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A VERY NEW LAWYER'S FIRST CASE: *BROWN v. BOARD OF EDUCATION*

*John J. Cound**

They asked the FBI three times to find me that mid-August weekend in 1953. They couldn't do it. Maybe I should have held up a bank or two. They turned the job over to the Harvard Law School grapevine, and within two hours I had a telegram from my fiancée telling me to call a Philip Elman.

I was a year out of law school and had just completed a wonderful clerkship in New York with Learned Hand. I was on vacation, a job with the Department of Justice to begin September 15. When I called Elman, he said that Justice was forming a group to brief the reargument in the School Segregation Cases. Could I come to work immediately? I reported on Monday and began my first case.

The Segregation Cases were five lawsuits involving segregated schools in Delaware, Kansas, South Carolina, Virginia, and the District of Columbia. The thrust of plaintiffs' claims was no longer for equal schools—for better schools—but for the same schools, for a decision that law-enforced segregation of primary and secondary public schools violated the Constitution of the United States. The principle had been established for graduate and professional schools. The NAACP, in a carefully planned campaign, was now extending its challenge to the lower grades. The focus of the case was aided by a finding in the Kansas district court that the black and white schools of Topeka were physically, and in all other respects, equal. In the other four areas black schools were clearly unequal; in D.C., South Carolina, and Virginia, federal courts had given the states time to build new schools. Interestingly, it was only the state courts of Delaware that, while finding that U.S. Supreme Court precedent allowed separate but equal treatment, nevertheless ordered the immediate admission of black children to white schools,

* Professor of Law, University of Minnesota. This was a talk given to Friends of the University of Minnesota Library, February 5, 1998.

pending efforts to bring the black schools up to equality. The right of the children, the Delaware court said, was personal.¹ The five cases had been argued in December of 1952, but in June 1953 reargument was ordered, with directions "to discuss particularly five questions."

The first two questions dealt with the history of the Fourteenth Amendment. Was there an intention or understanding of Congress, or of the state legislatures which ratified the Fourteenth Amendment, with respect to segregation in the public schools?

The last two questions, perhaps critical to the Court's eventual conclusion, asked whether the Court, if it found a constitutional violation, might allow a gradual adjustment.

The third question asked whether, if the legislative history provided no answer, it was "within the judicial power, in construing the Amendment, to abolish segregation in public schools"?

It was this third question I was asked to brief. The "team" consisted of Philip Elman, a member of the Solicitor General's office, who had handled most of the Government's civil rights work, and four other lawyers, two from Alien Property, one from Antitrust and one from Tax. They were all experienced lawyers. Only I was brand-new. Within the Department overall responsibility for the project lay with the Assistant Attorney General for the Office of Legal Counsel, Lee Rankin, an excellent Nebraska lawyer with no experience in constitutional law. Eisenhower had not yet named a Solicitor General. One consequence of that vacancy provided me with the biggest office I will ever have. All the other team members were established lawyers in the Department; they had offices. I was given the S.G.'s office, about the size of a basketball court with its own bath. I felt like a beetle in the Temple of Karnak. I found a tiny room over the secretary's office, which Justice Reed had put in for himself when he was S.G. There I prepared the Government's answer to Question 3.

Writing a vigorous argument that it was indeed "within the judicial power, in construing the Amendment, to abolish segregation in the public schools" I found myself reflecting that this was a slant quite different from the lessons I had learned during the preceding year from America's stoutest exponent of judicial

1. *Gebhart v. Belton*, 91 A.2d 137 (1952).

restraint. I was still answering some questions from the Judge about a complex case on which I had worked. In a letter I commented that my present task entailed a view of judicial power quite different from the one he had so recently imparted to me. I received a quick reply, in which he said, "I am sorry if anything I have said to you is troubling you in your new work." I assumed he was simply telling me to do my job—Hand was a charter member of Holmes's Society of Jobbists and regarded craftsmanlike performance as man's closest approach to meaning. But I have always wondered whether he was also telling me that he would have had little philosophical problem with this one.

I had been picked for the team because I had a strong law school record, and, most important, I was available. I was certainly not selected because of any track record on the issue. My views on segregation were hardly militant. Until law school, I had never attended an integrated school. Two years in Louisiana, one year in Virginia, and nine years in the District of Columbia schools. Four years at all-white George Washington University. Harvard Law School had a few African-American students, but I think there were none in my class of 1952. I hadn't thought much about the question until Law School. I had frequently in the previous year discussed the issue with Gus Hand's law clerk, a good friend from law school. I think Harry Thayer descended from Massachusetts abolitionists, and he had no doubts about the proper answer. Ironically, after the clerkships my next meeting with Harry was at the Supreme Court during the December oral arguments. He had gone with Davis, Polk in New York, and his first assignment—with which he was distinctly not pleased—was to the South Carolina brief.

I favored integration as a policy, although I was undecided on the constitutional question. I had three reasons for my judgment on policy. First, I could not see any good reason for segregation. Why shouldn't blacks and whites go to school together? Second, it seemed economically dumb. As a Virginia taxpayer, I thought running one school system was hard enough. Why two? Third, separate-but-equal was a myth; it had never existed anywhere with which I was familiar. In Washington, D.C. and Arlington, Virginia, the systems were not even close. The 1951 dissenting opinion of Henry Edgerton in the D.C. Circuit case of *Carr v Corning*² demonstrates that there had been

2. 182 F.2d 14 (D.C. Cir. 1950).

not the slightest attempt to maintain equal schools. (There had been a controversy among the black civil rights lawyers about *Carr*; those who wanted segregation banned outright were opposed to litigating a case which so clearly invited an order to equalize.) Maybe segregation was not per se unconstitutional, but I was authoritarian enough in my legal attitudes that I could not accept ignoring the separate-only-if-equal mandate. A view that the Southern states had forfeited any claim to run separate schools made my conversion to the constitutional position easy.

I have briefed more difficult issues in less important cases. Ironically the precedent most difficult to distinguish was an 1899 opinion by Justice Harlan,³ who had dissented from the separate-and equal doctrine in *Plessy* and insisted that the Constitution is color-blind. The Court permitted the operation of a white high school when no similar school for blacks was provided. Standing by itself, the case clearly does not sit easily with *Brown*. But the Supreme Court had in enough subsequent cases found an obligation of at-least-equality to render the 1899 decision a sport. The argument made in the early '50s by the Southern states that the Fourteenth Amendment did not apply to education had clearly been rejected decades before.

The briefing of Question Three took about three weeks. Just about the time it was finished, we learned of the sudden death of Chief Justice Fred Vinson. Much has been written about the significance of this event to the eventual outcome. Justice Frankfurter is frequently quoted as saying that "This is the first solid piece of evidence I've ever had that there really is a God." At the time no one expressed such a sentiment to me. Perhaps that shows how low on the totem pole I was. Vinson is said to have been opposed to overruling *Plessy*: A sure vote against. I think two comments on Vinson are appropriate: Vinson marshaled the unanimous Courts for the decisions in *McLaurin*⁴ and *Sweatt*⁵—the Oklahoma and Texas law school cases—and in *Shelley v. Kraemer*,⁶ which many scholars in the '50s regarded as the toughest of them all. Second, Earl Warren was certainly a positive accession.

I was then assigned to join the others who were researching the legislative history of the Fourteenth Amendment, and spent about eight weeks in the Library of Congress. The Congres-

3. *Cumming v. Board of Education*, 175 U.S. 528 (1899).

4. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

5. *Sweatt v. Painter*, 339 U.S. 629 (1950).

6. 334 U.S. 1 (1948).

sional history had been finished, but we now engaged in a state-by-state examination. We looked at the governors' addresses, the legislative journals, and the few committee reports. We went page by page through newspapers covering the entire legislative session. We looked into memoirs and current histories. It was fascinating, but it was not very revealing on our questions. You will note that I did not mention legislative debates. In 1866 only two states reported debates: Pennsylvania in full, Indiana in digest. (This was incidentally still the case in 1953.) It is frequently said that there is nothing in the records about schools and segregation (often attributed to the fact that many states had no public education for anybody at the time). But there is a single mention in each of the two states for whom we have a record of debates. In Pennsylvania the mention was by a supporter of the Amendment. In Indiana it was an opponent who threatened, "Pass this amendment, and your children will go to school with black children."

Our conclusion was "in sum, while the legislative history does not conclusively establish that the Congress which proposed the Fourteenth Amendment specifically understood that it would abolish racial segregation in the public schools, there is ample evidence that it did understand that the Amendment established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race and color."

Incidentally, one thing which research showed was that there was a time in this country when party loyalty meant something. In all the non-secessionist states, no Republican legislator voted against ratification; only one Democrat voted in favor. As a Republican in 1953, I was rather proud of that.

We were informed by Elman the day the brief went to the Court that Rankin had told him that Attorney General Brownell had taken the brief to the White House and that the President had approved.

I now began my regular assignment in the Appellate Section of the Civil Division. But when the oral arguments took place I was privileged to sit with counsel. Indeed I was lucky enough to sit immediately behind Thurgood Marshall and Jack Greenberg. When you have been immersed for a dozen weeks on a legal matter, listening to about fifteen hours of argument is interesting, but not very exciting. It is unlikely that anything new or startling will occur. There was one stir. Late on the sec-

ond afternoon, the case from the District of Columbia was begun. The question quickly arose whether the Corporation Counsel continued to represent the School Board. Congress had never ordered segregation in the D.C. schools; it had simply made separate appropriations for what were designated Division One (white) and Division Two (black) schools. Less than two weeks before the arguments the School Board made noises about itself integrating the D.C. schools. There were questions from the Court, but nothing came of it. I thought the Court was not prepared to let the strongest case for integration — the nation's capital—pass out of its reach. My chief memory of the episode came on the third morning, when John W. Davis came over to Thurgood Marshall and smilingly showed him a telegram “from Governor Byrnes saying that I do represent the state of South Carolina.”

The arguments on the whole were solid. A few impressions remain. The very courtly Attorney General of Delaware, Hollywood's image of a Supreme Court advocate. Thurgood Marshall's forceful dignity. John W. Davis, over 80, in the last of a hundred and forty arguments he made before the Court, was not as impressive. The few questions addressed to him by the Justices seemed to reflect a sense that his responses would not be too helpful. (I was told by my later boss in the Department that during the arguments in the Steel Seizure Cases two years before, virtually no questions were addressed to Davis arguing for the steel companies, while a young lawyer making the same arguments for the Locomotive Engineers was subjected to what the boss described as “the most merciless questioning I have ever heard in the Court.”). My favorite of the lawyers was James Nabrit representing the black students in the District of Columbia case. He was a master of the “I'm only a simple country lawyer” approach, although he had an extensive urban practice. He phrased many of his arguments as humble suggestions, while, as a colleague phrased it, “firing greased curveballs past the court.” I was happy to read Richard Kluger conclude in his book *Simple Justice*, that Nabrit had “provided the Negro side with its most memorable moment of oratory.”⁷ Nabrit died in December 1997; I thought the press might have been more attentive to his passing.

One other part of the argument is unforgettable. During an afternoon when the tremendous significance of the occasion be-

7. Richard Kluger, *Simple Justice* 676 (Knopf, 1975).

gan to be challenged by the dim light and warm air of the courtroom, I was glad to see that mine was not the only attention that needed reinforcement. Attorney General Lindsay Almond of Virginia was speaking, and was using the tidewater pronunciation of "nigra." Thurgood Marshall and Jack Greenberg sat in the chairs immediately in front of me, carefully paying attention—to see if Almond slipped into a more opprobrious word. I remember Marshall whispering, "There he almost said it," "That's closer," and finally "There, he did it!"

I doubt the oral arguments affected any vote. They rarely do in the most important cases. But it was hard to observe the quality, the integrity, and the dedication of the NAACP lawyers without feeling that a system that separated them from the rest of us was terribly wrong. That, I think, was the most important contribution of the argument sessions.

The Government's brief argued that if the Court struck down segregation it could order a gradual implementation. The Government had proposed this in 1952 as well. Philip Elman in an oral archive⁸ asserts that this was a necessary concession if some Justices were to be persuaded; it was, he thought, the key to a unanimous opinion. The NAACP argued that a remedy must issue "forthwith." When the Court in May 1954 came down with its opinion declaring school segregation unconstitutional, it ordered another reargument on the remedy. I was vaguely troubled at the time at the delay. The District of Columbia board immediately announced integration for the Fall of 1954. I am glad that George Washington University, though a private institution, made the same decision. But it seemed that the Southern states simply took the time to dig deeper. I did not play any part in the work on the new brief. When the Court in May 1955 announced that integration should proceed "with all deliberate speed," I told a colleague that I was reminded of the story of the young lady who told her boyfriend, "I will give you just one-half hour to take your hand off my knee."

The Government's position, in my view, was justified only if it was necessary to a majority. I have always believed that unanimity was an overrated concern. From *McCulloch v. Maryland* to *Roe v. Wade*, many of the Court's most important decisions have been split. Many unanimous decisions have stirred significant opposition. It is not to be expected, I believe, that experi-

8. P. Elman and N. Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-60: An Oral History*, 100 Harv. L. Rev. 817 (1987).

enced and highly intelligent men and women will easily reach unanimity on propositions more controversial than a geometry theorem. The Court again was unanimous in ordering integration of Little Rock Central High School in 1957; indeed in an unusual gesture the opinion was issued in the name of each justice. It took the United States Army to enforce that one. Incidentally I believe that the President's action and the soldier's bayonets were accepted by the nation because it was the law and the law must be obeyed. I wonder whether that argument would carry so well today?

I make no pretense to having played a significant part in this great case. I can look at the brief and see that I wrote a very important section of it; my contribution to the historical appendix is a substantial part of the best legislative history of the Fourteenth Amendment ever compiled. But I know that if I had not been there the brief and the history would have looked much the same, and the result of the case would certainly not have changed. I was no part of strategic or tactical choices, nor the origin of any brilliant insight. I did a lawyer's job; I am glad we won, and I am proud to have been there. Agincourt would have been won had any single English archer been abed upon St. Crispian's day, but Henry V told the happy few that each would be remembered. When I sat in the court on that second afternoon in the subdued December light and was simultaneously bored and thrilled, there crossed my mind the motto of my high school—the now-most-integrated high school in the city of Washington. The motto, from Virgil: *Haec Olim Meminisse Juvabit*. In times to come it may please us to remember this. It pleases me to remember those days.