Brown Conference Notes

From Justice Douglas's conference notes in *Bolling v. Sharpe*
(the segregation case from the District of Columbia)
Dec. 13, 1952

Chief Justice Vinson: Congress has not declared there should be no segregation--hard for Chief Justice to get away from that construction of the Amendments--schools here have long been segregated--Harlan in his dissent in *Plessy* does not refer to schools--that is significant to Chief Justice and he can't get away from that construction by those who wrote the amendments and those who followed--Congress has the power to act in the District and in the states--it may act in the District either directly through the Board of Education or by a new statute.

From Douglas's conference notes in *Brown v. Board of Education*
Dec. 13, 1952

Chief Justice recites some of the long history of segregation in schools--Chief Justice believes segregation not required--doubts if it can be banned.

Black: there may be violence if Court holds segregation unlawful--states would probably take evasive measures which ?? to obey--the courts would then be in the firing line for enforcement through injunctions and contempt--can't draw a rational distinction between this case and other cases under the 14th amendment as respects the self-executing argument--he is compelled to belief that reason for segregation is the opinion the colored people are inferior--the Amendments have as their basic purpose protection of the negro against discrimination--southerners say it is to prevent the mixture of the races--purpose of the law is to discriminate because of color--the Amendments were designed to stop that--he concludes that segregation per se is bad *unless* the long line of decisions bars that construction of the amendment.

Reed: takes different view from Black--the state legislatures have informed views on this matter--minority here has not been assimilated--states are authorized to make up their minds on this question--there is a reasonable body of opinion in the various states for segregation. He points to the constant progress in this field and in the advancement of the interests of the negroes--states should be left to work out the problem for themselves--segregation is gradually disappearing; optional in Kansas, Kentucky, and others. Segregation in the border states will disappear in 15 or 20 years. In the deep south separate but equal schools must be allowed.

Frankfurter: these are equity suits--they involve imagination in shaping decrees--he would ask counsel on reargument to address themselves to problems of enforcement--he favors reargument in the state as well as the District cases--few things more dangerous than the unfamiliar--how does Black know the purpose of the fourteenth amendment?--he (Frankfurter) says he has read all of its history and he can't say it meant to abolish segregation-- . . . --on Kansas alone he would reverse on the finding of the trial court--equal protection does not mean what *was* equal but what *is* equal--he wants to know why what has gone before is wrong--he can't say it's

unconstitutional to treat a negro differently than a white--but he would put all the cases down for reargument.

Jackson: nothing in the text that says this is unconstitutional--nothing in the opinions of the courts that says it's unconstitutional--nothing in the history of the 14th amendment--on basis of precedent he would have to say segregation is OK--refers to segregation in New York in the 1860s and in 1890. Says it will be bad for the negroes to be put into white schools--he won't say it is unconstitutional to practice segregation tomorrow--but segregation is nearing an end--we should perhaps give them time to get rid of it and he would go along on that basis--. . .

Douglas: segregation is an easy problem--no classifications on the bassis of race can be made--14th Amendment prohibits racial classifications, so does due process clause of the 5th--a negro can't be put by the state in one room because he's black and another put in the other room because he's white--the answer is simple though the application of it may present great difficulties.

Burton: *Sipuel* crossed the threshhold of these cases--education is more than buildings and faculties--it's a habit of mind--with 14th Amendment states do not have the choice--segregation violates equal protection--total effect is that separate education is not sufficient for today's problems--not reasonable to educate separately for a joint life--he refers to his policies as Mayor of Cleveland in putting colored nurses, etc. in white hospitals--. . . 5th amendment bars segregation--he would give plenty of time in this decree.

Clark: result must be the same in all the cases--refers to Texas where the problem is as acute as anywhere--Texas also has the Mexican problem--Mexican boy of 15 is in a class with a negro girl of 12. Some negro girls get in trouble--if we can delay action it will help--opinion should give lower courts the right to withhold relief in light of troubles--he would go along on that--otherwise he would say we had led the states on to think segregation is OK and we should let them work it out.

Minton: body of law has laid down separate but equal doctrine--that however has been whittled away in these cases--classification on the basis of race does not add up--it's invidious and can't be maintained.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 17, 1954.

Memorandum for the File
in re Segregation Cases

The above cases which were decided today were twice argued -- once in December 1952 and once in December 1953. At the original conference in December 1952 it was decided that there should be no recorded vote in the cases because of the likelihood that there might be some leaks.

In the original conference there were only four who voted that segregation in the public schools was unconstitutional. Those four were Black, Burton, Minton and myself. Vinson was of the opinion that the Plessy case was right and that segregation was constitutional. Reed followed the view of Vinson and Clark was inclined that way. In the 1952 conference Frankfurter and Jackson viewed the problem with great alarm and thought that the Court should not decide the question if it was possible to avoid it. Both of them expressed the view that segregation in the public schools was probably constitutional. Frankfurter drew a distinction between segregation in the public schools of the District of Columbia and segregation in the public schools in the States. He thought that segregation in the public schools of the District of Columbia violated due process but he thought that history was against the claim of unconstitutionality as applied to the public schools of the States.

So as a result of the informal vote at the 1952 conference, it seemed that if the cases were to be then decided the vote would be five to four in favor of the constitutionality of segregation in the public schools in the States with Frankfurter indicating he would join the four of us when it came to the District of Columbia case.

The matter dragged on during the 1952 Term until as a result of further discussions it was decided to put the cases down for reargument. But it is apparent that if the cases had been decided during the 1952 Term there would probably have been many opinions and a wide divergence of views and a result that would have sustained, so far as the States were concerned, segregation of students.

By the time the cases were reached for argument Vinson had died and Warren had taken his place. At the conference following that argument in December 1953 Black was absent but he sent in his vote indicating that he thought that segregation in the public schools was unconstitutional. His vote, together with Burton's, Minton's and my own made four. Chief Justice Warren was very clearly of the view that segregation in public schools was unconstitutional. That made a bare majority for the reversal of the judgments below. Reed voted the other way. He thought that segregation was constitutional. Clark was inclined that way although doubtful. So was Frankfurter and so was Jackson. The latter two expressed the hope that the Court would not have to decide these cases but somehow avoid these decisions.

It was once more decided to treat the matter informally, not to take a vote and to have the Chief Justice prepare a memorandum.

The matter was brought back to conference for further discussion. During the Term I mentioned it to the Chief Justice and I think Harold Burton did also and each time he said he was working on the matter. He circulated proposed opinions in the two sets of cases on May 7th, bringing them around to our offices by hand. These were in typewritten form. After they were read and suggestions made, the opinions were typed up and they went through one revision between May 7th and May 15th, the date of our conference. Everyone thought that at least Justice Reed was going to write a dissent but he finally agreed to leave his doubts unsaid and to go along. Frankfurter, Jackson* and Clark agreed to do the same. It was then decided to get the cases down either May 17th or May 24th. Someone suggested that they be delayed until May 24th because there were still some primaries in the South that the decision might adversely effect. But at the end of the Conference on Saturday, May 15th it was decided, if possible, to get them down on May 17th to prevent any leaks or advance information or tip-offs or rumors about the opinions.

It was decided by a few of us** who worked closely with Chief Justice Warren on the matter that these opinions should be short and concise and easily understood by everyone in the country, that they should be written for laymen and not for lawyers, that they should be brief, succinct and to the point.

William O. Douglas