With Much Deliberation and Some Speed: Eisenhower and the *Brown* Decision

By MICHAEL S. MAYER

RECENT HISTORICAL WRITING ON THE EISENHOWER ERA HAS focused on the president's active participation in the formulation of both foreign and domestic policy. This new work has dispelled the notion that Dwight D. Eisenhower was a "do-nothing" president who delegated too much authority to subordinates, was an incompetent, or at least was a bumbling, grandfatherly caretaker. The earlier view was influenced at least in part by the fact that liberal Democrats of one shade or another were responsible for the preponderance of historical writing on the postwar era. The experience of the American involvement in Indochina and the domestic unrest of the 1960s prompted a reexamination of the postwar liberal consensus. Influenced by this trend, some historians began to view the 1940s and 1950s from a new perspective. In addition, as previously closed papers were opened to scholars, new information became available for historical study. These two elements combined to create an active interest in the 1950s. Through this research, a new image of the thirty-fourth president has emerged. He appears now to have been an aware, indeed clever, politician who functioned behind the scenes while allowing his subordinates to announce and implement policy decisions. In doing so, he projected to the public an image of a man above petty political infighting. Nevertheless, he participated in the formulation of policy, often from the earliest stages, and always reserved the final decision for himself.

The first fruit of this new scholarship on Eisenhower began to appear in the early 1970s. Much of this work stressed not only his activism but also his conservatism.[1] These studies had only limited

[1] See for example Gary W. Reichard, *The Reaffirmation of Republicanism: Eisenhower and the Eighty-third Congress* (Knoxville, Tenn., 1975).

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access to the enormous treasures contained in the Eisenhower Library. The release in 1975 of the papers of James C. Hagerty, Eisenhower's capable press secretary, vastly increased both the quantity and quality of material available to historians. That same year an even larger and richer body of papers became available for research—the files of Eisenhower's personal secretary, Ann Whitman. The enormously rich Whitman files led to a second major reevaluation of Eisenhower in a decade. While the new material reinforced the perception of Eisenhower as an active president and an astute politician, it called into question the notion that Eisenhower was a rock-ribbed conservative. His personal correspondence in particular revealed that, although he was a fiscal conservative, Eisenhower's politics fell well within the consensus established by Franklin Roosevelt and the New Deal. Studies reflecting this research have recently begun to appear.[2]

Eisenhower's response to the issue of civil rights demonstrates the dominance that he exercised over policy within his administration and the political maneuvering with which he sought to implement his policies. A careful examination of his handling of civil rights also destroys forever the neat lines of traditional historiography, which glorifies the contributions of Harry S. Truman and John F. Kennedy and portrays Eisenhower's two terms as an intervening period of quiescence. Neither, however, do the facts indicate that Eisenhower was an unequivocal advocate of racial equality.

Complex and at times ambiguous, Eisenhower's personal attitudes towards desegregation were refracted through his perception of his duty as president of the United States. Personally, he believed it

[2] Elmo Richardson, *The Presidency of Dwight D. Eisenhower* (Lawrence, Kan., 1979); Fred I. Greenstein, *The Hidden-Hand Presidency: Eisenhower as Leader* (New York, 1982); Fred I. Greenstein, "Eisenhower as an Activist President: A Look at New Evidence," *Political Science Quarterly*, XCIV (Winter 1978–1979), 575–99; Richard H. Immerman, "Eisenhower and Dulles: Who Made the Decisions?" *Political Psychology*, I (Autumn 1979), 3–20; James C. Duram, *A Moderate Among Extremists: Dwight D. Eisenhower and the School Desegregation Crisis* (Chicago, 1981); William Bragg Ewald, Jr., *Eisenhower the President: Crucial Days, 1957–1960* (Englewood Cliffs, N. J., 1981); Michael S. Mayer, "Eisenhower's Conditional Crusade: The Eisenhower Administration and Civil Rights, 1953–1957" (unpublished Ph.D. dissertation, Princeton University, 1984); and Robert F. Burk, *The Eisenhower Administration and Black Civil Rights* (Knoxville, Tenn., 1984). While several of these works argue for a more positive evaluation of Eisenhower's policies, there is no agreement among revisionists. On the issue of civil rights, Duram regards Eisenhower as a moderate and evaluates his civil rights policies more favorably than has generally been the custom. Ewald paints a similar picture of a man caught in the middle. On the other hand, Burk contends that Eisenhower was committed only to "symbolic equality" and established an ideology that conservatives and opponents of civil rights have used since the 1960s. His account of Eisenhower and the *Brown* decision is similar to the traditional view of Eisenhower as an obstructionist. Burk's treatment, however, is less than comprehensive.

wrong to deny the rights of citizenship or equality of opportunity to anyone because of race, and, as president, he considered it his duty to ensure that all citizens received equal treatment at the hands of the government. Thus, he determined that the activities of the federal government should do nothing to support and should in no way be tarnished by segregation. He sympathized, however, with southerners whose social system would be disrupted, and he shared some of their misgivings towards blacks. He believed that rapid desegregation would affront southerners and that forced contact between whites and unassimilated blacks would result in conflict, thus setting back the cause of desegregation. His course of action reflected these concerns and resulted in a policy aimed at gradual, noncoercive desegregation, which at times seemed to be working at cross purposes.

The first year of Eisenhower's presidency witnessed landmark gains such as the end of segregation in the nation's capital, the unprecedented appointment of blacks to clerical and administrative positions in the executive branch, significant steps towards the actual desegregation of the armed forces, and a commitment to end segregation and discrimination in federal employment. All of this was accomplished with as little fanfare as possible. For the most part, subordinates implemented policies and announced those that required public articulation. Eisenhower's hand remained invisible, and he associated himself publicly with the policies only to a limited extent. Moreover, all of these reforms affected areas in which the federal government exercised sole jurisdiction and the executive branch possessed unilateral authority. Eisenhower wanted no part of a noisy, partisan battle with Congress. Nor did he desire any confrontation with the states over principles of federalism. Indeed, in such a conflict, he tended to side with the states, a concern that constituted the primary distinction between Eisenhower and the liberal Democrats of his era with respect to civil rights.

In the spring of 1954 the focus of civil rights changed dramatically. On May 17 the U. S. Supreme Court declared unanimously that segregated public schools violated the Constitution of the United States. The decision culminated a decades-long struggle waged in the courts by the National Association for the Advancement of Colored People. The Court postponed granting relief, however, until after it could hear arguments on that issue in the fall.[3] Eisenhower's reaction to the Court's decision would be crucial, both to the public's response and to

[3] *Brown* et al. v. *Board of Education of Topeka, Kansas*, et al., 347 U. S. 483 (1954), at 495.

the Court's willingness to frame a decree that might require executive action for enforcement. Despite the significant advances of Eisenhower's first year or so in office, no one could predict just what his response would be. While he had committed his administration to desegregating the armed forces and the nation's capital city and to ending discrimination in federal employment, the president had also maintained his opposition to a federal Fair Employment Practices Committee. Moreover, Eisenhower had made clear "his displeasure with 'punitive or compulsory federal law'" in this area and opposed as "extraneous" (as did many liberals) the attempts of Congressman Adam Clayton Powell, Jr., to forbid the allocation of federal funds to any recipient who practiced or sanctioned segregation.[4]

From the preinaugural period the school segregation cases had presented a dilemma to the newly elected president and his administration. In the last of days of Truman's presidency the Justice Department filed a brief as an *amicus curiae* on behalf of black children seeking admission to previously all-white schools. Impetus for the brief came from Philip Elman, a Justice Department lawyer and a former law clerk to U. S. Supreme Court Justice Felix Frankfurter. Final say on the decision, however, rested with Attorney General James P. McGranery, who insisted that the brief not be filed until after the election of 1952 so as not to make desegregation an issue and thus create a problem for the Democratic presidential candidate, Adlai E. Stevenson.[5]

The government's decision to enter the case on behalf of the plaintiffs resulted from a complicated set of circumstances that allowed a concerted effort by liberals in the Justice Department to secure the government's entry. Solicitor General Philip B. Perlman, who served during the Truman administration, had been moderately sympathetic towards civil rights, intervening forcefully in *Shelley* v. *Kraemer* and *Henderson* v. *U. S.*, cases that related to restrictive covenants and segregated facilities used in interstate travel, respectively. He drew the line, however, at *Briggs* v. *Elliott*, which challenged segregated public schools in Clarendon County, South Carolina. Graduate and professional schools were one thing, but mandated desegregation in public secondary schools was quite another; moreover, he feared open defiance from the South. Elman wrote a forceful memorandum

[4] *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1954* . . . . (Washington, D. C., 1960), 293; Herbert S. Parmet, *Eisenhower and the American Crusades* (New York and London, 1972), 436–37 (first quotation on p. 437), 442–43 (second quotation on p. 443); Robert J. Donovan, *Eisenhower: The Inside Story* (New York, 1956), 155, 161.

[5] Daniel M. Berman, *It Is So Ordered: The Supreme Court Rules on School Desegregation* (New York, 1966), 60–61; telephone interview with Philip Elman, November 23, 1976.

urging intervention, but Perlman remained steadfast. During this period Attorney General J. Howard McGrath was forced to resign for failing to prosecute scandals within the administration. McGranery, a federal judge who had served in Congress with Truman, replaced McGrath. A number of officials at Justice considered McGranery to be close to irresponsible; Perlman clashed with him immediately and resigned shortly thereafter. Robert L. Stern, whose views on civil rights more closely approximated Elman's, took over as acting solicitor general. McGranery did not interfere with or obstruct the efforts of Elman and Stern to involve the government in the case.[6]

Normally, the solicitor general takes responsibility for deciding in which cases the government asks for *certiorari* or appeal and which cases to enter as an *amicus curiae*, although in politically explosive cases the attorney general almost always takes part in the decision. Perlman was an influential and competent solicitor general, and his resignation left that highly important, if little understood, office vacant for thirteen months as the several cases that came to be known collectively as *Brown* v. *Board of Education* made their way to the Supreme Court. Stern served as acting solicitor general both before and after the brief tenure of Walter J. Cummings, who held the office from December 2, 1952, to March 1, 1953. Stern functioned in that capacity first from August 15 to December 2, 1952, and again from March 2, 1953, until February 15, 1954, when Simon E. Sobeloff became solicitor general. Thus, when Elman suggested that the government file a brief in the school cases, the Justice Department was in an unusual state of flux. The situation contributed to the success of the persistent efforts of Elman and Stern as the Truman era wound to an end.[7]

When Eisenhower took the oath of office, the Supreme Court had already heard arguments on school segregation in cases from South Carolina, Kansas, Virginia, the District of Columbia, and Delaware. On June 8, 1953, the Supreme Court announced that it wished to hear reargument on October 12 and set out a series of five questions to

[6] Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York, 1976), 558; *Shelley* et ux. v. *Kraemer* et ux., 334 U. S. 1 (1948); *Henderson* v. *United States* et al., 339 U. S. 816 (1950); *Briggs* et al. v. *Elliott* et al., 342 U. S. 350 (1952).

[7] For information on the solicitor general's office see Archibald Cox, "The Government in the Supreme Court," *Chicago Bar Record*, XLIV (February 1963), 221; Charles Fahy, "The Office of the Solicitor General," *American Bar Association Journal*, XXVIII (January 1942), 20–22; Erwin N. Griswold, "The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court," *Missouri Law Review*, XXXIV (Fall 1969), 527; and Simon E. Sobeloff, "Attorney for the Government: The Work of the Solicitor General's Office," *American Bar Association Journal*, XLI (March 1955), 229–32, 279.

which counsel were to address themselves. The questions posed by the Court concerned the intention of the framers of the Fourteenth Amendment, the power of Congress and the courts to abolish segregation, and whether or not the Court had power to grant gradual relief. At the same time the Court invited the attorney general to file a brief and participate in the oral arguments.[8]

The new men, Herbert R. Brownell, Jr., attorney general; William P. Rogers, deputy attorney general; and J. Lee Rankin, assistant attorney general, met with Elman and Stern. According to Elman, Rogers expressed the prevailing view of the Republicans when he said, in effect, "Jesus, do we really *have* to file a brief?" Whether or not he was as reluctant as Elman has suggested, Brownell did remove the case from the solicitor general's office and bring it into his own, under the supervision of his fellow Nebraskan, Rankin.[9]

The Court's request that the government submit a memorandum of fact and an opinion concerning the intention of the Fourteenth Amendment made Eisenhower uncomfortable. He considered the rendering of an "opinion" by the attorney general on this kind of question to constitute an invasion of the authority of the Supreme Court. On August 19 he telephoned the attorney general to present this view.[10] Brownell, whose political judgment and legal abilities Eisenhower admired greatly, persuaded him that answering such a question posed by the Court in no way violated its integrity or authority, and the brief submitted by the government contained an opinion on the intent of the Fourteenth Amendment.[11]

The president's reluctance to have his Justice Department submit a brief revealed an important aspect of the assumptions that he brought

[8] 345 U. S. 972 (1953); Dennis J. Hutchinson, "Unanimity and Desegregation: Decision-making and the Supreme Court, 1948-1958," *Georgetown Law Journal*, LXVIII (October 1979), 31-32. The Court set forth the following questions for reargument: 1) Did the Congress that submitted the Fourteenth Amendment to state legislatures contemplate that it would abolish segregation in public schools? 2) If it did not, did the framers intend for Congress to have the power to do so, and did the framers intend for the courts to have power to construe it to do so of its own force in light of future conditions? 3) If question two did not dispose of the issue, was it within the Court's judicial power to abolish segregation in public schools? 4) If it found segregation unconstitutional, did the Court have to order immediate desegregation? 5) Should the decrees handed down be specific, or should the cases be remanded to the courts of first instance to frame the decrees?

[9] Kluger, *Simple Justice*, 650-51 (quotation on p. 650).

[10] Memorandum for the Record, August 19, 1953, Eisenhower Diary, August-September 1953, Whitman File (Dwight D. Eisenhower Library, Abilene, Kan.; hereinafter DDEL).

[11] Dwight D. Eisenhower, *The White House Years: Waging Peace, 1956-1961* (New York, 1965), 150; brief filed by the United States government as *amicus curiae* in *Brown* v. *Board of Education*, Papers of Simon E. Sobeloff, Segregation (Manuscript Division, Library of Congress, Washington, D. C.); Alfred H. Kelly, "The School Desegregation Case" in John A. Garraty, ed., *Quarrels That Have Shaped the Constitution*, (New York, 1964), 265.

to the problem of civil rights in general. While he strove to make sure that the federal government in no way supported segregation, he rejected federal legislative leadership on two grounds: it would usurp powers that belonged properly to the states, and it would be ineffective. He rejected other coercive steps towards desegregation on similar grounds.

On July 20, 1953, Eisenhower had lunch with his friend James F. Byrnes, the governor of South Carolina and former secretary of state in the Truman administration, who had come to discuss the possibility of a ruling by the Supreme Court that would abolish segregation in public schools. In his diary Eisenhower noted that Byrnes was "very fearful of [the] consequences in the South" that such a decision would bring about. The governor brought up the possibility of riots, ill feeling, and defiance, but only briefly. He stressed instead that a number of southern states would immediately cease support for public schools. Several times he told the president that the South had no great problem in dealing with adult blacks, but they were "frightened at putting the children together," a position with which Eisenhower was not completely out of sympathy. Eisenhower also observed that "the Governor was obviously afraid that I would be carried away by the hope of capturing the Negro vote in this country, and as a consequence take a stand on the question that would forever defeat any possibility of developing a real Republican or 'Opposition' Party in the South." The president declined to give Byrnes an opinion on a Supreme Court decision that had not yet been handed down, but assured him that his "convictions would not be formed by political expediency." He also took great pains to make Byrnes "well aware" of his own convictions that "improvement in race relations is one of those things that will be healthy and sound only if it starts locally. I do not believe that prejudices, even palpably unjustified prejudices, will succumb to compulsion." He then predicted that any attempt to impose federal law on the states would result in a conflict of police powers between state and federal government that "would set back the cause of progress in race relations for a long time."[12]

Several weeks later he wrote a letter to Byrnes contending that the best way to avoid such a conflict would be for state officials to cooperate with desegregation. He continued:

I think it is incumbent upon people who honestly believe in the power of leadership, education, example, and acceptance of clear responsibility to show constant progress in the direction of complete justice. We who hold

[12] Eisenhower Diary, July 20, 1953, Eisenhower Diary Series, 1953–1954 (2), Whitman File.

office not only must discharge the duties placed upon us by the Constitution and conscience, but also must, by constructive advances, prove to be mistaken those who insist that true reforms can come only through overriding Federal law and Federal police methods.[13]

As the date of the oral arguments approached, Eisenhower received letters from three southern governors, Allan Shivers of Texas, Robert F. Kennon of Louisiana, and Byrnes, all of whom had supported him in 1952. They stressed the local nature of school systems, the limited authority of the Supreme Court, and the threat to the federal system if the Supreme Court extended federal control into the area of public schools.[14] Eisenhower answered Shivers and Kennon politely and sent a more revealing letter to Byrnes. His note to Byrnes stated that he was "primarily interested in progress," but that he hoped for a solution that would "progressively work toward the goals established by abstract principle, but which would not, at the same time cause such disruption and mental anguish among great portions of our population that progress would actually be reversed." He challenged, however, the "equal but separate" alternative that would have brought black schools up to parity with white schools, but allowed them to remain separate. On practical grounds alone, Eisenhower argued that it would involve "extraordinary expenditures," and he "wonder[ed] just what officials of government would be charged with the responsibility for determining when facilities [were] exactly equal." Once again, the president attempted to convince Byrnes that "no political consideration of any kind [would] be given any weight whatsoever."[15]

During the preparation of the brief a split developed within the administration. Brownell, Rankin (who would argue the case), and others within the Justice Department favored a strong stand against segregation. Some members of the administration, including Wilton B. Persons, head of the congressional liaison staff, and Secretary of the Treasury George M. Humphrey, hoped to draw disaffected south-

[13] Eisenhower to Byrnes, August 14, 1953, Administration Series, Nixon, Richard (5), Whitman File.

[14] Shivers to Eisenhower, July 16, 1953; Byrnes to Eisenhower, November 20, 1953; Kennon to Eisenhower, November 20, 1953, all in Official File (hereinafter OF), 142-A-4 (1), (DDEL).

[15] Eisenhower to Shivers, July 21, 1953; Eisenhower to Byrnes, November 30, 1953; and Eisenhower to Kennon, November 30, 1953, all in OF 142-A-4 (1). The letter quoted in the text is Eisenhower to Byrnes, December 1, 1953, Eisenhower Diary Series, December 1953 (2), Whitman File. That letter demolishes the notion that Eisenhower knew little of the issues relating to desegregation and was led along a primrose path by subordinates. In it the president demonstrated familiarity with the Supreme Court's decision in *McLaurin* v. *Oklahoma State Regents for Higher Education* et al., 339 U. S. 637 (1950).

ern Democrats into the Republican camp and were loath to alienate potential political allies. The disagreement delayed preparations, and in July the Justice Department asked the Court for a postponement, which the justices gladly granted. The Court rescheduled the oral arguments for December 7.[16]

As the Supreme Court prepared for the fall term of 1953 and one of the most significant cases in its history, a major shock rocked the institution—the death of Chief Justice Fred M. Vinson. After addressing a meeting of the American Bar Association in Boston on Monday, September 7, he returned to Washington that evening and complained of indigestion. Early the following morning he died of a massive heart attack.[17] Eisenhower now faced the task of appointing a successor. When Truman had appointed his old friend from the Senate to the nation's highest judicial office, Vinson took over the helm of an extremely divided Court. He proved to be a weak chief justice, and the rift had deepened by the time of his death. Personal as well as philosophical issues divided factions led by Justices Hugo L. Black and Robert H. Jackson. In addition, the prestige of the Court had come to one of its periodic low ebbs. This decline resulted in large part from Truman's four appointments, whom political scientist Clinton Rossiter described as "about the least distinguished in history."[18]

Bent on restoring prestige as well as some degree of unity to the Court, Eisenhower wanted a man of national stature, proven administrative ability, and statesmanship. He considered, among others, John J. Parker, chief judge of the Fourth Circuit Court of Appeals; Arthur T. Vanderbilt, chief judge of the New Jersey Supreme Court; Judge Orie L. Phillips, chief judge of the Tenth Judicial Circuit; John W. Davis, former solicitor general, ambassador to Great Britain, and Democratic presidential candidate in 1924; Secretary of State John Foster Dulles; and Earl Warren, former governor of California. He also considered promoting one of the associate justices, but eliminated them one by one because of failing health, advanced age, or "extreme legal or philosophic views."[19]

[16] For an example of concern with the black vote see William E. Robinson to Eisenhower, November 10, 1954, Name Series, Robinson, William E., 1952–1955 (2), Whitman File. Berman, *It Is So Ordered*, 84–86; Kelly, "School Desegregation Case," 265; Anthony Lewis, *Portrait of a Decade: The Second American Revolution* (New York, 1964), 20–27; Kluger, *Simple Justice*, 651–52.

[17] John D. Weaver, *Warren: The Man, the Court, the Era* (Boston and Toronto, 1967), 190; Hutchinson, "Unanimity and Desegregation," 32–33; Liva Baker, *Felix Frankfurter* (New York, 1969), 307; Earl Warren, *The Memoirs of Earl Warren* (Garden City, N. Y., 1977), 269–70; Peter Lyon, *Eisenhower: Portrait of a Hero* (Boston, 1974), 56.

[18] Leo Katcher, *Earl Warren: A Political Biography* (New York and other cities, 1967), 302–303 (quotation on p. 303).

[19] Dwight D. Eisenhower, *The White House Years: Mandate for Change, 1953–1956* (Gar-

Predictably, Eisenhower did not lack for suggestions. His older brother Edgar, a successful lawyer, president of the American Bar Association, and a right-wing Republican, suggested Vanderbilt, Phillips, and Frank E. Holman, a past president of the ABA. President Eisenhower responded that the first two were "among those whose qualifications I have been studying." He also revealed something of what he wanted in a chief justice. "Almost without exception," he wrote, "if a lawyer recommends someone, that individual is now a practicing judge, or at the very least a successful practicing lawyer. Almost everybody else seems to favor some man who has been experienced in more phases of our governmental life than merely the legal." He concluded that, "for myself, the only thing I am determined to do is to make certain that I shall do my part in attempting to restore some of the prestige that the Court has lost." The older Eisenhower found the president's note "very reassuring," but admitted to having "such a low regard for the legal ability of most politicians, including Governors, that I naturally strike them off any list of judicial appointments."[20]

More welcome advice came from the youngest and most liberal Eisenhower brother, Milton, who expressed certainty that the public would support the president's efforts to restore dignity to the Court. Milton supposed that a chief justice ought to have judicial experience. He suggested the possibility of "elevating one of the present justices to the top post and then appointing a man like Governor Warren to the new vacancy."[21]

In yet another letter to Edgar the president ruminated on what made a great chief justice. "So far as I can find out," he related, "there seems to be universal respect for Hughes, Taft, and Stone as Chief Justices. None of them had any great experience as a judge—indeed, they were principally known for efforts in work other than the law. This did not apply to Stone, who was Dean of Columbia's Law School. But the point is that he was *not* a practicing lawyer, nor a judge. As I recall the life of John Marshall, the same applied to him." Demonstrating a far better understanding of the internal workings of the Supreme Court than many so-called experts, Eisenhower proposed that "a Governor with a *good* legal background just might be about the best type we could find—provided, of course, that he had a

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den City, N. Y., 1963), 226–27; Diary of James C. Hagerty, June 16, 1954, Papers of James C. Hagerty (DDEL).

[20] Edgar Eisenhower to Dwight Eisenhower, September 11, 1953; Dwight Eisenhower to Edgar Eisenhower, September 14, 1953; Edgar Eisenhower to Dwight Eisenhower, September 16, 1953, all in Name Series, Eisenhower, Edgar, 1953 (1), Whitman File.

[21] Milton Eisenhower to Dwight Eisenhower, September 15, 1953, Name Series, Eisenhower, Milton, 1953 (1), Whitman File.

successful record of administration and experience and was nationally known as a man of integrity and fairness." Finally, he once again expressed the hope of avoiding a man who reached "the voluntary retirement age of seventy in two years."[22]

It is difficult to determine whether Eisenhower had Warren in mind all along, or if the Californian simply met the requirements that the president had worked out on his own. Various accounts of the relationship between the two men suggest different answers. Warren remembered that Eisenhower telephoned him not long after the election to say that there would be no place for him in the cabinet. Warren had received consideration for the position of attorney general, but Brownell had been a trusted political adviser during the campaign, and the president-elect wanted to retain his political advice as well as his legal counsel. Eisenhower then remarked that he intended to offer Warren the first vacancy on the Supreme Court. But they both understood that the commitment was not concrete, and when Vinson died, Eisenhower shopped around. Brownell's recollection coincides with Warren's on this point. Eisenhower himself recalled speaking with Warren before Vinson's death and coming away impressed with him as a man of "high ideals and a great deal of common sense." He also remembered telling Warren that he had him in mind for the Supreme Court should a vacancy arise. Eisenhower was not, however, thinking of him as a prospective chief justice, but to everyone's surprise, the first vacancy occurred in that position.[23]

Soon after Vinson's death the president had Brownell check into Warren's record. To avoid speculation, Eisenhower did not meet with Warren personally. Attempting to escape from the embarrassment of answering questions from the press, Warren arranged to go deer hunting on a private island in California. The island had no telephone, and a ship-to-shore radio provided the only communication with the outside world. On September 25, 1953, Warren received a message to contact Brownell in Washington. Upon calling, he found that Brownell wanted to arrange a meeting on Sunday, September 27. The attorney general flew to McClellen Field, an Air Force base near

[22] Dwight Eisenhower to Edgar Eisenhower, September 22, 1953, Name Series, Eisenhower, Edgar, 1953 (1), Whitman File.

[23] Warren, *Memoirs*, 260, 269–71; transcript of interview with Herbert Brownell, Columbia Oral History Project (Columbia University Library, New York, N. Y.), 128 (hereinafter COH); Eisenhower, *Mandate For Change*, 228 (quotation); Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* (New York and London, 1983), 1–7. Schwartz contends that Warren took Eisenhower's tender of the next vacancy on the Supreme Court to be a firm commitment. Brownell's recollection in his interview with the Columbia Oral History Project contradicts this, and Warren's own *Memoirs*, though somewhat vague, also argues against Schwartz's interpretation.

Sacramento, and conferred with Warren for ninety minutes. Brownell told him that the president was considering him for the Supreme Court and asked if he would accept a nomination. He explained to Warren that with Congress out of session, Eisenhower wanted the appointee to accept a recess appointment that would enable him to sit when the term began on October 5. Immediately after parting with Warren, Brownell flew back to Washington. On September 30 Warren received a call from Washington informing him that the White House would announce his appointment later that day.[24]

At the press conference Eisenhower commented on his reasons for choosing Warren. He told the newsmen that he "certainly wanted a man whose reputation for integrity, honesty, middle-of-the-road philosophy, experience in Government, experience in the law, were all such as to convince the United States that here was a man who had no ends to serve except the United States, and nothing else." He also sought a man in good health who was relatively young—"if you can call a man of approximately my age relatively young . . . ."[25]

The appointment generated widespread favorable reaction. The political left had its doubts, however. The *Nation* responded coolly, although the *New Republic* adopted a wait-and-see position. Stronger criticism came from the right. Fulton Lewis, Jr., David Lawrence, and Raymond Moley voiced strenuous objections.[26] Stern criticism, and the only source Eisenhower felt compelled to answer, also came from his brother Edgar. The president began a letter to his brother by conceding "that our respective ideas of government and of personnel to fill the key posts are characterized more by differences than by accord." As to the Warren appointment, Eisenhower remained "unmoved by mere assertions of likes and dislikes, just as I pay little heed to opinion unsupported by some kind of factual statement." He

[24] Weaver, *Warren*, 191; Warren, *Memoirs*, 261, 269–71; Katcher, *Earl Warren*, 304–305; Eisenhower, *Mandate for Change*, 228. A recess appointment is provided for in Article II, Section 2 of the Constitution. The nominee is authorized to serve through the next session of Congress. A recess appointment of a federal judge, particularly a Supreme Court justice, places the appointee in the awkward position of participating in decisions that might offend the Senators who will later vote on his confirmation, thus creating an obvious threat to the delicate balance between judicial and legislative authority. A group of Harvard law professors urged Eisenhower to call a special session of Congress to act on the nomination. Eisenhower's decision to make a recess appointment was not without precedent. George Washington gave John Rutledge a recess appointment as chief justice. The precedent contained a warning, however, for Rutledge immediately infuriated Federalist senators with his attack on John Jay's treaty with England. Four months later the Senate rejected the nomination.

[25] *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1953* . . . . (Washington, D. C., 1960), 618–19.

[26] Katcher, *Earl Warren*, 306–309.

wondered if Edgar had ever met and talked seriously with Warren. The president had done so "on a number of occasions, because, from the very beginning of my acquaintanceship with him, I had him in mind for an appointment to the high court—although, of course, I never anticipated an early vacancy in the chief justice position." "To my mind," he continued, "he is a statesman. We have too few of these." Moreover, in Warren he found "a man of national stature (and I ask you when we have had any man of national stature appointed to the Supreme Court), of unimpeachable integrity, of middle-of-the-road views, and with a splendid record during his years of active law work." At the end of the lengthy letter, his patience finally expired. "I get a bit weary," he wrote, "of having the word 'political' used with respect to such decisions. These appointments get my long and earnest study, and I am not trying to please anybody *politically* . . . . It is useless to talk to me in such terms."[27]

With Hugo Black administering the oath of office, Warren took his place on the bench as an interim appointment on October 5, 1953.[28] Eisenhower still found himself defending the nomination, this time to Milton, who had forwarded to his brother a letter from an acquaintance condemning the president's action in naming Warren. Although Milton advised him to ignore criticism, big brother Ike felt compelled to address himself to it. As the president saw it, the writer of the letter "apparently assumes that a lifetime on the bench or in the exclusive practice of law would produce the highest possible qualification for the Supreme Court." He disagreed emphatically.

I believe that we need *statesmanship* on the Supreme Court. Statesmanship is developed in the hard knocks of a general experience, private and public. Naturally, a man occupying the post must be competent in the law—and Warren has had seventeen years of practice in *public* law, during which his record was one of remarkable accomplishment and success, to say nothing of dedication. He has been very definitely a liberal-conservative; he represents the kind of political, economic, and social thinking that I believe we need on the Supreme Court. Finally, he has a national name for integrity, uprightness, and courage that, again, I believe we need on the Court.

He was especially exasperated by the assertion that "reactionaries"

[27] Dwight Eisenhower to Edgar Eisenhower, October 1, 1953, Name Series, Eisenhower, Edgar, 1953 (1), Whitman File. In a letter to his friend and confidant, Swede Hazlett, Eisenhower again denied "emphatically" that the Warren appointment was "political." The Court, Eisenhower told his old friend, required personal leadership and a statesman to give it that leadership. In addition, Eisenhower wanted someone whose "philosophy of government was somewhat along the lines of my own." Eisenhower to Hazlett, October 23, 1954, Name Series, Hazlett, Swede, 1954 (1), Whitman File.

[28] Katcher, *Earl Warren*, 310; Paul L. Murphy, *The Constitution in Crisis Times, 1918–1969* (New York and other cities, 1972), 310.

engineered the Warren appointment. The only real opponents to the appointment he had encountered, he pointed out to Milton, "were of the Chicago *Tribune* stripe, the very ones that your friend says supported him!" He found most fantastic of all the assertion that the right wing wanted Warren out of California so they had him put on the Court, where, Eisenhower ironically noted, "manifestly, his influence over our national economy and future will be vastly multiplied."[29] In making that observation, Eisenhower was almost certainly not thinking specifically of the school segregation cases then awaiting reargument. Clearly, however, the addition of Warren to the Court would have enormous implications for those cases.

In November the Justice Department entered the final stages of drafting the brief. On Monday, November 16, Brownell called the president to express his opinion that a decision by the Supreme Court on the constitutionality of segregation would be necessary. Eisenhower remarked that Byrnes was coming to dinner, and he might have a chance to speak with him. In any case, Byrnes had an appointment to see the attorney general on Wednesday morning. Eisenhower asked Brownell what would happen if the southern states abandoned public education. Brownell responded that he would try to convince Byrnes that "under our doctrine it would take a period of years, and he wouldn't have to 'declare war,' so to speak."[30]

Eisenhower's Justice Department did not enter the case with a blank slate. The brief the government had filed in 1952, written by Elman and submitted over his own signature and that of McGranary, conceded that the Court could decide the cases without overturning *Plessy* v. *Ferguson*, the Supreme Court's decision of 1896 that provided the basis for the separate but equal rule. The brief stated that the *Plessy* decision said nothing about limiting considerations of equality to physical plants; so if segregation produced damaging effects on students, the justices could invoke *Plessy* to end segregated public schools. If, however, the Court wished to come to terms with its earlier decision, it should overturn it; experience had shown separate and equal to be a contradiction in terms. Moreover, the *Plessy* decision constituted "an unwarranted departure, based on dubious assumptions of fact combined with a basic disregard of the basic purpose of the Fourteenth Amendment," and the age of the precedent did not "give it immunity from re-examination and rejection."[31]

[29] Dwight Eisenhower to Milton Eisenhower, October 9, 1953, Name Series, Eisenhower, Milton, 1952-1953 (3), Whitman File.

[30] Transcript of telephone conversation, Brownell to Eisenhower, November 16, 1953, Eisenhower Diary Series, Phone Calls, July-December 1953, Whitman File (quotation). James F. Byrnes, *All in One Lifetime* (New York, 1958), 417-18.

[31] Brief filed by the United States government in *Brown* v. *Board of Education*, Sobeloff

Apparently pleased with Elman's work on the *Thompson* case, which ended segregation in Washington's restaurants, Brownell assigned him to write the government's brief answering the questions posed by the Court for reargument in *Brown*. Aided by a staff of eight, Elman produced a massive six-hundred-page document, which his superiors approved and the government filed in late November. Submitted as a supplement to the brief filed the year before, it did not call explicitly for a decision overturning *Plessy*. It concluded that the evidence regarding the legislative history of the Fourteenth Amendment provided no definite answer as to the intention of its framers. The amendment did, however, establish "the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color." Moreover, the framers clearly intended the amendment to "prohibit all state action based upon race or color," and therefore "all segregation in public education."[32] Elman, Brownell, and Rankin wanted to write a direct statement requesting that the Court strike down segregation. Some observers have suggested that Elman did not include it because he believed that it would receive little sympathy from within the White House and that the president himself would not favor it. Brownell has stated that the brief was filed in direct response to the questions submitted by the Court, and addressed itself to those questions only. At the same time, Brownell did advise the president that if the question arose during oral argument, the Justice Department would take a position in favor of striking down segregation.[33]

Oral arguments began on December 8, 1953, and lasted for an unprecedented ten hours over three days. The arguments presented covered everything from the historical background and intent of the Fourteenth Amendment to the psychological and social impact of segregation on black school children. All in all, nine attorneys spoke during the three days of oral presentations. Arguing for the plaintiffs, Thurgood Marshall and his lieutenants proffered extensive historical research concerning the background and intention of the Fourteenth Amendment to support their contention that it applied to public schools. They also asserted forcefully that the Court did indeed have the power to abolish segregation in public schools. Mus-

Papers, Segregation (quotations); Kluger, *Simple Justice*, 558–60; Lewis, *Portrait of a Decade*, 24; Kelly, "The School Desegregation Case," 265; Berman, *It Is So Ordered*, 84–86.

[32] Supplemental brief filed by the United States government in *Brown* v. *Board of Education*, Sobeloff Papers (quotations); Kluger, *Simple Justice*, 650–52; Lewis, *Portrait of a Decade*, 26–28; Berman, *It Is So Ordered*, 84–86; Kelly, "The School Desegregation Case," 265.

[33] Berman, *It Is So Ordered*, 84; Lewis, *Portrait of a Decade*, 27; Kluger, *Simple Justice*, 651.

tering an equally impressive historical case, lawyers for the school boards, led by John W. Davis, contended that the NAACP's argument "amounted to nothing more substantial than an exercise in sociological analysis," and a poor one at that. They adopted the position that judicial power did not extend to setting aside, "on a sociological basis," a school system that had existed for three quarters of a century.[34]

Rankin then stood to present the government's views. He had not spoken very long when Justice William O. Douglas broke in with a question. Commenting on the equivocal nature of the brief, Douglas asked Rankin if the government took a position on the constitutional controversy. Rankin answered affirmatively and went on to say that the government believed that "segregation in public schools cannot be maintained under the Fourteenth Amendment . . . . " Douglas then asked Rankin if the Court could properly decide the case either way. Rankin replied that the Court "properly could find only one answer." This position must have pleased the NAACP greatly; the government had taken their side. Rankin's responses to questions on the possible implementation of an antisegregation decision gave them less cause for elation. He argued that the Court had power to issue gradual decrees and that the situation would best be handled by local solutions, not a national timetable.[35]

On January 12, 1954, a month after the oral arguments ended, Eisenhower sent the Warren nomination to the Senate. Most observers expected a swift termination of Warren's uncomfortable interim status, especially with the obviously important segregation cases awaiting a decision. Senator William Langer, a Republican from North Dakota and chairman of the judiciary subcommittee, held up the appointment for weeks as a protest over lack of patronage. During this time a succession of irresponsible witnesses vilified the nominee. Despite these troubles Warren received approval from the Senate on March 1, 1954.[36]

[34] Kluger, *Simple Justice*, 667–78; Berman, *It Is So Ordered*, 89–95 (first quotation, pp. 94–95); Kelly, "The School Desegregation Case," 266 (second quotation).

[35] Berman, *It Is So Ordered*, 96 (first quotation); Kelly, "The School Desegregation Case," 267 (second quotation).

[36] Katcher, *Earl Warren*, 315–18; Weaver, *Warren*, 191. Most of those testifying against Warren came from the extreme right. Moreover, the Senate subcommittee under Langer heard a vast number of unsworn, unsubstantiated charges. The subcommittee voted in favor of the nomination two to one (Langer voted no). The Judiciary Committee as a whole voted to recommend confirmation twelve to three. This time Langer voted for Warren. The three votes in opposition came from southern Democrats, James O. Eastland of Mississippi, Olin D. Johnston of South Carolina, and Harley M. Kilgore of West Virginia, who feared a decision overturning segregation.

During the period between the arguments and the Court's decision, Eisenhower maintained a close watch over the case through his attorney general. On January 26, 1954, Brownell informed him that the Court might decide the constitutionality of segregation that spring, but postpone the problem of a remedy until fall. Obviously struggling with the issue, Eisenhower replied vaguely, "I don't know where I stand, but I think that the best interests of the U. S. demand an answer in keep [*sic*] with past decisions." When the attorney general suggested that the Court wanted to defer the matter as long as possible, the president laughingly responded that perhaps they would defer the matter until the next administration.[37]

If Eisenhower entertained any serious hopes along those lines, the Court shattered them on May 17. As Brownell predicted, the Court found segregation unconstitutional but held off on the question of relief. Chief Justice Earl Warren, speaking for a unanimous Court, ruled that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[38] Segregation, he continued, deprived the plaintiffs and all others similarly situated of the equal protection of the laws guaranteed by the Fourteenth Amendment. Noting that these cases had wide applicability and that there existed a variety of local conditions, the Court found the formulation of decrees in these cases to "present problems of considerable complexity." In order to deal with these problems, the Court ordered the cases restored to the docket and requested counsel for both sides to provide further argument for implementing the decision that fall. The Court invited the attorney general of the United States to participate again and also invited arguments from the attorneys general of all states that required or permitted segregation in their public schools.[39] On the same day, Warren read another unanimous decision, striking down segregated public schools in the District of Columbia on the ground that separate schools in the nation's capital violated the due process clause of the Fifth Amendment.[40]

In spite of the assertion in his memoirs that "I definitely agreed with the unanimous decision," Eisenhower harbored serious misgiv-

[37] Transcript of telephone conversation, Brownell to Eisenhower, January 25, 1954, Eisenhower Diary Series, Phone Calls, January-May 1954, Whitman File.

[38] *Brown* et al. v. *Board of Education of Topeka* et al., 347 U. S. 483 (1954), at 495.

[39] 347 U. S. 483, at 495.

[40] *Bolling* et al. v. *Sharpe* et al., 347 U. S. 497 (1954). Although the Court heard the District of Columbia case with the cases from the four states, it decided the case separately because the Fourteenth Amendment prohibits states from denying persons equal protection of the laws. Since the Capital is federal territory, the Court struck down segregation under the Fifth Amendment's prohibition on the federal government.

ings about the Court's ruling in *Brown*.[41] Arthur Larson, Eisenhower's under secretary of labor, later wrote that the president unequivocally disagreed with the Court's decision.[42] Similarly, Emmet John Hughes, a speechwriter, related a conversation in which the president said to him, "I am convinced that the Supreme Court decision *set back* progress in the South *at least fifteen years* . . . . We can't demand *perfection* in these moral questions. All we can do is keep working toward a goal and keep it high. And the fellow who tries to tell me that you can do these things by *force* is just plain *nuts*."[43] Sherman Adams, on the other hand, claimed that Eisenhower believed "that progress toward school integration had to be made "with considerable deliberation." Adams further described Eisenhower as thinking that "in general principle . . . the Supreme Court decision was correct and personally he had no quarrel with it."[44]

These contrasting opinions need not be mutually exclusive. Eisenhower believed in the morality, necessity, and inevitability of desegregation, but he thought it best accomplished through a slow process, beginning at the graduate and professional level and working down slowly, perhaps at the rate of one grade per year. Graduate and professional schools could integrate immediately on the basis of merit because they concerned "mature and relatively purposeful students." He might also have added, very few blacks. Eisenhower recognized that his scheme was "probably too slow to fit the aspirations of many Negroes. But it would, [he] was convinced, effect real progress and would insure an orderly integration process."[45] To his way of thinking, a process of education and public acceptance had to precede other gains, and he rejected the idea that segregation should end by a summary court order or federal statute. To Larson and Hughes, it may well have seemed that he opposed the Court's decision.

[41] Eisenhower, *Waging Peace*, 150.

[42] Arthur Larson, *Eisenhower: The President Nobody Knew* (New York, 1968), 124.

[43] Emmet John Hughes, *The Ordeal of Power: A Political Memoir of the Eisenhower Years* (New York, 1963), 201.

[44] Sherman Adams, *Firsthand Report: The Story of the Eisenhower Administration* (New York, 1961), 331–32.

[45] Eisenhower, *Waging Peace*, 151*n* (quotations); Eisenhower, *Mandate for Change*, 230. See also Ewald, *Eisenhower the President*, 205. One of Eisenhower's closest and most powerful assistants observed that the president "was committed to the abolition of segregation, but he did not believe that this ought to be the result of any summary court order applying to immediate termination of every vestige of segregation." Kluger, *Simple Justice*, 651. Maxwell Rabb believes that Eisenhower "had his doubts" about *Brown* and forced desegregation, but once the Court settled the issue he was "dead set" on enforcement. Interview with Maxwell Rabb by Fred Greenstein. The author is indebted to Professor Greenstein for permitting him to listen to the tape of that interview. Eisenhower also expressed his views about graduate schools in a telephone conversation with Oveta Culp Hobby. See Whitman Diary, March 21, 1956, Whitman Diary Series, March 1956 (1), Whitman File.

The day after the *Brown* decision, the president met with James Hagerty, his press secretary, to discuss a news conference scheduled for the following day, May 19. Eisenhower indicated that he would simply say that the Supreme Court was the law of the land, that he was sworn to uphold the Constitution, and that he would do so.[46] He told the press precisely that and repeated the position years later in his memoirs, concluding, "this determination was one of principle." Having once expressed an opinion of a decision, he argued, he "would be obliged to do so in many, if not all, cases." Eventually he would be drawn into a statement disagreeing with the Court, that would, if nothing else, create doubt as to the vigor with which he would enforce the decision.[47]

In his briefing with Hagerty, Eisenhower expressed considerable concern over the effect of the ruling. He worried primarily about the possibility that southern states would abolish public education altogether and institute "private" schools supported by state aid. Such a system, he continued, would handicap blacks and "poor white" children. Eisenhower especially feared the reaction of Georgia and its governor, Herman E. Talmadge.[48] His fears proved to be well-founded. The initial reaction to the decision in the South was generally muted, but one of the few rebel yells emitted came from the governor of Georgia.[49]

Although Eisenhower made it a point not to announce his discomfort with the Court's decision, hints of his displeasure emerged nonetheless. During the press conference of May 19, Harry C. Dent, a reporter for the Columbia, South Carolina, *State and Record*, noted that the *Brown* decision had been made under a Republican administration. Eisenhower retorted: "The Supreme Court, as I understand it, is not under any administration."[50] Moreover, at every chance, he reiterated that he did not believe "you can change the hearts of men with laws or decisions."[51] Not once throughout the summer between

[46] Hagerty Diary, May 18, 1954, Hagerty Papers.

[47] Eisenhower, *Waging Peace*, 150 (quotations); Richardson, *The Presidency of Dwight D. Eisenhower*, 110; *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1958* . . . . (Washington, D. C., 1959), 626, 647; *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1959* . . . . (Washington, D. C., 1960), 123.

[48] Hagerty Diary, May 18, 1954, Hagerty Papers.

[49] Harry S. Ashmore, *The Negro and the Schools* (Chapel Hill, N. C., 1954), 108; Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, 1962), 254–55.

[50] *Public Papers . . . Eisenhower, 1954*, 491–92 (quotation on p. 492).

[51] Lewis, *Portrait of a Decade*, 12 (quotation); Charles C. Alexander, *Holding the Line: The Eisenhower Era, 1952–1961* (Bloomington, Ind., and London, 1975), 119; J. W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (New York, 1961), 47.

the *Brown* decision and the arguments on implementation did the president make a statement supporting the Court's decision or directly calling for compliance with it. His tremendous personal popularity would have provided an invaluable ally to the beleaguered Court. Nor did he answer the segregationists who on the floor of Congress and on television advised their constituents to defy the federal courts. Such silence also gave encouragement to southern states preparing to argue for the slowest possible implementation when the Supreme Court convened that fall.

Not all of the signals emanating from the White House during this period were hostile, however. Immediately after the Court struck down segregated schools in the District of Columbia, Eisenhower declared that there was no need for a judicial order to make the federal government recognize its responsibilities and that the District of Columbia would serve as a model for the nation by desegregating voluntarily and immediately. His actions extended beyond rhetoric; he summoned the District of Columbia commissioners to the White House and told them he expected the district to take the lead in desegregating its schools. Under pressure from the White House, the district government had no choice but to comply. Hobart M. Corning, the district's superintendent of schools, drew up a plan to reorganize the capital's school system along nonsegregated lines. The Board of Education adopted the Corning plan on June 2, after rejecting complete desegregation beginning in September 1954. On September 20, Samuel Spencer, president of the board of commissioners of the District of Columbia, wrote to Eisenhower to inform him of the completion of the first week of the fall semester under a nonsegregated system. He reported further that the transition had proceeded smoothly and without disturbances. Of the district's 158 schools, 116 had "bi-racial attendance," and the teaching staffs of 37 schools included members of both races. Moreover, the enrollment figures showed that it would be possible to accelerate the original plan.[52]

As the fall of 1954 approached, the president made another important concession to the Court's determination to end segregation. When Justice Robert H. Jackson died in October, Eisenhower selected John Marshall Harlan III, the grandson of the lone dissenter in *Plessy* v. *Ferguson*, to replace him. The appointment was significant for its symbolism. Southern senators, fearing he would share his

[52] Corning to D. C. Board of Education, May 25, 1954; Spencer to Eisenhower, May 26, 1954; Spencer to Eisenhower, June 5, 1954, all in OF 71-U; Spencer to Eisenhower, September 20, 1954, OF 142-A-5 (quotation); Eisenhower, *Waging Peace*, 150; Donovan, *Eisenhower: The Inside Story*, 162; Adams, *Firsthand Report*, 334; Washington *Post*, June 18, 1954, September 17, 22, 23, 1954; Pittsburgh *Courier*, May 29, 1954.

grandfather's belief that the "Constitution is color-blind," voiced their displeasure with the appointment and questioned the nominee extensively about his views on the United Nations, "one worldism" (he was a Rhodes scholar), and, of course, segregation. Despite Harlan's exceptional qualifications, southerners delayed his confirmation for four months. The Senate finally approved the nomination on March 16, 1955. Though Harlan had a reputation as a moderate conservative, his conservatism clearly did not extend to civil rights.[53]

Eisenhower's most direct impact on the outcome of *Brown II* (as the decision dealing with implementation came to be known) came through his participation in the *amicus curiae* brief that the Justice Department prepared. Interest in the department's position extended beyond the president to others within the White House. Electoral politics influenced the way in which some of Eisenhower's aides assessed what position the Justice Department and the administration should adopt regarding desegregation. While recognizing the potential of black voters, particularly in the urban North, they also saw a chance to make inroads into another bloc of Democratic voters, the disaffected southern Democrats who had walked out of the 1948 convention. A compromise therefore interested the administration not only because it might insure peace and unity, but also because it could benefit the Republican party.[54]

Opinion within the Justice Department differed from that within the White House. The men responsible for the preparation of the *Brown* case in the department were unanimous in their commitment to end segregation. Philip Elman had written or assisted in the writing of every major brief filed by the government in a civil rights case

[53] The elder Harlan's remark occurs in *Plessy* v. *Ferguson*, 163 U. S. 537, at 559. The younger Harlan's qualifications were beyond doubt. A Princeton graduate and Rhodes scholar, he joined a major Wall Street law firm in the mid-1920s. His practice was interspersed with stints as United States attorney for the southern district of New York, counsel for the New York City Board of Higher Education, and chief counsel for the New York State Crime Commission. In addition, he was a leader of the New York City Bar. A year earlier, Eisenhower had appointed him to the Second Circuit Court of Appeals. Nine of the eleven votes against confirmation came from southern Democrats. See Katcher, *Earl Warren*, 331; Berman, *It Is So Ordered*, 116–17; Kluger, *Simple Justice*, 715–16; Hutchinson, "Unanimity and Desegregation," 52; Baltimore *Sun*, April 10, 1955; Washington *Post*, April 9, 1955.

[54] Lewis, *Portrait of a Decade*, 25–27, and Parmet, *Eisenhower and the American Crusades*, 436, 444. For information on Republican interest in black votes see E. Frederic Morrow, *Black Man in the White House: A Diary of the Eisenhower Years by the Administrative Officer for Special Projects* (New York, 1963), 28–31; Hughes, *Ordeal of Power*, 201; Robinson to Eisenhower, November 10, 1954, Name Series, Robinson, William E., 1952–1955 (2), Whitman File; E. Frederic Morrow to Gabriel Hauge, March 21, 1956, Whitman Diary Series, March 1956 (Misc.), Whitman File; Bryce Harlow to Maxwell Rabb, May 3, 1956, Civil Rights, Harlow Papers; and Charles F. Masterson to Howard Pyle, January 19, 1956, Papers of Howard Pyle (all in DDEL).

since the *Sweatt* and *McLaurin* cases. A vocal and effective advocate of civil rights, he could claim a large share of the responsibility for involving the government in *Brown*. Herbert Brownell was a major architect not only of the Eisenhower administration's entry into *Brown*, but also of the Civil Rights Act of 1957 and the federal intervention at Little Rock. He believed that segregation was wrong and that the time to end it had arrived. J. Lee Rankin shared the beliefs of his boss in this matter. He had less to do with preparing the briefs and arguments on implementation, however, because by the fall of 1954 the Eisenhower administration had appointed its own solicitor general.[55]

Simon E. Sobeloff, who as solicitor general presented the government's plan for implementing the *Brown* decision to the Court, came to the job as an outspoken and active opponent of racial inequality. During the 1930s he had opposed segregation and the exclusion of blacks from public housing. In 1933 he went before the Senate Judiciary Committee to plead for the passage of a federal antilynching bill. He continued his unvarnished opposition to segregation in his native Baltimore throughout the 1940s. Addressing a meeting of the city's Advertising Club, Sobeloff lashed out at segregation, chiding theater owners for allowing blacks into their establishments to appear onstage but not as patrons, and telling his audience that the prejudiced man injures not only his target but himself, for his bigotry "degrades his humanity." His fellow Baltimorian, Thurgood Marshall, the man who more than any other individual was responsible for the desegregation of graduate, professional, and public schools, recalls that "when I started my hard battle in Baltimore, he was one of only three white lawyers who were at all interested. He stuck with me from the beginning to the end." Sobeloff's beliefs on civil rights were such that when Eisenhower appointed him to the United States Fourth Circuit Court of Appeals in 1955, southern senators, led by Samuel J. Ervin, Jr., of North Carolina, Olin D. Johnston of South Carolina, and James O. Eastland of Mississippi, held up his confirmation for a year. As a judge, and later chief judge of the Fourth Circuit, he led

[55] For comment on the differences between the White House and Justice Department see Kluger, *Simple Justice*, 651, 675. The two decisions cited are *Sweatt* v. *Painter* et al., 339 U. S. 629 (1950) and *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. In *Sweatt*, the Court ruled that since Texas had no equal law school for blacks, it had to admit Sweatt to the University of Texas Law School. *McLaurin* dealt with the accommodation on equal terms of a black student pursuing a doctorate in education at the University of Oklahoma. Brownell was generally to the left of the rest of the cabinet on civil rights issues. For example, see his opposition to discrimination in housing in the cabinet meeting of January 28, 1955, Cabinet Series, Meeting of January 28, 1955, Whitman File, or the discussion of the State of the Union message for 1956 at the cabinet meeting of November 30, 1955, Cabinet Series, Meeting of November 30, 1955, Whitman File.

that court to a reputation as a highly progressive court and wrote several landmark desegregation opinions.[56]

While Eisenhower cautiously isolated himself from the *Brown* decision, the Justice Department prepared itself for the coming arguments on implementation. Sobeloff, with the aid of Elman, arrived at a position for the government in a preliminary draft of the government's brief. In it, they argued that the Court did not need to order immediate relief and that the issuance of a decree ordering a gradual adjustment would fall within the proper exercise of the Court's equity powers. If, however, the Court were to order a gradual adjustment, the vindication of the constitutional rights involved in the cases should be "as prompt as possible," for relief short of immediate admission to nonsegregated schools necessarily implied the continuing deprivation of these rights. Further, they urged prompt action because the "personal and present right of a Black child to not be segregated while attending a public school [was] one which, if not enforced when the child [was] of school age, lost its value."[57]

At the same time, they recognized that the public interest required an "intelligent, orderly, and effective solution" to various problems that might be encountered in complying with the decision. When the Court overruled segregation, it struck down an institution whose "origins and development [were] woven in the fabric of American history." In ordering the cases for reargument the Court had recognized that these difficulties could not "be resolved by a single stroke of the judicial pen."[58] The problems they considered relevant involved administrative and financial adjustments the states would face in changing to nonsegregated schools. (At the same time, they pointed out that equalizing all-black schools would have cost far more than desegregation and that ending the maintenance of separate school systems would further reduce costs.) Because of the compelling nature of the children's right to an equal education, however, they stated that "there should be no delay in the full vindication of the constitutional rights involved in these cases, and if delay is required, it should be kept at a minimum."[59]

[56] For biographical information on Sobeloff see Michael S. Mayer, *Simon E. Sobeloff* (Baltimore, 1980), and Abel J. Merrill, "Biographical Sketch" in "Tribute to Simon E. Sobeloff," *Maryland Law Review*, XXXIV (1974), 491. For an account of Sobeloff's address to the Advertising Club see Mayer, *Simon E. Sobeloff*, 11. The Marshall quotation is from a letter to the author, October 23, 1974. For a study of Sobeloff's desegregation decisions see Sanford J. Rosen, "Judge Sobeloff's Public School Race Decisions," *Maryland Law Review*, XXXIV (1974), 498–531.

[57] Draft of the brief, 3–7, Sobeloff Papers.

[58] *Ibid.*, 8.

[59] *Ibid.*, 9–17.

The brief then turned to the problem of popular hostility with which school authorities would have to cope and the threats of various states to withdraw funds from public education. Such hostility, contended the government lawyers, should not be allowed to interfere with the implementation of the Court's decision and the vindication of the rights of black children.

> Popular hostility, where found to exist, is a problem that needs to be recognized and faced with understanding, but it can afford no legal justification for a failure to end school segregation. Racial segregation in public schools is unconstitutional and will have to be terminated as quickly as possible, regardless of how much it may be favored by some people in the community. There can be no "local option" on that question which has now been finally settled by the tribunal empowered under the Constitution to decide it.[60]

As to the threat that violence would follow integration, they argued that scattered disturbances provided no basis for supposing that local officials would tolerate such action.

Finally, because of the "wide variance in local conditions," the brief submitted that no single formula or blueprint readily applied to all localities. The formulation of any practicable program for ending segregation required a knowledge of the special problems and needs of that community. Therefore, rather than frame a blanket decree, the Court should remand the individual cases to the courts of first instance, which would consider plans for ending segregation submitted by the defendants in light of guidelines established by the Supreme Court.[61] It would be essential for the Justices to lay down clear guidelines for the lower courts, specifying what the Supreme Court would or would not consider acceptable. The Justice Department suggested that "a remand for further proceedings without more, would add to the uncertainty and doubt which already exist and would serve only to make the process of adjustment more difficult."[62] In addition, the Court should be sure to enter no order that "might have the practical effect of slowing down desegregation."[63]

Sobeloff then presented suggestions for the decrees he and Elman believed the Court should frame. First, they suggested that the Court reiterate its declaration that segregation in public schools violated the Constitution and emphasize that all provisions of law requiring or permitting such segregation were unconstitutional.[64] Second, the lower courts should receive instructions to require that the school

[60] *Ibid.*, 19.
[61] *Ibid.*, 27–29.
[62] *Ibid.*, 23.
[63] *Ibid.*, 25.
[64] *Ibid.*, 27.

boards admit the plaintiffs, and others similarly situated, "forthwith to public schools on a non-segregated basis or to propose promptly, for the court's consideration and approval, an effective program for accomplishing the transition as soon as possible." If the school authorities wished any postponement, they would bear the burden of proof to establish the need for extra time. Where no "solid obstacles to desegregation" existed, any delay was "not justified and should not be permitted."[65] Third, to insure a prompt start towards implementing the decision, the justices should direct the lower courts to enter orders requiring school boards to submit plans for ending school segregation within ninety days. If the local boards failed to submit a satisfactory plan within the ninety-day period, the lower courts should be instructed to issue appropriate orders directing the admission of the plaintiffs and others similarly situated to nonsegregated schools at the beginning of the next school term. Upon submission of a plan by the school board, the appropriate lower court would hold a hearing to determine if the plan provided for a transition to nonsegregated schools "as expeditiously as the circumstances" permitted; the lower court should sanction no program that did not call for immediate commencement of the procedures necessary to accomplish the transition. During the transitional period, the lower courts would require the defendants to submit detailed periodic reports on the progress of desegregation. Moreover, the Supreme Court should retain jurisdiction for the purpose of making further orders, if such were necessary, to carry out its mandate.[66]

In a Saturday morning conference, held on November 20, 1954, Sobeloff met with Eisenhower and other members of the administration at the White House to discuss the brief he had prepared. The meeting produced several changes in the wording of the brief that altered the tone of the document. To this conference, Sobeloff carried a copy of the brief he had prepared, which was already in page proof. In the margin of that copy he penciled the changes that resulted from the meeting.[67]

The first change concerned the speed with which desegregation was to proceed. Sobeloff had written that "the vindication of the constitutional rights should be as prompt as possible." The phrase "as prompt as possible" was very similar to the phrase "at as early a date

[65] *Ibid.*, 26–28.

[66] *Ibid.*, 28–29.

[67] The Sobeloff Papers contain the page proof copy of the original draft with pencil notations in Sobeloff's handwriting indicating the changes that resulted from the meeting of November 20, 1954. On the cover is a notation, also in Sobeloff's hand, that reads, "This copy is the one used on Saturday—and contains the pencil corrections."

as possible" that Robert Carter, who represented the black children in *Brown*, would use several months later in the oral arguments before the Supreme Court. The conference that Saturday morning produced the following change in wording: "the vindication of the constitutional rights should be as prompt as feasible." The word "feasible" replaced the word "possible" at every instance in which Sobeloff had used it. In a later interview Philip Elman discounted the importance of the change, maintaining that if one were not aware of it, the substitution of the words would not affect the import of the brief. He admitted, however, that the word "possible" could be taken to mean that only administrative and physical problems would properly be considered as causes for delay and that "feasible" could be read to include nontangible problems, perhaps even community hostility. *Webster's Dictionary* defines "possible" as "within the powers of performance, attainment" and "feasible" as "capable of being . . . dealt with successfully." That distinction may well have been the nuance Eisenhower desired; he believed that immediate desegregation would not succeed.[68]

Elman did not attend the conference, and the substitution clearly indicated an alteration in the intent of the brief, especially in light of the circumstances in which the change occurred. To begin with, even a cursory review of Eisenhower's personal correspondence, the comments and changes he made in drafts of his speeches, and the several handwritten drafts of the famous Guildhall speech delivered at the end of World War II (which he wrote without assistance) reveals him to be a careful wordsmith. It seems highly unlikely that he would have insisted on such a change unless he intended it to have some significance.[69] Moreover, the substitution of the word coincides with other alterations made during the course of the meeting.

[68] I am indebted for information concerning the meeting and the preparation of the original draft to Philip Elman, who graciously answered all my inquiries. My conclusions, while greatly influenced by his firsthand knowledge, are not, however, always in complete accord with his. Brownell recalls Eisenhower making some handwritten notes on a copy of the *Brown* brief. If indeed he did so, it may have been the brief submitted in *Brown I*; Brownell's recollection is not specific. Brownell interview, 246-48, COH. The page proofs show the change for the first time on page 4, and the new wording appears on page 4 of the brief as filed. Other incidents of the same change occur on pages 19 and 25 of the page proof. Carter's use of the phrase appears in *United States Law Week*, XXIII (April 19, 1955), 3253, and in Leon Friedman, ed., *Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55* (New York, 1969), 352.

[69] Hughes, *Ordeal of Power*, 24-25; Larson, *Eisenhower*, 145-69; Steve Neal, *The Eisenhowers: Reluctant Dynasty* (Garden City, N. Y., 1978), 222-23; Milton S. Eisenhower, *The President is Calling* (New York, 1974), 313; Virgil Pinkley, *Eisenhower Declassified* (Old Tappan, N. J., 1979), 102-103; Greenstein, "Eisenhower as an Activist President," 591-92; Greenstein, *The Hidden-Hand Presidency*, 19-24.

Other, more obvious changes made that Saturday morning had a similar effect. Sobeloff had included a passage citing the positive results produced by rapid desegregation of the armed forces. He asserted that "experience has shown that normal contacts between people, in groups or as individuals, serve to diminish prejudice while enforced separation intensifies it. Race relations are improved when individuals, without distinction as to race or color, serve in the armed forces together, work together, and go to school together."[70] The implication was that desegregation should commence immediately. Essentially, this answered the argument that community hostility necessitated a delay in beginning desegregation.[71] As a result of the conference, however, this passage was removed altogether from the brief.

Finally, Eisenhower himself inserted an additional passage. The president's suggestions formed the basis for the following excerpt from the brief.

> The Court's decision in these cases has outlawed a social institution which has existed for a long time in many areas throughout the country—an institution, it may be noted, which during its existence not only has had the sanction of decisions by this Court but has been fervently supported by great numbers of people as justifiable on legal and moral grounds. The Court's holding in the present cases that segregation is a denial of Constitutional rights involved an express recognition of the importance of psychological and emotional factors; the impact of segregation upon children, the Court has found, can so affect their entire lives as to preclude their full enjoyment of constitutional rights. In similar fashion, psychological and emotional factors are involved—and must be met with understanding and good will—in the alterations that must now take place in order to bring about compliance with the Court's decision.[72]

This passage left no doubt as to its meaning. It implied that the time allowed for the period of adjustment should not be merely time enough to allow administrative adjustments to take place, but time for the shock to wear off and for southern attitudes at least to begin to change. While it is probable that Eisenhower did not mean to suggest the interminable period of time that actually elapsed, it is clear that he did not support the position taken by Sobeloff and other members of the Justice Department that desegregation could and must begin immediately.

[70] Page proof, 6, Sobeloff Papers.

[71] Their contention was supported by Ashmore, *The Negro and the Schools*, 80.

[72] Brief for the United States on the Further Argument of the Questions of Relief, Sobeloff Papers, 8. The notes that formed the basis for this passage appear on page 8 of the page proofs. It is quite possible that Eisenhower is the only sitting president ever to aid in the preparation of a brief for a case before the U. S. Supreme Court.

The changes Eisenhower effected in the brief reflected a position he maintained throughout the period between the decision of May 1954 and the Court's ruling on implementation. A month before he met with Sobeloff and Brownell to rework the government's brief, the president discussed the issue of implementation in a letter to his friend and confidant, Swede Hazlett. He believed that the segregation issue would "become acute or tend to die out according to the character of the procedure orders that the Court will probably issue this winter. My guess is that they will be very moderate and accord a maximum of initiative to local courts."[73] At a news conference held on November 23, after the president's meeting with Sobeloff and Brownell but before the government filed its brief, Harry Dent asked Eisenhower to comment on his personal views on implementation. The president took the opportunity to lobby for the views he had injected into the brief. Expressing certainty that the country wanted to obey the Constitution, he pointed out that desegregation presented "a very great practical problem" and involved "deep-seated emotions." "What I understand the Supreme Court has undertaken as its task," he continued, "is to write its orders or procedure in such fashion as to take into consideration these great emotional strains and the practical problems, and try to devise a way where under some form of decentralized process we can bring this about. I don't believe they intend to be arbitrary, at least that is my understanding."[74]

Submitted on the last day of November, the government's brief was the last of a seemingly endless procession of briefs to reach the Court. At the time of the Court's decision on May 17, 1954, twenty-one states had mandatory or permissive segregation laws. Since the ruling affected them all, the Court invited each of them to file briefs and participate in the oral arguments on implementation. The invitation constituted not only a conciliatory gesture on the part of the Court, but an astute political move as well. Participation by the southern states in the process of determining implementation amounted to a tacit acceptance of the original decision. Significantly, Georgia, Louisiana, Alabama, and Mississippi ignored the invitation; and several of these states indicated that they would not permit integrated schools within their borders, regardless of what decrees the Court might formulate.[75] Maryland, Florida, Arkansas, Oklahoma, North Carolina, and Texas accepted the Court's offer to participate.

[73] Eisenhower to Hazlett, October 23, 1954, Name Series, Hazlett, Swede, 1954 (1), Whitman File.

[74] *Public Papers . . . Eisenhower, 1954*, 1065–66.

[75] Baltimore *Sun*, April 9, 1955.

Predictably, the attorneys for the southern states sought a drawn-out period of adjustment. Delaware, Kansas, and the District of Columbia all had begun the process of desegregation and asked the Court to remand the cases to the lower courts without specific decrees and leave the necessary adjustments to the localities. South Carolina and Virginia adopted more openly defiant positions.[76] While not formulated in precisely the same terms, the basic positions of all of the briefs submitted by the southern states, including those that accepted the Court's invitation to participate as an *amicus curiae*, were virtually the same. Their positions can be summed up along the following lines: any attempt to desegregate school facilities would encounter grave obstacles, stemming primarily from community hostility to mixing the races in the classroom; overcoming these obstacles would take a long and indefinite period of time; in the process of desegregation, school children should not be "martyred" in the institution of new social policy; and due to these factors, the Court should not formulate detailed decrees, but rather should leave it to the courts below to determine when and how integration could be accomplished without disrupting the school systems or endangering the welfare of the children.[77]

The attorneys for the NAACP conceded that desegregation was probably not possible overnight everywhere, or even advisable, but warned against undue delay. They charged that many advocates of a gradual transition intended, in actuality, to stall the process indefinitely.[78] Therefore, their brief called on the Court to effectuate the *Brown* decision by "decrees forthwith enjoining the continuation" of segregation.[79] Such a decree, as envisioned by the NAACP's lawyers, would have required the immediate initiation of administrative procedures to end segregation and to admit the plaintiffs and others similarly situated to white schools by the beginning of the following academic term. In granting any postponement of relief beyond that date, the lower courts were to understand that school authorities bore the "affirmative burden" of proof to establish that there existed "judicially cognizable advantages greater than those inherent in the prompt vindication of the appellants' adjudicated constitutional

[76] Briefs submitted to the Court by Delaware, Kansas, the District of Columbia, South Carolina, and Virginia, Sobeloff Papers; Supplemental Memorandum for Appellees [Virginia] on Further Reargument, Sobeloff Papers. These briefs may also be found on microfiche in most law school libraries.

[77] Briefs submitted to the Court by Arkansas, North Carolina, Oklahoma, Texas, Maryland, and Florida, Sobeloff Papers.

[78] Brief submitted to the Court by NAACP [covering all cases except the District of Columbia], 3–10, Sobeloff Papers.

[79] *Ibid.*, 10.

rights." Judges should remain aware of the especially heavy burden in these cases, since the rights were "personal and present," and since each day of delayed relief produced a "day of serious and irreparable injury."[80]

Because of the protracted debate over John M. Harlan's nomination, the Court postponed the oral arguments originally scheduled for December 6, 1954, until Monday, April 11, 1955.[81] The oral presentations largely followed the lines of argument established in the briefs. Once again, the same distinguished teams of lawyers squared off, although the illness of John W. Davis deprived the South of its most eloquent advocate. In his place, S. E. Rogers and Robert McC. Figg, Jr., represented South Carolina. Their appearance before the Court degenerated into sullen defiance.[82] Much as they had in their brief, Virginia's representatives stressed concerns of public health and morality.[83] In rebuttal, Thurgood Marshall addressed the contention that the maintenance of public health required a continuation of segregation. For the first time, he allowed a tone of bitterness to creep into his speech by observing that southerners always excluded servants from such concerns. While the South's defenders complained of the danger to public health created by black children attending school with white children he noted that they had no qualms about the same white children, having their "food . . . prepared, served and almost put into their mouths by the mothers of those [black] children . . . . "[84]

On the third day of the arguments Sobeloff rose to speak for the government. Once again he rejected both specific decrees and the "other extreme," which asked the Court to set no criteria for guidance to the lower courts.[85] Delay for its own sake was inexcusable. Arguing beyond the bounds established in the government's brief, Sobeloff contended that the Court should leave no doubt that the cases were being remanded "for the purpose of effecting the decision as

[80] *Ibid.*, 11.

[81] Katcher, *Earl Warren*, 331; Baltimore *Sun*, April 10, 1955; Washington *Post*, April 9, 1955; Berman, *It Is So Ordered*, 116–17.

[82] Friedman, ed., *Argument*, 410–23; *United States Law Week*, XXIII (April 19, 1955), 3258.

[83] Friedman, ed., *Argument*, 428; *United States Law Week*, XXIII (April 19, 1955), 3258; Washington *Post*, April 13, 1955. See also Supplemental Memorandum for Appellees [Virginia] on Further Reargument, Sobeloff Papers.

[84] Friedman, ed., *Argument*, 437 (quotation); Washington *Post*, April 13, 1955.

[85] Friedman, ed., *Argument*, 503. Sobeloff's argument is recorded on pages 502–21 of Friedman, ed., *Argument*. Other accounts are in the Baltimore *Sun*, Washington *Post*, Washington *Evening Star*, Washington *Daily News*, New York *Herald Tribune*, and New York *Times* of April 14, 1955; Berman, *It Is So Ordered*, 120; Nashville *Southern School News*, May 4, 1955, p. 1; and *United States Law Week*, XXIII (April 19, 1955), 3260–61.

soon as feasible . . . ," and "feasible" did not mean that the courts should wait for a change of attitude.[86]

Ideological commitments to judicial restraint, shared to a surprising extent by even the most activist justices, militated against a decision to formulate detailed decrees ordering immediate desegregation.[87] Although such ideological considerations went into the formulation of the Court's decree, practical reasons influenced the Court as well.[88] It was apparent to the Court and to those who heard or read the arguments of lawyers representing the southern states and the public statements of southern political leaders that the Deep South would not cooperate with any decree and would overtly defy one calling for immediate desegregation. Moreover, it was also clear that no help was forthcoming from Congress. The Court, particularly the chief justice, believed that it could expect little more from the president. Warren's memoirs indicate that he believed Eisenhower to be an unalterable opponent of desegregation.[89] No significant legislation on civil rights had a chance of passing the southern-dominated House and Senate, and, after his order to desegregate the District of Columbia's public schools, Eisenhower's words and deeds seemed to give as much comfort to the Court's southern opponents as it did to the justices. In any enforcement crisis the Court had to depend on the executive to lend weight to its pronouncements, and the president's public coolness towards the *Brown* decision was not lost on the Court.

On May 31, 1955, a unanimous Court, again speaking through the chief justice, announced its ruling on implementation. Desegrega-

[86] Friedman, ed., *Argument*, 508.

[87] Discussions of judicial restraint include Bickel, *The Least Dangerous Branch*, 247–54, and *Politics and the Warren Court* (New York, 1965), 1–45; Bernard Schwartz, *American Constitutional Law* (Cambridge, Eng., 1955), 40–48; and Robert H. Jackson, *The Supreme Court in the American System of Government* (Cambridge, Mass., 1955). See also John P. Frank, "Political Questions," in Edmond Cahn, ed., *Supreme Court and Supreme Law* (New York, 1968), 36–47; Bernard Schwartz, *The Supreme Court: Constitutional Revolution in Retrospect* (New York, 1957); and Learned Hand, *The Bill of Rights* (Cambridge, Mass., 1958).

[88] In the early 1970s the opening of Justice Harold Burton's papers, which are in the Library of Congress, added a great deal of information about the Court's conferences and the personal positions of the individual justices. An excellent summary is S. Sidney Ulmer, "Earl Warren and the Brown Decision," *Journal of Politics*, XXXIII (August 1971), 689–702. Burton and Ulmer credit Warren with the achievement of unanimous decisions in both 1954 and 1955. It seems almost certain that Felix Frankfurter and Robert Jackson would have opposed ordering immediate relief in 1954 in keeping with their judicial philosophy. Frankfurter resisted detailed decrees the following year on the same principle. Based on wider documentation now available, Hutchinson's article, "Unanimity and Desegregation," while not denigrating Warren's role in the decision, emphasizes other factors which made unanimity both likely and desirable from the Court's point of view.

[89] See Warren, *Memoirs*, 289–92.

tion, declared Warren, should begin immediately and proceed "with all deliberate speed."[90] The Court's decision followed closely the plan submitted by the Justice Department. It differed, however, in one respect. The justices chose not to include the Justice Department's ninety-day time limit for school boards to submit a satisfactory plan for desegregation or be faced with court-ordered integration the following school term. Nevertheless, the decision won the support of the most staunchly liberal magazines, such as the *Progressive* and *New Republic*.[91] Thurgood Marshall and Robert Carter lent their public assent to the decision in an article published not long after the Court's ruling. In it they evaluated the decision not to set a deadline by which time the process of desegregation would have to be completed and concluded that "the decision was a good one." They even judged that desegregation might proceed more smoothly than if "a more stringent order had been issued."[92]

The *Brown* decision constituted an important milestone for the Eisenhower administration as well as for the rest of the nation. Prior to the Supreme Court's decisions of May 1954 and 1955 the administration had proceeded rapidly and effectively with its program of quiet, limited gains in areas over which it had unquestioned jurisdiction. After *Brown* that policy became an instant anachronism. Eisenhower dug in his heels and attempted to put a brake on the accelerated rate and scope of change. He supported the Court's ruling when necessary, but only to the minimum extent he believed the law required, and while the programs begun earlier continued no major new ones were undertaken until the introduction of civil rights legislation in 1956. Now traveling uncertain and uncharted waters, Eisenhower and his men cast about for a way to avoid what they considered the extremes of too-rapid desegregation that would result in southern defiance and the alternative of no progress at all.

[90] *Brown* v. *Board of Education*, 349 U. S. 294, at 301. The phrase "all deliberate speed" became the most controversial in the decision and the focal point for southern resistance. The phrase was Frankfurter's, who apparently got it from Justice Oliver Wendell Holmes. Holmes claimed to have borrowed it from English chancery practice, but it is just as likely that he took it from "The Hound of Heaven," a poem by Francis Thompson, an English mystical religious poet, or from Sir Walter Scott's *Rob Roy*. See Jack Greenberg, *Race Relations in American Law* (New York, 1959), 216; Alexander M. Bickel, "Integration: The Second Year in Perspective," *New Republic*, CXXXV (October 8, 1956), 12, 14; Kluger, *Simple Justice*, 743; and Berman, *It Is So Ordered*, 122–23. Berman cites Greenberg as a source for the reference to *Rob Roy*, but this author could find no such reference in Greenberg.

[91] C. L. Golightly, "Our Obsolete Southern Liberals," *The Progressive*, XIX (March 1955), 19–21; Vic Reinmer, "The South—A Year Later," *The Progressive*, XIX (May 1955), 7–8; Harold C. Fleming, "The Southern Response," *New Republic*, CXXXII (June 13, 1955), 6.

[92] Robert Carter and Thurgood Marshall, "The Meaning and Significance of the Supreme Court Decree," *The Journal of Negro Education*, XXIV (Summer 1955), 403.

Eisenhower's hesitancy expressed itself during the furor which arose following the Court's decision when he repeatedly declined to give the decision his personal endorsement. Maintaining what he considered to be a "neutral" posture, he refused to comment publicly on his views regarding desegregation. Instead, he adopted the position that it was his job to carry out decisions of the Supreme Court, not to pass judgment on them. Nor did he use the power of the chief executive to uphold the substantive rights of blacks when they faced threats from recalcitrant southerners. When he reluctantly sent troops to Little Rock in 1957, he made it clear that he did so to enforce the orders of a federal court, not for the purpose of integrating Central High School.

Although Eisenhower never used the presidency as a pulpit from which to speak out for acceptance of the Court's decision, he and his administration began slowly to take concrete steps to advance the cause of desegregation. In the field of legislation the Eisenhower administration sponsored two civil rights acts and pushed them through Congress, the first such legislation since the era of Reconstruction. These accomplishments, achieved in the face of the heated, partisan battle with Congress that the president had earlier hoped to avoid, should not be underestimated.

Eisenhower's appointments to federal judgeships, especially to the fourth and fifth circuits, constituted his greatest contribution to the cause of civil rights. The liberals and moderates whom he appointed to the areas most affected by the *Brown* decision quietly insured a continuing process of desegregation. When compared to the appointments made by his predecessor and successor, his achievement stands out in dramatic relief. Although engineered by Brownell, Eisenhower knew of and cleared these appointments, which fit with his vision of desegregation. The men he appointed would enforce the Supreme Court's ruling, but by the very nature of the American legal system, the process would be a gradual one.[93]

The *Brown* decision played a crucial role in determining the administration's policy. Initially, it functioned to inhibit Eisenhower's attempts to advance the cause of civil rights. While Eisenhower could agree in principle with the decision's intent, he had doubts about the federal government or the courts taking such an active role. Moreover, he believed that a court ruling (or compulsory, immediatist legislation for that matter) would fail to bring about equality for blacks. He worried that a backlash would wipe out advances that had already been made.

[93] Mayer, "Eisenhower's Conditional Crusade," 491–501.

Because they have devoted so much of their attention to the *Brown* decision, many historians have misinterpreted Eisenhower's purpose and his role in the struggle for civil rights. Clearly, the Court's decision in the segregation cases deserves the continuing attention of scholars, and the president's response to such a significant event reveals much about his policies towards blacks. However, focusing on *Brown* without placing it in the context of Eisenhower's attitudes and activities on the broader question of race obscures the nature and intent of his policies. While he was not the obstructionist that some historians have portrayed, Eisenhower did have his doubts about *Brown*. His quarrel was with the Court's methods, not its intent. He had qualms about the exercise of judicial power represented in the school segregation decision and even more serious doubts about the extension of federal power. These doubts did not, however, extend to the *principle* of desegregation.