Actually Remembering
Brown v. Board of Education

John Q. Barrett[*]

On May 31, 1955, the Supreme Court announced its unanimous remedy-phase decision in *Brown v. Board of Education*.[1] This decision, known popularly as "*Brown II*," followed on the unanimous Court's invalidation, a year earlier, of school segregation laws in *Brown I*.[2]

In *Brown II*, the Court remanded the legal cases that had been brought on behalf of black children, who had been unconstitutionally barred from so-called white public schools, to the trial courts where the cases had begun. The Supreme Court ordered those trial courts to achieve the "admission" of those black students to the schools from which they had been excluded unconstitutionally, but in making that charge the Court also used the now-infamous phase "all deliberate speed."[3] Over many ensuing years, judicial and other anti-black racists and resisters to *Brown* tried to claim that phrase as their Supreme Court license for delay and inaction.

In 1955, the detailed future of school desegregation was of course unknowable, but the difficulty of the path ahead was foreseeable. When Justice Felix Frankfurter (who naively, for obscurely historical and personal reasons, had championed inclusion of "all deliberate speed" in the *Brown II* opinion[4]) penned a private congratulatory note late on May 31, 1955, to Chief Justice Earl Warren, the leader of the Court and the author of *Brown I* and *Brown II*, for example, Frankfurter began with a prediction—maybe a

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[1] 349 U.S. 294 (1955)

[2] 347 U.S. 483 (1954).

[3] *See Brown II*, 349 U.S. at 301: "the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

[4] *See gene*rally John Q. Barrett, Introduction to *Supreme Court Law Clerks' Recollections of* Brown v. Board of Education II, 79 ST. JOHN'S LAW REVIEW 823, 835 & n.37, 836-37 & nn. 42-45 (Fall 2005).

very safe prediction—that undeniably has come true: "The harvest of today's planting won't be fully assessed for many a day."[5]

Thursday, June 28, 2007, was one of those many days. The Supreme Court decisions in the Seattle and Louisville school cases (*Parents Involved in Community Schools v. Seattle School District No. 1, et al.*[6]), and the clashing opinions of 2007's deeply divided Supreme Court Justices, show that we are still harvesting *Brown* (or not) and struggling to understand (or not) our historical, constitutional soil, seeds and growth.

The *PICS* opinions are filled with competing claims about *Brown v. Board of Education*. Much of that debate concerns *Brown*'s development and meaning over the past fifty-three years. But some of the debate concerns simply *Brown* and its companion cases themselves in their time at the Supreme Court, 1951-1955. On that, as important resources for anyone who seeks to sort out and evaluate today's arguments and clashing perspectives, I commend the memories and careful thoughts of attorneys who were there, as captured in these Robert H. Jackson Center roundtable discussions:

- John David Fassett, Earl E. Pollock, E. Barrett Prettyman, Jr., & Frank E.A. Sander, *Supreme Court Law Clerks' Recollections of* Brown v. Board of Education, 78 ST. JOHN'S LAW REVIEW 515-567 (Summer 2004);[7] and

- Gordon B. Davidson, Daniel J. Meador, Earl E. Pollock & E. Barrett Prettyman, Jr., *Supreme Court Law Clerks' Recollections of* Brown v. Board of Education II, 79 ST. JOHN'S LAW REVIEW 823-885 (Fall 2005) (click here).[8]

I also commend the clear, accessible words of Chief Justice Warren—whose name, curiously, went unmentioned in any of the Justices'

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[5] Letter from Justice Felix Frankfurter to Chief Justice Earl Warren, May 31, 1955, *in* Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C., Box 574.

[6] 551 U.S. ___, 2007 WL 1836531 (Nos. 05-908 & 05-915, decided June 28, 2007), available at www.law.cornell.edu/supct/html/historics/USSC_CR_0349_0294_ZS.html.

[7] Available at www.stjohns.edu/academics/graduate/law/journals/lawreview/issues/78-3.

[8] Available at www.stjohns.edu/academics/graduate/law/journals/lawreview/issues/79-4/currentissue.sju.

opinions in *PICS*—for the unanimous Supreme Courts of May 14, 1954, and May 31, 1955:

- *Brown v. Board of Education (Brown I)*;[9]
- *Bolling v. Sharpe* (*Brown I*'s companion case, concerning the unconstitutionality of the District of Columbia's segregated schools);[10] and—even—
- *Brown II*.[11]

[9] 347 U.S. 483 (1954), available at www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0483_ZS.html.

[10] 347 U.S. 497 (1954), available at www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0497_ZS.html.

[11] 349 U.S. 294 (1955), available at www.law.cornell.edu/supct/html/historics/USSC_CR_0349_0294_ZS.html.