

Deciding the Fate of *Brown*

THE POPULIST VOICES OF EARL WARREN AND HUGO BLACK

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Yale Law School hosted a panel discussion titled “Yale Law School Alumni Supreme Court Clerks During the *Brown* Era” on October 31, 2003. Charles Reich, who clerked for Justice Hugo L. Black during the October 1953 Term of the Court, spoke via a teleconferencing hookup from Boston, where he was recovering from heart surgery. What follows is the text of his remarks. A video recording that also includes the remarks of the other panelists (Frederick M. Rowe, William D. Rogers, Ernst Rubenstein, Raymond S. Troubh, and James R. Wimmer) is available at www.law.yale.edu/outside/html/Alumni_Affairs/alumniwkend_av03.htm.

– The Editors

I STARTED WORK August 1 1953 as one of two law clerks for Justice Hugo L. Black of Alabama. The other clerk was David J. Vann, also from Alabama and now unfortunately deceased. I was from New York City, and I was startled to find that Washington, D.C. was a racially segregated city. I was even more surprised to see that the Supreme Court itself was 100% segregated. All of the secretaries and clerks were white, all of the messengers were black and so forth. David and I soon learned that the Court was in disarray, unable to decide *Brown v. Board of Education*, and suffering also from internal rifts caused by Justice Jackson’s unseemly public criticism of

Justices Black and Douglas, and by the Court’s hasty special session to authorize the execution of the Rosenbergs. The latter left Justice Black outraged at what he believed was an egregiously illegal and improper action by the Court. In fact, Justice Black regularly had lunch with us in the Court’s public cafeteria rather than going to the Justices’ private dining room to have lunch with “them.”

We talked about everything but the school segregation cases. Fearing leaks, the Justices had agreed to keep their deliberations secret even from the law clerks, as the other participants in this forum will tell you. Despite the secrecy, David and I were well situated to

Charles Reich is the author of, among other things, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673 (1963). Copyright 2003 Charles A. Reich.

make some intriguing observations on the progress of *Brown v. Board*. David and I enjoyed the remarkable privilege of living in Justice Black's home in Alexandria, Virginia. His wife had recently died, and he said that his grown children did not want him to live alone. We paid a token rent and shared gasoline charges for the daily ride to work, but the wonderful meals, including breakfast and Sunday night dinner cooked by Justice Black himself, were free.

Soon after David and I started work, the Court was shaken by the sudden death of Chief Justice Vinson, which was to have a profound effect on the outcome of *Brown v. Board of Education*. Then came a bombshell. Earl Warren, governor of California, and a presidential contender, was named Chief Justice of the United States. An imposing, dignified man with a warm smile, he immediately reached out to everyone at the Court. When I was first introduced,

he boomed, "How *Are* you Sir," and I nearly fell through the floor. I was twenty-five, and hardly accustomed to being called Sir by anyone. This was the remarkable man who would decide the fate of *Brown v. Board*.

No sooner did Warren arrive than Justice Frankfurter, ever the law professor, sought to gain special influence as the new Chief's "teacher." In the hallway I often saw the unforgettable sight of the two Justices, very large and very small, walking together, with Frankfurter gesticulating with one hand while clutching the Chief's arm with the other hand. For a few weeks Warren played the student, but not after he saw the bullying side of Frankfurter's persona.

One Saturday after the Justices' weekly private conference, Justice Black got in the car

for the ride home and said to David and me, "I thought a man was going to get *hit* today." Eagerly we pressed our Judge for details. In front of all the Justices, Frankfurter had taken a printed draft opinion by Justice Tom Clark and first verbally and then physically torn it to shreds, contemptuously tossing the sheets of paper all over the ornate private room. Frankfurter did not get hit, but the Chief was shocked at the discourtesy. After describing this remarkable scene, Justice Black smiled his

most innocent smile to David and me. "Maybe it's time to invite the Chief to dinner," he said.

I was the owner of a blue 1948 Dodge convertible, my first car. Justice Black sent me to the Wardman Park Hotel in Washington to pick up the Chief Justice, who was coming to dinner alone, having temporarily left his famously photogenic family back in California. Needless to say, I was extremely nervous about my driving, but the Chief put

me at ease, talking about his love of fishing in Baja California. Arriving safely at 619 S. Lee Street in Alexandria, we went up to Justice Black's study lined with books and photos. David and I then had front row seats to watch an encounter whose influence is still with us.

Justice Black started talking about experiences he shared with Warren – running for elective office. Black had run for the Senate in Alabama, driving his own car from town to town. Warren had run for state office in California. They both remembered the humor and hard work involved in getting elected. Both were populists at heart. When we got up to go downstairs to dinner, Warren noticed the framed photograph of the great populist senator from Nebraska, George Norris, dedicated to Hugo Black "with admiration and love."



Senator Hugo Black.

After a steak dinner, we returned upstairs, and Warren had some questions for Black, who had already served on the Court for so many years. What to read, how to write opinions, what philosophy to bring to constitutional questions. Read history, Black said, all the way back to the Romans, because the same struggle between tyranny and liberty was present then and remains with us now. Opinions should be as short, simple and clear as possible, free of excessive footnotes and legal jargon, so that they could be read and understood by ordinary people. A philosophy for a Supreme Court Justice was fidelity, keeping faith with the people by safeguarding their liberties as embodied in the Constitution. A justice must remember that fundamental fairness remains the people's idea of justice. History shows that every form of power will inevitably be abused, Justice Black said. The Court serves as guardian of the people by making sure that no person suffers unjust treatment at the behest of power.

When *Brown* was formally reargued, John W. Davis, the white haired dean of the bar, was passionate in telling the Court that it must not attempt to dictate the social customs of the South. His peroration ended with a direct appeal to the new Chief: there is wisdom in allowing the process of healing to take its own time, and folly in attempting to hurry up the process from outside.

After the argument, returning to Alexandria, David and I were both impressed by the grand old man's eloquence, but Justice Black snorted. Davis talked down to the Chief, Black said. Earl Warren, for all his largeness of persona, was thin-skinned, Black shrewdly

observed. The Chief resented any form of condescension. Asking the Supreme Court of the United States to defer to superior wisdom was certain to make the Chief angry, Black continued. Davis had damaged his case.

Months followed during which we were busy with other cases. Uncertainty about *Brown* was heightened when Justice Jackson was hospitalized after a serious heart attack and no date was set for his return to the Court.

May 17 was a warm sunny day in Alexandria,

Virginia. As we drove to the Court as usual, Justice Black turned to us and said: David and Charlie, you might want to go down to Court today. In those days the Court convened at noon and we were of course there. When the Court entered, Justice Jackson took his seat for the first time since his heart attack, and we knew the great moment was at hand.

It was still the custom in 1954 for the justices to read every word of every opinion when the decision was announced. Thus even after the Chief began the opinion in *Brown*, the suspense con-

tinued, right up to the sentence "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" Warren paused, then continued: "We *unanimously* hold that it does."

When we returned to Justice Black's home in Alexandria that afternoon he asked us to sit down under the grape arbor outside for a session that lasted several hours. He apologized for the secrecy, and said we were now free



Governor Earl Warren and his photogenic family.

to talk as long as we wanted about how the amazing outcome in *Brown* had been achieved.

"Earl Warren has earned his place in history," Black said. He described how the Chief had patiently talked to each justice privately, over many months, slowly building a consensus that would hold school segregation unconstitutional in a single unanimous opinion. Justice Reed was the last and hardest to persuade on the merits, but Warren finally called on Reed's patriotism to avoid dividing the country by a public dissent, regardless of Reed's private views. Frankfurter, who was determined to file a concurring opinion, was simply told, politely but firmly, that a single unanimous opinion would be better for the country.

Thorny legal issues, such as the fate of *Plessy v. Ferguson* or the lack of an equal protection clause in the District of Columbia, were swept aside, and the contentious issue of a remedy was postponed. Warren got what he wanted not by legal arguments but by the force of his personality, and the political skills he had practiced as governor of California.

Justice Black said that although he wrote no

dissent, he strongly disagreed with putting off the remedy. "I would have ordered the plaintiffs admitted forthwith," he told us. The Court, he said, should not withhold a person's constitutional right for any reason once that right had been determined; the right belonged to the individual, and no other interest could override it. It remains an interesting question whether Black's approach might have speeded up the process of desegregation.

Today it has become the custom to appoint to the Supreme Court individuals with judicial or academic backgrounds whose judicial philosophies are well known and can be fully vetted. Earl Warren and Hugo Black were the product of a much earlier tradition of appointing to the court individuals with political backgrounds, often holders of elective office, who had no known judicial philosophy and were free to bring statesmanship and the voice of populist democracy to the Court. Today, when such figures are no longer appointed to the Court, it is worth pondering that the historic decision in *Brown* was the product of the Court's lost populist tradition. *CR*