

ARTICLES

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

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MODERATED BY JOHN Q. BARRETT†

INTRODUCTION

On May 17, 1954, the Supreme Court of the United States decided in *Brown v. Board of Education* that state and federal laws segregating public school children by race were unconstitutional.¹ In *Brown*, which actually is the name of just one of the five lower court decisions on school segregation that the Supreme Court reviewed 50 years ago,² Chief Justice Earl Warren wrote for a Supreme Court that was unanimous. The

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¹ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

² The *Brown* decision and opinion actually covers and resolves four cases that arose from states: No. 1, *Brown et al. v. Board of Education of Topeka et al.* [Kansas]; No. 2, *Briggs et al. v. Elliott et al.* [South Carolina]; No. 4, *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*; and No. 10, *Gebhart et al. v. Belton et al.* [Delaware]. A fifth case, No. 8, *Bolling et al. v. Sharpe et al.*, arose from the federal government's District of Columbia and was decided and explained, as *Brown's* companion, in a separate opinion by Chief Justice Warren for the unanimous Court. See 347 U.S. 497.

Court in *Brown* explicitly rejected its own almost 60-year-old precedent approving “separate but equal” public institutions and facilities for persons of differing races.³ *Brown* is generally regarded as among the most, if not as itself *the* most, significant Supreme Court decision in United States history.⁴

The Justices of the Supreme Court recognized, during the two Terms in which they considered *Brown* and its companion school segregation cases, that the issues they raised were, in much of the United States, extremely controversial. The Justices therefore agreed among themselves not to discuss their deliberations on these cases with others—not even their own law clerks. As a result, most of the thirty-six young lawyers who worked as law clerks at the Supreme Court during its 1952 and 1953 Terms were not privy to very much of the Justices’ thinking, work, discussions and draft opinions concerning school segregation—the legal and human processes that actually produced the *Brown* decision. But few “total secrecy” systems actually live up to their ideal, and this one had exceptions.

On April 28, 2004, the Robert H. Jackson Center in Jamestown, New York,⁵ assembled, for a group discussion, four former Supreme Court law clerks: John David Fassett, Earl E. Pollock, E. Barrett Prettyman, Jr. and Frank E.A. Sander. These attorneys had been, fifty years earlier and to varying degrees, “in the loop” of the Justices’ thinking about and deciding of *Brown v. Board of Education*. After leaving their Supreme Court clerkships (two of them just a month or two after the

³ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴ For some of the best recent measures of *Brown*’s significance, see CLARE CUSHMAN & MELVIN I. UROFSKY, EDS., *BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT* (2004); DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004); NORMAN I. SILBER, *WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR* (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

⁵ The Robert H. Jackson Center is named after and dedicated to the life, work, words and legacy of Justice Jackson (1892-1954). See www.roberthjackson.org. Jackson was one of the nine Justices serving on the Supreme Court as it considered and decided *Brown* and its companion cases during October Terms 1952 and 1953.

Brown decision), these men built distinguished careers in different cities and generally did not see each other or keep in touch. Although they were interviewed individually over the years about *Brown* by historians and others,⁶ these former law clerks did not, until this discussion, gather as a group and share, compare and assemble their recollections—against the backdrop of years of personal and societal experience and much historical scholarship and analysis—of *Brown*.

The result, on April 28th of this year and now in this publication,⁷ is an extraordinary and unprecedented discussion. The participants, who are the most knowledgeable “insiders” who still are in positions to guide us, explain how the Justices of the Supreme Court came to decide *Brown v. Board of Education* as they did, individually and as a Court. This discussion is the best first-person account (to date) of the decision making process inside the Court. The discussion illuminates particularly well the process and chronology of developments by which Chief Justice Warren wrote his *Brown* opinion and other Justices decided not to write separately and also not to dissent, resulting in the unanimous Court of May 17, 1954.

BIOGRAPHICAL BACKGROUND ON THE PARTICIPANTS

John David Fassett, a graduate of the University of Rochester and Yale Law School, is the retired CEO and Chairman of the Board of United Illuminating Company in New Haven, Connecticut. He began to work as a law clerk to Justice Stanley F. Reed in June 1953 and served through the Supreme Court’s October Term 1953.

⁶ The leading history of *Brown* is RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1975; updated ed. 2004). At various times in 1971 and 1974, Kluger interviewed Fassett, Pollock, Prettyman and Sander individually for what became *SIMPLE JUSTICE*.

⁷ The participants in the April 28, 2004, Jackson Center discussion lightly edited their remarks for this publication. Their discussion was taped and rebroadcast in two parts on C-SPAN’s “America and the Courts” program on June 12 and 19, 2004. These programs are now available for viewing in a streaming video format on C-SPAN’s website (www.cspan.com) and also can be purchased from C-SPAN on video and CD-ROM.

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 law firm of Sonnenschein, Nath & Rosenthal. He became a law clerk to Chief Justice Fred M. Vinson in summer 1953 and, following the Chief Justice's sudden 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 law clerk during the Supreme Court's October Terms 1953 and 1954 and, upon the Justice's death in October 1954, clerked for Associate Justices Felix Frankfurter and John M. Harlan, successively, during the remainder of the 1954 Term.

Frank E.A. Sander, a graduate of Harvard College and Harvard Law School, is Harvard's Bussey Professor of Law and Director of the Harvard Law School Program on Dispute Resolution. He was a law clerk to Justice Felix Frankfurter during the Supreme Court's October Term 1953.

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 here at the Robert H. Jackson Center in Jamestown, New York.

The Robert H. Jackson Center is named after and dedicated to the life, work, words and legacy of Robert H. Jackson. Born in 1892, Jackson was a native of northwestern Pennsylvania. In the private sector phase of his life, Jackson was a lawyer here in this community of Jamestown for twenty years (1913-33). In 1934, Jackson went to Washington. Rising through the

Roosevelt Administration, he became the Solicitor General of the United States, the Attorney General of the United States and, beginning in 1941, an Associate Justice of the Supreme Court, where he served for the remaining thirteen years of his life except for one year away as the chief American prosecutor before the International Military Tribunal at Nuremberg, Germany following World War II.

Justice Jackson was one of the nine Justices serving on the Supreme Court during the Terms 1952 and 1953 as it considered the case and rendered the decision that we commemorate this spring on the occasion of its fiftieth anniversary, *Brown v. the Board of Education of Topeka, Kansas*. The *Brown* case actually consisted of five cases, four cases arising from states and one case arising from the District of Columbia, which of course is a federal entity, not a state. The four states involved were Kansas, which had the lead billing, and thus gives us *Brown v. Board of Education of Topeka* as the title we use. The other state cases came from Virginia, South Carolina and Delaware.

The Supreme Court, in the *Brown* case, on May 17, 1954, ended segregation of school children, by law, according to race. It did so in the name of the 14th Amendment, which had been ratified following the Civil War and which guarantees to all persons "the equal protection of the laws." What the Supreme Court unanimously decided that May 17th, fifty years ago, was that equal protection means that segregation by law has no place in elementary and secondary school education. The Court's decision in *Brown* was the start of legal desegregation in America and the start of the process of racial integration in America, which of course has proven to be an extremely difficult, complex and unfinished project

for our society. But for that start, we gather here today to commemorate and give credit to the Supreme Court.

The nine Justices of course are no longer with us, but we are privileged to have with us four of the law clerks who worked in private, in confidence, for four of the Justices who participated in the Court's deciding of the *Brown* case in May 1954. The law clerks, who are with me today, are introduced at length in your materials. . . .

These gentlemen are both protagonists and representatives in our conversation this morning. They are protagonists because each of them was involved, in his own way, in the Court's work that emerged in public on May 17, 1954 as *Brown v. Board of Education*. But they also are here as representatives, as proxies, for the Justices who were their employers.

As each of these men left law school, he got one of the most coveted opportunities for a young lawyer entering the work force: a clerkship with a Supreme Court Justice. I would like to begin by asking each of them to simply introduce the boss and describe what that meant—whom they were arriving to work for—as they arrived at the Supreme Court in the summer of 1953.

So Earl Pollock, tell us about Chief Justice Fred Vinson.

Pollock: I arrived at the Supreme Court in June 1953 to become Vinson's law clerk. Unfortunately, I did not have much of an opportunity to discuss much in the way of law with him because this was the summer period and in early September, just two days after my wife and I had given him a lift home to his apartment, he died very suddenly and as a

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result, my tenure with Chief Justice Vinson was quite brief.

Moderator: Give us little sense of his background. Where was he from, in terms of region, and what was his career trajectory that led him to become Chief Justice?

Pollock: Vinson had come from Kentucky. He had been Secretary of the Treasury, appointed by President Harry Truman, with whom he was very friendly. He served on the Court of Appeals for the District of Columbia Circuit. He was elevated from Treasury to the Chief Justiceship of the United States.

Moderator: Jack Fassett, in terms of seniority, Stanley Reed was, among the Justices represented here, the senior Associate Justice. As you arrived from Yale to be a law clerk, who was Stanley Reed and what did it mean to be going to work for him?

Fassett: Stanley Reed had been born in 1884, in Minerva, Kentucky, a small town outside of Maysville. He had been a country lawyer there and represented tobacco cooperatives until he was persuaded to come to Washington by the Hoover Administration to work as General Counsel for the Federal Farm Board and then for the Reconstruction Finance Corporation, which also was a Hoover entity. He stayed on when Franklin Roosevelt won his first term and ended up being made Solicitor General and having the dubious honor of being the Solicitor General who argued all the early New Deal cases, the so-called “sick chicken” case, and the A.A.A. case, and all those other ones involving the New Deal statutes that were struck down by the old Supreme Court.

Stanley Reed was F.D.R.’s second appointment to the Court—Hugo Black was the

first and there was a little furor when he was appointed about some of his background and Stanley Reed, I guess, was deemed to be a safer appointment. He was a country gentleman, a very kind and nice gentleman who had a cosmopolitan education. He had been brought up in Maysville by a father who was a doctor and his mother died at a very early age. But he had gone to Kentucky Wesleyan University and gotten a degree there. He then applied to Yale University; Yale recognized his Kentucky Wesleyan degree for a year of credit; he ultimately became a graduate in the class of 1906 at Yale and then he went to law school at Virginia and Columbia and then off to Paris and studied at the Sorbonne—

Moderator: An upward march.

Fassett: Yes, and then he came back to Maysville to practice.

Moderator: Now Frank Sander, let me turn to you. It certainly can't be the case that each member of the Court was from Kentucky. Who was Felix Frankfurter and what did it mean to be arriving as Felix Frankfurter's law clerk?

Sander: Well, about as far from Kentucky as you can think of: he was from Vienna—that is Austria, not Virginia. [Laughter] He was a very complex person, hard to capsule in a short profile: very interested in the world of ideas, endless interest in the world of people. I think he wrote more letters and received more letters than anybody that I know of.

Prettyman: Corresponded with just about everybody, didn't he?

Sander: Absolutely. And I think at Harvard Law School, I guess, he was very much revered because he

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graduated Harvard Law School and then was in the government some and then came back to teach and was a long-time faculty member at Harvard Law School. He made an arrangement with one of the professors at Harvard Law School that he would select his two law clerks each year from people who had worked in the lower courts, so people who got this opportunity were very lucky. They knew something—he wasn't as much of a mystery for us when we went down to Washington because we knew the prior law clerks. With very few exceptions, they were all Harvard law school graduates, which was perhaps a mistake, but it was just Frankfurter's simple way of trying to preserve continuity and get people who were known very well to the recommender. So he didn't have what people do these days—people writing endless letters to nine Justices to try and get a clerkship. In those days with Frankfurter it was quite different.

I think the other thing that was extraordinary about him, he had no children, so his law clerks really were part of his family and there was a very close relationship between us and the Justice. He and I were very interested in classical music and it wouldn't be unusual for him at eleven o'clock at night to call me up and say, "I just heard this concert by X, Y or Z. What do you think about this person?" That was not atypical. So, Frankfurter was a complex person who was, I sometimes say, alternatively exasperating and exhilarating to work for.

Moderator: Barrett Prettyman, you also later had that opportunity, but your longest clerkship, and your initial clerkship, was with Robert Jackson. As you arrived in that summer of 1953, who was Robert Jackson as a Justice of the Court?

Prettyman: Well, before I arrived, as a member of the Legal Forum at Virginia Law School, I had had him down to speak and spent a delightful weekend with him down there, where I really got to know him even though it was a very abbreviated time. And then when I went up for my interview with him in Washington, we had a very wonderful long chat, less about the law than just about theory and life and whatever. And at the end of the interview he said, "You know we are allowed two clerks, but I don't want two clerks. I only want one clerk and if you would be willing to be my only clerk, well, you can have the job." Immediately, of course, I accepted, so that was the end of that. I had not been with an intermediate appellate judge and therefore was absolutely delighted to be able to go directly from law school into this place on the Hill.

Moderator: So you had no training and twice the responsibility of Frank Sander?

Prettyman: You got it.

Sander: But not twice the pay.

Prettyman: No. What was it, \$5,400 in those days?

Sander: \$6,000.

Prettyman: Well, then you got more than I did.

Moderator: That's where that first clerkship had a benefit.

Now, let's talk about the school segregation cases. The five cases came to the Court before you gentlemen arrived. The Court actually took a while to docket them and put them all in motion, but they had been argued to the Court in December of 1952. And then in June of 1953, very shortly before you arrived, the Court ordered them reargued, calling for additional briefing on a long

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list of topics that the Court asked the parties to research and write for the Court's benefit. So segregation in many forms had been percolating towards the Court, and in the graduate school and law school context it had been dealt with by the Court, and the Court was in the midst of grappling with it, as you arrived, in the elementary and secondary context.

Again let's begin with Earl Pollock. How did you get oriented to what we today call *Brown v. Board of Education* as a pending matter?

Pollock: I became involved directly with the case after Chief Justice Warren arrived in September.

Moderator: Let's stay earlier. Was there any contact during the Vinson phase?

Pollock: There was none that summer, except that among the clerks who were already there, there was tremendous excitement and interest in the pending segregation cases, and a lot of discussion about it. The cases were, of course, recognized as constituting the most important issue before the Court at that time.

Moderator: Was there discussion with your departing predecessors, for any of you, about this pending case and what was happening in the Court that you were now arriving in the middle of?

Pollock: If there was, I've managed to forget after fifty years. One of my great regrets is that I never kept a diary or a journal, which would have been very useful trying to answer questions like that today.

Moderator: Jack, how about you?

Fassett: I did have a discussion with the one former Term clerk who was still there when I arrived on June

20, 1953. The order for the reargument, the questions that you talked about, came down on June 8th and then immediately thereafter the Court had two special sessions in the *Rosenberg* case, involving the stay of the execution of the Rosenbergs. It had been very acrimonious, and it was just over on June 19th. I arrived on the next day and the one law clerk still left from the prior Term had an assignment from Justice Reed to do a project having to do with a possible dissent in the segregation cases, and so I did talk to him about that.

I saw the Justice for about a half an hour before he took off from there. He was going off to Duke Medical Center, where he had his annual exam, and then to Maysville, Kentucky where he had a couple of farms. And he said he'd be seeing me and we'd talk at the end of August or he'd see me when he came back through, going off to a place he'd rented up in New York State, in Oyster Bay, New York, for the month of August. But we didn't have too much time to talk and all he'd said to me was, "Are you up to date on the school segregation cases?" He had not mentioned the subject at all at the time I was hired. I said, "I've heard of them, but I don't know much about them." I also didn't know much about him. When I had the lightning strike of getting the clerkship, I didn't know much about Justice Reed and was able to find very little.

But he said to me as he was leaving, "Well, on these shelves over there are all the records and briefs in the cases. In your spare time, get yourself up to date on them." And so that was the total talk with him about it, and then the clerk who was there filled me in on the job he was doing. But he didn't have too much handle on what had happened at the Court with respect to them because they were being pretty secretive with most

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of the law clerks about what was going on. And then I started getting these letters from Justice Reed, first from Durham, then from Maysville, then from Oyster Bay, sending me these projects—And when he came back through, we had a whole long conversation about them, but that’s getting ahead of the story.

Moderator: Right. Frank, how about you?

Sander: Well, I, like Earl, I’m not quite sure about this, about whether I had any conversations with one of our predecessors, Alex Bickel. His is an important name in the *Brown* history because one of the unusual things about Frankfurter is that he didn’t use his clerks for routine work, like the *certiorari* petitions, whether the Supreme Court ought to take a case—he handled those himself, but he would assign major tasks to people that really required full concentration for an extended period. And related to the questions for the rehearing, he had asked his prior clerk, Alex Bickel, to make an investigation of the legislative history of the 14th Amendment to see what light he’d shed on desegregation. In the end, it turned out not much. But being a professor and scholar, Frankfurter wanted to leave no stone unturned. So this was in process and I don’t know whether I talked with Alex Bickel about this, but we were certainly very aware of that event.

Moderator: From Jack’s description of his predecessor writing or doing research for Reed on an expected dissent, it sounds like the climate you’re arriving in is one where school segregation is losing—it’s going to be struck down?

Fassett: I had no indication of that. When I finally had had my long conversation with Justice Reed when he came through at the end of July on his way from Maysville to Oyster Bay, I asked him, “Well, is the

Court going to decide these cases now?" And he said, "They are going to decide them. They've got the votes." But the indication was that the decision was going to be to strike down *Plessy v. Ferguson*. And he and some others were going to be in a minority. But he didn't identify who they were going to be. But we had a big argument about it and that's the stage where I learned that long word "krytocracy," because I said, "Well aren't they going to be reaching the right decision? I think that sounds like—" and he said to me, "Are you one of those people who believes in krytocracy?" I said, "What does that mean?" And he referred me to a book or paper that he had there and showed me that krytocracy means "government by judges." And it was the beginning of a very long dialogue that we had over a period of several months, where we had a very interesting time as he thought over the process of whether he was going to dissent or not, and krytocracy was foremost in his mind, that he didn't quite think that this was a role that the judges ought to play.

Moderator: Barrett, as you were arriving and replacing two clerks all by your lonesome, did you get any transition briefing or any sense of where segregation stood with the Court?

Prettyman: I don't recall any discussions with Bill Rehnquist or Don Cronson about the segregation cases. And I was not aware of their now-famous memos that they wrote. But the only discussions I had with the Justice gave me the impression that the Court was in somewhat of a disarray. But it was not clear to me, and I'm not sure it was clear to him, where the votes actually lay because the Justices, at their one conference, had decided not to take a vote.

Unbeknownst to me, not that long thereafter—in fact, the day before the second

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argument in *Brown*—he began writing a concurring opinion because he assumed that regardless of how the vote went, the Justices either would all be writing or many of them would, that there would be dissents and concurrences and so forth, so he was trying to get his thoughts down on paper. I didn't see that draft of a concurring opinion until four drafts later when he finally gave it to me.

Moderator: We will catch up to that point of the story. Does anyone deserve credit for the decision to request additional briefing and the postponement of deciding it at the end of that 1952 Term? Was that Frankfurter and Bickel? Was that Vinson? Any light to shed on that?

Sander: I don't know definitely, but I would suspect both from the nature of the inquiry and what I've read that it was largely Frankfurter, but it was not Bickel. It was Frankfurter commissioning Bickel to do this and then persuading the Court to go along. One of his main concerns was the whole theme of judicial restraint, the issue that Jack referred to, so I think putting the thing off because it was a difficult decision and getting more research seems very much in character for him.

Fassett: I think it was— Except for a couple of the Justices who were anxious to go ahead and have the vote, most of them felt that it would be desirable to have more time. I think Justice Clark and Justice Reed— I think, Justice Jackson as well, concurred in that. So what they needed was a device to do it and Justice Frankfurter provided the device by coming up—he drafted these five questions which they issued as their order.

The other thing they did, which is significant in that same June 8th period, was to invite the new administration, Ike— President

Eisenhower's administration had just begun and they invited, almost directed, the new administration to file a brief with respect to it and take a position on it. In this new book that just came out, *Black, White and Brown*, issued this week, Herb Brownell, who was the Attorney General at the time, has a very interesting and illuminating piece telling about what happened at the White House when they were advised that they should participate in this. It required the administration to take a position and Herb Brownell was very important in convincing the President that they should take a position and that they should oppose school segregation.

Moderator: That's a nice segue. Much of our discussion obviously is going to be legal in nature—the Court's work, of course, is legal in nature—but it is connected to fundamental social realities and politics.

Where were your Justices, as men, on segregation, as you understood them at the starts of your clerkships?

Pollock: I understood, not directly from Vinson, that he was opposed to overruling *Plessy v. Ferguson*. Not because he was a racist, but rather because of his belief that a decision that had lasted that long should not be overturned by the Supreme Court, that as a matter of *stare decisis* it should be done through action by Congress or possibly constitutional amendment. I think it was essentially a matter of judicial process that motivated him to take that view, which in a way was something that also, of course, concerned both Frankfurter and Jackson, although they ultimately took quite a different view.

Moderator: Right. Frank?

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Sander: Well I just wanted to add this footnote. I think that is exactly right, what Earl says, because I remember coming to work on September 8th and in the elevator the operator said, “Do you know what just happened?” And I said, “No.” He said that Chief Justice Vinson died. And shortly thereafter Frankfurter got off his now-famous line: that’s the first time he believed in God. So, this rather suggests that Vinson was clearly in favor of upholding *Plessy v. Ferguson* and that Frankfurter thought this was a whole new era that was being ushered in. I think he said this before the other side of the coin came in, *i.e.*, the appointment of Earl Warren, which was the other really important thing.

Pollock: Frank, I think that that statement of Frankfurter’s was made at Vinson’s memorial service to Phil Elman, another distinguished clerk of Frankfurter’s, and I think it was not directed solely at the matter of how Vinson was expected to vote, but rather Frankfurter’s belief that at long last there could be a Chief Justice who was capable of welding the different factions together—something that, unfortunately, Vinson had not been able to do. It was very much of a fractured Court under Vinson, and I think Frankfurter saw the Warren appointment as a chance to overcome that.

Prettyman: A number of people have written, and Earl has just stated, the view that Jackson seemed originally to be in favor of upholding *Plessy*, not striking down segregation, and then came around and changed his view. I think I disagree with that. I don’t think that’s what happened and I think that his unpublished concurring opinion demonstrates it. At that first conference everybody was expressing his opinion and a number of Justices, including Douglas, wrote down that Jackson appeared to be in that school.

Actually, Jackson, being a very, very, very practical person, recognized that school segregation was going to be struck down and he was willing to go along with that, but he was very worried about all kinds of things. He was worried about not giving direction to the district courts as to how they were going to do this. He was worried about what legal ground the Court was going to base this decision on. He was worried that the Court was going to find fault with the school systems, with district court judges, with the South and so forth. And having expressed all these concerns, I think that writers today, and even Justices at the conference, got the impression that he was negative. And lo and behold, the concurring opinion that he finally gave to me was negative in many respects, but only in those respects. His bottom line was that he was going to go along with the majority because he felt that the Negroes had made such an astonishing progress in the years since the Civil War, the most astonishing progress in history, that even if once there had been any grounds for segregating and dividing them based on race, that had long since disappeared, that they were now equal in every respect, and that therefore it was denial of both due process and equal protection to segregate them solely on the basis of the color of their skin. That's how I read that.

Fassett: I do too, and Justice Reed and Justice Jackson were very close together on their thinking on this.

Prettyman: Well, except that Reed was going to dissent.

Fassett: He was going to write a dissent, but for the same reason that Justice Jackson referred to in his memo in February where he used the term "a ruthless use of judicial power." That was sort of Justice Reed's feeling too—his kryptocracy thought was the same thing.

Justice Reed had been much in favor of fairness for the Negro race. He had written the famous *Smith v. Allwright* decision that did away with the southern white primaries. He had written a couple of other decisions, but he just did not think that the Supreme Court ought to be doing this at the early stages. And so, in that sense they were— Well, Justice Jackson would have done a concurrence on that basis. Basically, Justice Reed was going to—he was looking for more time. In the conference, he said that *Plessy* probably has gone by its day and is no longer good law, but we need more time for things to occur. He was a great believer in time taking care of things. And he was worried about a whole bunch of subjects that he would talk to me about—“What’s going to happen to the black teachers in the schools if we outlaw segregation? They won’t be able to teach anymore,” that sort of thing. We collected more materials on subjects like that in the early months while he was still thinking about this.

Moderator: Now let’s introduce perhaps *the* legal protagonist, Earl Warren, because on that September 8, 1953, Fred Vinson goes home to his apartment, and he watches—it wasn’t called Monday Night Football at the time, but he watches an exhibition game on television and doesn’t live to see the morning. And that vacancy is quickly filled on a recess appointment, without confirmation by the Senate. Eisenhower appoints Earl Warren and has him in place for the Court to begin its Term at the start of October. Earl Pollock is one of the law clerks who I guess inherits a new Chief.

Pollock: Well, I guess that would be one way to put it. I think the other two Vinson clerks and I were in something of a state of insecurity because we didn’t know what our future was going to be. We

were given temporary appointments by Hugo Black until it was determined whether we were to be retained by Chief Justice Warren. Warren did ask us to continue and later he asked me to stay with him for a second year as well.

Moderator: Obviously we know him as Chief Justice Warren, but remind us, as he is being selected by Eisenhower and as he is arriving, who was Earl Warren on the landscape of this country, and what did it mean for him to be the new Chief Justice put on the Court as it was about to start its Term, as it was in the middle of the segregation cases?

Pollock: Warren was a very sharp contrast to Fred Vinson. Both had extensive political backgrounds, but Warren, to use a much-hackneyed phrase, was very much a "people person." He would come into a room and he would immediately dominate the scene. He was very impressive physically. He had a big smile. He greeted everyone very warmly, whether it was a messenger or secretary or anybody else—that was probably a vestige of his days as a very successful politician. He also seemed to exude a kind of integrity. And he was, by his nature, his very persona, a very persuasive gentleman. People wanted to agree with him. He tended to put people at ease. He had a patience in dealing with people. There was very little throwing his weight around. If anything, he ordinarily showed a high degree of humility, which made it much easier for him to become very friendly with, and to be liked by, the Associate Justices.

Moderator: So he was a Republican governor of California, but he wasn't a muscle-bound, weight-lifting type? [Laughter]

Pollock: No, he wasn't, but he was not only a Republican governor, but, I recall, in the previous election for

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governor he had received the nomination by both the Republican and Democratic parties, indicating the extent of his popularity in California essentially on a non-partisan basis.

Moderator: You mentioned, Frank, the Frankfurter quip—it is such a good line that obviously he used it with Phil Elman, yourself and a number of others—about Vinson’s death indicating the existence of a God.

Do you, Barrett and Jack, remember any particular Jackson or Reed reaction to this Vinson-replaced-by-Warren development and what that would mean in the context of these school cases?

Prettyman: Well, I don’t remember much from Jackson. Frankfurter was in my office a lot because he was in all of our offices a lot. And I do remember that he was thrilled, there was no question—he didn’t tell me that quip, but I could tell that he was thrilled.

One element—I think everything that Earl said about Warren is correct, but one element that you left out—is that he was a very tough man. Underneath that affability, he really expected things to be done in certain ways. When he sent out orders in the Court that something was to be changed or whatever, he expected things to move. And I saw him several times where you could tell he was upset and you didn’t want to be at the forefront of that anger when he went that way.

Fassett: He sure could stroke you though. I mean, after the decision—I recounted the story last night about having a private session with the Chief Justice—he called me into his office and put his feet up on his desk and we just chatted, you know, talked about our high schools together. My Justice had already left. He was such a charming man, he

could really be convincing, and I think that was a very important aspect.

As to the question of expectations right after Vinson died, and before Warren, the rumors running around that courthouse on what was going to happen were rife. I mean, Justice Reed told me about some of the things. They didn't know who was going to be appointed. It wasn't certain for quite some time that Warren was going to be appointed, but when the appointment was made Justice Reed was so happy. He thought that was a good appointment. So I think he had some of the same thoughts. He got a little unhappy with his fellow Kentuckian, Fred Vinson, because of the dissension in the Court and the Chief not running the Court tightly enough. And Reed always thought highly of Charles Evans Hughes, the first Chief Justice when he was on board, who really knew how to run the Court, and neither Harlan Stone nor Vinson really did.

Moderator: Frank?

Sander: It's very hard in these fifty-year recollections to know whether you're really recalling something or you're—

Prettyman: —making it up? [Laughter]

Sander: Well not making it up, but attributing backwards something that you know happened as your own reflection—I think I find that hard.

But I have a very distinct reaction, maybe because I worked for Justice Frankfurter, that it was as if a cloud had been lifted after Warren was appointed. There was much more hope and positive outlook, not necessarily how the case was going to be decided, but that this stalemate had been ameliorated and that good things were going

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to come from Warren's appointment, partly just because of this very impressive personality of Warren's. He obviously was pouring himself into this job and regarded this as his primary challenge.

Prettyman: You could argue that almost anybody new would have created something of the same feeling, but it was greatly enhanced by his personality.

Fassett: We had the two occurrences: Vinson died, and then they had the state funeral at the National Cathedral where all of us went by directive. And it was quite an occurrence because we sat right behind our Justices, and in the next row sat President Eisenhower and Mamie and the Vice President and his wife and Harry Truman. Bess wasn't there. And then the Justices went off as a group. I think all of them went to Kentucky for the funeral there and when they came back shortly after, the point was made and the atmosphere was just different.

Moderator: As we look back fifty years and recall these powerful events, I am certain that I wasn't there, but it is a pleasure to be here. We'll take a short break now and resume again in a few minutes. Thank you.

* * *

Welcome back to the Robert H. Jackson Center. I'm John Barrett, and we are gathered here on the fiftieth anniversary of *Brown v. Board of Education* with four lawyers who were law clerks during the Supreme Court's work in the 1953-54 Term of the Court, producing the *Brown* decision. We're with Jack Fassett, who was law clerk to Justice Stanley Reed; Earl Pollock, who was law clerk to Chief Justice Earl Warren; Frank

Sander, who was law clerk to Justice Felix Frankfurter; and Barrett Prettyman, who was law clerk to Justice Robert Jackson.

Now, the fall of 1953 brought the extensive additional briefing that the Court had requested and the preparation, and then in December it brought the second round of oral argument, where these five school segregation cases were reargued to the Court. Were you there for the oral arguments and what do you recall of that forensic moment in this piece of history?

Pollock: I was in the courtroom. The Chief Justice expected any clerk who had been assigned to work on a particular case to be present during the argument. Although I don't recall all the dramatic moments of the argument as much as I would like, I do recall very clearly the argument that Thurgood Marshall made. It was very effective. It was very emotional, not by any means confined to arguments about *stare decisis* or other technical legal issues, but pointing out, for example, how white and black children who played together, who spent time together, were then suddenly separated along two different tracks once they began their public school education. It was a very effective argument.

I don't recall much of Davis's argument—

Moderator: That's John W. Davis?

Pollock: —John W. Davis, who was then regarded as really the dean of the American bar, probably a man who at that time had argued more Supreme Court cases than anybody else in the country. It was an eloquent argument. But it was, of course, limited by the fact that his position had to rely to a much greater extent than Marshall's on technical legal arguments as to why the Court should defer to the

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doctrine of *stare decisis* and not undertake to overrule *Plessy v. Ferguson* after all those years.

Prettyman: Well, yes, I heard both of those arguments too. I don't think I heard all of the arguments that were given because it went on over a couple of days, but I do remember those well, and I would add to what Earl just said about John W. Davis, who had incidentally been a presidential candidate at one point: he relied heavily on states' rights in addition to *stare decisis*. And his theme was—"You have even said in your opinions, Supreme Court, that education is a matter for the states. Educating children is not some big federal thing, it's states' rights, it's what the state does, and now all of a sudden you're trying to take away from the state this right to decide where children go to school. Why not leave the matter with the states?"—which I thought was really very clever, because that appeal did invoke something which a number of the Justices actually believed in.

I must say that in my own mind, I thought the die was cast in these cases when they agreed to hear them. It seemed inconceivable to me that, as late as 1954, a majority of the Supreme Court would say that it is still valid under the law to separate children solely on the basis of race when they go to school. So while these oral arguments are always important and while these were very good arguments, I'm not sure they dramatically affected in any way the result in the cases.

Pollock: I agree with Barrett on that. It frequently is thought that it was the compelling argument of Thurgood Marshall that caused the Court to decide the case as it did. I think that is quite an overstatement. I agree with Barrett that the argument did not have a substantial effect on changing anyone's mind.

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Moderator: Not even towards the ultimate unanimity of the Court?

Pollock: I doubt that. I doubt that. I think that many Supreme Court arguments are really more designed to avoid losing than to achieve winning. And I doubt very much whether it had a substantial effect on the ultimate outcome.

Fassett: I agree entirely. I don't think the oral arguments, which spanned the three days of December 7, 8 and 9 of that Term— While it was interesting and while it was quite a public drama, I don't think it affected the vote one iota.

The interesting things that had happened before then were that on November 1, they filed all these briefs with the answers to the five questions from the June 8th order at the end of the prior Term. And on November 1, right after that, Justice Frankfurter circulated the long memorandum that Alex Bickel had written on the history of the 14th Amendment. Those things were what the Justices had studied and though they asked some questions of some of the arguers with respect to that, nobody changed their mind as a result of it.

Another thing that happened in between here that is—very interesting, that is seldom mentioned—on December 1— We remember because it was quite a big day in the life of we young law clerks—President Eisenhower and Mrs. Eisenhower reinstated the procedure of a White House reception for the Judiciary, inviting the Justices, and of all things they sent engraved invitations to each of us, I guess, and my wife. And we had to rent white ties and tails and went off and got to shake the hands of the President and Mamie and got to talk with them, and Herb Brownell was there, the Attorney General, and it

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was quite an occasion. But the timing is very interesting: December 1. The argument was scheduled to start on December 7, and there are some stories that go on about the Chief Justice having been taken aside and having had some words said to him during that. It didn't affect the outcome obviously.

But as to the oral arguments themselves, like Barrett I was very busy working on other cases, doing a draft of another opinion for Justice Reed, so I couldn't go in there and sit there all day, and the Justice hadn't ask me to. So I went in and out, but it was certain I wanted to be there. I heard part of Thurgood Marshall and part of Spotswood Robinson. We had a special little place where the clerks and secretaries could go in and see and go in and out. Anybody else you had to come in through the main way in the court and it was a real problem to get in for something as in demand as that.

I particularly wanted to hear John W. Davis and I did, because, as I concluded law school at Yale, one of the firms that I interviewed with was his. They invited me down to New York and when they heard I had been recommended to go to Justice Reed, the interviewers ushered me into John W. Davis's office. I didn't realize what was going on at the time, but he explained to me how he knew Justice Reed and what a fine gentleman he was and whatnot and hoped I would get it. And there he turned up—he was way ahead of me on that one.

Pollock: Think he was doing a little lobbying?

Fassett: It happens, you know.

Moderator: Now the Court's procedure—and it's important to remember that the Court is not only dealing with

Brown v. Board of Education during this or any Term—after hearing oral argument is for the Justices alone to meet in conference to discuss and vote and then assign opinion-writing responsibilities. And so after that oral argument over those three days, the Court has a conference and the Justices emerge and something is in the process of having been decided or being done with the school segregation cases.

Frank, did you have any understanding of the conference and its result?

Sander: It's one of these questions that I know the answer to now but didn't then, so I don't want to recreate history.

Fassett: Any question is like that—

Sander: I guess I want to say we are getting a little false picture of the involvement of the law clerks. The three gentlemen that are sharing the platform with me, law clerks, were exceptions. The general rule of the Supreme Court was that law clerks would have no role in this decision because even then, the fear of leakage would be so serious. So there were some violations of that by some Justices, including my own, but— Not that there was a report of what happened at the conference, which often Justices discussed with their law clerks afterwards, but not in this case.

Moderator: Was it true for the other three of you that there was an information blackout about these cases coming out of that conference, or did you come to understand where the Court was heading?

Fassett: It was common knowledge that this was very close to the vest and only the people directly involved should have anything to do with it. I didn't know Barrett was directly involved. We never discussed

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it at the time. I didn't know who was working on it for the Chief Justice. But Justice Reed had fingered me to be the one working with him and I'd been working with him since the summer on what he was thinking about doing. But the secrecy was very strict and most of the law clerks had no idea what was going on. And the December 12 conference, when they came back, I assumed—They always had the conferences on Saturday afternoons in those days. When they came back, he'd open his docket book and tell us what had occurred. But nothing with respect to the segregation cases. They had no vote. They decided at that occasion that they would not have a vote. They'd continue to talk about it until they got to a stage where there could be a vote. And I think one reason for that is that, as you mentioned, Chief Justice Warren was an interim appointment. He had not yet been confirmed by the Senate. And he wasn't confirmed by the Senate until March 1. So the first vote, I'm firmly convinced—he said in his memoirs that it happened in February, but I'm convinced it didn't happen until the first week of March.

Sander: I think it was more than that. I think Warren, as a politician, recognized that it was a bad thing to get people to commit themselves—

Fassett: I agree with that.

Prettyman: —before they saw anything on paper.

Pollock: It has to be understood how unusual it was not to take a vote, because it was very customary after an argument that the Justices convened and took at least an initial vote. This was not done in that case, I think, for the very reason that Frank has pointed out. The Chief Justice, I think, recognized, and I'm sure other Justices did too, that it would be inadvisable to take a vote that might freeze

certain Justices into a fixed position before further work and discussion could take place in order to arrive, one hoped, at unanimity—not only unanimity, but unanimity without dissents or concurrences.

Moderator: Did you observe your boss, the Chief Justice, during this period, informally working on his colleagues toward those objectives?

Pollock: Yes, but I was not present at those sessions.

Sander: Meaning one-on-one?

Pollock: One-on-one. I wasn't present at those, but I was aware of the fact that he was very patiently attempting to discuss the matter on an individual basis with each other Justice, whether in chambers, or at lunch, or taking a walk around the Supreme Court building. I knew that this was going on.

Moderator: Barrett, from your perspective, what was happening? What was Jackson up to and what was happening in Jackson's thinking in this post-conference period?

Prettyman: He did not tell me anything about votes after that conference. I did get the impression that he thought that the majority clearly was going to strike down segregation.

But, don't forget, it was early in the next month when he first gave me this draft, which he had gone through for many months, of what he thought was going to be a concurring opinion. And, it was right after that, when I wrote a memo back and I said for the— To show you how naïve I was, I wrote that in my office on my typewriter. I did not give it to Elsie Douglas, his secretary, for typing as I normally did. I gave it to him myself

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and it never occurred to me that anybody else in the entire world would ever see that memo, which of course has now been published in books and everything else. But I was quite critical of his draft. I thought it was very defensive. And I thought it said some things which would give grounds particularly to those in the South who were combating any decision striking down segregation, and it was soon after that—I hope not because of that, but it was soon after that—that he had a heart attack.

And then he was in the hospital when—I'm jumping ahead now a little, but he was in the hospital when the Chief Justice brought his first draft of *Brown* around.

Moderator: So Jackson is drafting a concurrence before he's ever seen a proposed approach by Warren?

Prettyman: Exactly, and before they'd ever taken a final formal vote.

Moderator: What was Frankfurter doing during this post-argument phase?

Sander: Well again, I now know that he had some written thoughts of some kind of a concurring opinion. There were a lot of discussions with Justice Jackson about possibly writing a joint concurrence. We had nothing to do with that in our office. I think the first formal involvement we had was much later when an opinion had been drawn up by the Chief Justice that was being taken around. And Frankfurter, I think in violation of the agreement, one afternoon came in and showed it to the two of us law clerks and said, "Do you have any quick reaction to this?" and retrieved it very quickly. That was the limit of it.

Moderator: What was Reed up to? The previous summer he had been thinking, researching, and assigning your predecessor and you to gather information in anticipation of being a dissenter.

Fassett: Yes. After he arrived back on Labor Day, we had these extended discussions about it and he assigned me a number of additional footnotes to prepare on various subjects such as: "What has been the position of the United Nations and its Declaration of Rights with the respect to segregation over the years?" "What has been the position of the Catholic Church?" was another one of them. One of them had to do with the role of the NAACP, had it ever taken the position until very recently that segregation was—

Prettyman: Jack, didn't you say that one of them had to do with the crime statistics?

Fassett: He asked me to get— That one came in one of the letters. That was before he came back. He wanted crime statistics compared from various cities and he had identified the cities, one in the North and one in the South, cities where things were segregated and non-segregated. And I had no idea how to get these things. But Helen Gaylord, his long time secretary, bailed me out a little bit, and she got in touch with the FBI and sent me up there and they tried to help me. What I got was not too conclusive.

But I had all of these footnotes and then, when Alex Bickel's memo came around and the briefs came around in the first of November, he asked me to write three more footnotes. One about what the role of the States was, what they thought about segregation in schools when they ratified the 14th Amendment. One on what the Congress that proposed it had in mind about it. And he also asked me to do one about segregation in the Armed

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Forces and to show the fact that in an area where the Executive branch of the government had control of the situation, nothing was done until an Executive Order was issued by Harry Truman fairly recently.

Moderator: Jack, let me stay with you. In early 1954, Reed shows you some drafting he had done of a dissenting position. As far as I'm aware, that's the only Justice writing of a proposed dissent in the *Brown* cases.

Fassett: What happened, you see, was that we went up until the time of the oral arguments, and after that he asked me for no other things. I had many conversations with him about what he was going to do and I argued with him. I said, "You gotta look at this from the point of view of the role of our country in the world." And he said to me, "Boy, have I been hearing a lot about that." He'd been having lunch with Burton and Minton and they had been talking about it. They were both committed to overruling *Plessy* and the Chief Justice, I know, had been meeting with them. But none of these meetings involved any law clerks.

The one supposed occurrence of Warren and Reed and a law clerk that appears in Dick Kluger's book *Simple Justice* I'm convinced is erroneous. And the fellow who is identified there as doing it, has denied that he said so. So it makes it—

Moderator: So, what about Reed's writing? His draft of his dissent—

Fassett: So what happened was that we'd done nothing on a dissent after the oral arguments, until the Court went into recess on February 9, 1954. Out of a blue sky he called me in there and he said, "Jack, take a look at this and tell me what you think," with sort of a twinkle in his eye. Stanley Reed

could be a very pleasant, kindly man. And we had been having all of these extended discussions and so I took it out and— We law clerks, we each had our own big Royal typewriters and typed all of our own stuff in those days. So I made a triple-spaced copy of what he had written. And then I went through and made comments on each of the things, as I'm sure each of you did on occasion with things, and I went back in and talked to him about it and his reaction was sort of an ambivalent sort of thing. I'm sure—

Pollock: What was the main pitch of the dissent?

Fassett: The main pitch was that the Equal Protection Clause issue had been settled. History had settled—*Plessy* and the history of the 14th Amendment. So the only question open was whether under the Due Process Clause it should be overruled. And he went on at great length, but never came to a conclusion in the thing. And it was yellow pages.

Now, I'm convinced he'd written it the former summer while he'd been off in Oyster Bay and was thinking about it and that he was just sort of teasing me at that stage. But I took it back and I kept his whole file of these footnotes and whatnot and so—

Prettyman: At the time that you went back to him, is it your view that he had changed his mind?

Fassett: It was my view that he had already told the Chief Justice that he would join an opinion if it was an opinion that he could accept. And I think that is sort of confirmed by Frankfurter's letter to him of May 19—right after it came down, Frankfurter congratulated him on having joined it and the—

Sander: I saw that as pretty late.

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Pollock: I don't think Reed made that clear to the Chief Justice until almost the end of April because—

Moderator: Yes, tell us why, because unanimity is part of the accomplishment here, so it's important to try and date it as best we can.

Pollock: What happened was that in the week of April 26, Chief Justice Warren took a pen to hand and a yellow tablet and scratched out what he later told me he thought was an outline of an opinion. And it's available now on the Internet, I think. He had it typed up and on April 29, which was a Thursday, he called me in to his office. He gave me this document which was headed "Memorandum." He called it an outline, said that he wanted me to revise and expand it into a full opinion. He said he wanted it to be short. He wanted it to be readable. He wanted it to be non-legalistic. He wanted it to be something that could be understood by the layman and, he said, "Something that even could be published on the front page of a newspaper." And he also said speed was of the essence. Of course, he told me that it was unanimous. And I understood from what he was telling me that he had just achieved the agreement for unanimity—

Moderator: In late April?

Pollock: Yes, in late April. And he also cautioned me about the need for tight security on it, and that there was not even to be any discussion with anybody outside the Chief Justice's chambers.

Prettyman: Earl, may I ask you a question? I have seen, just recently, the draft—Nina Totenberg showed it to me when she had her [National Public Radio] program. And from a quick look at it, it looked like

pretty much the final opinion, yet it was in his handwriting.

Pollock: The longhand is something like nine pages—in longhand. And he clearly, in this memorandum, established the framework of the opinion. In addition, the memorandum has at least two of the most stirring sentences that wound up in the final version, including the “hearts and minds” sentence and “we cannot turn the clock back.” But probably close to half of the draft never wound up in the final opinion.

Moderator: And at that point it goes to you as an assignment to—

Pollock: That’s right.

Moderator: —flesh it out.

Pollock: That’s right.

Moderator: Okay.

Pollock: Do you want me to continue on that?

Moderator: This is where the action is. What did you do next?—this is what it’s all about.

Pollock: Well, with the hubris of youth—

Prettyman: —which we had enough of in those days.
[Laughter]

Pollock: I started work on it the very next day and worked about 24 straight hours, and that brought me into the weekend. This was mostly in longhand because I did not have a typewriter at home. I brought my longhand revision into the office Monday morning, had it typed, and presented it to the Chief Justice with a cover memo, which is also

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now on the Internet someplace, saying that I've tried to carry out your instructions, and that this draft included all five cases, but I strongly recommended that the District of Columbia case be stripped out because we could not rely on the Equal Protection Clause in that case.

Moderator: That applies only to state governments.

Pollock: That's right. His draft had made references to both Due Process and Equal Protection, and in fact even also referred to "constitutional privileges." I felt very strongly that the State cases should be tightly limited to the Equal Protection Clause. Among other reasons, if we got into Due Process, then we would have to confront the question of does the Supreme Court really want to rely on substantive due process which involves all kinds of thorny issues. I thought it should be limited to the Equal Protection Clause.

He agreed that that's the way it should be restructured and that there should be a short opinion on the D.C. case, which was assigned to the other two clerks.

The next few days, there were further changes in the May 3 revision. Also, footnotes were added that week—

Prettyman: That's where the trouble began. [Laughter]

Pollock: —and then on Friday of that week, that was May 7th, the Chief decided that the drafts of the two opinions were now ready to be circulated to the other Justices. And he prepared a cover memo, which in large measure repeated what he had told me on April 29. The cover memo said that—"Here are these drafts," he said, "for discussion." He said, "As you'll see, the opinion drafts are short, non-legalistic." And he said that they should also,

above all, be “non-accusatory,” as he was already thinking in terms of acceptability in the South.

That Saturday, May 8, he took copies and delivered one to each of the Justices who was present in the Court at that time. There were two Justices who were not present, Minton and Black, and another clerk and I—

Moderator: Well, and Jackson, who was in the hospital.

Pollock: Oh that's right—and he delivered copies personally to Jackson, quite right.

We delivered Minton's copy to him at his apartment, which was I think located just across the street from the Supreme Court. And then we went out to Alexandria and delivered Black's copy to him while he was in his tennis clothes on the tennis court. And he stopped the game and—

Moderator: Started reading?

Pollock: I don't think he read it right then and there.

Unidentified: Tennis first.

Moderator: Saturday, May 8. Now for all the security strictures, it's probably shortly thereafter that Frankfurter quickly shares a peek with you and your co-clerk, Jim Vorenberg.

Sander: I think so. I can't place the date but that would fit in with this picture, yes.

Moderator: What was Frankfurter's reaction to the long-awaited draft by Chief Justice Warren?

Sander: Well, my best recollection is that he was very pleased because he thought it should be unanimous. I think he'd come around to that. He

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had some serious concerns about the role of the judiciary that we've talked about and judicial restraint that he is a great proponent of, and so I think he had these concerns. But he saw this movement toward unanimity and clearly felt that was the most important thing. So he was ready to jump on the bandwagon.

Moderator: Now, Barrett, as we've said, Jackson was in the hospital, and Earl just mentioned that Chief Justice Warren personally delivered the draft to Jackson. Pick it up there and tell us what happened.

Prettyman: Well, Frank, this is one of those things that I actually remember.

Sander: At least you say so.

Prettyman: I do remember quite well. I happened to be with Jackson in his hospital room when Earl Warren came by and he made it clear very quickly what he was there for. I excused myself and went down the hall. I waited until a nurse came down and said that the Chief Justice had left. I went back. Jackson by then had read the opinion and didn't say anything about it; he handed me a copy and said, "Go read it." I went down the hall again, I read it and came back, and we talked about it. And it was very obvious that he—I guess the best word I can use is that he was relieved. He was very relieved that something had been presented that he could go along with. Even though, I have to emphasize, there were parts in it that he differed with Warren on. For example, Warren said that the history of the 14th Amendment was inconclusive about what the Framers felt about segregation and segregated schools.

Pollock: And that of course was based on the Bickel memo.

Prettyman: The Bickel memo, that's right.

Jackson thought it was quite clear what they thought, that they had, in fact, approved segregated schools, in the District of Columbia, for example. But he didn't care what the Framers thought about this now-current problem. It couldn't have bothered him less. He thought that you had to interpret—as a very practical man, which he was—he thought you had to interpret the Constitution in terms of today's world, and therefore he put that problem to one side. So he had different approaches from what Warren had. But basically, he very much liked the idea that it was simple, short, people could understand it, you could easily agree. You tended to read those words and say, "Yes. Yes. When you separate people on the basis of race, you are denigrating the black race."

Sander: Here's a speculative question for you. I have sort of always wondered whether Jackson's heart attack along with Warren's appointment was one of the things that made possible a unanimous opinion. Do you think that his physical condition had something to do with his lowering his acceptability point and going along with the opinion, or do you think this would have been the same if he hadn't been ill?

Prettyman: It's a fair question, but I didn't see any signs that he was not robust in mind. I think he was genuinely pleased. Now, he did make some suggestions about changes, one or two of which Warren—one in the *Bolling* opinion, for example—that Warren accepted, but several of his suggested changes Warren did not want to accept because they related to segregation generally. And as you know, Earl, Warren was absolutely adamant about restricting this opinion to education. And he did not want to intimate that segregation was going to

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fall in any other area, even though he knew perfectly well that it would. That was the politician in him and very wise, I might say. But, no, I think that Jackson— He was so pleased that there was no blame. He just liked it. He thought it was a master work, whether it was yours or his. So I don't think his heart attack played a part in that.

Moderator: Jack?

Fassett: As I said before, when Reed told the Chief Justice that he'd be going along, or when there was a clear understanding, it was of course all based on the opinion being something he could accept. But Justice Reed had done nothing further on a dissent after December. And they had a conference even though they didn't have the vote until, as I said, probably the first week in March, right after Warren was confirmed. But they had a conference on January 16, having to do—looking forward to the problem of a decree, how it would be implemented. The Chief Justice, I think, my understanding is, had hopes to handle that all in the original opinion and, of course, learned quickly that he was not going to get a consensus on that subject. And that's when they decided that they were going to have to have a further argument the following Term. But Reed did nothing on the dissent after that. I'm sure, if he had not expressly said so, he impliedly said so, to the other Justices, that he would go along if it was an opinion that was acceptable. He was—still had the idea that Due Process was better than Equal Protection as a way of doing it because, like Jackson, he thought the history on it, on the Equal Protection Clause, on the 14th Amendment, was fairly clear. He did not agree with Alex Bickel's conclusion, that it was inconclusive.

Moderator: Now, it moves very quickly, obviously—Warren is starting to write in late April, we're now around May 10 and it's only seven more days until the opinion is announced. There's tinkering, suggested language, some accepted—

Pollock: Comments came in from the other Justices. There were very few, and they were essentially stylistic. For example, and this relates exactly to what Barrett was saying before about the way that Jackson was looking at the issue, Jackson added, with the Chief's agreement, a sentence saying blacks had progressed tremendously since the time of *Plessy v. Ferguson*. And so that sentence was added.

Frankfurter made several changes, including one I regretted in one of the sentences that was in the Chief's original memorandum about the effect of segregation on the "hearts and minds" of black children because it put a mark of inferiority on the blacks. And that point seemed to me very appropriate because it directly refuted the *Plessy* premise that if blacks saw a badge of inferiority in segregation, it was just a matter of their own perception. Frankfurter asked the Chief, and the Chief agreed, to change "a mark of inferiority" to "generates a feeling of inferiority" and that's the way that came out.

Burton, I think, wanted a change from a phrase "some Southern states" to "some states." He also asked that we identify the case names of the four cases more specifically in one of the footnotes.

Clark expressed concern about the fact that one of the citations in the opinion was to an article by "Clark." He was concerned that the reader might get the idea that Tom Clark was the author of that article, and so to accommodate him (and in

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complete violation of the strictures of the Harvard *Bluebook*, which we always sought to follow), we put in the initials “K.B.” in front of “Clark” so as to avoid any confusion as to whether Tom Clark was the author.

Prettyman: Do you remember this change in *Bolling*, the D.C. case, Earl? Jackson had suggested the addition of the sentence, “The equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law and therefore we do not imply that the two are interchangeable phrases.” And then Black came along and convinced Warren to put in the word “always.” So therefore it read, “We do not imply that the two are always interchangeable.” Jackson was very upset about that.

Pollock: Dick Flynn, one of my fellow clerks, after I had suggested the removal of the D.C. case from the state cases, was assigned the *Bolling* opinion. So I really was not involved in that one.

Prettyman: The only reason I know this—I wrote a contemporaneous memo about that situation and that’s what it said.

Fassett: My impression is that Justice Reed accepted the two opinions that they brought down on that day without the—

Pollock: I don’t know of any comments that he made. I know that Douglas sent in a note saying that he wouldn’t change one word.

Moderator: Hugo Black? From Alabama?

Pollock: I don’t recall any changes requested by Black.

Sander: He had signed on long ago.

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Fassett: Right. He wanted to decide it the whole way in the prior Term. Hugo Black was one of the most ardent supporters of overruling *Plessy*.

Pollock: So there were very few changes and so—

Moderator: Let's go to May 17.

Pollock: Well, before you get to May 17, we get to May 15, which was a conference—

Moderator: Right—Saturday.

Pollock: —and it was at that conference that all the Justices signed off, figuratively, on the drafts which had been circulated and revised that week. And the Court then decided that we're going to announce this two days from now, on Monday, May 17.

And that was exactly what happened, without any advance announcement of what the intention was—with a result that many of the law clerks from other offices were not even present when the case was delivered.

Sander: My recollection is that most law clerks were there because their bosses said, "Well, I think you ought to be in court today" or something like what Frankfurter said to us.

Fassett: Well, Justice Reed came through and said to me, "Jack, this is the day you had better be in court." And he also told Helen, his secretary. But unfortunately my co-clerk had gone off to lunch somewhere, so he missed it.

Pollock: There were a number of clerks who were off to lunch and who were very angry that they had missed the event.

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Moderator: Now, Barrett, for the first time since the end of March, your boss was back.

Prettyman: Yes. Elsie Douglas, his secretary, told me that he was coming in for the opinion. So I knew it was coming down, but that was, you know, not that long ahead of time. And he did, in fact, arrive. Came up the usual way—basement, in the back elevator—and word began to get around the Court. So that's several clerks'—that's the first indication—

Fassett: Ellis McKay, who was Clark's clerk, whose office was right next door to Reed, had gone down to the print shop, which was in the lower confines of the Supreme Court building—all the printing is done in this very confidential place down there—that morning, or just before noon, to get an opinion of Justice Clark's that was going to be released that day, or that he was working on, and he saw these huge piles of packages of opinions. They get them ready to give to the press and whatnot as soon as they are handed down, and they had no indication of docket number, which always appeared on them. And Ellis came back up and told his co-clerk, who then contacted me and said, "Something's going to happen." So there were—rumors traveled fast even though their security was very good. There weren't many people that were forewarned.

Pollock: I think the security was remarkable, in that I don't think there was any public leak.

Fassett: No, I don't think so.

Pollock: It was kept under wraps.

Moderator: How did the lawyers come to be present? Would they just be present every Monday?

Fassett: Every opinion day at that stage.

Prettyman: Well now, wait a minute, I wanted to ask you about this because I did not see Thurgood Marshall. I was sitting a way—

Pollock: I think the reports say that he was in New York.

Prettyman: No, other reports say that he was in the courtroom.

Fassett: He was in the courtroom, and he made much in his oral history of watching Justice Reed.

Prettyman: A picture was taken of him right outside of the courthouse, so I don't—I wondered if you knew who called him. I mean, it sounds like something Frankfurter might have done.

Pollock: Yes, but, Barrett, those were the days—long since gone—when the Court would deliver its opinions only on Mondays. And so lawyers could show up every Monday thinking, “Well, maybe this will be the day.” Today, opinions can be handed down almost any day.

Prettyman: In the “Separate but Equal” George Stevens film on this case, there's a scene where Marshall is in New York, picks up the phone and says, “Oh, okay, I'll catch the midnight train” or something, and so he got the call. I did not know whether that was just made up or—

Fassett: Well, that's just the movies.

Moderator: Does anyone recall John W. Davis being present?

Prettyman & Fassett (simultaneously): No, I don't think he was.

Moderator: Now the announcement itself can be a fairly mundane event—the announcement of a Supreme

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Court opinion, the author reading an opinion— I take it that this was not a mundane event?

Prettyman: Well, it was in one sense—

Pollock: It was mundane until about two or three rather unimportant opinions had been read. Then it became non-mundane.

Fassett: You've got to recognize that May 17 was getting very close to the end of the Term. At that stage, the Terms usually adjourned June 1, so you only had about two more opinion days. So the tenseness was rising because everybody thought something was going to happen, but there had been, as far as I know, no leak even amongst the law clerks prior to just before noon time, when word got out that Justice Jackson had come for that occasion.

Prettyman: As a matter of fact, the first A.P. [wire] that went out after Warren had begun reading indicated that the result could not be determined from what he was reading. It was only when he came to a key phrase, where he inserted a word that was not in the opinion, the word "unanimously"— He had said in an interview that he heard a reaction from the crowd at that word, and I remember a great intake of breathe. I mean, the people present went, "ahhhhh," like that, because that was the one thing that they had not expected.

Fassett: That was dramatic. Yes, that was what Thurgood Marshall made much about. He came there, said he sat there and watched Justice Reed because he heard this rumor that Justice Reed was writing a dissent. So he wanted to look him in the eye as it came down. And as it came down, he nodded to Justice Reed and Reed nodded back and gave him a big smile and he realized that he had joined it.

That's one of the— I think that's a very true statement of what happened, contrary to some of the histories that have come out. Quite a few of them have Justice Reed crying as it came down, and other ones that have him receiving an ultimatum from [to Frank Sander] your boss and the Chief Justice just before it came down, "Stanley, you've got to join this now," citing a law clerk being with Reed when he had this conference. We know that the Chief Justice would not have had somebody's law clerk, even somebody working on it, at that stage. So there have been some myths and when some get issued they get propagated.

Moderator: The decision, of course, unanimously held that "separate but equal" has no place in education and then deferred the question of how segregation was to be remedied. Were there misgivings among your bosses or among you clerks about this approach to the remedy question?

Sander: Well, I think in our chamber we then had some discussion about this whole question about deferring the enforcement and Frankfurter, I think, was one of the leaders for that move to put that, to defer the enforcement question, and then came up with this phrase "with all deliberate speed" that finally appeared in the *Brown II*—

Moderator: —one year later.

Was that necessary to accomplish unanimity?

Pollock: Absolutely. Absolutely. In fact, the idea that the Court could have said, "We now order admission of the plaintiffs and the destruction of racial segregation forthwith" I think is, essentially, to put it mildly, unrealistic.

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Sander: That's what the plaintiffs asked for.

Pollock: That's what the plaintiffs asked for, but plaintiffs in damage cases may ask for billions, but not expect that they are going to get it.

There are two reasons why that really would not have worked. First of all, it would have absolutely inflamed the South, would have lengthened the time of resistance, and made it much longer than the long time that it took. And second, there would have never been unanimity. I think there probably would have been a 5-4 or 6-3 decision, maybe spanning a hundred or hundred and fifty pages of concurrences and dissents. There would have been no authoritative voice of the Supreme Court on this issue. Today it's very easy for some authors to look back and say, "Well, you know, it would have been better if we had just done it that way," but I just don't think it's realistic.

Black subsequently told his law clerk that he thinks the Court should have ordered desegregation forthwith and Warren has expressed some sympathy with that, but I think that is speculation after the fact, and that the only realistic way of achieving unanimity and avoiding dissents and concurrences was to follow the two-step procedure that the Court followed.

Moderator: Let's conclude by taking the fifty-year perspective that we have on this—as an accomplishment of the Supreme Court, but also as a social issue that continues to bedevil the country. It definitely remains on the list of unfinished projects.

What is the accomplishment and the significance of *Brown v. Board of Education* from your perspective as an insider and as a proxy for

one of the creators of what the Court accomplished in the 1954 decision?

Sander: I think this is one that is really difficult, to cast yourself back fifty years, because, I think, many people thought at the time: the problem is solved. Marshall was said to have said that in five years from now there won't be any more segregation left. Obviously that has not happened. I'm intrigued by the fact that some authors recently have criticized the Court and said maybe it would have been better if *Plessy v. Ferguson* had been forcefully affirmed—that is, expecting real equality, but still separation. I don't agree with that, but I think that it's a symptom of the fact that, in terms of integration, we haven't gotten very far.

I think the real meaning of the case is in terms of a statement of national ideals and policy and interpretation of the Constitution. It's interesting—in Massachusetts, as many of you know, we've had this whole issue of gay marriage and the Supreme Judicial Court of Massachusetts there used the *Brown* notion and quoted the sense of "separate is never equal." So I think—

Moderator: Coincidentally, its process of approving same-sex marriage takes legal effect next month on May 17.

Sander: That's true. I think that's a coincidence. But, so I think, one has to separate what the case means in the broader sense, which I think is terribly important, and one couldn't imagine another result, to its narrow effectuation, which, I think, has been disappointing. And I'm sort of surprised that these sophisticated scholars have made this argument that perhaps with separate but equal they would have achieved more.

Fassett: There has been an awful lot of criticism of what has happened in the fifty years, that we haven't

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gone as far as we could and I'm sympathetic with that. But I think when you get old, you start looking at the big picture a little more. And the big picture of *Brown* was not just public school desegregation. It was the cornerstone for dealing with racial equality in all areas, and as a former corporate executive, for example, what it meant in the employment patterns of companies. I had the first two black directors on my board of directors after I became the head of an electric company. And in politics, you see black people at the top level and in the legislatures. You see it in every area of our society. That all goes back to *Brown v. Board of Education*.

Now public schools have problems, there's no question about it. But most of them don't have any basis in the *Brown* decision and, Frank, I think it would be a terrible decision if they reaffirmed *Plessy*, but you know, we have problems with housing and with economics and parental control and whatnot, but that does not negate the very many positive things that have come out of it.

Prettyman: That's exactly the point that I was going to make, differing with you just a little bit, Frank. And that is, I think you have to segregate, if you will, education and the rest of the world. In education, the progress has been disappointing. It has been dramatic in some areas. In the District of Columbia, they did away with segregated schools at that time right away, and in many other parts of the country. But overall we're seeing more and more segregated schools for whatever reason. But *Brown* was the beginning of dramatic changes. At the time *Brown* came down, you had separate drinking fountains for blacks and whites in the District. African-Americans could not go into Constitutional Hall. You had these tremendous burdens that began to be lifted with that decision.

Black politicians began taking over cities and legislatures. All kinds of dramatic things have happened and we must not overlook that. That all really originated with *Brown*.

Pollock: We sometimes hear comments that the promise of *Brown* against *Board* has not been realized. You really have to ask the question, "Well, what was that promise?" *Brown* did not promise the end of racism, although I think that *Brown* has had a profound effect in reducing racism as the separate walls have, to a great extent, at least when compelled by state law, have been broken down. *Brown* did not promise the end of discrimination, which is still, undoubtedly, a national plague that has to be addressed whenever we can. And *Brown* did not promise integration. What *Brown* was all about was a matter of attacking compelled segregation under law. It was not aimed at creating racial balances in our institutions. It was not intended or designed as an end to the horrendous black poverty that continues. It had a very important target, which, I think, it very successfully addressed. And that is ending the blight of post-slavery segregation compelled by state law. So from my perspective, I think the promise of *Brown* has been now realized and that it, I think, deserves its prominence which we are celebrating here today as very possibly the most important decision in the history of the Supreme Court.

Multiple voices: Amen. [Applause.]

Moderator: Ladies and gentlemen, please join me in two activities—one of which you have already anticipated. But before I ask you to applaud again—

I took the occasion to reread *Brown v. Board of Education* last night in preparation for

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today's conversation. I think that one of the most profound things any citizen can do is really to read that opinion, which Chief Justice Warren wrote deliberately for all of us to read. And in those words, which are not about Utopia but are about the abolition of a kind of legal line-drawing that once may have had a place but today has no place, one finds the genius and the accomplishment of the decision.

The second thing I ask you to do is join me again in thanking our guests Jack Fassett, Earl Pollock, Frank Sander and Barrett Prettyman for a wonderful conversation. [Applause]