaneous record has been found that corroborates this recollection, however, and it seems unlikely that the Chief Justice would have called for this vote before he had been confirmed by the Senate, or that the conference vote could have occurred during the second, third, or fourth weeks of February 1954, when the Court was in recess and not all Justices were present in Washington, D.C. *Cf.* Letter from Bill [Justice Douglas] to Harold [Justice Burton], Feb. 22, 1954, at 1-2 ("I meant to talk with you before I left Wash DC to see if you would have a chance to talk with Earl [Chief Justice Warren] + urge expedition of the big cases. Now that he will be quickly confirmed, we can proceed with some dispatch I hope[.]") (writing from Tucson, AZ), in Harold H. Burton Papers, Manuscript Division, Library of Congress ("HHB LOC") Box 314. Thus a March 1954 conference vote, on some date following both Chief Justice Warren's March 1, 1954, confirmation by the Senate and the Court's March 8 return from its 30-day recess, seems a better estimate.

¹⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 & n.13 (1954).

- (b) if so, what specific issues should the decrees reach;
- (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
- (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?²⁰

The Court also invited the Attorney General of the United States to participate in the further briefing and argument, and it invited the attorneys general in all states with segregated schools to appear as amici curiae if they made such requests by September 15 and filed briefs by October 1, 1954.²¹ Three weeks later, on Monday, June 7, 1954, the Court announced its final opinions of the Term and began its summer recess.

During the ensuing summer of 1954, as the litigants and amici curiae analyzed the *Brown* decision and began to draft the briefs that they would file in the fall, the Supreme Court Justices and their law clerks also continued to work on the segregation cases. Chief Justice Warren continued to lead the Court's collective work. In discussions with Justice Stanley Reed, for example, Warren learned that Reed had amassed a large amount of information on segregation-related topics.²² It included a collection of state statutes prohibiting segregation, a compilation of all Court cases decided in the previous decade that involved denial of due process claims, a comparison of white and Negro crime rates in cities that had legal segregation and others that did not, research concerning the NAACP and whether it had a charter that adopted ending segregation as an objective, and research that indicated the attitudes of other countries, the Catholic Church, and the armed forces towards segregation.²³ Warren later borrowed these materials from Reed's law clerk and met with him several times for informal discussions, including about race relations.²⁴ Perhaps stimulated by Justice Reed's

²⁰ *Id.*

²¹ *Id.* at 495–96.

²² See JACK FASSETT, *supra* note 13, at 145.

²³ See JOHN D. FASSETT, *NEW DEAL JUSTICE*, *supra* note 13, at 565–67.

²⁴ See JACK FASSETT, *supra* note 13, at 146; see also Memo to Justice Reed re Integration Materials, n.d. (departing law clerk Fassett's report to Justice Reed,

research, Chief Justice Warren asked Justice Harold Burton (and presumably other Justices as well) to think about research that could be done, resulting in some kind of report, within the Court that summer. Burton, in response, wrote Warren a memorandum outlining fact issues that could be researched and addressed in a report, including the current status of school desegregation, procedures being employed to move from school segregation to desegregation, and programs that had been authorized to promote future school integration.²⁵ Justice Felix Frankfurter, writing from summer lodging in Charlemont, Massachusetts, to Warren back at the Court, suggested that it look to the experiences in northern, western, and middle western States to shed light on anticipated problems with desegregation.²⁶

Chief Justice Warren continued to canvas his colleagues and, in the end, he confirmed that five others—Justices Reed, Burton, Frankfurter, Jackson, and Tom Clark—each would direct a law clerk to work with other designated clerks on a collective segregation research project. Thus, before Warren left Washington after July 4th for his own vacation in California, he dictated a memorandum assigning his soon-to-arrive new law clerk Gerald Gunther to coordinate this task.²⁷ Gunther and five other clerks organized themselves, performed the research, and drafted reports on their work and findings.²⁸ They ultimately

written in approximately mid-July 1954, on Fassett's book loans to Chief Justice Warren and conversations with him about appropriate decrees in the school segregation cases), *reprinted in* JOHN D. FASSETT, *NEW DEAL JUSTICE*, *supra* note 13, at 630–31.

²⁵ See Memorandum [from Justice Burton] to Chief Justice [Warren], "Suggestions as to Report on Integration of Races in Public Schools," June 24, 1954, in EW LOC Box 574.

²⁶ See Letter from F.F. [Justice Frankfurter] to Hon. Earl Warren, July 5, 1954, in EW LOC Box 574.

²⁷ Cover note from [Chief Justice Warren's secretary] M.K. McHugh to Mr. Gunther, July 7, 1954 ("Before leaving for the West Coast, the Chief Justice dictated the attached memorandum which he asked me to give to you when you reported to work."), in EW LOC Box 574; see [Chief Justice Warren's] Memorandum to Mr. Gunther, July 6, 1954, in EW LOC Box 574. Gunther's first day of work in Chief Justice Warren's chambers was Monday, July 19, 1954. See typed note on Gerald Gunther letter to Mrs. McHugh, June 22, 1954, in EW LOC Box 396.

²⁸ The law clerks who participated in this work were Gerald Gunther (who was one of Chief Justice Warren's two new clerks, joining returning chief clerk Earl Pollock, during O.T. 1954), Gordon Davidson (one of Justice Reed's two new clerks), Richard E. Sherwood (one of Justice Frankfurter's two new clerks), Barrett Prettyman (Justice Jackson's returning and sole law clerk), John Kaplan (one of

produced a unified text, had it set in type by the Court's print shop and on November 17, 1954, circulated from the Chief Justice's chambers an unsigned, eighty-one-page "Segregation Research Report" to the Justices.²⁹ The Report considers five broad topics: it surveys the "normal" practices of school administrators, focusing particularly on the methods by which they determine which students attend which schools; it summarizes, state-by-state, Southern reactions to *Brown I*; it summarizes experiences in various jurisdictions, particularly border states, that tried to implement desegregation plans in the years before *Brown I*; it describes the plans to abolish public schools that were proposed in some states following *Brown I* and analogous experiences in some Northern areas; and it discusses the limited experience of courts in the supervision of governmental districting processes that are historically "gerrymandered." Separately, the clerks assembled and circulated to the Justices a collection of regional, state, and metropolitan maps. These maps, along with an accompanying final section of the clerks' Report, show racially concentrated and separated housing patterns and the varying boundaries of particular school attendance district systems.³⁰

Justice Clark's two new law clerks), and William B. Matteson (one of Justice Burton's two new clerks). See Outline—Segregation Research Project, n.d., in The Papers of E. Barrett Prettyman, Jr., Mss 86-5, Special Collections, University of Virginia Law Library ("EBP UVa"), Box 2.

²⁹ The law clerks' "Segregation Research Report" is preserved in a number of the Justices' archived papers. See, e.g., Segregation Research Report, n.d., in EW LOC Box 574; *id.*, in William O. Douglas Papers, Manuscript Division, Library of Congress ("WOD LOC") Box 1151 (stamped to indicate that it was circulated by Chief Justice Warren on November 17, 1954). Justice Clark's archived copy of this Report also is available online. See utopia.utexas.edu/explore/clark/view_doc.php?id=a27-04-14.

³⁰ The clerks apparently had only one set of maps, so they provided a single "Maps" report, prepared by Jackson law clerk Barrett Prettyman, to the Justices collectively. It contains four pages of text, a large map showing the locations of black and white households in Spartanburg, South Carolina, and eleven other maps showing segregated school locations and/or school district boundaries in Pensacola, Florida; Madison County, Florida; Escambia County, Florida; Buffalo, New York; West Roxbury, Massachusetts; Shorewood, Wisconsin; Washington, D.C.; Whittier, California; and West Hartford, Connecticut. On November 17, 1954, Chief Justice Warren's chambers circulated this report to the associate justices in order of seniority (i.e., starting with Justice Black). Each justice ultimately received the report in turn and, after initialing its covering circulation slip, passed the report along to his next-senior colleague. Justice Harlan, appointed to the Court in March 1955, was the last justice to receive the Maps report, which is preserved today in Prettyman's archived papers. See Discussion of Maps, n.d., in EBP UVa, Box 2,

As the summer ended and the new Supreme Court Term approached, state attorneys general notified the Court of their intentions to submit briefs and, in some instances, also to participate in the oral arguments concerning how to put *Brown* into effect.³¹ The states seeking oral argument also requested extensions of time in which to file their briefs. On September 21, 1954, the Court announced that November 15 would be the deadline for filing briefs, and that the Court would devote the full week of December 6, 1954—more than a month after the nation's midterm elections—to hearing oral arguments. In the end, the parties to the five cases, the United States, the American Veterans Committee Inc., and the attorneys general of the states of Arkansas, Florida, Maryland, North Carolina, Oklahoma, and Texas all filed new briefs in the cases.³²

On Saturday, October 9, 1954, just five days after the start of the Court's new Term, Justice Jackson died suddenly of a heart attack. On November 8, President Eisenhower nominated Judge John M. Harlan of the United States Court of Appeals for the Second Circuit to succeed Jackson on the Supreme Court. Although it was initially expected that Harlan would be confirmed before Thanksgiving, the chairman of the Senate subcommittee to which Harlan's nomination had been referred announced on Friday, November 19, that the subcommittee would not consider the nomination until the new Congress was seated in January 1955.³³ On the following Monday morning, the

Folder 2. In addition to the one circulating Maps report, each Justice apparently received in this time period, from someone, to keep, a 1950 census map showing in five brown-to-orange-to-yellow color shades the concentration of the "Nonwhite" population in each county in the thirteen Southern states. *See, e.g.*, EW LOC Box 574 (containing Chief Justice Warren's copy of this map); WOD LOC Box 1151 (containing Justice Douglas's copy of the same); HHB LOC Box 257 (containing Justice Burton's copy of the same).

³¹ *See* Int'l News Serv., *6 States in Hearing Role*, WASH. POST & TIMES HERALD, Sept. 17, 1954, at 11. Arkansas, Maryland, and Tennessee notified the Court that they would submit amicus briefs. Florida, North Carolina, and Oklahoma notified the Court that they would also participate, along with the four states that were parties and the District of Columbia, in oral argument. *See id.*

³² *See* 49A LANDMARK BRIEFS & ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 631-1070 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Kurland & Casper] (reproducing these briefs).

³³ *See* Thomas Winship, *Nomination of Harlan to Court Is Delayed*, WASH. POST & TIMES HERALD, Nov. 20, 1954, at 1. Sen. William Langer (R.-ND), chairman of the Senate Judiciary subcommittee, granted this delay at the request of Sen. James O. Eastland (D.-MS), an ardent segregationist. This postponement of Judge Harlan's hearing until January 1955 had the effect of precluding him, a northerner, from

Supreme Court responded to this prolonging of its short-handed status by issuing a new order in *Brown II*: "In view of the absence of a full Court," it announced, the school segregation cases "scheduled for argument December 6th, are continued."³⁴

Justice Harlan's appointment, which members of the Senate Judiciary Committee ultimately delayed for months, finally was confirmed by the Senate on March 16, 1955. Shortly thereafter, the Court announced that it would devote the full week of April 11 to hearing oral arguments in *Brown II*.

On Sunday, April 10, 1955, the day before the oral arguments commenced, the Justices received an additional, detailed document from the six law clerks who previously had submitted the "Segregation Research Report" on November 17, 1954. This document, captioned the "Law Clerks' Recommendations for Segregation Decree," advocates that the Court remand the cases to the lower courts and issue a simple decree, giving guidance for lower courts to follow on remand, and issue an opinion including other specified content.³⁵ The clerks also reported, however, that they were not unanimous on most of these points. The document includes, for example, one unnamed clerk's argument, in disagreement with the view shared by the other five, against the Court giving lower courts any guidance beyond the terms of a simple remedial decree.

The *Brown II* oral arguments, running across four days, filled over thirteen hours. On Monday, April 11, the Court heard oral arguments on behalf of the parties to the five cases. On Tuesday, the Court continued to hear from these advocates, including NAACP counsel Thurgood Marshall representing the plaintiffs. On Wednesday, the Court heard oral arguments from attorneys representing amici states North Carolina, Arkansas, Oklahoma, Maryland, and Texas, and from the Solicitor General of the United States. On Thursday, the Court's argument week concluded with rebuttal argument by Marshall.³⁶

Near the end of this oral argument week, someone—likely Justice Frankfurter—gave Chief Justice Warren a draft decree to

joining the Supreme Court in time to hear the then-scheduled December 1954 oral arguments in the school segregation cases. *See id.* at 6.

³⁴ *Brown v. Bd. of Educ.*, 348 U.S. 886 (1954) (per curiam).

³⁵ *See* Law Clerks' Recommendation for Segregation Decree, in EW LOC Box 574; *id.*, in WOD LOC Box 1151. This nine-page document is unsigned and undated.

³⁶ *See* Kurland & Casper, *supra* note 32, at 1071–1289 (reproducing transcripts of these oral arguments).

consider. It provided that the five cases would be remanded to their respective lower courts for them to enter appropriate decrees to carry out the Supreme Court's mandate in light of *Brown I* and *Bolling*. The proposed decree also addressed, in language that was to become famous, the speed with which those courts should act: "Decrees in conformity with this decree, on the basis of detailed findings, shall be issued by the appropriate lower courts with all deliberate speed, after due hearing on the relevant issues."³⁷

On Saturday, April 16, 1955, the Justices met in conference to discuss and decide the remedy cases. They agreed on the objective of deciding the cases unanimously, gave no serious consideration to ordering immediate school desegregation, and generally ranged widely in their discussion of whether and how to issue any remedial decree.³⁸ Chief Justice Warren again assigned himself, as he had in *Brown I*, responsibility for drafting the Court's opinion. He had begun, even before the Justices' conference and vote, to outline in longhand a tentative draft opinion.³⁹ In the second half of May, Warren revised this initial draft and wrote new passages to augment it.⁴⁰ His law clerks assembled the Chief Justice's draft pieces to create a

³⁷ Decree #2, Apr. 14, 1955, at 1–2, in EW LOC Box 574. Although this document has no identified author, circumstances suggest strongly that it came from Justice Frankfurter. First, this draft contains some of the distinctive ideas and phrases, including "all deliberate speed," that he had been thinking, writing, and circulating to his colleagues as they considered the school segregation cases. See *supra* note 16; see also *infra* note 69 and accompanying text (discussing the origins of the phrase "all deliberate speed"). Second, the "April 14, 1955," date on the top right-hand corner of the first page of "Decree #2" is written in Frankfurter's distinctive hand. Third, the "Decree #2" name and its content suggest that it followed on another Frankfurter memorandum, this one dated and initialed in typeface, in which he described to Warren on that very day the alternatives of a "bare bones" decree versus one in which the Supreme Court articulated some standards for lower courts to follow on remand. See F.F. [Justice Frankfurter], Memorandum on the Segregation Decree, Apr. 14, 1955, in EW LOC Box 574.

³⁸ See generally THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 662–69 (Del Dickson ed., 2001); Hutchinson, *supra* note 14, at 54–57.

³⁹ See Chief Justice Warren's notes, "Tentative," at 1–5, in EW LOC Box 574. On Thursday, April 21, 1955, five days after the Justices' conference discussion of *Brown II*, Chief Justice Warren had his handwritten draft opinion typed, and he then continued to edit the document. See "4/21/55" typescript at 1–4, in EW LOC Box 574.

⁴⁰ See "5/18/55" typescript pages, with handwritten edits by Chief Justice Warren, in EW LOC Box 574; "C.J. Draft-5/23/55," in EW LOC Box 574; "Law clerks' composite #1 Draft," May 24, 1955, in EW LOC Box 574.

composite draft opinion, which Warren then circulated to and discussed with his colleagues. Although some Justices suggested language to the Chief Justice—Justice Harlan, for instance, persuaded Warren to add to the opinion the strong statement that “it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them”⁴¹—the Court continued to be unanimous as the opinion took final form.

Justice Frankfurter provided the last, and historically the most significant, editorial change to Chief Justice Warren’s proposed *Brown II* opinion. Frankfurter had been urging Warren since early 1954, months before *Brown I* was decided, to state explicitly that governments would be permitted to dismantle their unconstitutionally segregated school systems “with all deliberate speed.”⁴² On May 24, 1955, Frankfurter wrote to Warren that he was joining his *Brown II* draft, and to repeat, for at least the third time, his request for an opinion that contained that four-word phrase:

I have only one further and minor remark to make. I still think that “with all deliberate speed”, *Virginia v. West Virginia* 222 U.S. 17, 22, is preferable to “at the earliest practicable date” (p. 4). The reference to *Virginia v. West Virginia* is, from my point of view, all to the good. That, too, involved constitutional rights—the right of a State to have this Court enforce its just claims against another State. And if the Virginia litigation may suggest that it takes time to get enforcement, that is a good intimation.⁴³

When they discussed this suggestion in person, Frankfurter found that Warren seemed amenable.⁴⁴ On May 27, Frankfurter wrote once more to the Chief Justice to close the deal:

I still strongly believe that “with all deliberate speed” conveys more effectively the process of time for the effectuation of our decision. And the reference to *Virginia v. West Virginia*, I deem desirable in that it is the nearest experience this Court has had in trying to get obedience from a state for a decision highly

⁴¹ *Brown II*, 349 U.S. 294, 300 (1955); see Gunther, *Another View of Justice Harlan*, *supra* note 13, at 68.

⁴² See *supra* notes 16, 37.

⁴³ F.F. [Justice Frankfurter] to The Chief Justice [Warren], May 24, 1955, in EW LOC Box 574.

⁴⁴ See F.F. [Justice Frankfurter] to The Chief Justice [Warren], May 27, 1955, in EW LOC Box 574.

unpalatable to it. I think it is highly desirable to educate public opinion—the parties themselves and the general public—to an understanding that we are at the beginning of a process of enforcement and not concluding it. In short, I think it is far better to habituate the public’s mind to the realization of this, as both the phrase “with all deliberate speed” and the citation of *Virginia v. West Virginia*, are calculated to do.⁴⁵

On Tuesday, May 31, 1955, Chief Justice Warren announced the Supreme Court’s unanimous *Brown II* decision. It declared that the school segregation cases would be remanded to the district courts from which they had arisen, and that those courts should use their equitable powers to fashion practical, flexible remedial decrees.⁴⁶ The Supreme Court also directed these lower courts to require each defendant to “make a prompt and reasonable start toward full compliance” with *Brown I* and *Bolling*.⁴⁷ But the Supreme Court also authorized lower courts to make findings thereafter, as they retained jurisdiction in these cases, that any defendant had established a need for additional time as it pursued “good faith compliance at the earlier practicable date” with the Supreme Court’s school desegregation decree, and thus to grant such an extension.⁴⁸ Finally, as to the parties to the five cases, the Supreme Court directed the lower courts “[t]o take such proceedings and enter such orders and decrees consistent with this [*Brown II*] opinion as are necessary and proper to admit [these parties] to public schools on a racially nondiscriminatory basis with all deliberate speed”⁴⁹

BIOGRAPHICAL BACKGROUND ON THE PARTICIPANTS

Gordon B. Davidson, a graduate of Centre College, the University of Louisville School of Law and Yale Law School, is Of Counsel to Wyatt, Tarrant & Combs, LLP in Louisville. He served as a law clerk to Justice Stanley Reed during the Supreme Court’s October Term 1954.

Daniel J. Meador, a graduate of Auburn University, the University of Alabama School of Law and Harvard Law

⁴⁵ *Id.*

⁴⁶ *See Brown II*, 349 U.S. at 299–300.

⁴⁷ *Id.* at 300.

⁴⁸ *Id.*

⁴⁹ *Id.* at 301.

School, is James Monroe Professor of Law Emeritus at the University of Virginia School of Law. He served as a law clerk to Justice Hugo L. Black during the Supreme Court's October Term 1954.

Earl E. Pollock, a graduate of the University of Minnesota and the Northwestern University School of Law, retired in 1992 from his partnership in the Chicago law firm of Sonnenschein, Nath & Rosenthal. He became a law clerk to Chief Justice Fred M. Vinson in summer 1953 and, following Vinson's death that September, a law clerk to Chief Justice Earl Warren for the Supreme Court's October Terms 1953 and 1954.

E. Barrett Prettyman, Jr., a graduate of Yale University and the University of Virginia School of Law, is Of Counsel to Hogan & Hartson in Washington, D.C. He served as Justice Robert H. Jackson's only law clerk during the Supreme Court's October Terms 1953 and 1954 and, after Jackson's death in October 1954, clerked for Justices Felix Frankfurter and John M. Harlan, successively, during the remainder of the 1954 Term.

THE ROUNDTABLE DISCUSSION

Moderator: Good morning. My name is John Barrett. I am a Professor of Law at St. John's University in New York City and the Elizabeth S. Lenna Fellow at the Robert H. Jackson Center in Jamestown, New York.

We are here this morning to discuss the final, and perhaps the most important, part of the *Brown v. Board of Education* decision by the Supreme Court of the United States. The Court's May 1954 decision declared the unconstitutionality of public school segregation, but it did not decree what legal remedy the prevailing parties were entitled to receive. On this question of "remedy," the Court in 1954 merely announced that it would hear additional argument on that issue during the next Court Term. The Court invited additional briefing, not only from the parties to the five cases

2005]

LAW CLERKS RECALL BROWN II

839

known as *Brown*, but also from all interested states that would be affected by and work to implement the new regime that the Court had just announced. Thus culminated the next twelve-month period that we know now, fifty years later, as the year of *Brown v. Board of Education II*.

We are very privileged to have with us four distinguished attorneys who were present on the inside of the Supreme Court process for that year of deciding *Brown II*. I would like to turn to each of you and get a bit of personal flavor on who your boss was and how it came to be that you were a Supreme Court law clerk. I'll turn to you first, Earl Pollock. Fred Vinson will be a background figure, but you might tell us a bit about him and then of course tell us about your coming to be the clerk of Chief Justice Earl Warren.

Pollock:

I came to the Court in June of 1953 to work as a law clerk to Chief Justice Vinson. Unfortunately, that proved to be of short duration because in September of 1953, in fact the same weekend that my wife and I had just driven him home to his apartment in the Wardman Park Hotel, he died. For approximately three weeks or so we were on tenterhooks waiting to find out whether I was going to start my practice much sooner than I had expected because I might not be reappointed. But then Earl Warren was appointed to succeed Vinson, and he asked me and the other two Vinson clerks to continue as his clerks.

Vinson was of course a radically different type of person than Earl Warren. Both Vinson and Warren were politicians in every sense of the word, but Warren was much more of a, shall we say, public personality, enormously popular in California. So far as I know, he's the only Californian who ever was nominated by both the Democratic and Republican parties for the position of Governor. He had a very commanding presence. He seemed to be instantly liked by almost everyone whom he came in contact with, whether it be other Justices of the Court or law clerks, or messengers,

or chauffeurs or whatever. He had very much of a common touch and it was a great experience working for him. I was pleased that he asked me to continue for a second year as his law clerk, whereupon I then achieved the most distinguished title that I have ever had in my entire life: I was Chief Law Clerk to the Chief Justice of the United States. Everything since then has been downhill (chuckles).

Moderator: Barrett Prettyman, you'll have to do this three times, but for now just double duty: Can you introduce us a bit to Robert Jackson, and also to Felix Frankfurter? And tell us about the process by which you became a law clerk?

Prettyman: Robert Jackson was an absolutely wonderful person to work for and particularly to be his only clerk because I didn't have to deal with another clerk doing part of my work. It was a busy time. I had to write cert. memos in all the cases we got that Term. He asked me to stay the second Term and we were beginning that when he very suddenly passed away. In an unpublished *Brown* opinion which he assumed he would be filing, a concurring opinion, while Vinson was still alive, he referred to the decree a couple of times and primarily seemed to think that it would be Congress's task to deal with the school situation now that the Court had ruled. He didn't go into any great detail about that.

Justice Frankfurter was in my office a lot while Jackson was alive. He proselytized me under the mistaken assumption that I would have some say in getting Jackson to do one thing or another. But he, in any event, as soon as Harlan was appointed, got ahold of Harlan and suggested that he come to the Court with somebody who was already there. And he was the one who talked him into hiring me virtually sight unseen.

Harlan immediately became interested in the decree problem and asked me to write a memo to him, which I did. It was exactly fifty pages long,

2005]

LAW CLERKS RECALL BROWN II

841

summarizing each of the cases, the positions that the parties were taking on all pending questions, everything from should there be a master appointed to run the cases, what rules should the local school boards have, should there be immediate compliance, etc., and he asked me not only to summarize the briefs, but to state my own views about the decree, which I did.

So then he finally came down before he was actually a member of the Court and we met, we talked. What a wonderful person he was too. A lawyer's lawyer, a judge's judge, he was very bright and serious, not in the sense of having no sense of humor, but very serious about his work.

Moderator: Gordon, let me turn to you. Stanley Reed was a long-time veteran of the Court by the time you arrived. Give us a sense of him.

Davidson: Well, of course he was from Kentucky but interestingly he was brought to Washington in 1929 by Herbert Hoover. Reed, of course, was an avid Democrat, but he was brought there because of his expertise in the farm area. He was a practicing lawyer in Maysville, Kentucky, and he knew the tobacco business and the farm business very well. Hoover brought him up as counsel to the Federal Farm Board where he served for a number of years and after that Hoover appointed him to the Reconstruction Finance Corporation, which had just been formed to take care of the banks and the difficulty they were having during the Depression. And so he was in that capacity as general counsel when Roosevelt was elected.

Reed always said that a principal reason that he got to be a Supreme Court Justice was because when he went to a meeting at the White House with Roosevelt for the first time, a man met him at the door and said, "Stanley you don't remember me? I was in prep school with you." Stanley said, "Oh, really, that's great," and he went back to meet with the President. He said he was sure that for the next four years that fellow,

Marvin McIntyre, the President's White House secretary, always reminded Roosevelt of his old prep school friend. So Reed always felt that he had a leg up because of his friend at the White House.

Reed became Roosevelt's Solicitor General. Actually, he earned his spurs, I suppose, by the famous *Gold Clause Cases*, which he argued and won earlier.⁵⁰ As Solicitor General he argued most of the early New Deal cases on behalf of the Roosevelt Administration. In 1938, he was appointed by Roosevelt to the Supreme Court and served for nineteen years thereafter. He obviously was very interested and very involved in both *Brown I* and *Brown II* and I guess we'll get to that a little later.

Moderator: Dan Meador, let me turn to you. Justice Black was also from the South. He was from the Deep South—Alabama, as you are. Introduce us a bit to your Justice, Hugo L. Black.

Meador: Justice Black had been elected to the United States Senate in 1926 from Alabama. So I grew up knowing who he was and hearing a lot about him, and actually I aspired to become his law clerk even long before I went to law school, because two men older than I from my hometown had been his law clerks. So I knew of the position of law clerk, and I decided that that would be a pretty interesting thing to do. So that had been in my mind all the

⁵⁰ The *Gold Clause Cases* were argued before the Supreme Court on January 8, 9, 10, and 11, 1935. Attorney General Homer S. Cummings, who opened and closed the government's oral argument in the cases, shared his podium time before the Court with Reconstruction Finance Corporation general counsel Stanley F. Reed. See *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 272–78 (1935) (noting Reed's oral argument and summarizing the brief for the U.S. and the RFC). On February 18, the Court decided the cases in the government's favor by a 5–4 vote. See *id.* at 240–42 (upholding the June 5, 1933, Joint Resolution of Congress that had nullified “gold clauses”—provisions giving obligees contractual rights to be paid in U.S. gold coin—in private contractual provisions); *Nortz v. United States*, 294 U.S. 317, 317 (1935) (upholding the power of the U.S. Treasury to compel “gold certificate” owners to surrender them for currency, not gold specie); *Perry v. United States*, 294 U.S. 330, 331–32 (1935) (holding that owners of U.S. bonds payable in gold may be paid in currency, even if gold is more valuable than the obligation of the bond).

2005]

LAW CLERKS RECALL BROWN II

843

way through and eventually it would work out that way; he appointed me.

He was Roosevelt's first appointment to the Supreme Court in 1937, which was a rather startling event to much of the legal world. I think most people did not think of him as the ideal candidate, that after four or five years of no appointments Roosevelt would pick him as the first.

When I arrived in the summer of 1954, he had been there seventeen years and was the Senior Associate Justice. He ended up serving thirty-four years on the Court. He was a great person to work for, very personable, friendly, amiable, warm, willing to engage his law clerks in a lot of very heated but friendly disputations over issues and what not, and it was a grand experience.

As far as the subject of this panel goes, *Brown II*, I'm not going to be able to add a whole lot here because Justice Black never discussed the case, and this was true the previous year leading up to *Brown I*. I talked about this over the years with his two clerks from that year, one of whom was David Vann, who later became mayor of Birmingham and the other was Charlie Reich, who gained fame later as the author of *The Greening of America*.^[51] They actually lived at Black's house for that year and he never discussed the case with them at all, and they never saw a piece of paper relating to it. It was as though it did not exist, and the same carried through in my year there—he just did not discuss the case. So I am not going to be able to add a whole lot, but I'm delighted to be here.

Moderator: You're understating your contribution, as time will prove. The silence of Justice Black was not, I

⁵¹ CHARLES A. REICH, *THE GREENING OF AMERICA* (1970). Reich wrote this book, which was the nationwide non-fiction best seller, when he was a Professor at Yale Law School. See generally Thomas Meehan, *The Yale Faculty Makes the Scene*, N.Y. TIMES, Feb. 7, 1971 (Magazine), at 12–13, 48–52.

think, a personal foible. It was part of the context in which Chief Justice Warren and the Associate Justices handled the *Brown* litigation as a very confidential matter, even within the confidentiality of the Court. Earl and Barrett, you were there for that first year. Could you describe that dynamic of secrecy, delicacy, and so forth?

Prettyman: Well, I think a good example of it is the fact that some law clerks did not know that *Brown* was coming down.

Moderator: The decision day?

Prettyman: On decision day, yes. It was very confidential and there were strict orders from the top that it was not to be discussed with anybody; the clerks who were working on it were not to discuss it with their wives or anybody else. So I'm not sure exactly why it was—this was not, after all, a national security case or something. I'm not sure why the Chief Justice was so adamant about it, but Earl could tell you about that.

Meador: What was your impression as to how many clerks were actually working on the case in any way at all?

Prettyman: Well, on the decree there was a committee of six of us who worked on the decree. But for the main opinion, I never did know exactly how many worked on it and how many didn't. I did, only because of Jackson giving me his unpublished opinion.

Pollock: The decision of the Court to maintain such secrecy was probably stimulated by Warren himself, who was very much concerned about newspaper leaks. The Justices agreed that none of the clerks, other than the Chief's own clerks, would be involved in any way. Several of the Justices, as we know, honored that agreement only in the breach and there were Justices like Jackson who, I think, shared his views with Barrett. But I'm not even sure if it was true in Frankfurter's chambers.

2005]

LAW CLERKS RECALL BROWN II

845

There was a good deal of emphasis on maintaining security. For example, the usual routine in the Court is that every draft of an opinion that is going to be distributed to the Justices is sent down to the Supreme Court's own print shop, and the drafts then are distributed to the Justices in printed form—galleys, as they are sometimes called. In this instance, that was ruled out. Everything was done in typed form. In addition, even messengers were kept out of this. When the time came in early May, 1954, to distribute the first draft of *Brown I*, Warren personally delivered copies to each Justice in the building. He personally took a copy to Justice Jackson in the hospital. And another clerk and I personally delivered copies to Justice Minton at his apartment and to Justice Black, who was playing tennis at the time when we arrived at his Alexandria home.

The security was regarded as very, very important and in the Chief's office we were repeatedly admonished that this was not something that we were to discuss with other law clerks. That in itself would be quite unusual, because the normal procedure would be that at lunch or in private conferences, there would be a good deal of interchange among clerks about "What do you think about this?" or "Do you think that draft is good?" and so on. Not so in *Brown I*.

Meador: Let me ask you about that. You know, we had the clerks' private dining room—downstairs, where the eighteen of us gathered most days for lunch, my recollection is—and you can correct me on this—I never recall hearing this case discussed at lunch with the clerks.

Pollock: I'm not surprised because I know the Chief's clerks would have been absolutely silent in any such discussion and probably might have even gone so far as to say that any discussion of that sort is out of bounds.

Moderator: Is that your memory of the lunchroom also?

- Davidson: Well, you're confusing *Brown I* and *Brown II*.
- Prettyman: Yes. Big difference. Big difference.
- Davidson: *Brown I* was the one with the great secrecy. Now, just a footnote, not of personal knowledge, but a footnote to Earl's comments. In those chambers of Justices who had trouble with *Brown I*, including Justice Reed, Justice Jackson, and Justice Clark to some degree—I was not there, so this is second-hand knowledge—but in those chambers, there was a good deal of interchange between the Justice and the law clerk. That was not true of the other Justices who were pretty well signed on originally, so there was a good bit of that. But the same sort of culture was on those law clerks in regard to even those who had trouble with the decision. That's *Brown I*. Now, *Brown II*—
- Moderator: *Brown II* is the cafeteria conversation question that Dan asked—
- Davidson: My recollection, subject to better memory from my colleagues, is *Brown II* did not have the same type of *in terrorum* culture.
- Prettyman: You're absolutely right.
- Davidson: Regarding the lunch room, it is worth noting that there is a private lunch room in the Supreme Court building for the law clerks. Fortunately, they test it for bugs and sound every day—it's a good thing, because if you had a tape recorder in that lunch room, goodness knows what would happen to this country.
- Moderator: Well, I want to make sure we're clear on this, Dan. Your memory of that lunch room during the *Brown II* year, which is the year you were employed as a law clerk, is that this was not a lunch room topic.
- Meador: I do not recall ever having heard it discussed. Now my memory may be faulty and I'd be happy to be corrected, but I do not recall any discussion in the lunch room of the case.

2005] *LAW CLERKS RECALL BROWN II* 847

Prettyman: If I could drop a footnote to one thing that you said, Justice Jackson did not have trouble with the result. He had a lot of trouble with how they were going to get there and what they were going to say.

Davidson: That is also true of Reed. Reed had no trouble with the result. He certainly believed that *Plessy* should be overruled, but it was a question of how and when.

Moderator: Certainly he was there by May 17, 1954. They were all unanimously part of that decision.

I want to start at that moment, or maybe the next day. The morning after *Brown v. Board of Education*, two of you are law clerks and two of you are about to be law clerks, but you're on the outside. Let's start on the outside: What was your sense of what this meant for the country and for the Court that you would be working at during this next year?

Davidson: Well, of course, I was in the Korean War in JAG at that time and it wasn't at the top of our agenda, but we were all delighted, enthralled. I mean, no one disagreed with the basic decision—that is, my colleagues, friends, and lawyers—so that part of it was very easy. It wasn't until I got to the Court—you had to fully get into it to find out what all the problems were.

Back to Barrett's point about Justice Jackson, it was true of Reed also, to a slightly different degree. His concern—which brings up *Brown II*—was not so much the decision that separate but equal had to go. It was the question of when and how, and he was more interested, or more concerned with how than anything else. I'm sure a lot of the other Justices had this problem.

Having made the decision in *Brown I*, that all public schools had to be desegregated, it was very much like, in my opinion, the dog chasing the ambulance: he catches the tire and finally gets hold of it and doesn't know what to do with it. Not

that they didn't know what to do with it, but they didn't know how exactly to do it. So I would say that really *Brown II* had a lot more difficulties in a way—not controversy between Justices particularly, or antagonisms like *Brown I* did—but there was a great concern among all the Justices on, now that we have caught the tire, what do we do with it, and how do we make this thing work? And I think they were all concerned with that. I know Justice Reed had more concern with how than he did with *Brown I*. He was more concerned and more fearful of what possibilities could occur if it was not done properly—insurrections, strikes, bloodshed, all types of horrors if it were done badly.

Prettyman: Don't forget that the briefs ranged all the way from plaintiffs who were asking for immediate, complete action—desegregate now, we are entitled to our rights, you have said we have constitutional rights, you don't spread them out, you don't delay them—all the way to South Carolina and Florida and a couple of other states, which were in effect thumbing their nose at the Court, both at oral argument and in the briefs, indicating that nothing may ever happen.^[52]

Moderator: Dan, from the outside, as your clerkship was approaching, before the Court reached this decision, what was your sense of what the Court had bitten off and what this *Brown II* process was really about?

Meador: It opened up to me a sort of chasm, to see how this thing was going to be carried out and implemented and what the impact was going to be. The enormity of the thing is what immediately impressed me. I just had difficulty foreseeing how it would all work out.

⁵² See Kurland & Casper, *supra* note 32 (reproducing these briefs and oral argument transcripts).

2005] *LAW CLERKS RECALL BROWN II* 849

Moderator: Obviously you were a student at Harvard Law School, but were you getting a direct feel for the Alabama reaction to *Brown v. Board of Education*?

Meador: Of course, as you say, I was at Harvard Law School at that moment, but I went back to Alabama that summer between the end of the academic year and arriving with Justice Black, and there obviously was enormous upset and objection to it down there, although as I look back, that summer was relatively quiescent on the subject. It was as though they were waiting for the other shoe to drop with *Brown II*. But there was enormous objection to it, basically—I mean I didn't learn of anybody who approved of it in Alabama.

Pollock: I think my perception is just a little bit different. I think the other shoe was already in the air, perhaps at the time that *Brown I* was decided. Unanimity of the Court was absolutely essential in the view of the Chief Justice and I think in the view of the other Justices of the Court. In fact, I think it was the need for unanimity that Warren exploited with Justices like Reed in order to induce them to join in *Brown I*, and they would not have done so—clearly in my mind—unless it had already been determined by the Justices that the decree would be implemented on a gradual basis. I don't think there ever would have been a unanimous decision unless there was already a clear understanding that that is the way it would have to be done—because of fear of violence, school closings, fear of the Court issuing orders that they could not enforce, and fear that the prestige of the Court in that event would take a terrific licking.

 There really—as I saw it—were three issues in the *Brown* litigation: One, is separate but equal to be accepted? Second, is desegregation to be done on a gradual basis? Third, what are the instructions to give to the district courts in carrying out gradual transition? In my mind, the first two issues were determined in the '53-'54 Term, leaving only the determination of what instructions to give to the district courts.

As far as I understood it, there was not any chance whatsoever that the Court would ever issue a “forthwith” decree. I don’t think it was ever seriously considered by anyone. A footnote on that is that Black took the position that desegregation of the South would probably never take place, and so he thought the Court in *Brown II* should exclude any reference to class actions and should only order admission of the handful of named plaintiffs. And that was really the only change that was made in the Chief Justice’s draft of *Brown II* that was circulated to the other Justices.

Prettyman: There was an added factor that came in here that was not apparent, I don’t think—certainly in our chambers at the time of the original decision. I had always naively assumed that people went to school because they were in a school district that was like a congressional district, with clearly drawn lines except without the gerrymandering, and that you went to the school within your district, and that therefore it was going to be a relatively simple thing to readjust that. But during the work that I did on the committee of six, I discovered that there were at least five different methods of deciding where you went to school, including all the way from open choice to strict districting to loose districting with lines intercrossing, and some areas being determined by where the railroad track ran or a stream ran. And it became quite clear that there was no way that you were going to write a decree that was going to tell each district judge how to work all this out because, for example, you had to have the entire bus structure redone. You had to have, in many cases, the legislature dealing with new tax systems, because many Negro sections were taxed differently than white sections. School boards—you had to figure out what to do. And what about teachers? What were you going to do to support them?—you’re talking about students, but what about the teachers? Were you having Negro teachers now teaching classes that were largely white but not entirely? How are you going to deal with all this? And that’s part of what our memos

2005] *LAW CLERKS RECALL BROWN II* 851

dealt with to the Court, which I guess you're going to come to in a minute.

Moderator: That's the topic I want to go to next. Earl really has introduced it a bit with a helpfully direct and I think provocative statement that *Brown II* is a bit of an anticlimax or a *fait accompli* given *Brown I*.

Pollock: I wouldn't want to understate the importance of the issues that had to be decided as to how it should be implemented and how the district courts should decide this. Those were very significant issues. But I don't think that the Court really had on its internal agenda, at that time, such issues as "Should there be 'forthwith' admission?" or "Should there not be forthwith admission?" There had been essentially a commitment to people like Reed, Clark and others who were desperately concerned—

Davidson: Frankfurter?

Pollock: Yes, Frankfurter—who were desperately concerned about how it was going to be implemented. There was a commitment that was, I think, unshakeable that the implementation would be done on a gradual basis. And then there were these important additional questions: "Okay, it's going to be done on a gradual basis; now how do we try to direct the district courts to carry out this very awesome task?"

Moderator: The Justices tended to leave Washington during parts of their summer recess, and the summer of 1954 included the creation of the committee of law clerks that went to work on *Brown II*. A couple of you were a part of that process and a couple of you were not. What kinds of instructions or conversations do you recall with your Justices as that summer was moving forward?

Davidson: Let's talk about the "Committee of Six" for a minute, which has a little interesting history. Justice Reed was more concerned, as I said earlier, with what would happen after you overruled *Plessy*

than with overruling *Plessy*. That was not his big problem. His big problem was how we do it and when we do it. And there's no question that Chief Justice Warren was the guy who got unanimity in the Court, and I want to give him credit for that on the way by. He absolutely got it in both *Brown I* and *Brown II* and he deserves a tremendous amount of credit.

But let's go to the committee. Back before they argued *Brown I*, Reed became very fascinated, according to Jack Fassett, my predecessor clerk, with what has happened in other places that had had desegregation, so he had Fassett and probably his other clerk, a fellow named George Mickum, start doing research on places that had this problem, and he began to collect through the clerks a tremendous amount of material. In the summer, after the decision of *Brown I*, he suggested to Jack Fassett, the clerk who was my predecessor, who broke me in, so to speak, that he take this material to the Chief Justice and show him what he had collected—it was a great bulk of work.⁵³ Well, Warren took it very gracefully and wanted it and read it. Shortly after that, Barrett, is when the Chief Justice appointed the six of us. I was one. You were one—I don't remember; Earl, were you one?

Pollock: No, I wasn't.

Davidson: Well, there were six of us, a clerk from each of six Justices—he didn't take two from any one Justice.

Moderator: So basically your bosses volunteered you up—

Davidson: Absolutely. There was no question about that. There's no appeal. (Laughter). I mean, he said "Go," and you went. So we started work and we divided up our workload and so on and so forth.

⁵³ See *supra* note 24 and accompanying text; see also JOHN D. FASSETT, NEW DEAL JUSTICE, *supra* note 13, at 576–77.

2005]

LAW CLERKS RECALL BROWN II

853

Then we go to Barrett's final point, to speed things up: Having done all this work— I remember I had Cairo, Illinois. I remember that distinctly, because of Cairo not being in one of the southern states, but one that had problems similar to the south. The Ford Foundation came out with a book then—they had endowed a writer to collect material on places that had had desegregation: What were their problems? What did they run into?^[54]

So we worked and worked and worked and worked and we had— I don't know, would you say it was that high [indicating with his hand a three-foot-tall stack of paper]?

Prettyman: We had a lot of material.

Davidson: We had more material, and I don't know whatever happened to it—I guess it's up in Washington gathering dust somewhere.

Moderator: It's in various archives, I think. One piece of this project was a study of many maps. I think that was part of preparing—

Prettyman: My job was to try to show where Negroes and whites lived in particular areas. The principal map, for example, was of Spartanburg, South Carolina. There weren't many maps like that around, but I was able to get a number of them, because by showing where the homes were and where the schools were, you could get some idea of how much relocation and so forth there would be if you actually desegregated. So I did a memo for the Court which was seen by all the Justices, and they signed off on it, on the point of the maps. The principal point made was the one I mentioned a few minutes ago, that there were a lot of different systems going on out there and a lot of different problems to deal with.

⁵⁴ The book is HARRY ASHMORE, *THE NEGRO & THE SCHOOLS* (1954). See generally KLUGER, *supra* note 14, at 720–21.

Moderator: Gordon, in your piece of this work, which I think was part of what Justice Frankfurter among others had suggested to Chief Justice Warren, a study of how northern locales had done their desegregation efforts—

Davidson: Frankfurter was very interested in the work of the clerks. He stayed in Washington during part of the summer and that's when we were doing our work. He was very interested in that and had some participation in that. He didn't try to guide us in any way, but he was very interested and very much in favor of it. As was Reed—Reed thought we ought to gather as much information as we possibly could.

Back to Earl's point, there is no question that what he said is exactly correct—that is, there is no way you could have gotten unanimity without, and now I come to the great phrase, "all deliberate speed." That was a phrase that I think Earl Warren sold to most of the other Justices. At least it was what they wanted—what Frankfurter wanted, what Reed wanted—not the words, but I mean the principle. I'm using the words to introduce the point.

Now I think we ought to bring it up a little bit to today. I thought, in my naïve way, that it was a wonderful order. I liked it. I thought "all deliberate speed" and the way the Chief Justice had phrased it and so forth—I'm talking about *Brown II*—was really what needed to be done. That's from the background of knowing what my Justice wanted, knowing what some of the other Justices wanted, knowing what the country could tolerate, and I thought, "Boy, the old guys have got it."

Prettyman: Well, you know, there has been so much emphasis on that phrase that I think you forget that it is preceded by this language that really explained what the Court had in mind: "The courts"—meaning the district courts—"will require that the defendants make a prompt and reasonable start

2005]

LAW CLERKS RECALL BROWN II

855

toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.”^[55] That’s the key.

Davidson: I really appreciate you bringing that up. I used that term only to introduce this point, because that language is probably more important than “all deliberate speed,” which grabbed the public’s interest.

Meador: May I interject to comment on a point Earl made a moment ago about Justice Black? He told me a couple of years later in a conversation that he thought at the time of *Brown II*, as Earl mentioned, that the Court should have ordered immediate admission of the named plaintiffs on a non-segregated basis to the schools. Obviously he did not prevail on that point, and I don’t know how hard he pressed it at the time. But two years later, he still was of that view.

There is another aspect I would like to mention. I recall a conversation with him shortly after the *Brown II* decision came down, and he told me that what he was most worried about in this whole situation was that a lot of district judges across the South would be issuing injunctions against school board members and others and then they would bring them up on contempt charges and try them for contempt without a jury. Black believed, contrary to what the law was, that there was a right to trial by jury on a criminal contempt charge,^[56] and—

Pollock: Probably stemming from his labor days.

⁵⁵ *Brown II*, 349 U.S. 249, 300 (1955).

⁵⁶ See *Green v. United States*, 356 U.S. 165, 193 (1958) (Black, J., dissenting); see also Daniel J. Meador, *Justice Black and His Law Clerks*, *supra* note 13, at 59.

Meador: —he was fearful that he would see a rampant violation of that right, as he saw it, across the South, trying people without a jury.

Davidson: Let me just for a minute go back to the point which brings this up to date. The language that Barrett read is as important, or more important, than “all deliberate speed.” But I’m trying to go back and say the way we looked at it then. I felt that the Court had done a great service in that it had gotten unanimity, we had gotten the ball rolling, we’d taken the cork out of the bottle, *Plessy* was gone, there were equal rights for people—we’d all done a wonderful thing. Since that time—fifty years—”all deliberate speed” has become a bad phrase in many circles.

Prettyman: Well, that’s because so little has been done in some parts—

Davidson: Well, regardless of the reasons— I thought what the Court was doing was correct. You all could differ, but I thought it was correct, and I left the Court after my term saying, “Boy, I’m glad I was a part of this.” Now I read this stuff that we should have done this and we should have done that—I say “we,” but I mean the Court—they should have done maybe what Black wanted, or they should have put rules on having to desegregate within a certain time frame or in a certain way. Let me say this: in my own personal opinion, it has not worked the way I hoped it would. I thought, and I think the Court felt, that there would be more support in the South, as well as in the nation, to say, “Okay, now this is where we’re going. This is the path we’re going to take.” In the South, particularly, there were serious problems. I come from a border state, but it’s more south than it is north. And we had our problems in Louisville. We had riots—not anything like in some other places, but we had bad things happen. The people didn’t get behind this thing and really help press it forward—

2005] *LAW CLERKS RECALL BROWN II* 857

Pollock: I think the people who really should have gotten behind it were the other two branches of the federal government. And it was only with the enactment of the two Civil Rights Acts of 1964 and 1965—

Moderator: Ten years later.

Pollock: —that the federal government really put muscle behind what the Court had said in *Brown I* and sought to accomplish in *Brown II*. It is true—

Prettyman: Even Eisenhower showed disdain for it.

Pollock: Right. He even was quoted as saying that he thought *Brown* was a mistake^[57] and with that,

⁵⁷ At his press conference just two days after the Court announced *Brown I*, President Eisenhower gave these extemporaneous responses to reporter questions about the decision:

Q. Mr. President, do you have any advice to give the South as to just how to react to this recent Supreme Court decision banning segregation, sir?

A. Not in the slightest. I thought that [South Carolina] Governor [James F.] Byrnes made a very fine statement when he said, "Let's be calm and let's be reasonable and let's look this thing in the face." The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I will obey.

Q. Mr. President, one more question. Do you think this decision has put Mr. Byrnes and Mr. Byrd [Senator Harry F. Byrd (D.-VA)] and other Southern leaders who supported the Republican ticket in 1952 on the political hotspot, so to speak, since it [the *Brown I* decision] was brought out under the Republican administration?

A. The Supreme Court, as I understand it, is not under any administration.

Q. A question along that same line, sir, do you expect that this ruling will, however, alienate many of your Southern supporters politically?

A. This is all I will say: I have stood, so far as I know, for honest, decent government since I was first mentioned as a political figure. I am still standing for it, and they will have to make their own decisions as to whether they decide that I have got any sense or haven't.

The President's News Conference of May 19, 1954, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 489-90 (1954). President Eisenhower also reportedly reprimanded his appointee Chief Justice Warren privately during this same period, at a White House dinner, for the *Brown I* decision: "I thought I would never have to say this to you," Eisenhower was heard to tell Warren, "but I now find it necessary to say to you specifically: You mind your business, and I'll mind mine." Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990 (Magazine), reprinted in ROGER GOLDMAN WITH DAVID GALLEN, THURGOOD MARSHALL, JUSTICE FOR ALL 140, 151 (1992).

when that word got out, it didn't exactly help with the implementation.

On the subject of the words "all deliberate speed," I think there are some misconceptions. One is the notion that if those words hadn't been used, implementation would have been more rapid. I don't think so.

Davidson: I don't either.

Pollock: I don't think it would've made any difference at all. I think the critics of the decision have simply seized upon that phrase as a way of saying that the Court didn't show the sufficient degree of militancy or strength in its implementation decision.

And the other misconception, I think, is that many critics will blame "all deliberate speed" for the fact that Negro students have not achieved equal educational opportunities or that we have not achieved a racial balance in our schools. I think that is a misconception based on a misunderstanding of what the *Brown* decision was all about. It was not designed to achieve equality of educational opportunities. It was not designed to achieve racial balance. It was designed to end legally imposed segregation of the races in the public schools. It was not intended to be a panacea for all of the terrible problems that we had then and, to a great extent, we may still have today in achieving not only legal equality, but educational equality, social equality, and equality in other respects as well. So to some extent, the words "all deliberate speed" have become demonized, as if to say if only the Court hadn't used those three words, everything would have been different. That simply does not reflect reality.

Meador: Let me say I agree fully with that. If I can go back and pick up this point, unlike Gordon, I was not surprised with what happened thereafter. I assumed enormous opposition and upset and so on.

2005]

LAW CLERKS RECALL BROWN II

859

Along that line, LBJ, President Johnson, made a comment once that I thought was quite thought-provoking. He said that we got things turned around the wrong way. The first steps should have been the passage of the Voting Rights Act and the political changes that brought about. He didn't go and spell it out, but what he, I think, intended to say is that the political change brought about by that Act would have resulted eventually in the elimination of segregation, at least in most places, or in many places, and so you would have a political solution to the problem, which might have been better for the country in the long run. But I've often pondered over that scenario—if that had happened that way, what the Supreme Court's role might have been ultimately in it, it might have been much less than it was.

Moderator: At this point, I'd like to take a short break. What you gentlemen have done, much more effectively than I could have hoped for, is to wrap your arms around not only the story of *Brown II*, but also the question of its legacy. After a short break, we'll return to some of that.

Welcome back to Lenna Theater at Chautauqua Institution. Let's finish up our discussion of the law clerks' committee. Barrett Prettyman, of course you were a participant in that—

Prettyman: I was just going to say, as an aside, that I have thought ever since that time fifty years ago, it's been quite extraordinary that there has been so little comment about the fact that here you had a committee working inside the courthouse, getting its own evidence together, submitting memos, factual and otherwise, to the Court, without anybody, any party to the Court— Bill Coleman, who is here today, was there then as an NAACP

lawyer^[58] and he will know that at the time, nobody outside the Court, I think, knew that all of this evidence was being gathered and being presented to the Court. Since it's become known, there has been no comment about it. The parties had no chance to critique it or either defend it or attack it. It is most extraordinary.

Meador: Maybe that's because it didn't reflect at all in the *Brown II* opinion. There's nothing to suggest, with all due respect, that you'd done any work. (Laughter)

Davidson: That's what he's complaining about. (Laughter)

Prettyman: There was certainly no reference to it, but I do think it had a very important effect. I think it's one of the things that convinced the Court that (a) desegregation had to take place over a period of time, and (b) the district courts had to be allowed a good deal of leeway in how they were going to handle it. I think our memo was directly responsible for at least part of that.

Davidson: There again, I think you have to give credit to the Chief Justice who instituted the committee of six. Even though Reed had started it several years before—before my day—for his own purposes and then had Jack Fassett take it to the Chief at Reed's request, the Chief fell in love with it, so to speak, as an idea, and then he augmented it, so he deserves the credit for really following through with it and distributing it to the other Justices.

Moderator: Earl, do you know—you were in the Chief's chambers, and he was the recipient of this work

⁵⁸ William T. Coleman, Jr., a graduate of the University of Pennsylvania and Harvard Law School, a law clerk to Justice Frankfurter during the Supreme Court's October Term 1948, Secretary of Transportation during the Ford Administration and today Senior Counselor at O'Melveny & Myers, during the 1950s was a key member of Thurgood Marshall's NAACP Legal Defense & Education Fund team working on desegregation cases including *Brown*. He was present in the audience on May 18, 2005, for this roundtable discussion and gave the keynote lecture that evening in Chautauqua Institution's Athenaeum Hotel at a dinner commemorating the 50th anniversary of *Brown II*.

2005] *LAW CLERKS RECALL BROWN II* 861

product—how he used it? Was he unrolling maps and looking at Spartanburg’s residential patterns?

Pollock: I do not recall that. I think that he obviously gave a good deal of consideration to it. My memory does not permit me to recall any specific recollection about that.

Moderator: Let’s move into the fall of 1954. One thing that was happening, literally down the street from the Supreme Court building, was the District of Columbia schools were implementing integration. It included some protests, riots, police crowd control, and so forth.^[59] Was that something that the Court was aware of, or were you hermetically sealed in and concentrating on the event in the building?

Prettyman: Well, the Justices read the newspapers, some of them avidly, and they were well aware of what was going on. And they would get reports from friends around the country, they’d get mail and so forth. I think they were well aware of what was going on, both on their doorstep and elsewhere.

Pollock: Of course, the Court knew that the desegregation in the District of Columbia had already started even before *Brown I*.

Moderator: In the fall, as the Court was about to begin its Term, it scheduled the *Brown II* case for oral argument in December 1954. Within weeks, Justice Jackson died and that schedule went out the window. What are your memories of that process—the scheduling, Jackson’s death and what

⁵⁹ When the 1954 school year began in the District of Columbia, high school students were surprised to discover that the Board of Education had, unannounced, opened previously all-white high schools to many more than the few Negro students the whites had been led to expect as classmates. In response, over 2000 white students at Anacostia High School, McKinley Technical High School, Eastern Junior-Senior High School, and six junior high schools went on “strike”—they refused to attend classes, and some marched on the Board of Education building downtown. See Bess Furman, *Student Strikes Widen in Capital*, N.Y. TIMES, Oct. 6, 1954, at 20; *Some Pupils Demonstrate to Protest Integration*, WASH. POST & TIMES HERALD, Oct. 5, 1954, at 25.

that did to this decision dynamic? Barrett Prettyman, we'll start with you—you were Jackson's law clerk.

Prettyman: Well, of course, Justice Harlan was actually appointed very quickly, but—

Meador: Nominated.

Prettyman: Sorry. Right. Exactly. Big difference. And we all assumed, since he had been a very prominent New York attorney with a large firm and then on the Second Circuit, that he would very quickly be confirmed and we were all surprised that it took, I guess, four months or so. There were all kinds of objections raised, but as I've already indicated, he and I were in touch immediately. He wanted work to start right away on the decree. He wanted to get up to speed and he did—I think he spent much time on it from then on until the actual vote at conference, getting up to speed on those cases.

Moderator: Harlan's grandfather had been a Justice of the Court and most famously was the lone dissenting Justice in *Plessy v. Ferguson* in 1896.^[60] Certainly that couldn't have been the reason why President Eisenhower selected him. But that did become part of the dynamic, didn't it, in the confirmation process given the *Brown* climate that surrounded the Court?

Meador: The big objection to Harlan, as I recall it, was that he was accused of being a One-Worlder. He belonged to an organization called the Atlantic Union, as I recall, and he'd been put on the board which advocated a sort of North American cooperation among nations, etc. etc. He said in his hearings that he had never attended a meeting of it and he was ashamed to say that he had never even paid his dues and so on.^[61] That was a big

⁶⁰ See *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

⁶¹ See Nomination of John M. Harlan, Hearings Before the S. Comm. on the Judiciary, 84th Cong., 136–37 (1955) (testimony of Judge John M. Harlan), reprinted in 6 THE SUPREME COURT OF THE UNITED STATES: HEARING & REPORTS ON

2005] *LAW CLERKS RECALL BROWN II* 863

point of discussion, as I recall it, during the confirmation phase.

Pollock: Do you think it would be filibustered today?

Meador: He had a sizeable vote against him.^[62] I was sitting in the gallery of the Senate the night Harlan was confirmed and heard the closing debates. I remember I went back to the chambers at the Court and called Justice Black at home to tell him that Harlan had been confirmed. I was mildly surprised at his lack of reaction—it was as though I told him I might be around late tomorrow morning. He showed no particular excitement or interest in the nature of the call. I was rather disappointed. I thought I was giving him some exciting news.

Prettyman: Well, don't you think that was because he anticipated that Justice Harlan would have a number of views that were contrary to his, which turned out to be true?

Meador: Yet in the end they turned out to be very warm friends.

Prettyman: Oh, yes.

Davidson: There was a good bit of criticism, too, from a political standpoint that of all the times in the world, to appoint a Harlan, Eisenhower did not use good political judgment in nominating another John Marshall Harlan right in the midst of this *Brown v. Board* situation. It was a minor type of thing—it was the kind of thing that Rush Limbaugh would have egged on. And it was sort of ironic that the grandson of the great dissenter in

SUCCESSFUL & UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916–72 (Roy M. Mersky & J. Myron Jacobstein eds., 1975).

⁶² The Senate confirmed Harlan on March 16, 1955. Eleven Senators, including nine Southern Democrats, voted against him, and twenty-eight Senators did not vote at all. See Rose McKee, *Harlan Is Approved for Supreme Court*, WASH. POST & TIMES HERALD, Mar. 17, 1955, at 2 (reporting the 71-11 vote to confirm the appointment).

the *Plessy* case was put on the Court to, in effect, overrule—he wasn't on when they overruled it, but he was there to second the motion and to work on the mandate. So it was kind of an ironic quirk of fate—of all the people who could have been appointed, that he appointed the grandson of the Justice who said originally that *Plessy* was a mistake. You have to go back in history and kind of say, "What if?"—if Harlan the grandfather had been in the majority, you would not have had *Brown* because you would not have needed *Brown*.

Meador: To go back to your point about the beginning of the Term, the huge dramatic news was Jackson's sudden death. My recollection, here's a human interest footnote, is that the law clerks attended his funeral service in the National Cathedral in a body. We sat together, as I recall it, in the balcony of the north transept for that service. Then all of the Justices went on up here to New York for the burial. Then the Court operated as an eight-man Court for about four or five months while Harlan's confirmation was pending. He was finally confirmed in the middle of March, so most of the time it was an eight Justice Court.

Moderator: That also, of course, was a mid-term election year, and this volatile issue was perhaps a concern to voters. Were the Justices concerned about dealing with this controversial issue during the mid-term election year?

Davidson: I think that had part to do with the scheduling, from what I've read. You may know, Earl—it may have been a discussion in your chambers. But I think that some have said that the scheduling thought was not only the death of Justice Jackson and the appointment, or the failure to confirm immediately, Harlan, but also the fact that it was a mid-term election, that they wanted to wait until that was over before they had the hearings on *Brown II*. Whether that is true or not I don't know, but it makes sense that it would be.

2005] *LAW CLERKS RECALL BROWN II* 865

Moderator: Once Harlan was confirmed and the Court was back up to nine members, it was the winter, early spring of 1955 and the *Brown II* case was active again. It was scheduled for oral argument in April. The briefs came in, and it was an enormous pile of briefs. Did you have responsibility to review, summarize and deal with the briefing?

Prettyman: Well, I've already mentioned that I summarized all of them for Justice Harlan—fifty pages.

Davidson: Yes. We reviewed them.

Moderator: Were there surprises in the briefing? The four states, of course, that were involved in the cases filed briefs. Other states filed their own briefs. The Eisenhower Administration filed its brief. And of course the plaintiffs filed their final briefs.

Prettyman: I was more surprised by the oral arguments than I was with the briefs.

Davidson: I was too, and somewhat shocked. Now I may have been a naïve, young somebody who was easily shocked, but I remember it vividly, the argument of J. Lindsay Almond, Jr., the Attorney General of Virginia. He later became governor, I suppose on the basis of the way he argued the case, which was one of the most horrible things I've ever heard. He had many points, but one of his major points was that you should not order any immediate integration.

That's an important point, too, if I might make a side remark. Justice Reed was always very certain that he understood—I think it was more for his own benefit than for anybody else—that the *Brown* case was desegregation; it was not integration. There was never—

Prettyman: The whole bussing thing and so forth came much later. Nobody talked about bussing.

- Davidson: It was very important to those guys who were having troubles with the case to say it's desegregation, we're not commanding integration.
- Pollock: If I could interrupt you for a moment on that, it's instructive that neither of the *Brown* opinions uses the word "integration."
- Davidson: Absolutely not.
- Meador: In fact, in *Brown II*, one of the things I remember about it—I was in the courtroom when Chief Justice Warren read the opinion of *Brown II*—is that a half dozen times or more, the word "discrimination" was used, and never was the word "segregation" or "desegregation" used in the opinion. So I went back right after Warren read it and saw Justice Black in his chambers, and I commented on this point. I said, "I noticed you used the word "discrimination" throughout the opinion. It never mentioned 'segregation' or 'desegregation,' which is what *Brown* is really all about, and I'm a little puzzled over that." All that Black did was to smile slightly and say, "Well, I think they'll understand what we mean."
- Moderator: Let's return to the oral argument of J. Lindsay Almond. What did he do that's so shocking?
- Davidson: What was shocking to me was that a major thrust of his argument was that the courts should not order integration or rapid desegregation, however you want to phrase it, because, among other reasons, the trouble with the blacks' health, their criminal records, their lack of intelligence, or lack of learning, or inability to learn. I particularly remember—and this was late in the afternoon; nobody else seems to remember this, so maybe I'm dreaming—he stood before the Court and there was a little light coming through— It was a very dramatic scene from my standpoint; Almond looked like he was from Central Casting, with absolutely perfect white hair, perfectly coiffed. And he said, "And I must state that venereal disease among the blacks is so much greater than the whites. There's

2005]

LAW CLERKS RECALL BROWN II

867

tuberculosis and unwed mothers,” but he kept going back to the venereal disease and “to put these children together is a mistake at this time.” I just cringed in that great hall of justice to hear that type of argument being made—^[63]

Prettyman: The two who shocked me the most were the fellow from South Carolina, Emory Rogers, and a fellow from North Carolina, Beverly Lake, because they were in effect telling the Court that it had no power in this area. They were still arguing *Brown I*. And at one point, the Chief—I remember he was shocked—said to one of them, “Are you trying to tell me that you will not obey the order of this

⁶³ It actually was Archibald G. Robertson, representing the Prince Edward County, Virginia, School Board, who made the “venereal disease” argument to the Justices during the April 12 afternoon session of the *Brown II* oral argument. His full statement on this issue was follows:

We are not aware of any unfairness or inequality and we are not responsible for that. We say that the standards of health and morals must also be taken into account. Tuberculosis is almost twice as prevalent among the Negroes as it is among the whites. Negroes constitute 22 percent of the population of Virginia, but 78 percent of all cases of syphilis and 83 percent of all cases of gonorrhea occur among the Negroes. One white child out of 50 born in Virginia is illegitimate. One Negro child out of 5 is illegitimate. Of course, the incidence of disease and illegitimacy is just a drop in the bucket compared to the promiscuity. We say that not as a moral issue, not as to where the fault lies, but that the fact is there and the white parents at this time will not appropriate the money to put their children among other children with that sort of a background. That is just one of the factors of life with which we are confronted.

Transcript of Oral Argument, *Briggs v. Elliott* (No. 2) and *Davis v. County School Board of Prince Edward Co.* (No. 4), Supreme Court of the United States, Apr. 12, 1955, at 38, 43–44 [hereinafter Transcript], reprinted in Kurland & Casper, *supra* note 32, at 1180, 1185–86. J. Lindsay Almond, Jr., the Attorney General of Virginia, who followed Mr. Robertson to the podium, did not mention venereal diseases explicitly, but he referred back to and reiterated such claims:

Regardless of why, and as to any other reason, it is a fact that these great differences [in reading comprehension test scores between Negro and white students in Virginia schools] do exist. And these are not intangibles; they are measurable. They are substantially the same variations as turn up year after year by race in the county and city schools. These realities cannot be ignored. I am not going further into the matter of health. Mr. Robertson brought it out, but with the same drinking fountain, the same toilets, the same physical daily habits and all, our problem is increased. The conclusion, as a result of these conditions with reference to health, is inescapable: that white parents will keep their children out of school; they will withdraw their support. I do not say that as a threat.

Transcript, *supra*, at 52, reprinted in Kurland & Casper, *supra* note 32, at 1194.

Court?" And the answer was not quite, "That's what I'm saying," but he said it in a way that strongly implied, "We aren't going to integrate."

Pollock: I believe it was Rogers who was asked by the Chief Justice, "You mean to tell me that you're not prepared to make an honest effort to desegregate?" And Rogers replied, "Well, let's get honest out of there." The Chief Justice replied, "No, let's keep it right in there." He was outraged.^[64]

⁶⁴ The full exchange between Chief Justice Warren and Mr. Rogers on these points during the *Brown II* oral argument was as follows:

Chief Justice Warren: Is your request for an open decree predicated upon the assumption that your school district will immediately undertake to conform to the opinion of this Court of last year and to the decree, or is it on the basis—

Mr. Rogers: Mr. Chief Justice, to say we will conform depends on the decree handed down. I am frank to tell you, right now in our district I do not think that we will send—the white people of the district will send their children to the Negro schools. It would be unfair to tell the Court that we are going to do that. I do not think it is. But I do think that something can be worked out. We hope so.

Warren: It is not a question of attitude; it is a question of conforming to the decree. Is there any basis upon which we can assume that there will be an immediate attempt to comply with the decree of this Court, whatever it may be?

Rogers: Mr. Chief Justice, I would say that we would present our problem, as I understand it, if the decree is sent out, that we would present our problem to the district court, and we are in the Fourth Circuit. Our opposition has just told this Court how the Fourth Circuit has been—he has no fear of the Fourth Circuit. I feel we can expect the courts in the Fourth Circuit and the people of the district to work out something in accordance with your decree.

Warren: Don't you believe that the question as to whether the district will attempt to comply should be considered in any such decree?

Rogers: Not necessarily, sir. I think that we should be left to the lower court.

Warren: And why?

Rogers: Your Honors, we have laid down here in this Court the principle that segregation is unconstitutional. The lower court, we feel, is the place that the machinery should be set in motion to conform to that.

2005]

LAW CLERKS RECALL BROWN II

869

Meador: I heard all these arguments too, and I well remember the argument you are talking about. I had two reactions to it. One was that it was rather poor advocacy—this was not the way to persuade the Court to do anything you might want them to do. The other was that however shocking or unpleasant it might be, those people were expressing widely-held views in their states. They were accurately saying what the sentiment was.

Davidson: Let me finish up with one thing, because we have to give credit to Thurgood Marshall again. At the end of all these arguments, the Court gave Justice Marshall—then attorney Marshall—the right to respond. He responded state by state, pretty much. He said, “South Carolina argues this” and “Virginia argues this.” And when he got to Virginia and Almond’s argument, he stopped for a moment. He was a handsome and impressive figure. And he stopped for a moment and he said, “It’s very interesting to me that the Attorney General of Virginia argues that the health, well-being, venereal disease of the blacks prevents their being put together with the white school children.” He stopped again and said, “Those are the same black people who work as servants to white Virginians, and yet their children can’t go to school together.”⁶⁵ And I’ll tell you, there wasn’t a dry

Warren: But you are not willing to say here that there would be an honest attempt to conform to this decree, if we did leave it to the district court?

Rogers: No, I am not. Let us get the word “honest” out of there.

Warren: No, leave it in.

Rogers: No, because I would have to tell you that right now we would not conform; we would not send our white children to the Negro schools.

Warren: Thank you.

Transcript, *supra* note 63, at 25–26, reprinted in Kurland & Casper, *supra* note 32, at 1167–68. In his rebuttal argument, attorney Thurgood Marshall described this as “hear[ing] from the Lawyer Almond: Not in his lifetime, some other place . . .” Transcript at 53, Kurland & Casper at 1195.

⁶⁵ Attorney Thurgood Marshall’s exact words were the following:

eye in me—I don't know about the rest of the people, but it was a moving experience.

Moderator: You've anticipated my question. Marshall, along with the other plaintiffs' attorneys, was powerfully and directly asking the Court for the forthwith integration remedy that many would say logically flows from the constitutional declaration of *Brown I*. These excellent attorneys, including Robert Carter, James Nabrit, Spottswood Robinson, and Thurgood Marshall, arguing their various cases, were presenting that argument directly to the Court. If I'm understanding your earlier statements, that is the remedy that already was off of the table in the Justices' minds. Is that correct?

Davidson: Well, that's my feeling.

Pollock: That's my view and—

Davidson: The lawyers didn't know that. We knew that.

Pollock: From a litigation strategy standpoint, I could understand their position. I think, first of all, the NAACP had its own political problems in terms of getting the backing of its members—and this is pure speculation on my part—but it might well have been impossible for the NAACP lawyers to have taken a more modest, gradualist position. Secondly, as a matter of litigation strategy, it's not unusual for plaintiffs to ask in their complaints or

Now, these health theories—and again we have figures that can go any way you want. I did not check them, because I think they are so completely immaterial, unless the State of Virginia either has no public health service in its schools, or they do not know how to use it. It has always been interesting to me, if the Court please, from the *Morgan* case involving transportation [*Morgan v. Virginia*, 328 U.S. 373 (1946)], that, well, whenever Negroes are separated from other people because of race, they always make an exception as to the Negro servants. In Virginia, it is interesting to me that the very people that argue for this side that would object to sending their white children to school with Negroes, are eating food that has been prepared, served, and almost put in their mouths by the mothers of those children. And they do it, day in and day out. But they cannot have the child go to school

Transcript, *supra* note 63, at 54, reprinted in Kurland & Casper, *supra* note 32, at 1196.

2005]

LAW CLERKS RECALL BROWN II

871

in their *ad damnums* for perhaps more than they actually expect that they're going to get, but perhaps recognizing that that could have some effect on what they ultimately will get.

So, I think it would be very interesting to hear what Mr. William Coleman might comment about that because he, I think, was one of the few lawyers in the NAACP group that had advised Marshall not to seek a forthwith remedy, but instead to accept a gradualist approach.^[66] Coleman, after all, was as far as I know the only NAACP lawyer involved in that group who had had the experience of being a law clerk at the Supreme Court. He perhaps had a perception of what the Court would accept as distinguished from, let's say, what a very good lawyer who did not have that experience might think would be the desirable strategy.

This is pure speculation on my part. I have to believe that in his heart of hearts, someone as sophisticated as Thurgood Marshall probably recognized that he wasn't going to get that Court to accept the forthwith remedy.

Davidson: In the fine book *Simple Justice* by Richard Kluger, there is a portion of a taped June 2, 1955, conversation between Thurgood Marshall and Carl Murphy, president of the Baltimore *Afro-American*, regarding the decision in *Brown II*. In that conversation, Marshall said, "you know, some people want most of the hog, other people insist on having the whole hog, and then there are some people who want the hog, the hair, and the rice on the hair. What the hell! The more I think about it, I think it's a damned good decision!"^[67]

⁶⁶ For information on Coleman's background and his presence at this roundtable discussion, see *supra* note 58. For a description of his 1954–55 advice to Thurgood Marshall not to seek a Supreme Court decree ordering school desegregation "forthwith," see KLUGER, *supra* note 14, at 725–26.

⁶⁷ KLUGER, *supra* note 14, at 750.

- Moderator: Did your Justices make any comments to you in that post-oral argument moment, before they retired to their conference to discuss how they were going to vote and write this? Or was oral argument simply something for you to take in?
- Prettyman: Well, I'm sure that mine did, because Bill Lifland was the other law clerk and Justice Harlan talked to us regarding just about everything.^[68] But I don't recall. I think he went into the conference very well prepared in terms of all the arguments and the pros and the cons. But he was, after all, the junior man, and I think he was prepared to go along with anything that sounded sensible.
- Pollock: The only thing I remember is how angry Warren still was about some of the arguments presented by the states.
- Meador: As I said, Justice Black never discussed the case at all.
- Moderator: The Justices had their conference in April, just a couple of days after those four days of oral arguments. And out of that conference emerges, of course, the unanimous decision written by Chief Justice Warren. As you understood it as law clerks, was there any prospect of a divided Court, or were the Justices simply a unanimous body now in a drafting phase?
- Davidson: As far as I knew, it was a *fait accompli*. I mean, they had satisfied, I think, all the concerns of—certainly Justice Reed, and I assume the other Justices.
- Prettyman: Earl, were there various drafts, or was the original draft essentially—

⁶⁸ William T. Lifland, a graduate of Yale University and Harvard Law School, was a law clerk to then-Judge Harlan at the United States Court of Appeals for the Second Circuit at the time of his Supreme Court appointment. Lifland today is Senior Counsel at Cahill Gordon & Reindel.

2005] *LAW CLERKS RECALL BROWN II* 873

Davidson: I base some of my recollection on my recent reading preparing for this program, but Frankfurter had a couple of suggestions which, as we all know, was not unusual. And there were a couple other comments, suggestions, but it was sort of a non-event. Do you remember, Earl?

Pollock: I don't know whether this occurred before the Chief Justice's draft was circulated, by way of a private meeting or memo with Frankfurter, or whether it was subsequent. As far as I know, Black was the only one who made a change in the draft that was circulated. But Frankfurter, I believe, was the one who proposed the use of the term "all deliberate speed," which he apparently had found in an old equity opinion by Holmes.

Prettyman: He had gotten it from a poem somewhere.

Davidson: They think he got it from a poem, "The Hound of Heaven," by an old English Catholic theologian-type writer who used the term^[69] and—

Moderator: Frankfurter was fighting for that phrase, and eventually he prevails on the Chief Justice to include it very, very late in the month of May.

⁶⁹ "The Hound of Heaven," written about July 1890, is the best-known work of English poet Francis Thompson (1857–1907). It describes his futile flight from God and, in its opening stanza, includes the phrase "deliberate speed":

I fled Him, down the nights and down the days;
 I fled Him, down the arches of the years;
 I fled Him, down the labyrinthine ways
 Of my own mind; and in the mist of tears
 I hid from Him, and under running laughter.
 Up vistaed hopes I sped;
 And shot, precipitated,
 Adown Titanic glooms of chasmed fears,
 From those strong feet that followed, followed after.
 But with unhurrying chase,
 And unperturbèd pace,
 Deliberate speed, majestic instancy,
 They beat—and a Voice beat
 More instant than the Feet—
 "All things betray thee, who betrayest Me."

THE POEMS OF FRANCIS THOMPSON 89 (Wilfrid Meynell ed., 1913).

Before that time, obviously, there was a drafting process and then circulation to the other Justices. How did the drafting process happen in Chief Justice Warren's chambers, Earl?

Pollock: I can't recall specifically. I know Gerry Gunther was shepherding this through the different drafts.^[70] The only thing that I remember very clearly was that there was no dispute about the basic draft that the Chief distributed, except insofar as Black and Douglas asking for the deletion of any references to the class actions.

Moderator: What was he thinking about in avoiding that phrase, "class action?"

Pollock: Well, Dan may be in a better position to comment on that. My understanding is that, number 1, Black did not like the concept of class actions. Number 2, he did not foresee even the possibility that there could be large-scale desegregation of the South. Number 3, I think he felt, as you suggested before, that there was a certain logic in saying that once the constitutional right has been declared, it should follow that that would be implemented, which I think led him to the view that the specific named plaintiffs—only a handful—should be given immediate admission, and consistent with that you eliminate the reference to "class actions." And so that the whole problem of implementation, as far as he was concerned, would be essentially a very minimal process. I don't understand the logic of his objection because *Brown I* specifically stated

⁷⁰ Gunther, who was one of Chief Justice Warren's three law clerks during the Court's October Term 1954, was his principal assistant as he worked on *Brown II*. See generally *supra* notes 27–30 and accompanying text. Gunther's clerkship with Chief Justice Warren ended on August 14, 1955. Later that year, the Chief Justice sent Gunther, who then was living and practicing law in New York City, a photograph and an inscribed copy of the Court's *Brown II* opinion. Gunther promptly wrote back to thank the Chief Justice for these mementos: "you know that I shall always treasure them as a remembrance of an exciting, wonderful year." Letter from Gerry Gunther to Chief Justice Warren, Jan. 2, 1956, at 1, in EW LOC Box 63. Warren soon wrote back in kind: "I want you to know that I, too, have a very happy remembrance of our intimate association last year." Letter from Earl Warren to Gerald Gunther, Jan. 16, 1956, in EW LOC Box 63.

2005]

LAW CLERKS RECALL BROWN II

875

that these were class actions and that it was because they were class actions there had to be a separate argument and decision on how this should be implemented—

Meador: But *Brown II* makes no reference—

Pollock: Because of the complexity. But then after *Brown II* was decided and the cases were remanded to the district courts, those cases were class actions—they were class actions when they were brought, and they were class actions on remand, and the district court judges had to deal with the class action problems. So I remain confused as to what precisely was the rationale that Justice Black, who was a very smart man, had in mind. Maybe Dan has some thoughts.

Meador: The only thing I can share on that is the conversation I had with him a couple of years later, in which he said that he was still convinced they should have ordered immediate admission on a non-segregated basis of the named plaintiffs, and— This is guesswork but I have a feeling that he may have thought that would have lessened the adverse reactions in the South, that it would be limited in its immediate impact and leave everything else for another day. But that's pretty much guesswork. I can't shed much more light on it than that.

Davidson: It's pretty interesting that in one of these things that I've been reading—Earl, you may know more about this—in one of Chief Justice Warren's memoirs or a book about him, he stated shortly after the two cases that he had received so much acclaim for getting a unanimous Court and doing this wise thing, but that he gave credit to the way this thing was handled by the southern Justices, to Clark and to Black and to Reed.^[71] Do you remember that?

⁷¹ Warren, speaking in his Supreme Court chambers about *Brown* to a friend from California, reportedly said, "Don't thank me, . . . I'm not the one. You should see what those . . . fellows from the southern states had to take from their

Pollock: Oh, yes.

Davidson: They were the ones who really knew the problem, and when they went along—

Pollock: Not only did they know the problem, but I think he felt that it was much easier for the northern Justices to agree that the South should desegregate. He recognized that for these Justices, like Black, who grew up in the Deep South, that that was really a tremendous revolution in thinking, and I think he recognized how Black and others—in particular, Black—would be vilified as he was in his own home area for having sold out the South. So that this was a great sacrifice and it was, to a great extent, a patriotic, statesmanlike move on the part of Black, quite contrary to what his natural self interest might have appeared to be.

Prettyman: You know, it's interesting that this decree is short, concise, and simple in the same way that *Brown I* was. It doesn't mention, just by way of example, two of the questions that the Justices posed to the parties for them to address on the argument about the decree. One related to the possible use of special masters. There is nothing in here about special masters, it doesn't say you can have it or you can't have it—it just ignores the whole subject. And there were a number of other things kind of rattling around there that are just never dealt with at all.

Moderator: Let's turn to decision day. It is Tuesday, May 31, 1955, the day after Memorial Day. The Justices take the bench at noon to announce decisions, and this is the second one. Were you in the courtroom and was it a momentous announcement?

constituencies. It was absolutely slaughter. They stood right up and did it anyway because they thought it was right." Scudder interview, Bancroft Oral History, *quoted in* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN & HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 106, 785 n.117 (1983) (ellipses in Schwartz book).

2005] *LAW CLERKS RECALL BROWN II* 877

Meador: I was there. Black, a few minutes before 12:00, said to us, “You might want to be in the courtroom this morning.”

Davidson: You were there?

Pollock: I was there.

Meador: I was there.

Davidson: And never before or since have I so gloried in the words—lawyers consider them sort of *pro forma*—that are at the end of the opinion, “It is so ordered.” *Finito*.

Moderator: The descriptions of the *Brown I* announcement—and of course, two of you [Pollock and Prettyman] had been there on May 17, 1954—include a kind of gasp in the courtroom when Warren uses the word, “unanimously.” Was there that kind of palpable experience as *Brown II* was being announced?

Pollock: No.

Prettyman: No. I didn’t sense it.

Pollock: I think it was more—not routine, but it didn’t involve the kind of emotional reaction that—

Prettyman: And I think part of it was that one of the reactions was, “What does that mean? What are they saying?”

Davidson: You know, it’s interesting on this question of secrecy, in not talking to the clerks and then in talking to the clerks, and the change, the particular attention that was given to *Brown I*, particularly more so than *Brown II*. As Dan said, Justice Black didn’t really discuss it at all. Is that right, Dan?

Meador: That’s right.

Davidson: Reed, of course, did discuss it a lot—so I understand from Fassett. But the two Justices

who were reported to have said something to their clerks on the way to the robing room—I'm talking about *Brown I* now, which was the secretive one—were Justice Clark, who said to his clerks on his way through their office, "I think you boys ought to be in court today," and Justice Reed, who did the same thing to Fassett and Mickum.

Meador: That's what Black did in *Brown II*.

Davidson: Did he?

Meador: Same thing.

Davidson: Well, we sort of knew that *Brown II* was coming down. I don't know how I knew that—maybe Barrett called me. (Laughter)

Moderator: Barrett, you have raised the issue of a listener wondering what it meant. I recognize that it was fifty years ago, but when one reads the opinion, I must say that it's filled with a lot more push on the accelerator than lift off the accelerator. You've read some of these phrases: "prompt and reasonable start;" "burden rests on the defendants to establish that delay is necessary;" "good faith compliance" and, I must add to that list, "admission with all deliberate speed the parties to these cases."^[72] In other words, I think even "all deliberate speed" is a push phrase^[73]—

Prettyman: It was perfectly clear that something had to begin right away, but I think what people couldn't quite understand, and I'm not sure they still do, is then what? I mean, how long do you get? Do you do it by school class years? Do you do it by six months

⁷² See *Brown II*, 349 U.S. 294, 300–301 (1955).

⁷³ Cf. Gunther, *Some Reflections on Judicial Role*, *supra* note 13, at 822 (reminding a 1979 conference audience that the "prompt and reasonable start" provision . . . was in the [*Brown II*] decree, and was intended to be a command as clear as the more widely publicized and attacked direction that, once that prompt start was made, completion of the process was to proceed 'with all deliberate speed').

2005] *LAW CLERKS RECALL BROWN II* 879

or ten years or a lifetime? I mean, what does that mean?

Meador: My impression was that outside of the courtroom there was what I would describe as sort of a collective sigh of relief across the South. They were off the hook immediately. What this meant was that it was something for another day.

Moderator: Because it didn't have a deadline?

Meador: Right.

Davidson: Okay. Of course that was a point that was argued, I mean within the Court—it had come up in the Court, and in the chambers. The point was—and you remember this, Earl; all of you do, very well—should it contain some guidelines. In other words, should it say—

Prettyman: Should it contain a deadline?

Davidson: Yes, and should it say, "You ought to do this, and you ought to do that, you have to do it by such and such"—that was a point of discussion.

Meador: In retrospect, it's hard to see how the Court could've done anything other than what it did.

Davidson: That's my feeling.

Prettyman: Because a deadline—let's say five years—would then become—Nobody would do anything for five years. That was the problem with the deadline. The deadline was asked for by just a few states.

Davidson: As I said earlier, I left the Court that day feeling that I'd done a momentous service to my country.

Pollock: You did.

Davidson: Not that I'd done a damn thing.

Moderator: Of course, given the tremendous unfinished business of this country, many revisionist critics

look back on the *Brown II* decree as a missed opportunity. They say that the Court should have done so much more, be it a deadline, be it a decree, be it specific requirements. Against that, I'd like to read you a note that Justice Frankfurter sent to Chief Justice Warren that afternoon:

Dear Chief:

The harvest of today's planting won't be fully assessed for many a day. For me it's a safe bet that the wisest historian of the Court a half century hence will acclaim the long-headed wisdom of what your opinion said and not less so what it didn't say.

In any event, I am content.

Yours faithfully,
FF^[74]

Davidson: And let me tell you, that last sentence from Frankfurter is remarkable. I never knew him to be content. (Laughter)

Meador: It strikes me as a typical Frankfurter ploy to curry favor with the Chief.

Moderator: I would ask you to assess the note and also perhaps to locate yourself between the harsh criticism of modern hindsight and the contentment—at least the professed contentment—of Justice Frankfurter in 1955.

Prettyman: This is one of those situations where it is very easy, if you will, to find fault with what the Court did or didn't do. It is much more difficult to turn around and say precisely what they should have done. "Forthwith," I am convinced, would have been ignored, and then what would've happened? Once anybody got away with doing nothing, would that have spread? I don't know. But just as there were— There is a book out on what *Brown_I* should have said, where academics wrote their own

⁷⁴ Letter from Justice Felix Frankfurter to Chief Justice Earl Warren, May 31, 1955, in EW LOC Box 574.

2005]

LAW CLERKS RECALL BROWN II

881

opinions, all of which were ten times worse than what the Court did.^[75] So here too, I think it is easy to say, well, they should have done more. But it's difficult to put your finger on exactly what they should have done that they did not do. I'm not saying they necessarily did the right thing. I'm just saying this was a difficult problem.

Pollock:

I think the question of how you evaluate *Brown II* depends on what was expected from the decision. If what was expected was the end of black poverty, equality of educational opportunity for black children, racial balance, then *Brown II* was a failure. But if you judge *Brown II* in terms of what was the only function it could undertake to perform given the limitations of the law—that is, ending the horrifying compulsory segregation of blacks and whites in public schools—it has proved to be a major success. It took too long, but desegregation has been accomplished.

A number of critics say, “Well, but segregation still continues because you have some schools that are almost all black and have other schools that are all white.” They say in addition that in some places where there had been racial balance, there now is what is called “resegregation.” That’s a whole different issue—it deals with concentrations of blacks in particular areas, which is reflected in the racial balance of the schools that they attend. That was not the objective, nor could it have been the objective, of *Brown* to change that.

I think that critics of *Brown* to a great extent engage in a play on words with the word “segregation.” They easily move from legally imposed segregation to what is called *de facto* segregation—that is, the fact that there may be a lack of racial balance. And I think that does a great disservice in analyzing where we are in racial

⁷⁵ WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

relations and it certainly does a great disservice to what the Court sought to accomplish and could possibly accomplish in 1954 and 1955.

One of the principal revisionist critics of *Brown* is a colleague of Dan's at the University of Virginia, Professor Michael Klarman. He wrote a superb book, and it has been highly honored.^[76] It's interesting what position he takes about *Brown II*. He says "[t]hat *Brown II* was a mistake from the Court's perspective and that was quickly apparent." But in the next paragraph, he says that "[t]o say that *Brown II* was misguided is not to say that the Justices calculated foolishly." Then he goes on to say that, "[i]n retrospect, the Justices should have been firm and imposed deadlines and specific desegregation requirements." Then he asks, "Did their miscalculation matter much? Probably not." And he says, "Most white Southerners would oppose desegregation until they were convinced that resistance was futile and costly. The Court was powerless to make that showing on its own."^[77]

It seems to me that, even on the basis of Klarman's revisionist criticism of *Brown I* and *Brown II*, those decisions come out very well.

Prettyman: I come at it from a slightly different standpoint. I think that *Brown I* and *Brown II*, although they were very carefully limited internally to education, actually began a revolution outside of education because you not only got the Civil Rights Act, but you got blacks voting more and beginning to vote more blacks into public office. The landscape today is just nothing like it was—

Davidson: I couldn't agree more with Barrett. To me, the great glory of the *Brown* cases I and II was, as I said earlier, that it opened the faucet. It pulled the plug. It let the flow of equality in governmental

⁷⁶ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

⁷⁷ *Id.* at 320.

2005]

LAW CLERKS RECALL BROWN II

883

intervention, to be sure that rights were protected and equal protection became a reality rather than a myth. And I think it was a monument regardless of the cases themselves involving only the schools. It was the beginning of something that, of course, should have been heard in this nation many years before, but at least it did occur, and it did occur in *Brown*.

And you go back and think what fate did to get *Brown*. You have to go back to the Roosevelt appointees. Would *Brown* have come without the Roosevelt appointees? I don't know. Would things have been different if the New Deal hadn't come upon us? I'm not arguing the Democratic point of view, but I am saying how fate plays into these things. So if you had a Court with Chief Justice Fred Vinson—who happened to be a graduate of the same college as I am, and he was a good friend of the family and a very fine man—would that have happened? If Roosevelt had not appointed Black? Reed, perhaps? Certainly Douglas? You know, it opened the floodgates to what should have been done many years ago.

Meador: One of the extraordinary things about it jurisprudentially speaking is that the Court put enormous emphasis on public education in the *Brown* decision. That was the whole thrust of it, the uniqueness, distinctiveness of education in relation to the separate but equal doctrine. But then you turn around a year or two later and suddenly, without much explanation, segregation on golf courses, buses, everything else, goes. And I've never seen any real efforts to explain that on the part of the Court. It's a rather extraordinary jurisprudential kind of twist.

Pollock: Well, I think I can offer a suggestion, and that is that the Court was trying to stick to what is often regarded as a key principle of constitutional interpretation: "Thou shalt make constitutional interpretations as narrowly as possible." I think another reason for that was the problem of getting acceptance just with respect to public education—

that in itself was such a massive undertaking that I think the Court was trying to limit the scope of the ruling as much as possible. But it was obvious that once *Brown* came down, the same thing in principle would have to apply to courthouses, parks, swimming pools, every other kind of public facility. And it worked out so that the Supreme Court did not even have to rule on that. What happened was there was a series of lower court decisions applying *Brown I* to these various kinds of public facilities, and in the Supreme Court certiorari was denied—

Meador: Well, they had to appeal from a three judge court, which was summarily affirmed.

Pollock: Right. Summarily affirmed—no opinion, just an order, and the Court never had to really get into—

Meador: That's what I'm saying. They never explained how you jumped from public education to those facilities.

Prettyman: Well, I know that you're right because, as I've mentioned before, in a different setting,^[78] Justice Jackson had a few suggested changes in *Brown I*, and the Chief Justice rejected one of them specifically because it could have applied outside of education—he, being the grand politician that he was, very definitely wanted this to relate solely to education. I think part of it was that he thought that was about as much as people could absorb at one time.

Davidson: But don't you think he also knew that this was, as Earl said, the beginning of a flow?

Prettyman: Of course he did.

Davidson: So he didn't have to do it at that time—

⁷⁸ See E. Barrett Prettyman, Jr., *Thoughts on Justice Jackson's Unpublished Opinion*, delivered at Chautauqua Institution's Athenaeum Hotel (Oct. 8, 2003) (transcript available at www.roberthjackson.org/Man/Speeches_About_Jackson_BrownvBoard).

2005]

LAW CLERKS RECALL BROWN II

885

Pollock: You know it all depends, Dan, on what you regard as the crux of *Brown I*. In my own view, *Brown I* was rejecting the underpinning of *Plessy*. It said, if you recall, that if blacks see an inferior status imposed on them by segregation, that's just their own imagination or their own perception.^[79] To me that was the fundamental issue, and then the effect of *Brown I* on black students was in effect the application of that broader principle, so that when the question of the application of *Brown I* came up with respect to, let's say, golf courses or courthouses, I think a lower court reading *Brown I* would have said, "It is impossible for us to reach a different determination here, even though we're dealing with a different kind of public facility."

Moderator: On that note, I'm sure you will all join me in thanking our guests. We no longer can have direct contact with their Justices, but I feel confident that they, fifty years since *Brown II*, would agree that their law clerks continue to perform extraordinary service. It has been a pleasure to have Barrett Prettyman, Dan Meador, Earl Pollock, and Gordon Davidson here today. On behalf of the Robert H. Jackson Center and the Supreme Court Historical Society, thank you very much. (Applause)

⁷⁹ See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").