Lawful, Political, Deplorable Senatorial Behavior (1954)

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When Justice Robert H. Jackson died suddenly in early October 1954, the Supreme Court of the United States had just started its new term. The U.S. Congress was in recess—both Houses had adjourned on August 8, the Senate until November 8 and the House of Representatives *sine die* (i.e., for the remainder of that Congress).[1] During October, most House Members and many Senators were in their home Districts and States, respectively, campaigning for reelection on Tuesday, November 2. President Eisenhower was completing his long summer vacation away from Washington.

On Monday, November 8, six days after the midterm elections, the Senate reconvened in special session. Its task was to consider a proposed resolution censuring Senator Joseph R. McCarthy (R.-WI).

President Eisenhower added to the Senate's work during that "lame duck" session by sending it, also on November 8, his nomination of Judge John M. Harlan of the United States Court of Appeals for the Second Circuit to succeed Justice Jackson on the Supreme Court.[2]

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[1] *See generally* Richard S. Beth & Jessica Tollestrup, LAME DUCK SESSIONS OF CONGRESS, 1935-2012 (74TH-112TH CONGRESSES), Congressional Research Service report (Sept. 19, 2014), *available at* https://www.senate.gov/reference/resources/pdf/RL33677.pdf.

[2] For a thorough account of Justice Harlan's appointment, including the Senate's delays in considering each of his nominations, see TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 87-113 (1992).

Circa 1955: John Marshall Harlan.

In the Senate, Judge Harlan's nomination was referred to a Judiciary Committee subcommittee. Most expected that it would hold hearings promptly, and that Judge Harlan's appointment would be confirmed by the full Senate before Thanksgiving Day, November 25.

On November 19, however, Senator William Langer (R.-ND), the subcommittee chairman, announced that he would not be holding the hearing that month, or indeed before the end of the year. He declared that the subcommittee would not consider Judge Harlan until a new Congress was seated in January 1955.

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All of this was connected to, and it affected, the Supreme Court's ongoing consideration of the constitutionality of state and federal laws segregating school children on the basis of race. On May 17, 1954, in *Brown v. Board of Education* and its four companion cases, the Court had unanimously declared school segregation laws and systems to be unconstitutional.[3] But those decisions had not completed the Supreme

[3] *Brown v. Board of Education*, 347 U.S. 483 (1954). This decision covered four state cases: *Brown et al. v. Board of Education of Topeka et al.* [Kansas]; *Briggs et al. v. Elliott et al.* [South

Court adjudications of the cases. At the same time that the Court had decreed in May 1954 that school segregation was unconstitutional, the Court also had deferred ordering any remedial action. Instead, the Court had restored the cases to its docket for the coming Term and asked the parties to file new briefs addressing the question of remedy.

That process went forward during summer and early fall 1954.[4] On September 21, the Court announced that November 15 would be the deadline for filing briefs, and that the Court would devote the full week of Monday, December 6, to hearing oral arguments.

Then, on October 9, Justice Jackson died.

Then President Eisenhower nominated Judge Harlan.

Then Senator Langer announced that the Senate then sitting would not give Judge Harlan a hearing.

Senator Langer acted as he did at the request of his colleague Senator James O. Eastland (D.-MS). Senator Eastland was an ardent racial segregationist.[5] As he well knew, Judge Harlan was a northerner—a New Yorker. He also was the grandson of the first Justice John M. Harlan, who had served on the U.S. Supreme Court from 1877 until 1911 and famously, in *Plessy v. Ferguson*,[6] dissented alone from the decision upholding the constitutionality of Louisiana's "separate but equal" racial segregation law governing railroad passengers. Senator Eastland was concerned in late 1954 that a Judge Harlan become a(nother) Justice Harlan would be strongly supportive of the *Brown* decision and hostile to racial segregation. Denying Supreme Court nominee Harlan a hearing at that time would preclude him from joining the Supreme Court in time to hear the then-scheduled December 1954 oral arguments about the proper remedy for

Carolina]; *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*; and *Gebhart et al. v. Belton et al.* [Delaware]. The fifth case was a national government case, arising from the District of Columbia. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

[4] I described and documented this regularly misdescribed history, including "behind the scenes" activities by Supreme Court justices and their law clerks, in my introduction to 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, 827-37 (2005), available for download at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=928873.

[5] To view a 1957 Mike Wallace interview of Senator Eastland regarding his segregationist views, visit www.hrc.utexas.edu/multimedia/video/2008/wallace/eastland_james_t.html.

[6] 163 U.S. 4537 (1896).

unconstitutional school segregation, and it might keep Harlan off the Court altogether.

On the morning following Senator Langer's "no hearing for Harlan" announcement, the *Washington Post* published the following editorial:

> There are most unfortunate overtones in the delay in confirming John Marshall Harlan to be an Associate Justice of the Supreme Court. Senator Eastland of Mississippi, whose objection caused the Senate Judiciary Committee to postpone hearings on Mr. Harlan until January, cited no good reason for his course. But everyone knows that the [oral] argument on how the court should carry out its antisegregation ruling has been set for December. The effect of the Eastland objection is to force the court to go ahead with only eight members on the bench or to postpone this important and long-scheduled hearing.
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> Of course the Senator had a right to object, and if any serious question concerning the nomination of Mr. Harlan had been raised, a careful investigation would be necessary. But the only objections filed with the Judiciary Committee have been too trivial to justify a moment's consideration. One letter complained that Mr. Harlan was a Rhodes scholar, others that he had been a member of the advisory board of the Atlantic Union, that he lacks sufficient experience and that his law firm once represented a telephone company. Senator Eastland did not dignify these objections by referring to them, and the effect was to leave his obstructionism entirely without justification. In the circumstances it is difficult to escape the conclusion that he used a senatorial prerogative to make it more difficult for the Supreme Court to go ahead with the segregation case.[7]

[7] *Mr. Eastland's Obstruction*, WASH. POST, Nov. 20, 1954, at 8 (editorial); *accord The Senate's Record*, WASH. POST, Sept. 18, 1955, at E4 (editorial) ("The [Senate] stalling and nit-picking on the confirmation of Justice Harlan … [was] downright disgraceful."). Perhaps an author who contributed to these editorials was Merlo J. Pusey, who at various times covered the Supreme Court for the *Post* and was a scholar of the Court's history and the award-winning biographer of Chief Justice Charles Evans Hughes.

Two days later, the Supreme Court responded publicly. It issued a new order in *Brown*: "In view of the absence of a full Court," it announced, the school segregation cases "scheduled for argument December 6th[] are continued."[8]

* * *

On December 2, 1954, the outgoing Senate voted to censure Senator McCarthy. It then adjourned *sine die*. President Eisenhower's nomination of Judge Harlan to serve on the Supreme Court, sent by the President to that Senate, the 83rd, accordingly expired.

The new Senate, the 84th, convened on January 3, 1955.

President Eisenhower did not change course. On January 10, he sent to the new Senate his new, second nomination of Judge Harlan to be an Associate Justice of the Supreme Court.

After further delays, which President Eisenhower criticized publicly,[9] the Senate held Judge Harlan's confirmation hearing.

On March 16, the full Senate, voting 71-11, confirmed Justice Harlan's appointment to the Supreme Court.

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[8] *Brown v. Board of Education*, 348 U.S. 886 (1954) (*per curiam*).

[9] On February 2, 1955, during his weekly press conference, President Eisenhower gave these answers to questions about the Senate's delay in considering Judge Harlan:

> Q. [by Donald Irwin, *New York Herald Tribune*]: Mr. President, it is nearly 3 months since you sent Judge Harlan's nomination to the Senate, and the Judiciary Committee has put off hearings until the 23d of February; and I wondered if you had any comment.
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> A. None, except that I continue to believe that Judge Harlan's qualifications for that post are of the highest; certainly they were the highest of any that I could find.
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> …
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> Q. [by Roscoe Drummond, *New York Herald Tribune*]: Mr. President, may I ask a further question about Judge Harlan? Do you think there is an inordinate delay in holding the hearings on Judge Harlan, and do you think that this delay could conceivably harm the functioning of the Court itself?
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> A. Report was made to me that the members of the Court naturally wanted to have a full Court as early as they could. So I moved as rapidly as I could to find a proper individual and recommended him to the Congress after the vacancy occurred as fast as I could. Now, I think it is too bad that the delay seems to be necessary in the eyes of the committee; but on the other hand, I, as usual, don't intend to stand up and publicly criticize Congress for what it does. I personally think it is unfortunate that this delay has to occur.

THE PRESIDENT'S NEWS CONFERENCE, Feb. 2, 1955, *available at* www.presidency.ucsb.edu/ws/index.php?pid=10401.

Spring 1955: The Supreme Court of the United States.
Front row, L-R: Associate Justices Felix Frankfurter and Hugo L. Black, Chief Justice Earl Warren, and Associate Justices Stanley Reed and William O. Douglas.
Back row, L-R: Associate Justices Sherman Minton, Harold H. Burton, Tom C. Clark, and John M. Harlan.

Shortly thereafter, the Court announced that it would devote the full week of April 11 to hearing oral arguments in the school segregation cases.

Seven weeks later, on May 31, 1955, the Supreme Court decided the school segregation remedy cases, *Brown II*, unanimously.[10] The Court sent the five cases before it back to the trial courts in which they had been filed. It directed those courts to use their equitable powers to fashion practical, flexible decrees remedying unconstitutional racial segregation in public schools.[11] The Court also directed those courts to require each defendant school board or other government entity or official to "make a prompt and reasonable start toward full compliance" with the May 1954 *Brown I* decision.[12] But the Court also authorized the trial courts to make factual findings thereafter, as they retained jurisdiction over these cases,

10 *Brown v. Board of Education*, 349 U.S. 294, 299–301 (1955).

11 *See id.* at 299–300.

12 *Id.* at 300.

that any defendant had established a need for additional time as it pursued "good faith compliance at the earlier practicable date" with the Supreme Court's school desegregation decree, and thus to grant such an extension.[13] Finally, as to the plaintiffs—the black school children—in the five cases, the Supreme Court directed the lower courts "[t]o take such proceedings and enter such orders and decrees consistent with this [*Brown II*] opinion as are necessary and proper to admit [the children] to public schools on a racially nondiscriminatory basis with all deliberate speed . . . ."[14]

[13] *Id.*

[14] *Id.* at 301.