

Mr. Justice Clark

May 27, 1953.

Memorandum for the Conference:

*Re: The Segregation Cases.*

With the thought that it may facilitate consideration to put into concrete terms the kind of questions to which the attention of counsel on the reargument of these cases should be directed, I have formulated the questions below.

A word or two of preliminary comment. These questions, I think, do not offend against the suggestion that we ought not to disclose our minds. Certainly as an entirety they look in opposite directions. Some give comfort to one side and some to the other, and that is precisely the intention. Insofar as the questions dealing with remedies may indicate that a decision against segregation has been reached by the Court, I think it is not undesirable that an adjustment be made in the public mind to such a possibility. I know not how others feel, but for me the ultimate crucial factor in the problem presented by these cases is psychological—the adjustment of men's minds and actions to the unfamiliar and the unpleasant. Time, in turn, is the ameliorative factor in the process of adjustment. It would, therefore, be all to the good that the minds of those who are opposed to a change should accustom themselves to the idea of it long before they may be confronted with it.

Needless to say the questions which follow are intended to elicit thought on the part of my brethren and not to propose a draft to which even I am committed.

SUGGESTED QUESTIONS.

1. What evidence is there that the Congress in submitting the Fourteenth Amendment to the States, and the State legislatures and conventions which ratified the Amendment, contemplated or did not contemplate, un-

derstood or did not understand, that the Amendment would abolish segregation at the primary school level, or that it might be construed to have that effect?

*legislative history*

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 at the primary school level, was it nevertheless the understanding of the Framers

(a) that future Congresses might, in the exercise of their power under § 5 of the Amendment, abolish primary school segregation, or

*Congress abolish?*

(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?

*upto Courts?*

3. On the assumption on which question 2 is based, and assuming further that it was the understanding of the Framers that the Congress might, in the exercise of its powers under § 5, act to apply the Amendment so as to abolish primary school segregation, does a judicial power to do so exist concurrently with that of Congress?

*is there judicial power to abolish?*

4. Assuming it were decided that segregation at the primary school level violates the Fourteenth Amendment,

*Decree*

(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

*Negroes forthwith admitted*

(b) may this Court, in the exercise of appropriate equity powers, permit an effective adjustment from existing segregated systems to a system not based on color distinctions to be brought about?

*adjustment gradual from one system to another*

5. On the assumption on which questions 4 (a) and (b) are based,

(a) should this Court formulate detailed decrees in these cases;

*Should court formulate detailed decrees*

(b) if so what specific issues should the decrees reach;

*what should it contain*

(c) should the Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

*Special master*

*or  
referred to D.C.?*

(d) should the Court remand to the courts of first instance with directions to frame decrees in each of these cases, and if so what general directions should the decrees of this Court include and what procedures should the former courts follow in arriving at the specific terms of more detailed decrees?

F. F.