

Hospital Report (1954)

*John Q. Barrett**

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On May 8, 1954, Justice Robert H. Jackson was a hospital patient—he was spending his fortieth day in Doctors Hospital in downtown Washington, D.C. Justice Jackson was recuperating from the serious heart attack he had suffered on March 30th. By May 8th, he was “out of the woods” but still under close supervision by doctors and nurses. He was building up his strength in preparation for his release in coming weeks.

On that May 8th morning (it was a Saturday), Chief Justice Earl Warren arrived at the hospital to visit Justice Jackson. His law clerk, E. Barrett Prettyman, Jr., visiting Jackson at the time, excused himself and went down the hall.

The Chief Justice delivered for Jackson’s review, and they discussed, three documents that Warren (and his law clerk Earl Pollock) had drafted: a cover memorandum regarding the school segregation cases that the Supreme Court was in the process of deciding; a memorandum (in effect a draft opinion) regarding four consolidated cases, captioned together as *Brown v. Board of Education*, on the constitutionality of racial segregation in state school systems; and a memorandum on a federal case, *Bolling v. Sharpe*, concerning racial segregation in District of Columbia schools.

The documents each concluded that racial segregation in public schools was unconstitutional. Justice Jackson had known, and he was part of the Court majority that agreed, that this was to be the Court’s holding. Jackson also had known that Chief Justice Warren, confirmed and commissioned in his office just six weeks earlier, would be writing for the Court.

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Warren, saying that he would return that afternoon, left Jackson to read the documents. When he did, he was very pleased with both. On the “Memorandum on the State Cases,” Jackson penciled a number of editorial comments. On the “Memorandum on the District of Columbia Cases,” he made just one small pencil mark of highlight or agreement in a margin.

When Barrett Prettyman returned to Jackson’s room, the Justice let the young lawyer read the Chief Justice’s drafts and then they discussed them. Each felt that the drafts “could use a little more law.”

Jackson asked Prettyman to type up legal justification language and he soon did. It included a clause criticizing the wisdom and justification of *Plessy v. Ferguson*, the 1896 Supreme Court decision affirming the constitutionality of racially segregated railway cars.

When Jackson reviewed Prettyman’s draft, he concluded quickly that he did not wish to suggest that idea to Chief Justice Warren. In Jackson’s view, which Warren shared and the Court in the end followed, it was a time to look only forward, not to criticize or blame perpetrators of past and present segregation.

When Chief Justice Warren returned to the hospital that afternoon, Jackson congratulated him on his drafts and stated his agreement. Jackson suggested an idea or sentence to be added to each draft and the Chief Justice agreed.

Jackson also suggested that the Chief add more explicit statements of the legal rationales for the Court’s holdings. Warren rejected these suggestions because they could be applied to segregation generally. He wanted everything in the opinions to be directed at segregation in public education. He explained, and Jackson agreed, that in these decisions the Court should, to maximize public acceptance, not intimate that segregation in other fields also was unconstitutional.

In the following week, the Chief Justice’s draft opinions were honed, printed and circulated to the Justices, including Jackson in the hospital. Chief Justice Warren returned to the hospital at least once more to confer with Jackson.

On Monday, May 17th, Justice Jackson left Doctors Hospital with his son, one of his doctors and a nurse. He went directly to the Court. He

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was present on the bench that afternoon when Chief Justice Warren announced the Court's unanimous decisions that racial segregation in public schools was unconstitutional.