

Fall 2004

Brown and Shades of Gray: Ex Parte Communication in the Litigation Over Racial Justice

Norman I. Silber

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Norman I. Silber, *Brown and Shades of Gray: Ex Parte Communication in the Litigation Over Racial Justice*, 31 *Litigation* 6 (2004)
Available at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship/626

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

Brown and Shades of Gray: Ex Parte Communication in the Litigation over Racial Justice

by Norman I. Silber

As the justices contemplated their case, a complicated picture emerged. Their opinion would dramatically affect the rights of African Americans in predominantly white America. Massive resistance and violence would be the likely result of any holding that upset the status quo. And yet, by acting courageously, the Supreme Court could align the Constitution with human dignity and equality. A clear and bold decision might just avert looming civil unrest.

To buy time for a consensus, the justices delayed. Several received advice from outside the Court and corresponded secretly with political leaders from the other branches of government. Some leaked information about their views to the press. The president contacted members of the Court privately. Congressmen lobbied the Court as well.

Rumors spread that the president and the chief justice were conspiring over the case.

No, the story above is not about *Brown v. Board of Education*, 347 U.S. 483 (1954), the most remarkable civil rights case of the 20th century. It is about *Dred Scott v. Sandford*, 60 U.S. 393 (1857)—the most controversial civil rights litigation of the 19th century. By the time *Dred Scott* was finally decided, the multiplicity of opinions produced substantial confusion about what it actually held. Justice Taney wrote an “opinion of the Court.” Justice Curtis wrote a dissent. Several others wrote partial concurrences. In the end, however, this much seemed certain: As a result of the opinion, Negroes could not be citizens of the United States; Congress had no power to exclude slavery from the federal territories; and, accordingly, the Missouri Compromise was unconstitutional. Adverse reaction throughout the North was immediate and intense.

Historians have confirmed that significant back-door communications between Southern politicians, especially the

president and the Court, swayed the deliberative process. The timing, operative language, and logic of the opinions all changed in response to political intrigues and partisan interests. *Dred Scott* diminished hope for confining the reach of slavery through the legal process. It made the American Civil War all but inevitable. The result, and the manner in which it was reached, diminished the stature of the Supreme Court and cemented a popular belief in its sectional bias and political partisanship.

Almost 100 years later, *Brown v. Board of Education* offered the Court a possible opportunity to redeem—from the perspective of an increasingly diverse and liberal nation—its judicial legacy. Popular interest in a case that might challenge racial segregation in American public schools increased throughout the late 1940s, as the NAACP transformed its quest for racial justice into a national social movement. Furthermore, as the competition between the two global “superpowers” intensified, competition between them over ideological respect for people of different races, religious groups, and nationalities emerged as a dimension of the Cold War.

More immediately, *Brown* required the justices to consider the narrower, institution-building context of their decision. Shortly before World War II, severe conflict over the constitutionality of New Deal legislation had left the Court’s place in the constitutional scheme highly problematic. President Franklin Roosevelt had proposed to pack the Court with New Deal sympathizers. All this occurred while the newer jurisprudence of “legal realism” contended that what the justices did was based less on enduring principles and more on the political and social context in which problems arrived at the Court. These developments suggested that the Court might just be making up the law to suit powerful interests, and its reputation and authority suffered as a result.

By the early 1940s, Roosevelt appointees dominated the Court, and the ideological tug-of-war over activism took a different form. Justices Douglas and Black, particularly, minimized the need for restraint in discovering core constitutional

Norman I. Silber is a professor at Hofstra University School of Law. He is the author of With All Deliberate Speed: The Life of Philip Elman, an oral history (2004).

values and in applying federal standards to the states, even as Justices Frankfurter and Jackson continued to profess the importance of deference to legislative will.

After FDR's death, President Truman occasionally placed pressure on the Court to see things his way. When Chief Justice Harlan Fiske Stone died in 1946, Truman replaced him with his friend Fred Vinson from Kentucky. According to historian Roger Newman, their special relationship included a phone in Truman's bedroom that connected directly at Vinson's house. *Hugo Black* (1994). In the spring of 1952, rumors circulated that before Truman seized steel mills to alleviate a national strike, he had received an "advance opinion" from the chief justice that it would be constitutional to do so. (Vinson was proved wrong, however, and wrote a dissent to the court's later decision overturning the seizures.) Relations between the justices worsened further as the Court mishandled appeals and stays in the convictions and executions of Julius and Ethel Rosenberg.



It was in this context of institutional fragility, ideological division, and political partisanship that the justices contemplated the five test cases that were grouped as *Brown v. Board of Education*. At that time, restoring the Court's earlier public image of legitimacy had become a special priority. A clear decision in *Brown*, it was hoped, might rebuild the Court's integrity, independence, nonpartisanship, and procedural rectitude.

The cases began to work their way up toward the Court in 1950. The first briefs were submitted there in December 1952 and were argued for the first time in front of the Court in early 1953. Several justices, Frankfurter and Jackson among them, believed that the race cases presented a special set of challenges to the Court's fragile stature. They had strong views about what they did and did not want the opinion in *Brown* to look like.

Philip Elman, the assistant to the solicitor general and former clerk to Justice Frankfurter, played a central role in developing the government's position. Elman described what Frankfurter had told him about his approach to dealing with the constitutionality of the separate-but-equal doctrine in the years between 1950 and 1952:

Frankfurter wanted the Court to deal with the issue openly, directly, wisely, courageously, and more than anything else, unanimously. He did not want the segregation issue to be decided by a fractured Court, as it then was; he did not want a decision to go out with nine or six or four opinions. He wanted the Court to stand before the country on this issue united and speaking in a single voice. He felt that whatever it did had to go out to the country with an appearance of unity, so that the Court as an institution would best be able to withstand the attacks that inevitably were going to be made on it.

[Author's Note: Quotations of Philip Elman are from *With All Deliberate Speed*, which is based on oral history recordings originally conducted under the auspices of the Columbia Oral History Research Project in 1983 and 1984.] In 1952, however, a unanimous or nearly unanimous outcome was not likely. According to Elman, in 1952 Justice Frankfurter could not count "five sure, or even probable, votes for overruling" *Plessy v. Ferguson*, 163 U.S. 537 (1896), which had adopted the principle of "separate but equal."

Justice Jackson shared Frankfurter's view that whatever the Court did, it should do as a united tribunal. In Elman's account, what Justice Jackson sought was to "erase *Plessy v. Ferguson*, simply erase it. Neither say it's wrong nor say it's right. . . . And he wanted, until the very end, for the Court to be honest and admit that it was rendering a political (as he called it) decision." But at that time, no justice could find a position to unite the bench. Justices Frankfurter and Jackson decided to try to postpone a decision for as long as possible.

Elman's account of his conversations with Frankfurter, published in *Harvard Law Review* in 1986, state that the justice helped Elman decide to argue for gradualism in the integration of public elementary schools in the government's December 1952 brief. That argument permitted the justices to reach a common agreement about the resolution. A year after the famous unanimous 1954 decision declaring that separate but equal had no place in American public education (*Brown I*), the Court decreed in *Brown II*, 349 U.S. 294 (1955), that school integration would occur under the supervision of the federal district courts, and "with all deliberate speed." It adopted

gradualism and rejected other possible solutions that might have accomplished integration swiftly.

The *New York Times* described Elman's private discussions with a justice as little short of a betrayal of the ethics of the legal system. In a March 24, 1987, editorial, the newspaper opined that Elman had behaved "with all deliberate impropriety." But as it turns out, there is more to the story of ex parte communication than one conversation between one attorney and one justice.

Before *Brown I*, Elman had represented the government before the Supreme Court in other cases that advocated the reversal of *Plessy*. As the assistant solicitor general who handled virtually all of the government's civil rights cases in the court, Elman encouraged Solicitor General Philip Perlman and Perlman's superiors to side with the African-American plaintiffs in such cases as *Shelley v. Kraemer*, 334 U.S. 1 (1948) (outlawing racially restrictive residential covenants); *Henderson v. ICC*, 180 F.2d 711 (7th Cir. 1949), *cert denied*, 339 U.S. 963 (1950) (invalidating segregated dining car rules); *Sweatt v. Painter*, 340 U.S. 846 (1950) (ordering the plaintiff's admission to a white law school based on unequal black school); and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (compelling integration of seating in a graduate school).

Perlman, however, drew a line when Elman urged support for the *Brown* plaintiffs. "Much to my surprise and dismay," Elman told me, "Perlman's response was, 'No, it's much too early to end segregation in public schools. You can't have little black boys sitting next to little white girls. The country isn't ready for that. This would lead to miscegenation and mongrelization of the races.'" According to Elman, Perlman's bigotry left those who hoped the government would intervene in favor of integration hopelessly stuck. "All the letters to the attorney general, all the telephone calls, all the visits that were paid to him didn't make him budge. Perlman said no, 'The line has to be drawn. Trains, dining cars, law schools, graduate schools, yes—but not public schools, no sir!'"

Then came a corruption scandal in Truman's Justice Department that radically changed everything. Attorney General J. Howard McGrath was replaced by James P. McGranery. Perlman and McGranery did not work well together, and Perlman departed in August 1952. Elman and Acting Solicitor General Robert Stern then sought and received a go-ahead to intervene on behalf of the plaintiffs in *Brown*.

In December 1952, before the option of gradualism was placed before the Court, Elman—basing his views to a considerable degree on Frankfurter's accounts—had counted three sure votes to reverse *Plessy* (Black, Douglas, Burton), and three votes to uphold the segregation of public elementary education (Reed, Clark, Vinson). He counted on Frankfurter to either concur or reverse, and he was not sure what Jackson or Minton would do. Elman searched for an argument that "would get Jackson, that would hold Frankfurter, that would even get a strong majority to hold racial segregation unconstitutional but would provide some kind of cushion." He wanted to give the Court "some insurance against the inevitable fallout of a court decision requiring immediate integration everywhere."

Elman took pride in his draft of the 1952 government brief in *Brown*, which suggested that if the Court held racial segregation in public schools unconstitutional, the district courts

should have a reasonable period of time to work out the details and timing of implementing the decision. On reading the brief, Frankfurter called to tell Elman that he had rendered a "service to the nation." The measure the brief suggested captured the idea of gradualism Frankfurter sought to import from nonconstitutional contexts.

The phrase "with all deliberate speed" surfaced for the first time in Solicitor General Jay Lee Rankin's oral argument in *Brown I*. Elman helped prepare Rankin for that argument and was familiar with Justice Frankfurter's use of the words in several earlier cases, borrowed, Frankfurter said, from Justice Oliver Wendell Holmes. Justice Frankfurter suggested to Chief Justice Earl Warren that it would be appropriate as a middle ground between immediate relief and interminable delay. Frankfurter convinced Warren to include the phrase in the 1955 relief decree, which ordered implementation to take place under the jurisdiction of the district courts. The result took the shape of the proposal that the government suggested in its 1952 brief.

After it was incorporated into the decree, "with all deliberate speed" became the notorious shorthand for judicial tolerance—some said encouragement—of resistance to integration. On the day the relief decree was issued, the phrase signaled to Thurgood Marshall and others that the Court's promise in *Brown I* had been hollowed out by *Brown II*. To them, "with all deliberate speed" meant simply *slow*. For more than a decade after *Brown II*, revanchist school district

"With all deliberate speed" became shorthand for judicial tolerance of resistance to integration.

administrators and local politicians would retard integration by use of that language.

Nevertheless, Elman took credit for the gradualist proposal. He included it, he said, despite the fact that it was essentially unprincipled and "indefensible" in denying relief for a personal constitutional violation. But the phrasing made it possible to reverse the separate-but-equal doctrine with more than a bare majority, and without concurrences or dissents. He included it because he believed the *Brown* cases, which were essentially test cases, were brought improvidently and prematurely—"in the wrong places, at the wrong time, using the wrong arguments."

Separating the constitutional principle of colorblindness from the remedy of gradualism was a proposal that both principal parties opposed. Yet it carried great weight because it conveyed endorsement by the Democratic Truman administration and, after the 1952 elections, the Republican Eisenhower administration as well. In Richard Kluger's classic account *Simple Justice* (1976), he called the government's brief "a good deal more useful to the Justices than all ten briefs filed in the five cases by the litigants."

In participating in the oral history, Elman stressed that although he and Frankfurter had many private conversations

about the litigation and the other justices' views about it, Justice Frankfurter did not spoon-feed him the "all deliberate speed" language. "But it did grow in my mind out of my many conversations with him over a period of many months." The suggestion in the government's brief, Elman assures us, "came as a complete surprise" to Frankfurter. Elman also emphasized that his proposal for gradualism was not based on what he thought was right. Rather, Elman was "counting votes" and seeking a realistic formula to win the case and "knock out separate but equal" without damaging the Court or the public educational systems. And without presenting the gradualist alternative to the Court as Elman did, the outcome in *Brown* might well have been profoundly unhappy from many different perspectives.

Even with the gradualist formula in front of them, however, the justices did not reach any conclusion about their collective position at their first conference early in 1953, after the oral argument. The arguments include some illuminating exchanges between the justices and John W. Davis, Thurgood Marshall, and Robert Carter. But there were also some especially low points. Elman described how Milton Korman, representing the District of Columbia, raised a phantom from the past:

The courtroom was filled. John W. Davis was on the same side, and Korman said something like this: "I would like to read to the Court some eloquent words written by a Chief Justice of this Court many years ago, as relevant to this case as they were to the case in which he wrote." And I listened and tried to figure out what it was he was reading from. What case was this? After about thirty seconds, I got it and couldn't believe, I just couldn't believe it. He was reading to the Court from *Dred Scott v. Sandford* . . . By God, when he finished reading, he said, "Your Honors, those are the words of Chief Justice Roger Taney in the case of *Dred Scott v. Sandford*." It was incredible! Imagine, the *Dred Scott* case, the one case everyone agrees was the worst decision in the history of the Supreme Court, and he read that to them in arguing the D.C. case.

The specter of *Dred Scott* hung over the Court—as if it needed reminders about just how dangerous its opinion might be.

When the justices discussed the cases after the first arguments ended, they did not take a vote. Their subsequently published notes suggest that a decision at that time would have involved dissents, and probably, concurrences. Vinson, Reed, and Clark seem to have been unpersuaded as to the need to reverse *Plessy*. Jackson and Frankfurter had trouble reconciling their personal views with their jurisprudential conservatism and the political and social magnitude of a reversal. Douglas, Black, and Minton appeared ready to reverse without further discussion; Burton wanted "plenty of time" in any decree. As a group, as Elman put it, "They couldn't decide the cases, they didn't know what to do with them, they had no majority, and they hadn't even taken a formal vote, because they didn't want to harden anybody's position." So they set the cases down for reargument, including new briefs and new oral arguments, which took place after the 1952 presidential elections.

The major intended effect of the delay was to box the Eisenhower administration into taking a position in support of school desegregation. As Elman said, "When the Court announced its decision, [Frankfurter] wanted both the present

and former presidents of the United States to be publicly on record as having urged the Court to take the position it had. And that's exactly the way it worked out."

The remainder of the story may sound familiar, particularly in this 50th anniversary year. When Fred Vinson unexpectedly died late in September 1953, Frankfurter considered the death enormously beneficial to the cause of ending school segregation. "As long as Vinson was Chief Justice, they could never get unanimity or anything close to it," Elman told me.

On October 5, 1954, Earl Warren took his seat as chief justice. He proved extraordinarily gifted and courageous in many respects. He was especially talented in negotiating with his colleagues—reflected in his engineering of the two-part *Brown* decision that divorced the finding of a constitutional violation from its remedy. Having been present but largely silent at the reargument of the case, he told his colleagues soon afterward that delays no longer were appropriate and that he personally had concluded that segregation of Negro schoolchildren had to be ended, "with a minimum of emotion and strife."

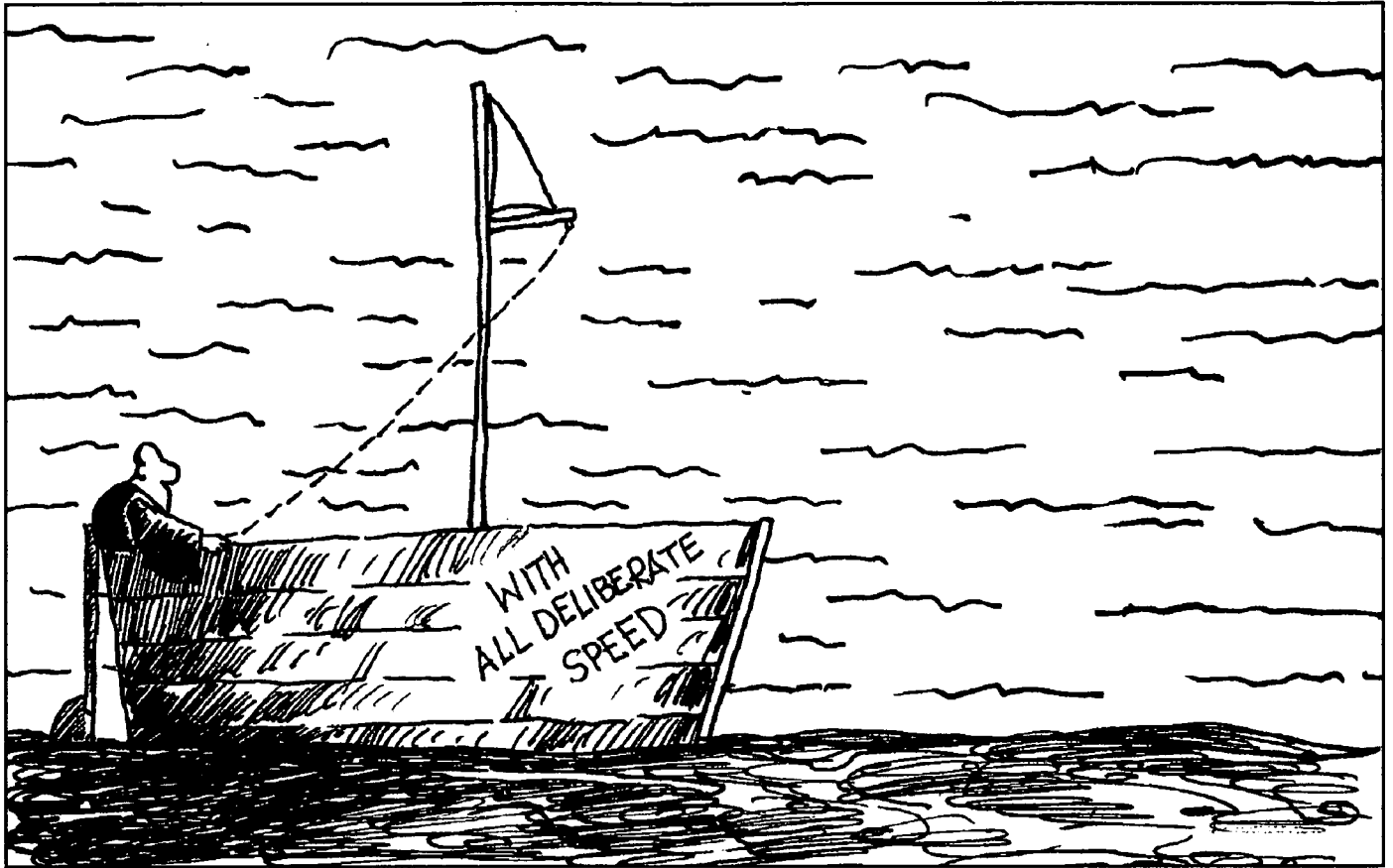
As Elman viewed it, Warren's job had been made easier than generally has been understood. By the time Warren assumed his office, Vinson was dead, disagreement over principle had narrowed considerably, and the proposal of gradualism achieved through district court supervision and enforcement offered the possibility of accomplishing desegregation with less "emotion and strife."

The Court announced its opinion in *Brown I* on May 17, 1954, concluding that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown I* was unanimous, and its declaration ending segregation in public schools rang in clarion tones. What remained in this unusual case was a decree to grant relief.

Around the time that the Court set the case down for further argument on that issue, Frankfurter wrote a mutually congratulatory note to Elman that together, they had managed to succeed in their efforts to "keep political considerations out of the Court's deliberations." But, he remarked, keeping politics out of the remaining litigation would be especially difficult. Although the public arguments among the parties suggested that this might be true, the justices themselves had less difficulty in reaching a conclusion than Frankfurter had feared.

The briefs and oral arguments on the issue of relief in 1954 exposed the deep divisions between the parties. Each side staked out opposite positions on many issues, including the amount of time to allow for compliance with the decision ending segregation. The surviving conference notes, memoranda, and reflections of the justices, however, show that when they met in April 1955 to discuss a relief order, there was considerable agreement about what the decree should look like. They tended to agree with Justice Minton that the main goal should be, as Kluger reported, "to get the desegregation process started without, in the process, revealing its own impotence to make it happen." Justice Black impressed on the other justices that it would be especially difficult to desegregate rapidly in the South. The idea of a time limit, in particular, was not generally appealing. Finding their way toward a unanimous relief decree was considered of great importance. Elman's discussions with Justice Frankfurter led to the approach that made unanimity possible.

What should we make of all this? Did the conversations



between Frankfurter and Elman constitute “improper machinations,” as some suggested? Were they unusual, whether or not they were improper? Do they support the criticism that *Brown* might have been an unprincipled decision or an illegitimate overreach of judicial authority, or both? Would their discussions be improper today, or are we unrealistically naive about the way the most important of Court decisions often are made? It should be noted that the list of Supreme Court decisions criticized for possible improprieties and improper conflicts of interest includes several of the most important decisions the Court ever has decided—not just *Dred Scott* and *Brown* but also *Marbury v. Madison* and *Bush v. Gore*.

In evaluating these questions, we may begin with Elman’s own defense of his behavior. When I asked him whether, through their private discussions, Justice Frankfurter had been receiving a government “brief” from him all along—one to which John Davis and others never had a chance to reply—Elman appealed to the larger cause in which he had been enlisted:

I have no easy, snappy response to that view. In *Brown* I didn’t consider myself a lawyer for a litigant. I considered it a cause that transcended ordinary notions about propriety in a litigation. This was not a litigation in the usual sense. The constitutional issue went to the heart of what kind of country we are, what kind of Constitution and Supreme Court we have: whether, almost a century after the fourteenth amendment was adopted, the Court could find the wisdom and courage to hold that the amendment meant what it said, that black people could no longer be singled out and treated differently because

of their color, that in everything it did, government had to be color-blind.

He said that he would not defend his discussions with Frankfurter in technical terms. “I just did what I thought was right,” he said. He had acted reflexively:

I regarded myself, in the literal sense, as an *amicus curiae*. The personal relationship that existed between Justice Frankfurter and me was very close. I was his law clerk emeritus, and he regarded me as his law clerk no matter where I was and what I did. That continued to be the case until the day he died.

Usually there were unspoken restrictions on their conversations. They never substantively discussed a case that Elman had argued before the Court. But, Elman reminded me:

Brown v. Board of Education, which we fully discussed, was an extraordinary case, and the ordinary rules didn’t apply. In that case I knew everything, or at least he gave me the impression that I knew everything, that was going on at the Court. He told me about what was said in conference and who said it.

Criticism erupted when portions of the Elman interviews were published in the *Harvard Law Review*. Some scholars and popular commentators claimed that, even if Elman’s conversations were the only ones that took place and even if they were ethically improper, they were defensible from a larger moral perspective in light of their success in overturning racial apartheid. On March 26, 1987, Max Lerner editorialized in the *New York Post*: “Elman’s answer rings true: Without that little impropriety you would not have had this enor-

mous contribution to American constitutional life of the 20th Century.” The *Los Angeles Times* similarly opined on March 29, 1987: “It may not have been right for Frankfurter to tell Elman what was going on inside the Court, but it’s a lucky thing that he did.” Others did not and would not agree. The *New York Times*, for example, wrote on March 24, 1987: “The secret, one-sided relationship, once divulged, cries out for contemporary judgment: It was wrong.”

Elman elaborated further in his own defense in an April 1, 1987, letter to the *New York Times*. He stated that the criticized conversations occurred when neither he nor Frankfurter believed that the civil rights attorneys in the Solicitor General’s Office would be permitted by Perlman and his superiors to file a brief on behalf of the government.

Should Justice Frankfurter and I have had the prescience to foresee the unlikely series of events, described in the oral history, that culminated in Mr. McGranery’s reversal of the Perlman-McGrath decision? Looking back now in the perspective of an Edwin Meese 3d as Attorney General, perhaps I should have recused myself from working on the amicus brief. I must plead guilty: It never occurred to me.

Nonetheless, editorials and reports continued to criticize Elman’s private conversations with Justice Frankfurter. Andrew Kaufman, a Harvard professor and former Frankfurter clerk, faulted his judge for having “engaged in *ex parte* conversations with a lawyer for the United States, which was involved as *amicus* in the most important case of the century.” See “Constitutional Law and the Supreme Court: Frankfurter and Wellington,” *N.Y.L. Sch. L. Rev.* 45 (2001):143. The idea that Elman’s status as his “law clerk for life” might trump Elman’s actual role as a government lawyer was, Kaufman argued, an “entirely specious notion.” Kaufman further noted that, considering the civil rights litigation in which the government already had been involved, Elman’s clarifications did not wholly refute assertions of mutual impropriety. “Even if they occurred when it seemed unlikely that the United States would participate,” Kaufman wrote, “that does not change the fact that the United States Government had been involved in previous litigation raising the issues of *Brown* and had an enormous interest in the outcome of the pending litigation.”

More recently, Derrick Bell’s book *Silent Covenants* (2004) suggests that in light of the subsequent failures of school desegregation litigation, an opinion that actually affirmed *Plessy* but insisted on equalization of every aspect of educational and social institutions would have been preferable to the actual outcome in *Brown*. From that perspective (with which this author does not agree) those conversations would be deemed not constructive of racial justice but destructive of racial equality.

Neither the original oral history transcript nor the *Harvard Law Review* excerpts clearly conveys that Elman and Frankfurter entirely stopped talking about the *Brown* cases as soon as the government became involved. Indeed, Elman’s stated view that he considered *Brown* “a cause that transcended ordinary notions about propriety in a litigation” suggests that they did not.

In the view of some prominent scholars, it would have transgressed ethical rules for Elman, as a lawyer, to communicate with Frankfurter about *Brown* at any time during the pendency of the litigation, regardless whether he represented

a party. “The proscription of *ex parte* communications goes back at least to the ABA’s 1908 Canons of Professional Ethics,” Professor Monroe Freedman wrote to me in a private communication in 2003. “Canon 3 says in part: ‘A lawyer should not communicate or argue privately with the judge as to the merits of a pending case.’ Note the disjunctive.” Judges were guided by related proscriptions:

... He [the judge] should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application . . . he should not permit the contents of . . . briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

Canons of Professional Ethics, Canons of Judicial Ethics, Canons 33 and 17 (1936 ed.) 2, 33.

Elman argued implicitly that Canon 3 as it was then understood was meant to prohibit lawyers from arguing *their own* pending cases with judges, that lawyers were just as free as others to converse with judges about matters in which they were not involved, and that he had talked to Frankfurter about *Brown* only while the government was not an intervenor. Elman also suggested that his role in the Solicitor General’s Office granted him special latitude to communicate with the court in circumstances where that communication was invited.

I have not yet found a discussion by Justice Frankfurter of his habits in communicating with Elman or other friends

Elman suspected or knew that Frankfurter was conversing with others about overruling *Plessy*.

about pending or nonpending cases. I have, however, examined the private correspondence between the two men that each saved. Frankfurter was a wonderful letter writer, in the epistolary tradition of late 19th and early 20th century correspondents. Elman, too, was a splendid writer who corresponded comfortably. The two men did have a close relationship, and it seems clear that their common interest in legal affairs and current events, rather than the Canons, generally was uppermost in their thoughts as they talked and wrote to each other.

It adds a dimension of complexity to realize that Elman’s discussions with Justice Frankfurter, when they did take place, probably occurred in the context of private conversations Frankfurter had with friends on every side of the civil rights struggle. Elman suspected or knew that Frankfurter was conversing with others on the subject of overruling *Plessy*.

Frankfurter maintained friendships with Southerners who

defended *Plessy*, as well as with at least one clerk working with the NAACP. In *Simple Justice*, Richard Kluger's rich history of the *Brown* decision, he implies that at least two others who were close to Frankfurter—James Byrnes, the former justice and governor of South Carolina who actively participated in the defense strategy, and William Coleman, a former Frankfurter clerk who provided services for the NAACP Legal Defense Fund—also talked with him about the case. Kluger does not specify the timing.

In contrast, at least some of the justices appear to have avoided any outside discussions of the case. Justice Minton's biographers state that Minton would not discuss the case with anyone else. "Regarding all the Court's business, but especially pertaining to *Brown*, Minton was adamant that neither he nor his law clerks would discuss the deliberations of the Court with outsiders, either then or in the future." Linda C. Gugin and James E. St. Clair, *Sherman Minton: New Deal Senator, Cold War Justice* 263-64 (1997).

Unwillingness to hear from other litigants outside normal court channels was not uniform across the Court, however. In an authoritative biography of Governor Jimmy Byrnes, David Robertson makes clear that Byrnes did not feel shy about communicating with several other friends and former colleagues on the Court about *Brown* while the case was being decided. "[I]n the spring and summer of 1953, before the rehearing," Robertson wrote, "Byrnes made the rounds of his former place of employment at the Court . . . he lobbied two

The justices were concerned that their conference deliberations would not remain private.

old friends there, Chief Justice Fred Vinson and Associate Justice Felix Frankfurter." *Sly and Able: A Political Biography of James F. Byrnes* 517 (1994).

Justice Jackson's secretary, Elsie L. Douglas, in an April 28, 1954, letter to C. George Niebank, a former Jackson law clerk, reported that Byrnes also had a "confab" with Justice Jackson in his hospital room in April 1954, the same period during which Chief Justice Warren was circulating drafts of the *Brown* opinion to Jackson. Jackson Papers, Box 17, Library of Congress. Chief Justice Warren's memoirs reflect that President Eisenhower tried to encourage ex parte communication when, at a White House dinner, he seated Warren near himself and John W. Davis, who was representing the *Brown* defendants. Warren recollected that Eisenhower "went to considerable lengths to tell me what a great man Mr. Davis was." At the end of the meal and "speaking of the Southern states in the segregation cases," Eisenhower said, "These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes." Earl Warren, *The Memoirs of Earl Warren* 291 (1977).

The justices, furthermore, apparently were concerned that

their conference deliberations about the case would not remain private. In a memorandum for the file dated May 17, 1954, Justice Douglas recorded that "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." *The Supreme Court in Conference* 660 (Del Dickson, ed., 2001).

Ex parte communication in the *Brown* cases was not limited to the level of the Supreme Court. Professor Jack Greenberg relates that in lower court proceedings in *Briggs v. Elliott*, the exposure of "backdoor dealings" between members of the NAACP board and Judge J. Waties Waring worried Thurgood Marshall considerably. Jack Greenberg, *Crusaders in the Courts* 122 (1994).

Multiple private conversations would not diminish the extent of impropriety by any of the parties, according to ethics scholar Monroe Freedman. "Even if Frankfurter was listening to lawyers on all sides (not likely)," Freedman pointed out, it would be theoretically possible but most unlikely for multiple violations to have canceled one another out. Frankfurter was not providing each lawyer with "the substance of each of the other communications and giving the lawyers a chance to respond." In a multi-judge court, the other justices should have been made aware of what was going on. Finally, "[I]t doesn't matter whether the lawyer is representing a party, currently or imminently. The judge shouldn't be getting extrajudicial communications without making the parties aware of them."

Professor Freedman's view that whether a lawyer is representing a pending party shouldn't affect the prohibition is reinforced by ethical rules adopted since *Brown*. In 1990, in response to several publicized instances of ex parte communication between courts and experts and scholars, the Judicial Conference added section 1(b) to Canon 3, which permits judges to "obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." Notwithstanding this enactment, several conclusions are likely: Some private conversations with judges still take place outside the Canon's newer notification rules; some judges continue informally to invite the opinions of former law clerks, scholars, and other non-party attorneys about pending cases; and prohibiting all such contact is not universally supported.

Notwithstanding the rules of legal ethics, several respected justices and several honored litigants communicated ex parte in *Brown*. The fact that multiple litigants had multiple discussions with multiple justices should sharply refocus attention to examining the difference between the Court's formal rules of ethics and procedure on one hand and its actual behavior on the other.

If *Brown* was the exception, its treatment was unusual because it presented such extraordinary perils—so politically delicate, socially sensitive, difficult to discuss squarely in a public forum, and potentially destructive of judicial authority—that some of the justices set their formal rules aside to receive perspectives about the case that might not have been available in a hearing. And yet the uncomfortable truth remains: However useful these multiple back channels were, they were also arguably unnecessary, definitely irregular, possibly unfair, and unlawful by the Court's own rules. □