



Winter 1-1-1996

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Recommended Citation

Sydnor Thompson, *John W. Davis and His Role in the Public School Segregation Cases - A Personal Memoir*, 52 Wash. & Lee L. Rev. 1679 (1995).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol52/iss5/6>

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John W. Davis and His Role in the Public School Segregation Cases — A Personal Memoir

Sydnor Thompson*

In August 1951, Governor James F. Byrnes of South Carolina retained John W. Davis (W&L A.B. 1892, LL.B. 1895), then senior partner at Davis Polk Wardwell Sunderland & Kiendl (Davis Polk) in New York City, to represent the State of South Carolina in *Briggs v. Elliott*,¹ one of five companion public school segregation cases (the School Segregation Cases) that, according to the lawyer who wrote the U.S. Attorney General's amicus curiae brief, "changed the whole course of race relations in the United States."² During that summer, I rejoined Davis Polk as an associate after a year's leave of absence to study law at Manchester University and the London School of Economics and Political Science under the auspices of the Fulbright Program. By virtue of that coincidence of events, I was provided an opportunity to work with one whom a commentator called "probably the nation's most distinguished appellate lawyer"³ on a case that other commentators have characterized as "the most important Supreme Court decision of the century,"⁴ and very close to if not actually "the most important decision in the history of the Court."⁵

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1. (*Brown v. Board of Educ.*), 347 U.S. 483 (1954).
2. Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV L. REV. 817, 837 (1986) (interview by Norman Silber).
3. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 461 (1994).
4. JACK GREENBERG, *CRUSADERS IN THE COURTS* 197 (1994).
5. RICHARD KLUGER, *SIMPLE JUSTICE* 709 (1975).

I. The First Eighty Years

John William Davis was born on April 13, 1873 in Clarksburg, West Virginia, the son of United States Congressman John J. Davis. John J. Davis was a typically conservative southerner of his day, serving the cause of white supremacy and states' rights while in Congress and contending on the floor of the United States House of Representatives that the Fourteenth and Fifteenth Amendments to the United States Constitution had been fraudulently adopted under circumstances in which the southern states had been illegally deprived of their rightful representation in the governmental bodies that adopted those amendments.⁶ Despite the elder Davis's conservative stance on social issues, he aligned himself in his law practice against the large corporate interests of his day. In representing the underprivileged members of his community, he demonstrated his belief that the law is a profession rather than a business.⁷

John W. Davis studied the classics at an early age under his mother's tutelage. He attended private schools in Clarksburg and in Albemarle County, Virginia, and in 1889 he enrolled as a sophomore at Washington and Lee College in Lexington, Virginia, at a time when General Robert E. Lee's son, Custis Lee, had succeeded his father as president.⁸ Two years after earning a bachelor's degree in 1892, he entered the W&L Law School and graduated in 1895, going immediately into practice with his father in Clarksburg. At the invitation of his former professor, Dean John Randolph Tucker, he accepted a teaching position at the W&L Law School, but served there for only one year. From that post he returned to Clarksburg to practice law and soon established a reputation as one of the outstanding lawyers in West Virginia, serving as president of its bar association at the age of thirty-three. Already his politeness and unique combination of warmth and reserve had won him many friends and admirers. After serving in the West Virginia House of Representatives, he served two terms in the United States Congress, where he soon became known as the ablest lawyer in Congress.⁹

6. WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 9 (1973).

7. *Id.* at 10.

8. He recounted to his colleagues at Davis Polk the story of how he and his friend Reynolds Vance had shared a bed in his first year there, a practice that was not uncommon for students and circuit riding lawyers in the 1800s. At the dedication of a portrait of Reynolds Vance at Yale University in New Haven, Connecticut, he told the assemblage, "I slept with him before [his wife] did." *Id.* at 262. It is a good example of Davis's pithy sense of humor.

9. *Id.* at 69.

During his time in Congress, he championed the cause of workmen's compensation as an appropriate regulation of interstate commerce and favored free trade, despite the fact that his own constituents felt threatened by it. Perhaps the high point of his progressive record came when he offered a bill to limit the issuance of injunctions against strikers in labor disputes. It eventually became a part of the Clayton Antitrust Act.¹⁰

In August 1913, Davis was appointed by President Woodrow Wilson as Solicitor General of the United States. True to form, he excelled in that post, as he had in each of his other career opportunities. During his service there he won a significant victory for black voters by convincing the United States Supreme Court that an Oklahoma "grandfather clause" exempting from a literacy test those voters whose ancestors had been eligible to vote prior to January 22, 1866 violated the Fifteenth Amendment.¹¹ When Davis resigned as Solicitor General, he had argued sixty-seven cases before the United States Supreme Court, winning forty-eight of them.¹² His arguments were frequently praised by the Justices before whom he appeared.

In 1918, while Davis was attending a meeting in Bern, Switzerland, as one of four commissioners to a conference with the Germans on the treatment and exchange of prisoners of war, President Wilson invited him to accept an appointment as ambassador to the Court of St. James in London. After much soul-searching, he accepted the post with the encouragement of Lord Reading, then the British ambassador to the United States, with whom he had formed a close friendship during his service in Washington, D.C. The British received Davis warmly. His gentlemanly manners and quiet dignity served him well in the diplomatic service, as might have been anticipated. He related well to both Prime Minister Lloyd George and King George V. As a consequence of that service, he became a zealous Anglophile and visited Great Britain frequently for the rest of his life.¹³

Although Davis continued to enjoy the confidence of the British, his yearning to return to law practice, which was always his first love, finally

10. *See id.* at 70-71.

11. *Gunn v United States*, 238 U.S. 347 (1915). The Court held that the Oklahoma statute was designed to discriminate against black voters since they did not have the right to vote prior to January 22, 1866.

12. He eventually argued 140 cases before the Supreme Court during his career at the Bar.

13. Queen Elizabeth II appointed him a Knight Grand Cross of the Most Excellent Order of the British Empire, the highest civilian distinction that the Queen could bestow upon a citizen of the United States. He was also an honorary bencher of the Middle Temple.

prevailed. He returned to the United States in March 1921 to join the well-established New York law firm of Stetson, Jennings and Russell. Most of that firm's senior partners were at the point of retirement, and Davis was virtually invited to dictate his own terms as the new head of the firm.¹⁴ His good friend Frank Polk, who had served the American Red Cross in Europe, also received an offer from the firm, and the two friends were soon practicing together there under the firm name Davis Polk Wardwell Gardiner and Reed. The firm had for some years represented J.P. Morgan and Co., Guaranty Trust Company of New York, the Erie Railroad, and a number of other major financial institutions. J.P. Morgan himself relied heavily on Davis's legal advice. Opinions differ as to whether Davis's representing such major corporate interests for many years served to encourage his increasingly conservative bent or whether he merely reverted to his native political philosophy after a period of public service in Congress and as Solicitor General. In any case, from the time he began to practice law in New York City in the early 1920s, his political and economic views definitely assumed a strong conservative hue.

Eighteen months after he joined the New York firm, he was widely touted as a candidate to replace Justice William R. Day on the United States Supreme Court.¹⁵ Many of his friends at the New York bar, as well as some of the Justices who had admired his work as Solicitor General, urged him to seek the post, which was said to have been his for the asking.¹⁶ In declining to permit his name to be submitted, however, he told prominent New York lawyer Charles C. Burlingham, "I have taken the vows of chastity and obedience but not of poverty."¹⁷

14. In later years he often voluntarily accepted significant reductions in his own percentage of the firm's profits in order to reward his younger partners. On one occasion, when Nelson Adams waited upon him to accept an invitation to partnership, Davis interrupted him to say, "Not so fast, Brother Adams, I suggest you have a look at our books before you accept." Letter from Nelson Adams, Senior Counsel, Davis Polk and Wardwell (successor firm to Davis Polk Wardwell Sunderland & Kiendl), to the author (Apr. 25, 1995) (on file with author).

15. HARBAUGH, *supra* note 6, at 191.

16. *Id.* at 190-91.

17. *Id.* at 192. When he returned to this country from his position as ambassador to the Court of St. James, Davis was not only virtually penniless, but he had also incurred substantial debts in his country's service there. It is fair to say that he was hardly free to engage in any further public service at that time. Letter from Nelson Adams, Senior Counsel, Davis Polk and Wardwell (successor firm to Davis Polk Wardwell Sunderland & Kiendl), to the author (Sept. 7, 1995) (on file with author). Most Americans who have filled that post have been independently wealthy.

In 1924, Davis was nominated for President of the United States by the Democratic National Convention as a compromise candidate between two warring factions of the Democratic Party — the supporters of Al Smith and those of William G. McAdoo — on the 103d ballot. The more liberal voices in the Democratic Party were of the opinion that Davis's intimate association with the moguls of Wall Street, especially J.P. Morgan, disqualified him as a potential Democratic nominee. In response to the suggestion that he resign from his firm in order to meet that criticism, he wrote a letter that received wide circulation and — at least for a time — quieted the criticism.¹⁸ It has

18. The letter read in part:

If I were in the market for the goods you offer, I would not complain of the character of this consignment, although I notice you do not guarantee delivery. The price you put on them, however, is entirely too high. You offer me a chance to be the Democratic nominee for the Presidency which carries with it in this year of grace more than a fair prospect of becoming President of the United States. In exchange, I am to abandon forthwith and immediately a law practice which is both pleasant and, within modest bounds, profitable; to throw over honorable clients who offer me honest employment; and desert a group of professional colleagues who are able, upright and loyal. If this were all, I would think your figures pretty stiff, but you are really asking something still more.

I have been at the bar nearly thirty years, and with the exception of ten years spent in public life I have enjoyed during the whole of that time a practice of an extremely varied character.

At no time have I confined my services to a single client, and in consequence I have been called upon to serve a great many different kinds of men; some of them good, some of them indifferently good, and others over whose character we will drop the veil of charity. Indeed, some of my clients — thanks perhaps to their failure to secure a better lawyer — have become the involuntary guests for fixed terms of the nation and the state. Since the law, however, is a profession and not a trade, I conceive it to be the duty of the lawyer, just as it is the duty of the priest or the surgeon, to serve those who call on him unless, indeed, there is some insuperable obstacle in the way.

No one in all this list of clients has ever controlled or even fancied that he could control my personal or my political conscience. I am vain enough to imagine that no one ever will. *The only limitation upon a right-thinking lawyer's independence is the duty which he owes to his clients, once selected, to serve them without the slightest thought of the effect such a service may have upon his personal popularity or his political fortunes. Any lawyer who surrenders this independence or shades this duty by trimming his professional course to fit the gusts of popular opinion in my judgment not only dishonors himself but disparages and degrades the great profession to which he should be proud to belong. You must not think me either indifferent or unappreciative if I tell you in candor that I would not pay this price for any honor in the gift of man.*

Id. at 198-99 (emphasis added) (quoting letter from John W. Davis to Theodore Huntley (Mar. 4, 1924)).

since been heralded as an eloquent apologia for the integrity of the profession.¹⁹

Davis's candidacy was destined for failure from the outset, however, because of the disaffection of a large body of liberal Democrats who supported Robert LaFollette as a Farmer-Labor candidate and who thus split the Democratic vote. The truth is that the 1924 campaign appears to have been the high water mark of Davis's political progressiveness.²⁰ He eventually became a staunch opponent of most of President Roosevelt's New Deal program.²¹

Despite Davis's continuing preference for constitutional principles that strictly limited the impingement of government on the private economy, he enthusiastically lent his support to two highly controversial public figures, Alger Hiss and Robert Oppenheimer, during the McCarthy years. With Lloyd Garrison, he advised Hiss in connection with the latter's perjury trial.²² He represented Oppenheimer before the Atomic Energy Commission at Oppenheimer's security clearance hearing.²³

Davis also accepted employment on behalf of a number of his friends and fellow lawyers who were under attack. Isador J. Kresel, a New York lawyer, was charged with a crime arising out of a bank failure. Louis Levy was alleged to have been implicated in bribery charges brought against Judge Martin Manton of the United States Court of Appeals for the Second Circuit. Davis never flinched from appearing in unpopular causes.²⁴

19. Not everyone accepted the apologia at face value. Felix Frankfurter, then teaching at Harvard Law School, did not favor Davis's candidacy. *See id.* at 201-02. He criticized Davis for denying that his connection with the most powerful banking firm in the world had any relationship to his fitness for the presidency: "Mr. Davis is not content to rest his Morgan retainer on those ultimate grounds of preference which are open to every free man. He must account for himself on the score of duty." *Id.* at 202. Indeed, Frankfurter faulted Davis and Wall Street lawyers in general for their "crass materialism": "Davis's career is subtly mischievous in its influence on the standards of the next generation." *Id.* at 242.

20. For example, despite the strong recommendation of most of his campaign advisers to the contrary, he came out four-square against the Ku Klux Klan, which was then in its heyday. *Id.* at 229.

21. In later years when he was asked if he were still a Democrat, he responded "yes, dammit, very still." *Id.* at 342.

22. *See id.* at 449-51.

23. *Id.* at 459. Davis joined Garrison in a letter protesting the Atomic Energy Commission's refusal to allow Davis to deliver an oral argument on the appeal. Davis was outraged at the cavalier treatment Oppenheimer received. *Id.* at 453-61.

24. In 1941 Davis wrote a distinguished paper about the lawyers who defended Louis XVI of France before the National Convention — Malesherbes, Tonchet, and deSeze. Hazard Gillespie, Davis's partner and now senior counsel to the firm, provided me with a

The last great Supreme Court victory that Davis enjoyed was in the case of *Youngstown Sheet & Tube Co. v Sawyer*,²⁵ in which, as counsel for the steel companies, he opposed President Truman's seizure of the steel industry. Truman's action was the means by which he sought to forestall a general strike during the Korean War. After Davis had delivered an eighty-seven minute attack on the President's action, the Supreme Court held that the seizure of the steel industry was unconstitutional.

II. *The School Segregation Cases*

When Davis accepted the challenge of Governor Byrnes to represent South Carolina in *Briggs v Elliott*, the case filed against the Board of Trustees of School District No. 22 of Clarendon County, South Carolina, and against other school authorities there, he was confident that the numerous precedents upholding the principle of "separate but equal" facilities in both federal and state jurisdictions, including the Supreme Court's 1896 landmark decision in *Plessy v Ferguson*,²⁶ would ensure his success. He viewed the subject as properly within the discretion of state legislatures. He was particularly encouraged after reading what he considered to be an outstanding opinion of Judge John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, who had chaired the three-judge panel that had decided the case in the defendants' favor at the trial level.²⁷

copy of the essay, which was privately printed. A highly edifying letter that the aged Lamoignon de Malesherbes wrote to the Convention appears in Davis's account:

Citizen President, I am yet uninformed whether the Convention will allow the defense of Louis XVI to be undertaken by counsel or not. If it be allowed, and the choice of counsel is left to him, I request that Louis XVI may know, that if he think proper to choose me for that office, I am ready to undertake it. I do not ask you to make my offer known to the Convention, for I am far from thinking myself of sufficient importance to engage their attention: but I was twice appointed a member of the Council of him who was my master, at a time when that office excited a general ambition. I feel it my duty to offer myself as his counsel, now that duty is thought dangerous by many.

John W Davis, *The Lawyers of Louis XVI* 5 (1941) (unpublished manuscript, on file with author). Malesherbes died on the guillotine for his loyalty to the king. It is not surprising that he was one of Davis's heroes.

25. 343 U.S. 579 (1952)

26. 163 U.S. 537 (1896).

27. Judge Parker lived in Charlotte, North Carolina, where I had worked in 1949 as a summer clerk with his son Justice Francis I. Parker, who later became my partner and still later a Justice of the North Carolina Supreme Court. I had occasion to discuss the case with the elder Judge Parker on several occasions during the pendency of the appeal. A brilliant

In fact, Davis quoted liberally from that opinion in preparing the appellees' initial brief for the United States Supreme Court. The *Briggs* case was eventually consolidated with four other cases in which the separate but equal doctrine was being challenged as applied to public schools in Kansas, Virginia, Delaware, and the District of Columbia.

William R. Meagher, a senior associate at Davis Polk at that time,²⁸ assisted Davis in the preparation of the first *Briggs* brief, to which Davis gave more personal attention than was his custom. It was a task for which his southern upbringing and conservative states' rights orientation had prepared him both philosophically and jurisprudentially. His friendship with Governor Byrnes, with whom he had served in Congress forty years earlier, and his custom of vacationing annually at Yeaman's Hall near Charleston, provided added incentives. The fact that the substantial forces of the NAACP were arrayed against him gave him little pause, despite that organization's record of successes in the United States Supreme Court since World War II.²⁹

The appeal was first argued before the United States Supreme Court on December 9, 1952. Unknown to Davis, Justice Felix Frankfurter was in frequent contact during this period with Philip Elman, then Special Assistant to the United States Attorney General, who was writing an amicus curiae brief on behalf of the United States government, flatly supporting the position of the plaintiffs.³⁰ Elman was Frankfurter's former law clerk and life-long confidante. His brief urged the Court to overrule *Plessy v. Ferguson*, but to allow desegregation to proceed gradually so that the country might have time to become accustomed to the decision.

In an interview conducted by Norman Silber in 1987, Elman reported at length on his continuing dialogue with Frankfurter during the time that the School Segregation Cases were pending in the Court and during the time that he was preparing the Department of Justice's briefs.³¹ In a 1987 editorial

jurist, he believed that his decision had been pre-empted. "[W]hen seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts in this country including the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes, and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights." *Briggs v. Elliot*, 98 F. Supp. 529, 537 (E.D.S.C. 1951), *vacated*, 342 U.S. 350 (1952).

28. Meagher later became a named partner in the law firm of Skadden, Arps, Slate, Meagher & Flom in New York City.

29. See KLUGER, *supra* note 5, at 543-44.

30. See *id.* at 560, 593, 600, 613; Elman, *supra* note 2, at 828-29, 843-44.

31. See Elman, *supra* note 2, at 832; see also KLUGER, *supra* note 5, at 600. Although

entitled *With All Deliberate Impropriety*, the *New York Times* was highly critical of that series of extra-judicial communications between Frankfurter and Elman.³²

Because Frankfurter was concerned that the Court as it was then constituted was unlikely to reach a unanimous decision in favor of abolishing public school segregation, a margin which he considered necessary in order to defuse the expected hue and cry that such a result was likely to provoke in the southern states, he persuaded his fellow justices that the cases should be set for reargument on certain specific legal questions. With the help of his then-clerk, Alexander Bickel, he prepared questions to be put to the litigants. By that means, Frankfurter also hoped to allow sufficient time to persuade certain of his reluctant brethren to overrule *Plessy v Ferguson*.³³

The questions put to the litigants were as follows:

1. What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

Elman told Silber that he had not coordinated the government's briefs with the plaintiffs' briefs, he had earlier told Richard Kluger, who interviewed him for the book *Simple Justice*, that he had participated in a number of strategy sessions with the NAACP lawyers at Howard University *Id.* at 562.

32. "[N]ew revelations about the 1954 collaboration between Justice Felix Frankfurter and Philip Elman, then a Justice Department lawyer, are deeply disturbing. They concern the most important constitutional decision of modern times, *Brown v. Board of Education*, the great school desegregation decision. The collaboration, long hinted at and now spelled out in great detail, needs to be judged unethical, both by the standards of that time and of this. It's not the first time in history that bright, high-minded officials became so sure of their causes that they thought they were above the rules. As recounted in the *Harvard Law Review*, Justice Frankfurter discussed the Court's most intimate secrets, including the leanings and prejudices of its members, before and after Mr. Elman filed briefs on the side of the black plaintiffs in the school desegregation case. [D]istinguished service and former connection notwithstanding, Mr. Elman and Justice Frankfurter both crossed a clear ethical line." *With All Deliberate Impropriety*, N.Y. TIMES, Mar. 24, 1987, at A30.

33. See KLUGER, *supra* note 5, at 614; Elman, *supra* note 2, at 822-23. William H. Rehnquist, now Chief Justice, was acting as Justice Jackson's clerk during the same 1952 term. A memorandum that he prepared for Justice Jackson on the subject of the school segregation cases became an issue in his confirmation hearings for the Chief Justiceship. KLUGER, *supra*, at 605-08.

- (a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or
- (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

- (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
- (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

- (a) should this Court formulate detailed decrees in these cases;
- (b) if so what specific issues should the decrees reach;
- (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
- (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

A fresh reading of those questions with the advantage of hindsight suggests that they constituted a blueprint for the decision that the majority of the Court had already reached and would provide an outline for the Court's opinions as eventually rendered.³⁴

In retrospect, it is clear that the direct consequence of the Frankfurter-Elman discourse and the Frankfurter-Bickel strategy of delay was to require the parties to prepare elaborate briefs and oral arguments on the questions

34. See *Brown v Board of Education*, 347 U.S. 483 (1954) (*Brown I*), 349 U.S. 294 (1955) (*Brown II*). During the 1952 Court Term, Frankfurter had assigned Bickel the project of reviewing the congressional debates on the Fourteenth Amendment. Thus, those who drafted the questions for reargument were already aware of the answer to their first question. KLUGER, *supra* note 5, at 598-99, 653; Elman, *supra* note 2, at 833.

specified at a time when the outcome of the cases had already been decided. After the first argument, Frankfurter saw the Court as favoring the plaintiffs by a five to four margin.³⁵ Burton read the vote as six to three for the same result. Jackson counted from five to seven votes in favor of overruling *Plessy v Ferguson*.³⁶ Public school segregation in the United States was to be abolished. It was just a question of when and how the Court would announce its ruling.

It was at that point that I was by some good fortune called upon to assist Davis in the preparation of the *Briggs* brief for reargument. My first assignment was that of reviewing the 1866 Congressional Globe reports of the 39th Congress at the New York Public Library in order to respond to the Court's first question — "What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"

The attorneys representing the defendants in the Virginia case — Justin Moore, Archibald Robertson, John W Riely, and Justin Moore, Jr. of the Hunton & Williams firm in Richmond together with Lindsey Almond and Henry Wickham of the office of Attorney General of Virginia — conferred with Davis, Meagher, and me in New York that summer. The Virginia lawyers agreed to pull the laboring oar in researching the understanding of the state legislatures which ratified the Amendment, while we agreed to study the reports of the 39th Congress, which had submitted the Amendment to the states.

The South Carolina brief was prepared by our team of three, with Davis's contribution being primarily that of adding colorful phrases here and there to cause an otherwise pedestrian prose to leap from the page. Taggart Whipple, a Davis Polk partner, eventually became involved at Davis's request to assist in coordinating the project. His contribution was principally supervisory, including some editing of the final product.

While the dog days of the New York City summer came and went, it became increasingly clear from a study of the Congressional Globe reports that most of the members of the 39th Congress had *not* understood that the Fourteenth Amendment that it submitted would abolish segregation in the public schools, at least certainly not posthaste or *per se*. Without undertaking to catalogue the myriad reasons that caused the Davis Polk team to reach that conclusion, it is enough to say here that (1) those who managed the bill

35. KLUGER, *supra* note 5, at 614; Elman, *supra* note 2, at 829.

36. KLUGER, *supra* note 5, at 614.

that was eventually enacted as the Civil Rights Act of 1866 during the term in which the Fourteenth Amendment was submitted disclaimed any intention that the Act should prohibit public school segregation; (2) the same 39th Congress that enacted the Fourteenth Amendment during the spring of 1866 also enacted at least two measures dealing with the administration of segregated schools in the District of Columbia; (3) hardly anything was said on the subject of school segregation during the debate on the Fourteenth Amendment itself; and (4) a number of legislators suggested that the Fourteenth Amendment was being adopted in order to resolve any doubts about the constitutionality of the Civil Rights Act of 1866.

Most of the state legislatures that ratified the Amendment during the two years following Congress's submission of it also enacted statutes allowing or requiring public school segregation in their particular states without any reference being made to the Fourteenth Amendment. The coincidence of all of these circumstances virtually established beyond doubt that the Amendment was not originally expected to abolish public school segregation.³⁷ Accordingly, the *Briggs* brief described our findings at great length.³⁸

The more significant question, as it developed, was the second question, which, in view of their earlier research, Frankfurter and Bickel had already concluded was likely to constitute the basis for the Court's decision to abolish public school segregation: "If neither the Congress in submitting nor the states in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?" Not

37 This conclusion is supported by Richard Kluger in his definitive study of the School Segregation Cases. KLUGER, *supra* note 5, at 578, 634-35. The conclusion is also supported by Alexander Bickel in *The Original Understanding and the Segregation Decision*, 69 HARV L. REV 1, 58-65 (1995).

38. Richard Kluger suggests that the Davis brief exaggerated the case by claiming that it was "the expressed intent of the framers" not to abolish segregated schools. KLUGER, *supra* note 5, at 649. The *Briggs* brief contained no such claim that the framers of the amendment had *expressly* disavowed any such intention. South Carolina's position was that "the overwhelming preponderance of the evidence demonstrates that Congress, which submitted and the state legislature which ratified the Fourteenth Amendment, did not contemplate and did not understand that it would abolish segregation in public schools." Brief for Appellees on Reargument at 8, *Briggs* (Oct. Term, 1953, No. 2). The draftsmen of the South Carolina brief were at pains not to exaggerate the evidence favoring their clients' position. Fortunately, they were not presented with the temptation.

surprisingly, our *Briggs* brief reflected Davis's sincere conviction that the Supreme Court had no power to extend or enlarge the scope of the prohibitions of the Amendment beyond those originally contemplated by its framers. Of course, this question presented an issue that constitutional scholars have debated for years. It invokes the ghosts of the "strict constructionists" and the "liberal constructionists" — of the "judicial activists" and the "judicial conservatives." In other words, it poses in a constitutional context the age-old question of the degree of judicial restraint that the Court should exercise in rendering its decisions.³⁹ May the Court treat the "equal protection" language of the Fourteenth Amendment as sufficiently latitudinarian to allow it to find actions unconstitutional that were clearly *not* considered as prohibited by the Amendment at the time it was adopted or at the time it was adopted by previous courts? May the meaning of constitutional language change with the times, depending upon the development of the social scene, particularly in the field of race relations? In an article written several years after the Court rendered its decision, Alexander Bickel suggested that the Court's ultimate decision was based upon the view that the meaning of the Amendment may actually evolve through the years to meet society's evolving concerns and that the framers may have contemplated such an evolution.⁴⁰

Despite Frankfurter's reputation for judicial restraint in the face of legislative edict,⁴¹ he appears to have abandoned any such reservations in the School Segregation Cases. When Chief Justice Vinson died, the newly elected President Eisenhower appointed Earl Warren to the Chief Justiceship.⁴² Thereafter, Frankfurter's efforts to forge a unanimous position in

39. During the first argument in December 1952, Justice Burton asked Davis, "What is your answer to the suggestion that at that time the conditions and relations between the two races were such that what might have been unconstitutional then would not be unconstitutional now." KLUGER, *supra* note 5, at 572. Davis responded that changed conditions could not broaden the meaning of the terms of the Amendment.

40. Bickel, *supra* note 37, at 64. Chief Justice Warren's statement at the outset of his first opinion supports Bickel's view. "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." *Brown v. Board of Education*, 347 U.S. 483, 492 (1954). And presumably the Court was also prepared to consider race relations in the light of current developments. Judge Learned Hand was critical of the *Brown* decision on just that account. *Brown*, he said, constituted an impermissible second-guessing of legislative choices. GUNTHER, *supra* note 3, at 656-57

41. KLUGER, *supra* note 5, at 596.

42. Eisenhower actually considered appointing Davis to that vacancy despite his advanced age, but decided in favor of Warren. He had made a commitment to appoint

favor of abolishing segregation began to bear fruit. He now had the strongest possible ally. There was never any doubt in Chief Justice Warren's mind as to his view of the cases from the day he assumed his duties.⁴³ He was strongly in favor of using the School Segregation Cases as the vehicle by which to abolish the "separate but equal" doctrine, which he considered to have rested from the beginning upon the fallacious idea that blacks are inferior.⁴⁴

On December 17, 1953, when Davis strode again into the Supreme Court in his typical club coat and striped pants,⁴⁵ he remained as confident as ever that the Court would vindicate South Carolina's position. It was as though the social and political winds that raged over his head did not exist for him, since they were not a part of his anima. Based upon a thorough study of the history of the adoption of the Fourteenth Amendment and the legal precedents that since construed it, the Davis team confidently predicted that the Court would rule for their clients by a vote of six to three, conceding only Justices Black, Douglas, and perhaps Warren to the plaintiffs. We could hardly have been more mistaken.

In addressing the Court, Davis reviewed South Carolina's answers to the Court's question with his usual grace and style, pointing to evidence that the drafters of the Fourteenth Amendment clearly did not intend to outlaw the public school segregation that flourished contemporaneously and for decades later and that had repeatedly received the Court's imprimatur. "Somewhere, some time, to every principle there comes a moment of repose when it has been so often pronounced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance," said Davis.⁴⁶

Warren to the Court at the time of the Republican National Convention at which Eisenhower was selected for the presidential nomination over Warren. STEPHEN E. AMBROSE, 2 EISENHOWER: THE PRESIDENT 128 (1984). Eisenhower would have preferred that the Court uphold *Plessy v. Ferguson* and said as much on a number of occasions, though only in private. *Id.* at 190. According to Warren, the decision ended cordial relations between the two. *Id.*

43. KLUGER, *supra* note 5, at 679.

44. *See id.* at 679.

45. Davis always wore formal attire when appearing before the Supreme Court, a habit which he developed from his time as Solicitor General. In fact, he was known for his sartorial correctness. At a time when hats were the fashion for men, he purportedly proffered a ten dollar bill to a young associate whom he encountered hatless on the elevator at 15 Broad Street, with instructions that he remedy that condition during the lunch hour. The story may be apocryphal, but it illustrates Davis's concern for proper dress.

46. *See* KLUGER, *supra* note 5, at 671. In response to a question from his interviewer

The unanimous decision of the Court was announced on May 17, 1954; it held segregation in the public schools unconstitutional *per se*. Warren had convinced even the most reluctant member of the Court, Justice Stanley Reed, not to dissent. The Court then set the cases for further reargument on the question of the relief to be granted. There is no question that the purpose of this delay was to give the southern states another year in which to become accustomed to such a radical cultural change before implementing the new policy of desegregation. Davis himself was no longer interested. He made it clear that he did not care to participate in dismantling the institution that he had undertaken to defend.⁴⁷

Symbolically, just two weeks before the second reargument was scheduled to occur, Davis died on March 24, 1955 at the age of eighty-one in Charleston, South Carolina, where he was hospitalized while on vacation at Yeaman's Hall. The entire profession mourned the passing of the man whose career had defined the term professionalism.

III. An Assessment

How should one characterize Davis the lawyer and Davis the man? There can be no doubt that he was one of the outstanding American lawyers of all time. His record of appearances before the United States Supreme Court is unequaled in this century. As an appellate advocate, he had no peers.⁴⁸ A paper he delivered to the Association of the Bar of New York, *The Argument of an Appeal*, is considered the definitive statement on the subject.⁴⁹ When Davis appeared before the Supreme Court, he was shown

as to the value of oral argument in the Supreme Court, Philip Elman opined, "[T]he more important the case is, the more far-reaching its effects, and the more the Justices have studied and thought about the issues beforehand, the less likely it is that the quality of the oral arguments will affect the decision. *Brown* was quintessentially that kind of case. In *Brown*, nothing the lawyers said made a difference. Thurgood Marshall could have stood up there and recited 'Mary had a little lamb,' and the result would have been exactly the same." Elman, *supra* note 2, at 851-52. No doubt this hyperbole does much less than justice to Marshall's contribution. Still, Elman succeeded in making his point.

47. Davis declined to submit a statement to the State of South Carolina for the firm's services. Nevertheless, Governor Byrnes made him a gift of a beautiful silver tea service from "The People of South Carolina."

48. See GREENBERG, *supra* note 4, at 166; GUNTHER, *supra* note 3, at 461, HARBAUGH, *supra* note 6, at 399; KLUGER, *supra* note 5, at 543; Elman, *supra* note 2, at 838.

49. Davis's ten points succinctly stated are as follows:

- (1) Change places with the judge.
- (2) Make yourself heard.
- (3) State the history of the case.

a unique degree of deference. He invariably received the rapt attention of the Justices — even in his last appearance in the *Briggs* case, in which all the cards were stacked against him. *Fortune* magazine aptly said of him that he was noted for a "calm, gracious and modest elucidation of complex matters."⁵⁰

Even Davis's opponents acknowledged his excellence. Thurgood Marshall accepted the view that Davis was motivated by his reverence for states' rights in his enthusiasm for the South Carolina cause. "He was a great advocate, the greatest," said Marshall.⁵¹

From time to time, other lawyers retained Davis to render legal opinions on matters with which their clients were concerned but as to which they wished to avoid litigation.⁵² They readily agreed to accept his opinion as final.

In my own experience as Davis's "friend and helpmate,"⁵³ I knew him as a warm and kindly mentor who, despite his unchallenged stature as the dean of the American bar, was always quick to put me at ease. Others also found him extraordinarily gracious. Judge Learned Hand once remarked that he had to steel himself against Davis's special charm for fear of deciding in his favor without regard to the merits of the case.⁵⁴

If in retrospect Davis may have appeared insensitive to the emotional and psychological needs of African-Americans, it was a trait common to

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- (4) State the facts with candor.
 - (5) Go for the jugular.
 - (6) Rejoice when the Court asks questions.
 - (7) Read sparingly and only from necessity
 - (8) Avoid personalities.
 - (9) Know your record from cover to cover.
 - (10) Sit down.

HARBAUGH, *supra* note 6, at 401-02.

50. *The U.S. Bar*, FORTUNE, May 1949, at 90, 91.

51. HARBAUGH, *supra* note 6, at 50.

52. Nelson Adams, a Davis Polk partner who assisted Davis in preparing such opinions, notes that "by a few deft touches such as the insertion of a word or phrase at a critical point he would add the sparks that were needed to bring the opinion to life." Letter from Nelson Adams, Senior Counsel, Davis Polk and Wardwell (successor firm to Davis Polk Wardwell Sunderland & Kiendl), to the author (Apr. 24, 1995) (on file with author).

53. When I left Davis Polk to return to Charlotte to practice law in 1954, that is how he signed the photograph he gave me.

54. "He was delightful and engaging," said Hand. "He had a way of stating differences that left no record of ill feeling." HARBAUGH, *supra* note 6, at 405. Davis generally made a point of shaking hands with his lawyer adversary when he entered the courtroom before argument.

many of us who shared his Southern upbringing. Fortunately, time has provided our generation an opportunity to do penance for its once myopic views. And, with whatever justification, the Warren Court fiat has led the way to a higher justice.

Perhaps the most vivid and lasting impression I have of the man whom most of his partners addressed as "Mr. Davis" is that which King George V reportedly said of him: "He was the most perfect gentleman I ever met."⁵⁵ No doubt that quality served him well in achieving near perfection as a lawyer. Surely in John W Davis the consummate gentleman met the consummate professional, in defeat as well as in victory. Perhaps that is a prescription for curing many of the ills that beset our contemporary Bar.

55. *Id.* at 146. As a graduate of Washington and Lee, Davis no doubt was familiar with Robert E. Lee's definition of a "gentleman":

The forbearing use of power does not only form a touchstone, but the manner in which an individual enjoys certain advantages over others is a test of a *true gentleman*.

The power which the strong have over the weak, the magistrate over the citizen, the employer over the employed, the educated over the unlettered, the experienced over the confiding, even the clever over the silly — the forbearing and inoffensive use of all this power or authority, or a total abstinence from it when the case admits it, will show the gentleman in a plain light. The gentleman does not needlessly and unnecessarily remind an offender of a wrong he may have committed against him. He cannot only forgive, he can forget; and he strives for that nobleness of self and mildness of character which imparts sufficient strength to let the past be but the past. *A true man of honor feels humbled himself when he cannot help humbling others.*

J. WILLIAM JONES, *PERSONAL REMINISCENCES, ANECDOTES, & LETTERS OF GEN. ROBERT E. LEE* 163 (New York, D. Appleton & Co. 1874) (quoting from loose sheet in Lee's handwriting found among his papers at death). Davis's relationship with his valet Charles Hanson was extremely close; Hanson was one of his greatest admirers. HARBAUGH, *supra* note 6, at 526.

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