

# **Nine Votes, Nine Present: The Unanimity of *Brown v. Board of Education***

*John Q. Barrett\**

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On May 17, 1954, the Supreme Court of the United States decided *Brown v. Board of Education* and its companion cases. The Court held that government segregation by race of school children was, henceforth, barred by the U.S. Constitution. The Court declared that state government school segregation was barred by the Fourteenth Amendment's Equal Protection Clause,<sup>1</sup> and that federal government school segregation was barred by the Fifth Amendment's Due Process Clause.<sup>2</sup>

During the Court's public session on that Monday, Chief Justice Earl Warren announced that his opinions for the Court in these cases were unanimous—all eight Associate Justices had voted to join him.

Chief Justice Warren announced the decisions in the company of all of his colleagues—a full Court of nine Justices filled the bench.

Each of those components—nine votes for Warren's opinions for the Court, and nine Justices present as the decisions were announced—came together thanks to the decision and effort of, in each instance, one justice who could be called a late joiner.

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\* Professor of Law, St. John's University, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York ([www.roberthjackson.org](http://www.roberthjackson.org)). On May 17, 2018, I emailed to The Jackson List the original version of this essay. This updated version is dated June 2, 2018.

The Jackson List is a large group to which I send emails, usually once or twice a month, about Justice Jackson, the Supreme Court, Nuremberg, and related topics. The Jackson List does not display recipient identities or distribute their email addresses. To subscribe, email me at [barrettj@stjohns.edu](mailto:barrettj@stjohns.edu).

The Jackson List website is <http://thejacksonlist.com>. It is a searchable archive of hundreds of past posts, produced in book-look PDF format with hyperlinks and, in many cases, embedded photographs and document images.

<sup>1</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954), available at [www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0347\\_0483\\_ZS.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0483_ZS.html).

<sup>2</sup> See *Bolling v. Sharpe*, 347 U.S. 497 (1954), available at [www.law.cornell.edu/supct/search/display.html?terms=bolling&url=/supct/html/historics/USSC\\_CR\\_0347\\_0497\\_ZS.html](http://www.law.cornell.edu/supct/search/display.html?terms=bolling&url=/supct/html/historics/USSC_CR_0347_0497_ZS.html).

Justice Stanley Reed was the justice who made the Court's decisions unanimous. In 1952, after the Segregation Cases were first argued at the Court, Reed had voted in the Justices' conference to adhere to the segregation-permitting "separate but equal" doctrine of *Plessy v. Ferguson* (1896). He stuck to those views in 1953 and perhaps into 1954. He drafted what could have become an opinion dissenting from a Court decision declaring school segregation to be unconstitutional.

But Justice Reed decided by Spring 1954 not to use that draft, and instead to vote as he did.

Reed's final "deciding"—in the sense of deciding to sign on to actual opinions declaring that school segregation was unconstitutional—began on Friday, May 7, 1954. On that day, Chief Justice Warren circulated typed memoranda, which really were draft opinions, for his colleagues to review.

The next day, Warren met with Reed, and also with other Justices. Reed, having read the drafts, no longer was saying that he intended to vote to uphold the constitutionality of school segregation.

Over the next days, Warren continued to converse with his colleagues about the cases. By Wednesday, May 12, the Chief Justice began to tell Associate Justices that the Court would be unanimous.

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Justice Robert H. Jackson was the justice whose presence made the Court physically complete when Chief Justice Warren announced on Monday, May 17, the unconstitutionality of school segregation.

In late March 1954, Justice Jackson suffered a major heart attack and almost died. Thereafter, he convalesced at Doctors Hospital in downtown Washington, ultimately for 49 days, and thus he was absent from the Court.

On Saturday, May 8, Warren visited Jackson twice at the hospital, in the morning to deliver the memoranda/draft opinions, and in the afternoon to discuss them. In the second meeting, Jackson voiced his enthusiasm for the drafts and suggested some edits and inserts—a couple of which the Chief Justice accepted.

On Monday, May 10, Justice Felix Frankfurter visited Justice Jackson at the hospital. Frankfurter found that Jackson was expecting to be released from the hospital in a week or less.

On Tuesday, May 11, Jackson, accompanied by a nurse, made his first foray out of the hospital—they went to lunch at a nearby French restaurant. (1954 cardiology!)

Two days later, on Thursday, May 13, Justice Jackson wrote a short letter to his colleague Justice Harold Burton:

Dear Harold

After our delightful visit [on April 21] it was most thoughtful of you and Selma to send the beautiful plant which still adorns my [hospital] room and is destined to be transplanted in the garden [at my home].

I think I have about served my sentence here and am promised release, without benefit of habeas corpus, Sunday [May 16]. A few days later I can come to the Court for short days. I expect to be able to attend a conference or two and a decision day or two before adjournment [for the Court's summer recess].

With thanks and good wishes

Bob

Here is an image of that letter as Jackson penned it on hospital stationery:<sup>3</sup>

DOCTORS HOSPITAL  
WASHINGTON 6, D. C.

4-25

Dear Harold

After our delightful visit it was most thoughtful of you and Selma to send the beautiful plant which still adorns my room and is destined to be transplanted in the garden.

I think I have about served my sentence here and am promised release, without benefit of habeas corpus, Sunday. A few days later I can come to the Court for short days. I expect to be able to attend a conference or two and a decision day or two before adjournment.

With thanks and good wishes

Bob

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<sup>3</sup> See Letter from Robert H. Jackson to Harold H. Burton, undated (est. May 13, 1954) (original), in *The Papers of Harold H. Burton*, Library of Congress, Manuscript Division, Washington, D.C., Box 399, Folder 9. The letter itself is undated; the “4-25” on its top right corner is not a date but a document number, added by someone who put sequential numbers (4-24, 4-25, 4-26, et seq.) on items in Justice Burton’s scrapbook. Because Burton noted in his diary that he received this letter from Jackson on Friday, May 14, 1954, I conclude that Jackson likely wrote it at the hospital and then sent it to Burton at the Court on the previous day.

In this letter, Jackson was referring back to Burton's visit to Jackson in the hospital on Wednesday, April 21. Now, three weeks and one day later, Jackson was reporting that he expected to be released from the hospital on Sunday, May 16, and to begin coming to the Supreme Court a few days after that for short conference and decision announcement days. Jackson was indicating, implicitly, that he was unaware that there would be a special reason for him to try to be present in Court on Monday, May 17.

On the afternoon of Thursday, May 13, probably within hours of Justice Jackson writing and sending the above letter to Justice Burton, Chief Justice Warren again visited Jackson at the hospital. Warren showed Jackson the now-printed Warren opinions for the Court in the Segregation Cases. This demonstrated that the decisions were ready to be announced on the Court's next decision day: Monday, May 17.

It seems that Jackson told Warren during this May 13 hospital visit that Jackson could and would be present on the bench for those decision announcements. It mattered to Jackson, and also to the Chief Justice, that the full Court be physically, visibly present in its moment of unanimous decision.

On Friday, May 14, Chief Justice Warren's proposed opinions were tweaked, reprinted, and recirculated to each justice.

On Saturday morning, May 15, Justice Frankfurter wrote by hand to Chief Justice Warren and had the note delivered to his Court chambers. Frankfurter, indicating his understanding that Jackson was well enough to join the Court on the bench, urged the Chief to announce the school segregation decisions on Monday, May 17:

May 15

Dear Chief:

An opinion in a touchy and explosive litigation, once it has been agreed to by the Court, is like a soufflé—it should be served at once after it has reached completion. And so I venture to urge that no room be left for contingencies—one

can never tell—nor for the  
real danger of leakage, since  
walls are supposed to have  
ears. I am assuming,  
of course, that all are in [i.e., voting with Warren]  
and that Bob [Jackson] can be here Monday! Yrs  
FF<sup>4</sup>]

Later that morning, eight Justices met in conference at the Court. Jackson was absent. Although still hospitalized, he actually was, during the hours when his colleagues were conferencing, out with his nurse and doctor for another French restaurant lunch.

In that Saturday, May 15, conference, the Justices discussed the Segregation Cases and agreed that the unanimous decisions would be announced two days hence.

And so they were, with all Justices present.

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**A note about ongoing research:**

Although many historians and others have done excellent research and writing about *Brown v. Board of Education*, including on the particulars of how the Justices of the Supreme Court were thinking and what they communicated to each other at specific points in time as they were deliberating, conferencing, and deciding the School Segregation cases, the vast universe of published work on *Brown* includes some errors and many matters that remain open to interpretation. (See, for example, my explanation in footnote 3, above, of why I date an undated document as I do.)

As I continue to research and write about *Brown*, I would be grateful to receive your comments, interpretations of existing evidence, and new discoveries. Please email me at [barrettj@stjohns.edu](mailto:barrettj@stjohns.edu). Thank you.

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<sup>4</sup> Note from Felix Frankfurter to Earl Warren, May 15, 1954 (original), in *The Papers of Earl Warren*, Library of Congress, Manuscript Division, Washington, D.C., Box 571.