January 15, 1954

Dear Brethren:

As is doubtless true of the rest of you, all sorts of considerations have arisen within me in regard to the fashioning of a decree. In order to judge the worth of these worries more clearly, I subjected them, sometime ago, to the test of paper. Although meant solely for the clarification of my own mind, I now circulate this memorandum with the thought that sometimes one's thinking, whether good or bad, may stimulate good thoughts in others.

I need hardly add that the typewriting was done under conditions of strictest security.

F.F.

1. A decree in this case in favor of the appellants of necessity would be drastically different from decrees enforcing merely individual rights before the Court. To be sure even in cases under the Sherman Law or a bill against a nuisance, like that in Georgia v. Tenn. Copper Co., 206 U.S. 230, so-called considerations of public convenience are balanced against the right of the plaintiff in molding an appropriate decree. Attention is paid to the element of time for obedience. Even in the cases involving higher education the Court was dealing with individuals, not merely the one or few before the Court, but all who would be affected by the results of the individual litigations were few in number Thus, the problem presented was amenable to individual treatment. This is not so in the situations before us.

2. To be sure, we have formally before us only individual claimants, standing on their individual rights. This is the prerequisite for our jurisdiction. This fact, however, does not change the essential subject-matter of the litigation - we are asked in effect to transform state-wide school systems in nearly a score of States. Of course, in these States the rootedness of the segregated systems varies and therefore the problem of uprooting has varying aspects. In any case, however, declaration of unconstitutionality is not a wand by which these transformations can be accomplished. Assuming the best will in the world, the transformation sought involves physical and educational changes which in turn depend on considerations affecting the utilization or improvisation of buildings, educational administration, (what teachers, for whom, under what circumstances), budgetary matters, and the function of time in bringing about the re-

quired result.

3. A clear appreciation of what result is required is indispensable. The aim is summarized in the phrase "integrated" schools. The heart of the matter is the meaning of "integrated" - what is implied by it. Integration, that is "equal protection", can readily be achieved by lowering the standards of those who at the start are, in the phrase of George Orwell, "more equal". "Integration" could be achieved in a way to lower the standards of those now under discrimination. It would indeed make a mockery of the Constitutional adjudication designed to vindicate a claim to equal treatment to achieve "integrated" but lower educational standards. Surely we can take as a starting-point that in enforcing the Fourteenth Amendment the Court is, broadly speaking, promoting a process of social betterment and not contributing to social deterioration. Not even a court can in a day change a deplorable situation into the ideal. It does its duty if it gets effectively under way the righting of a wrong. When the wrong is a deeply rooted state policy the court does its duty if it decrees measures that reverse the direction of the unconstitutional policy so as to uproot it "with all deliberate speed". Virginia v. West Virginia, 222 U.S. 17, 20.

4. So far as fashioning a decree is concerned, the problem before the Court is essentially a fact-finding problem, even if the "facts" are not wholly simple. To give only one illustration of the complexities of our problem, the spread of differences in the ratios of white to colored population among the

various counties in different States is very considerable. See, for instance, the 1950 Census figures for Arkansas and Virginia. Only on the basis of facts not now known will it be possible to judge how ills inherent in segregation of Negro children can be terminated without substantially diminishing the quality of education for all children. The Court does not know that a simple scrambling of the two school systems may not work. It surely cannot assume that scrambling is all there is to it. One is entitled to suspect that this is not so. It is surely entitled to suspect that spreading the adjustment over time will more effectively accomplish the desired end because more beneficial to the total situation. When the facts are found - no matter by whom - there are bound to be differences of opinion concerning the judgment to be based on them. This is almost certain, and hence future litigation is almost certain. The Court should take forethought in restricting so far as may be both the area and the occasions for such litigations. And one can be confident in believing that a mere declaration of unconstitutionality will be the most prolific breeder of litigation and chaos.

5. A mere declaration will not do. But, also plainly, an initial decree is bound to confine itself to general terms, namely, that the inequalities which any segregated school system begets cannot stand and must be terminated as soon as this can be done with due regard to the requirement that school systems be not disrupted and that no substantial lowering of standards over present ones result for any sizeable group.

6. These are generalities into which the facts to be found must put

meaning - considerations pertaining to physical, educational, budgetary, and time factors. Nor do these exclude concern for teachers as well as for pupils, or for problems caused by shifts in population which these readjustments may well induce.

7. And so we reach the crucial question of the agency for ascertaining these facts and giving them meaning. The one thing one can feel confidently is that this Court cannot do it directly. If this were a relatively simple case, like Paramount, we doubtless would remand to the District Court to formulate a decree after appropriate hearing. This is a case qualitatively different from cases where issues are merely complex. Here the facts relevant to formulation of a decree are not only different in kind than courts usually consider, they have to be dug out and are embedded in deep feeling. Since a social policy with entangling passions is at issue, the facts ought to be dug out by an active, disinterested digger-out of facts. A court is greatly handicapped in doing this; a court passes on materials that are dished up to it by the litigants. Here we cannot rely upon the ordinary adversary proceeding. The record in the Virginia case indicates that on remand to that court, for a hearing on the decree, the respective parties would support their respective claims with too many assertions and conclusions, too many untested theories based on too many unquestioned distillations of experience.

8. The functioning of a Master would be different. He would move around, he would be able to gather information more nearly at first hand. He would get the enlightenment that comes from a searching and self-directed in-

quiry. Conclusions would have the advantage that the report of a labor arbitrator has over a court result. A properly equipped Master would become immersed in the problem, undistracted by other judicial duties or the thought of them. It is not ill-will that is most obstructive in such matters. Habit and tradition, the comforts of the familiar, have cut grooves that are not conducive to evolving the necessary, new adjustments.

9. The appointment of a Master could, of course, be made in one of two ways. Either this Court could appoint the Master for each of the appropriate states or we could direct the District Courts to proceed in molding decrees through inquiry and hearing of a Master in the first instance. I am, of course, aware that it would not be easy to find Masters of the desired qualities. But we surely cannot assume that they are not to be had.

10. There are arguments for and against each alternative. Important considerations counsel retention of the litigation by this Court without entering, of course, into the details of judicial administration. Again, this Court would have a wider range of choice than the District Courts in the selection of Masters, even though they be citizens of the litigating States. In any event this Court would endow the Masters with greater moral authority. On the other hand, there are important things to be said for charging the District Courts with responsibility. For the present I am clear only about one thing - the considerations pro and con, as between the two alternatives, raise serious questions.

June 13, 1953

MEMORANDUM FOR THE CONFERENCE

In re Invitation to the Attorney General to argue the Segregation Cases

In view of the political uses that are being made of our permission to the Attorney General to argue the recent racial discrimination cases in the District of Columbia, I think we should amend our order in the segregation cases and eliminate the paragraph which invites the Attorney General to argue. I do not think that this Court should permit itself to become involved in current political controversies, and I know of no way to prevent it in respect to the subject except to change our order. Consequently, if this matter comes up before the conference, I vote to amend the order in this way.

HUGO L. BLACK