Memorandum for the Conference

It is, I believe, too much to hope that the Segregation Cases constitute the last litigation to come before this Court involving legislation affecting the relations between white and colored people. That being so, it is equally too much to hope that no further appeal will be made to the legislative history of the Fourteenth Amendment to support arguments, one way or the other, as to the intended scope of the Amendment. Having in the past found Flack's *Adoption of the Fourteenth Amendment*—the usual source of the legislative history of the Amendment—inadequate as a dependable, well-balanced summary of that history, I put one of my last Term's law clerks, Alexander Bickel, to work on such a summary. He was instructed to read afresh every word in the Congressional Globe bearing on what ultimately became the Fourteenth Amendment, which necessarily included the history of related measures. Bickel was peculiarly equipped to carry out this assignment not merely because he has the disciplined habit of accuracy to a degree unusual even among good lawyers but also because he is something of a specialist on American history. I myself spent not a little time in studying and revising his draft, and his labors had the benefit of a second revision by him and me.

My brethren may care to put the result of all this labor in their files, including a prefatory note summarizing this history.

F. F.

May 18, 1954.

LAW CLERKS' RECOMMENDATIONS FOR SEGREGATION DECREE

The following represents the views of the six law clerks who prepared the Segregation Research Report. These views are based upon the work done on the Report, and upon a number of discussions we have had during and after preparation of the Report. We disagree on a number of important matters, but there is a fairly large area of agreement.

A. Remand. We agree that the cases should be remanded to the District Courts for supervision of the execution of the decree. District Courts will be closer to the particular circumstances of each case, and may be regarded less as interlopers than direct supervision by this Court, or masters appointed by it, would be. District Courts may in turn wish to appoint masters in some cases, but this should be left to their discretion and should not be discussed in this Court's opinion.

B. Decree. We agree that this Court should formulate a simple decree, in light of the relief asked for in these cases. A suggested form would be: "The defendants are hereby enjoined from determining the admission of the plaintiffs to schools on the basis of a racially segregated school system."

If any general guides are to be enunciated, they should not be included in the decree itself, but rather in a separate opinion.

C. Necessity for Guides: We do not agree on this question. Five of us think some guides necessary; one is opposed.

(1) Reasons for guides: Those of us who favor general directions concerning desegregation share the following views:

We recognize the danger of deciding cases before they are here. At the same time, we realize that the present cases are class suits in fact affecting millions of children and that school boards and the lower courts are looking to this Court for guidance as to their respective duties under the decision. Moreover, this Court owes some obligation to those areas which began to desegregate after the decision: They proceeded on the theory that they would eventually be required to do so, and that their experience could be of help in framing the decrees. For this Court to say nothing more in its decrees than it has already said would be leaving those areas out on a limb. Further, there is an obligation to the District Judges who will be asked to supervise compliance. The remand will cast a heavy enough burden upon them. That burden will be lightened if this Court lays down general standards. It will enable the local judges to point to a superior authority in undertaking

will often be unpopular action. And it will give them some standards for evaluating the states' plans in determining whether they represent bona fide compliance, rather than being left wholly at sea when faced with the jargon of educators which may or may not be a guise for evasion.

As a result of our work on the Report, we appreciate the variety and complexity of legitimate educational considerations, and the consequent difficulty of formulating general standards. Obviously this Court cannot anticipate all the local problems which may arise. Nevertheless, some general guides for pending and future cases can be set forth, without embarrassing the Court at some later date. We do not think that the Court would obtain significant additional information for general standards by waiting for a few more cases to come up from the District Courts. A lack of guides at this time would increase confusion and encourage more delay than is necessary. Such guides would merely recognize normal practices of educational administration and aid in deciding the central issues in each case: whether the plaintiff is being segregated on the basis of race, and whether the defendants are making good faith efforts to end such segregation. Such guides should be set down in general terms and with the reservation that the law governing future cases

will not be finally decided until these cases are actually before the courts. It should be made clear that the purpose is solely general guidance and that District Courts will still have much discretion in light of local circumstances. Inevitably, this will not be the last word on the subject by this Court; further guidance will evolve from future litigation, which in some cases will have to be reviewed by this Court.

(2) Reasons against guides: The member of our group who opposes any statement by this Court beyond a decree such as suggested in (2), supra, states his reasons as follows:

The Report establishes the wide divergence of school organizational systems and other pertinent local conditions which would seem to point up the relative impossibility of this Court's making any effective generalization of standards. Rather, any intimation of what this Court thinks is required to constitute lawful school practices might well provide further opportunity for rebellious school administrators and states to employ their ingenuity in efforts to avoid compliance. My view is that the states should be allowed to conform to the principle of the mandate free from any guide or general restrictions. It would then be up to the individuals in the community who feel

the states or community school boards have not conformed to bring the appropriate action in the district courts. Through only a few of these concrete cases the lower courts and this Court will be able to set up the more specific requirements which a school administration must follow to be constitutionally permissible. Through this method the Court can allow the states the maximum freedom while standing ready to enforce any individual's constitutional right. In addition the Court will have before it specific situations with the added benefits of findings made by local judges when it takes steps to lay down what constitutes discriminatory or non-discriminatory practices.

D. The Contents of the Opinion: Unless specifically noted, all six of us agree on the following suggestions. [For purposes of this discussion the member of our group who opposes the issuance of any opinion, see C(2) supra, has expressed his views as to the contents of such an opinion, if one is to be handed down.]

1. General: The problem is recognized as primarily a local one. Diverse situations require that the main responsibility rest with local school boards. At the same time, the courts have a definite responsibility:

the state, under the guise of local responsibility, cannot continue to segregate in a pattern which has now been held invalid. Some degree of judicial control is unavoidable.

2. Procedural: We agree that the District Courts should recognize in future cases that the burden of proof, as in other cases, is on the plaintiff. One of us believes that in the cases now before the Court, and perhaps in future cases, the local school authorities shall always be required to submit a comprehensive desegregation plan for the District Court's approval. The rest of us, however, do not think that such an explicit requirement is necessary. To be sure, as a defense to a segregation claim, the defendants will in most cases probably point to the general admission practices of the school or districts involved. However, a uniform burden to come forward with a plan should not be required, since in some cases the defendants may be able to establish an adequate defense by pointing to factors short of a plan and relevant only to the particular plaintiff. In this manner, the traditional procedures of the adversary system can be more closely adhered to, and the danger of conveying the impression that no plan can be put into effect without prior court approval can be avoided.

The burden on the plaintiff which must be met before the defendants must come forward will vary with the particular situation. Obviously, the kind of allegation present in the cases now before the Court -- that the defendants are maintaining a segregated school system -- will be adequate. Unless the defendants show that they are complying with this Court's ruling of unconstitutionality in good faith, an injunction should issue. If the authorities have instituted a desegregation plan, the plaintiff may allege failure to be admitted to the desired school either (a) by attacking the plan itself or (b) state the facts particular to his own case, such as failure to be admitted to the nearest school. The issue of fact then to be determined will be whether (a) the plan constitutes good faith compliance with this Court's earlier ruling as supplemented by the forthcoming opinion, or (b) whether the individual is in fact being segregated because of race.s

3. Time for Compliance. We agree that, whatever may be said for immediate desegregation at all levels of the Southern School systems, such a requirement is impractical. The decree-and-opinion is likely to be ignored by almost all elements in the South if it is viewed as clearly arbitrary and unreasonable. Even such moderate spokesmen

as Ashmore, editor of "The Negro and the Schools," and Hodding Carter, Mississippi newspaper editor, warn that compliance is unthinkable if the decree does not provide for some gradualism. On the other hand, we think that our Report shows that the mere passage of time without any guidance and requirements by the courts produces rather than reduces friction. It smacks of indecisiveness, and gives the extremists more time to operate. This is particularly true where an area attempting desegregation in good faith is located near an area seeking to avoid desegregation; each area can point to the other and condemn its own leaders. Once there is some legal sanction, evasive tactics are cut down and popular acceptance spreads. Therefore, we are all opposed to complete silence from the courts on time limits, and agree that some compromise must be found. (a) One of us, as noted, would let the time be determined by the District Courts, in light of local conditions and sentiment; the rest of us oppose this, on the ground that this would put a premium on local hostility to demonstrate the "impracticability" of immediate action. (b) Another member of our group -- the one proposing that local authorities must submit desegregation plans for court approval -- would allow plans which did not contemplate <u>any</u> action for several years, as long as the desegregation

process is completed in a maximum of 12 years. The four remaining members of the group oppose this view as well, on the ground that we see nothing to be gained by sanctioning years of inaction; we fear that this would increase opposition, inhibit communities ready to move more quickly, and insult those officials who have already begun to desegregate.

(c) The four other members of our group agree that, after the passage of a reasonable time of no more than one year from the issuance of the decree-and-opinion to allow planning and administrative changes, some "immediate" steps toward desegregation must be demonstrated to support a finding of good faith compliance. We believe, for example, that some states may comply by desegregating one class at a time, which would mean a lapse of 12 years before total compliance. Such a plan would be permissible; good faith compliance with a decree enjoining maintenance of a segregated system would be established by showing that some classes are now desegregated, although the particular plaintiff may be attending a segregated grade. We recognize the difficulty of reconciling the usually personal nature of the claimed constitutional right with an opinion sanctioning the segregation of some children. However, we think that reconciliation possible here, in light of the unusual nature of these cases, which in fact are attacks on a system

of segregation. We think there is compliance with the requirement to eliminate that system if the defendants show that concrete steps have been taken to desegregate, though that process is not complete at the time of suit.

Although we think a 12-year gradual desegregation plan permissible, we are not certain that the opinion should explicitly sanction it. There is the danger that it may encourage gradualism even in communities ready for more speedy action. A suggestion that some immediate steps are required and that expeditious full desegregation is encouraged, with discretion in the District Judges to find good faith compliance even where a 12-year gradual plan is in effect and is justified by local circumstances, may be the answer. In short, this compromise would require that some action of an affirmative and demonstrable nature must be undertaken immediately, but that so long as efforts along these lines are continued in good faith, the states are allowed a reasonable time to carry them out.

4. Criteria re Desegregation Plans: Assuming that the school authorities submit as their defense an allegedly desegregated plan, the following general criteria are suggested for the guidance of the District Courts in determining the ultimate question: whether the plaintiff is being

segregated on the basis of race alone, or whether he is attending his school for ligitimate educational reasons.

(a) Attendance area districting (continuous lines drawn around contiguous areas, with students required to attend the school within their area): Such districting (which, as the Report indicates, is the most commonly used method of determining attendance) is assumed to be valid if the district boundaries are continuous lines drawn around contiguous areas unless (a) The plaintiff offers affirmative evidence showing that the boundaries of the districts were determined for the purpose of continuing unconstitutional segregation, or (b) the districting appears arbitrary and unreasonable on its face, as where the districts are so contoured as to extend geographical pehinsulas into physically unified areas to take in individual Negro homes. In situations (a) and (b), the defendants must satisfy the court that there is some basis for the districting other than race -- e.g., natural or man-made hazards. (The only substantial disagreement in our group as to the nature of the criteria relates to this point. One of the six would bar further judicial examination of districting if the defendants merely establish that the district boundaries are continuous lines enclosing contiguous areas. He would not consider a claim that the boundaries are arbitrary on their face.)

(b) Optional, Voluntary Choice Determination of Attendance (students attending schools of their choice; methods (a) and (b) are often used in conjunction). Such a plan is assumed to be valid if the choice is open to children of both races unless the plaintiff is denied admission to the school of his choice. In that event, the defendants must satisfy the court that the denial of admission was on non-racial grounds. If the state claims that the school was filled when the plaintiff applied, it becomes a question of fact whether the school was filled to normal capacity and whether that capacity was reached by non-discriminatory methods (e.g., whites may not have priority in enrollment over similarly situated Negroes.)

(c) Individual assignments by school authorities. - This method is not presumptively invalid. The plaintiff may challenge it by showing (a) that the resulting pattern of assignments reveals purposeful segregation (cf. grand jury cases), or (b) that the child was not assigned to the nearest school, thus requiring the defendants to come forward with a valid reason for the assignment.

Conclusion: We believe that these suggestions for the opinion would accomplish several major purposes: (1) They would indicate to the South that the Court understands and is sympathetic to the problems which the decision

raises in their states. (2) They would prevent the decision from being completely unenforceable in the deep South, because it offers opportunities for substantial compliance. Practically speaking, it seems more important at the present time to get a few Negroes into white schools than to require overall, immediate desegregation, unacceptable to white Southerners. (3) They would require some immediate action, preventing the decision from becoming a dead letter and supporting those officials who have already begun desegregation. (4) They would leave considerable discretion with local judges, yet not leave them wholly at sea and without explicit Court support for their actions.