

REMEMBERING BROWN: A TRIBUTE TO JOHN HOPE FRANKLIN

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MODERATOR: NEIL SIEGEL

Editor's Summary: On March 27, 2008, the Duke Forum for Law & Social Change and the Office of the Dean co-sponsored a Symposium entitled, "Remembering Brown." The panelists discussed both their experiences working to desegregate public schools and their perspectives on whether the aspiration of Brown v. Board of Education has been fulfilled. Below is a transcript of the event.

[Transcribed by the Duke Forum for Law & Social Change. The transcript has been lightly edited, and citations have been added for ease of reading.]

Moderator:

NEIL SIEGEL, Associate Professor of Law and Political Science, Duke University School of Law

Panelists:

JOHN HOPE FRANKLIN, Professor Emeritus, Duke University School of Law

JACK GREENBERG, Alphonse Fletcher Professor of Law, Columbia University School of Law

LOUIS H. POLLAK, Senior District Judge, United States District Court for the Eastern District of Pennsylvania

NEIL SIEGEL: Our students have studied what you did during the *Brown v. Board of Education*¹ litigation and what you have written and they are very excited that you are here. I want to thank you. I think we all want to thank you for everything that you did to redeem our Constitution and our country. It is not often in law that one encounters a genuine American hero, and today we find ourselves in the presence of three of them.

I have a lot of questions, but I think I want to stop and just open it up to you folks. You've heard a lot today; you've seen a lot. And I want to give you whatever opportunity you would like to speak for yourselves about anything—really anything that you want (*laughter*).

1. 347 U.S. 483 (1954).

JOHN HOPE FRANKLIN: I'd like to respond to that wonderful and, somewhat inaccurate introduction of me (*laughter*). Let me say in the first place that I want to welcome Dean Levi. This is my first public occasion that I can welcome him. I've known him since he was a high school student (*laughter*), and his father was one of my closest friends when he was president of the University of Chicago.

I would say secondly that the experience that I had during the litigation of *Brown* was the result of my rejection of the practice of law when I was in college. The reason I rejected it was the first year I was in college we lost our home through the remnants of the Great Depression. I was not desensitized to that; I thought that my father was an erratic practitioner of the law, and that he was starving us to death (*laughter*). I learned somewhat later that there were other forces operating to keep us from our daily bread, and I have long since repented for my indictment of my father for his dereliction of duty (*laughter*).

Finally, I want to say that in the course of my preparation, I did offer the law of the Constitution as one of my fields for my doctorate, and I then witnessed some great occasions at Harvard Law School, when I would go over there to listen to the law expounded by some of the great people—some of the great legal scholars—of all time. I was present the day that Felix Frankfurter was confirmed by the United States Congress to go on the Supreme Court, and I heard his farewell address. That's by way of indicating that I had my interest in the law although I had long since abandoned any notion that I would starve my family by practicing the law (*laughter*).

I'm especially proud to be back here at the law school where I spent seven wonderful years, and where I learned that you didn't have to starve to be a lawyer. I was particularly pleased to have the opportunity to teach here seven years because, as I have said in my own autobiography, I don't think my life would have been complete without the experience that I had here in the law school. It was simply a marvelous and refreshing and profitable experience. I learned a great deal. It was all new to me and it was a wonderful experience.

But on the way here, I had some experiences, one of which has been mentioned, which helped me a great deal in later life. I was the expert witness—in the case of *Johnson v. University of Kentucky*.² And the thing that I remember most about that experience is that I didn't get a chance to testify because Thurgood³ sped up the process by insisting that the judge—Judge H. Church Ford—hand down the decision based on the lack of information that the University of Kentucky advanced. And so although most were shouting, I was pouting (*laughter*); because I really wanted to show off on the witness stand. But I made an impression, I suppose, on Thurgood at the time, because he later called me at the beginning of the litigation of *Brown*, and asked me if I would testify and assist in the writing of the brief, and I said I would. And he proceeded to bring me to Washington every week from August to November [of 1953].

I worked with Jack Greenberg and others in trying to answer the questions which the Court had propounded when it remanded the case back to the

2. *Johnson v. Bd. of Trustees of U. Ky.*, 83 F. Supp. 707 (E.D. Ky. 1949).

3. "Thurgood" refers to Thurgood Marshall, then director-counsel of the NAACP Legal Defense Fund ("Legal Defense Fund"), and later Associate Justice of the U.S. Supreme Court.

attorneys on both sides with questions which had to be raised. The question of the moment—and the one that preoccupied us for the next several months—was the question of whether or not the legislators had in mind the abolition of segregation in the schools when the Constitution was written. Later, when the Fourteenth Amendment was enacted, and when people ratified these documents, did they know if they wanted to eliminate segregation?

Now, obviously we didn't know a great deal about the law, but we did know something about the effort that was made on the part of the people in the period of framing the Constitution, in the period of the ratification of the Fourteenth Amendment, and at other times. We knew and we made it clear—I hope we made it clear, Jack—to counsel that they had in mind the elimination of segregation.

And I don't know, really, we didn't find all that much in federal law or in the Constitution itself that would affirm this determination that we had to eliminate segregation in the public schools. But the thing that we really accomplished was that we made—I'm sorry Jack—we made the legal-side experts in Constitutional history, and the history of the Reconstruction period, and then the period following that. And I would love to impress you with the fact that when these lawyers started with us, they were stumbling and fumbling over these provisions of the Constitution, but before they argued this case before the Supreme Court they were expert witnesses themselves, and the most satisfying experience I had was to listen to the lawyers on the Legal Defense Fund as they expounded on the law as great legal historians, and I could say to myself, "That's my boy, that's my girl," (*laughter*) because they were so proficient by that time. I want to make some comments in addition about the ramifications and result of *Brown*, but I will let that go for now. Thank you.

NEIL SIEGEL: I was wondering, Professor Greenberg and Judge Pollak, if I could get a sense from you of your present understanding of the meaning of *Brown*. And to get at this, I'd like to ask you about a recent Supreme Court decision, *Parents Involved in Community Schools v. Seattle School District No. 1*.⁴ Recently the Supreme Court, for the first time since *Brown*, significantly limited the ability of local communities to use race in order to integrate—racially integrate—their public schools. And in so doing, Chief Justice Roberts—on behalf of himself, and Justices Scalia, Thomas and Alito—wrote the following, and I'd like to get your reaction to it.

This is Chief Justice Roberts: "The parties (and their amici) debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown*," you folks, "was spelled out in their brief and could not have been clearer." And then Chief Justice Roberts quotes from your brief in *Brown*: "The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." Then Chief Justice Roberts asks rhetorically:

What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? Before *Brown*, schoolchildren were told where they could and could not go to school based on the

4. 127 S.Ct. 2738 (2007).

color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

In your view, did the Chief Justice fairly characterize what you said, and more importantly, what you meant in the *Brown* litigation? And if not, I'd like to give you the opportunity, if you're willing, to speak for yourselves about your understanding of what *Brown* means.

JACK GREENBERG: The answer to your question is absolutely not. There are five surviving lawyers who participated in the *Brown* case, and if we count John Hope Franklin as a lawyer that makes six. And all of us have unanimously said that Chief Justice Roberts is wrong in his characterization of what we wrote in those briefs. You have to understand we were not legal philosophers, we were not the jurisprudes. We were advocates. We not only wrote that brief in *Brown*, I would say altogether twelve to fourteen briefs were written on the side of the Plaintiffs in *Brown*.

Brown was argued twice. The first time it was argued there were five cases if you want to count the District of Columbia case among them. The second time there were five cases again. Then on the "all deliberate speed" argument, it was argued once more.⁵ Lawyers in those cases took positions as advocates in which they argued the non-classification principle and they argued the non-subjugation principle. They were trying to make arguments that would be persuasive to the court. It's what advocates do.

They weren't writing a law review article. For him to take out just one sentence, or even three sentences out of the briefs makes it absolutely nonsensical, and I think everyone who participated on *Brown* at that time agrees with me on that.

LOUIS H. POLLAK: I would echo what Professor Greenberg has said, very emphatically. It is not generally the role of an inferior court judge to engage in extended critiques of the opinions by which he is bound (*laughter*), but I really do regard the opinion of the plurality—it was a plurality because Justice Kennedy's separate opinion makes it a majority—I think the plurality opinion was inappropriate. Taking the language of the brief in a sort of "gotcha" mentality—, saying, "That's what you guys said in 1953. And we, the Court, did what you told us to do, and now you're stuck with it,"—in a litigation setting is inappropriate in the sense that the parties before the Court in the *Louisville* and *Seattle* cases were different parties. They weren't responsible for what appeared in the *Brown* briefs.

But passing that, the language used in 1953 in arguing the five cases was not only—what Jack has so precisely said—the language of advocates addressing the litigation situation, it was language that had its own historical context, and it was the context that Professor Franklin was addressing in his professional perspective. *Brown* was about the use of governmental authority to segregate

5. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955)(holding that the lower courts should pursue such decrees and orders necessary to desegregate public schools with "all deliberate speed").

people by race for the purpose of subordinating a minority race. And if you want the clear text on that, I think John Hope Franklin has given it to us in so many of his writings, and standing with it would be Vann Woodward's classic work, *The Strange Career of Jim Crow*.⁶

That's what *Brown* was about, and to take the *Seattle* and *Louisville* context in which government is trying to eliminate forms of disadvantage that may flow from decades of disparate treatment of black and other persons of color, to take that setting and say, "You can't do what you're undertaking to do, the kind of reform you're undertaking" — it's a very, very modest use of race, only one factor at a remote point — "you can't do that because back in 1953 the Legal Defense Fund said" and then quote the words, is to impose on the constitutional process an a-historical flaw — it seems to me — of monumental proportions. And it really tends to trivialize what the court did in 1954 and unhappily did again last year.

The question of what *Brown* meant, I think, was put in focus by Professor Charles's initial remarks,⁷ in which he sets up two possible ways of looking at *Brown*. We look at it as what government does and attach to that the concern, that if government gives preference to one group and puts others in a secondary position, is that not a disparagement within constitutional norms? And second — as I understood Professor Charles's paradigm — is: was *Brown* really to be addressed as a lesson about citizenship?

And it was both. And it has to stand for both today. The citizenship sense is one of full participation in the American community, and that is hopefully what one would try to achieve through a variety of remedial enterprises. And to take the decision in a case which resolves systematic disparagement and transfer it to what contemporary communities are trying to do to put all their citizens in a common enterprise was, in my view, highly inappropriate, and contravenes what *Brown* — fully understood — is really about. The citizenship axis is one which I think gets very good expression in some of the writings of Charles Black,⁸ who was one of the very important participants — helping Jack and Thurgood and the others who were oral advocates in the framing of the briefs. That's what was being done and was being done importantly.

Before I finish let me say one further thing, if I may.

NEIL SIEGEL: Please.

LOUIS H. POLLAK: Much has been said and much more should be said about John Hope Franklin's unique role. There's nobody like him. And I hope this audience knows what an extraordinary advocate Jack Greenberg is. Following Thurgood Marshall as director-counsel of the Legal Defense Fund, his own career as a Supreme Court advocate, I think, is statistically a clear match with Thurgood's. In case after case after case after case, Jack Greenberg would come to Washington and tell the Supreme Court in slow, measured terms what was to be

6. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (Commemorative ed., 2001)(1955).

7. Professor Guy Uriel Charles, then the interim dean of University of Minnesota Law School, introduced the symposium by providing the backdrop of school desegregation. The *Duke Forum for Law & Social Change* would like to thank Professor Charles for his contribution to the panel.

8. Professor Charles L. Black, Jr. was a noted scholar of constitutional law, which he taught as a professor first at Columbia University, then at Yale University, and, finally, again at Columbia University until 1999. Black is noted for helping author the legal briefs in *Brown*.

done—and the judges did it. And I had the privilege of hearing that rhetoric—that slow, slow (*laughter*), non-polemic deliberate presentation. It was marvelous.

NEIL SIEGEL: Thank you very much. Did you say you wanted to say a few more things about the historical work you did in *Brown*? Did you want an opportunity to do that, John Hope?

JOHN HOPE FRANKLIN: First let me say that by the time Thurgood Marshall asked me to work on the case—that was in the summer of 1953—I had been following the case through the first term it was argued. That was the '52-'53 term. But then I was rather unhappy with the way things were turning out. I thought that the Court, in postponing the decision in the Spring of 1953—everyone was expecting a decision in *Brown*, but it didn't come—I thought that the Court was simply pulling some kind of special ploy for time or something.

So I was rather unhappy and unwilling to really waste any more of my time with trying to straighten out the Court. And I expressed some hesitation, some reluctance, when Thurgood asked me—on the telephone, as I was teaching at Cornell University that summer—he said, “What are you going to be doing in September?” I said, “I'm going back to the only job I have, and probably the only job I ever will have.” That's what I thought about higher education in this country. I had taught at Wisconsin, Harvard and Berkeley and so on, and Cornell, and they all just had me there for a semester, thanked me and sent me on my way to the next job. So I told Thurgood I was going back to the only job I had, and I really wasn't interested in anything, not in any appeal. Because I didn't have any confidence in the courts or anyone to do something very effective, very revolutionary about segregation in the United States.

And I made it quite clear. And I told Thurgood I didn't know whether I wanted to go to New York or not. And I wish that I could repeat in polite company what Thurgood said to me, but he said “If you don't agree to come and work on this case, then you can” Fill in the rest (*laughter*). And you know what kind of person he was. And I said, “yes sir.” (*laughter*)

And we worked. I can tell you we worked hard. Not merely the counsel—Jack Greenberg and Robert Carter⁹ and all the others—but the other non-legal groups who were there. We worked hard. I was teaching a full program at Howard University, coming back to New York on Wednesday afternoon and working Thursday, Friday, Saturday, and Sunday morning, and then getting back on the train—no shuttle in those days—getting back on the train and coming back to Washington and getting ready for a Monday morning class. It was really arduous work and I don't want anyone to think it was a picnic going to New York every week and working as we did until midnight.

Of course at midnight, Thurgood would say: “Let's take a five minute break.” And I would break out and around the corner to The Algonquin Hotel where I remained until the next morning (*laughter*). I didn't work all night. Never did, never will. But what we need to remember is the sacrifices that were made by the legal staff and the non-legal staff.

I shall never forget: I never went to the Legal Defense Fund offices when I

9. Judge Robert L. Carter presented part of the oral argument on behalf of petitioners in *Brown*. Carter was also the lead attorney in *Sweatt v. Painter*, 339 U.S. 629 (1950). In 1972, Carter was appointed a judge of the U.S. District Court for the Southern District of New York.

didn't see Thurgood Marshall sitting there. I don't know when he slept. I don't know if he slept. And for him to say we'll have a break—to him meant five minutes, to me meant ten hours. And the achievement of this group—I am speaking of the lawyers now—the achievement of this group was one of the most remarkable things I have ever seen in my life. And they were, by that time not only great lawyers, they were great historians too—great legal historians. They knew as much as we did about the Reconstruction period, and the period thereafter.

So it was a wonderful, rich experience. I wasn't certain of it at the time. Especially when we do all that work, and then they came back with the invitations to attend the argument. I said, "Where's ours?" Thurgood said, "Well you know, you're not a lawyer. We can't argue for you to have an admission to hear the arguments before the Supreme Court." So all that work went to the legal staff—I almost said down the drain (*laughter*)—but it went to the legal staff, but nothing but thank-you to the non-legal staff. But we held our chins up and we worked hard.

Now I did want to say something about the subsequent history of *Brown*. It's been disappointing all the way through, so far as I've been concerned. There was never a time when I thought that the country was really interested in doing something significant, even revolutionary about segregation in the schools or anywhere else. And so every time I looked at what was going on I was discouraged.

I was pessimistic about the possible realization, at any point, that there would be a significant move to eliminate segregation, period. And I remember I used to talk with Thurgood Marshall after he became Associate Justice. And sometimes you could hear the depression in his voice. And I would say, "What's wrong with you?" I would say that to him. And he would say, "Well, if you knew what I know, you wouldn't be happy either." At one point [the Supreme Court] was getting ready to hand down the decision on [*Regents of the University of California v. Bakke*].¹⁰ And at other points, where there was some decision—I didn't know what he was talking about at the time; I found out later—there'd be some decision he might be working on. And he'd be unhappy about the way in which he thought it was moving.

I don't think there is a Supreme Court decision that wracked this country, that stirred it up the way *Brown* did. Can you imagine a large number of United States Senators and members of the House of Representatives getting together to denounce the Supreme Court decision? And to say they were not going to obey it? It's as though it had been handed down by somebody in kindergarten or something. But that's what happened.

So *Brown* got off to a bad start, a terrible start, and I don't think it ever recovered, frankly. And it's one of the great tragedies of the twentieth century, that we could close the century with no more significant advance to the *full* realization of *Brown* than we had in 1955 or 1956. And so I can only say that the Court did its job, but almost no one else in this country did the job that needed to be done in order to move significantly toward a society that was equal.

10. 438 U.S. 265 (1978).

NEIL SIEGEL: Well, you certainly did your jobs, and we thank you. And we thank you as well for the time you've been willing to spend with us today.

Duke Forum for Law & Social Change *would like to thank Dr. Franklin, Judge Pollak, and Professor Greenberg for doing their parts to bring about educational equality for future generations. Dr. Franklin's legacy continues to inspire us all.*