

PRESIDENT EISENHOWER'S HANDWRITTEN CHANGES IN THE BRIEF ON RELIEF IN THE SCHOOL SEGREGATION CASES: MINDING THE WHYS AND WHEREFORES*

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Both historian Richard Kluger in his book *Simple Justice*¹ and the former principal Assistant to the Solicitor General, Philip Elman, in his published oral history² have disclosed the text of a change President Eisenhower made in his own handwriting in the Government's brief on remedies in the school segregation cases.³ Neither Kluger nor Elman, however, disclosed (1) the exact words used by the President before Elman (in Elman's words) "cleaned [them] up,"⁴ (2) the other changes made by Eisenhower in the brief or (3) how it came about that the President got his hands on the brief in the first place. This article undertakes to fill in those details.

The school segregation cases were first argued in the Supreme Court in December 1952 during the administration of President

* *Never mind the why and wherefore
Love can level ranks, and therefore
Gilbert & Sullivan, H.M.S. Pinafore.*

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1. See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 726-27 (First Vintage Books, 1977) ("Simple Justice").

2. Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 Harv. L. Rev. 817, 842 (1987).

3. Brief For the United States on the Further Argument of the Questions of Relief, filed in *Brown v. Board of Education* on Nov. 24, 1954.

4. See Elman, 100 Harv. L. Rev. at 842 (cited in note 2).

Truman. In May 1953, after President Eisenhower took office, the Supreme Court set the cases down for reargument.⁵ Although the President greatly admired his Attorney General, Herbert Brownell, Jr.,⁶ the two of them disagreed on the position the Government should take on reargument.⁷ Apparently, the Attorney General and Assistant Attorney General Rankin, on whom Brownell primarily relied for legal advice,⁸ favored a brief which would conclude that segregation was unconstitutional.⁹ The President favored a brief that would be limited to a presentation of “‘fact and historical record,’ and . . . [would] avoid giving his [Brownell’s] own opinion.”¹⁰ Thus, Brownell was placed in the awkward position of disagreeing with his boss. That disagreement continued even after the Court decided, on May 17, 1954, that segregation violated the fourteenth amendment.¹¹ The President steadfastly refused to give the Court’s unanimous opinion his public endorsement.¹²

After the Court held segregation unconstitutional, it again ordered the cases reargued—this time on the question of relief. The Court again invited the Attorney General of the United States “to participate.”¹³ Brownell personally favored the view of the Solicitor General and his staff that the Government should file a strong brief on relief. At the same time, the Attorney General could not overrule the President of the United States. Despite the hesitation at the highest level of the Administration, the Solicitor General’s Office started working on a brief on relief and so advised the Attorney General by memorandum dated June 22, 1954.¹⁴

Brownell’s written reply would have surprised, not to say an-

5. See *Brown v. Board of Education of Topeka*, 345 U.S. 972 (1953).

6. See Stephen E. Ambrose, 2 *Eisenhower* 125 (Simon and Schuster, 1984).

7. See James C. Duram, *A Moderate Among Extremists: Dwight D. Eisenhower and the School Desegregation Crisis* 64 (Nelson-Hall, 1981).

8. See the author’s memorandum of conversation with Elman on Nov. 8, 1991, now in the files of *Constitutional Commentary*.

9. See Ambrose, 2 *Eisenhower* at 125 (cited in note 6); cf. Kluger, *Simple Justice* at 651 and 754 (cited in note 1).

10. The quotation is from an Eisenhower memorandum dated Aug. 19, 1953, quoted by Ambrose, 2 *Eisenhower* at 125 (cited in note 6).

11. See *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

12. See Ambrose, 2 *Eisenhower* at 191 (cited in note 6); Kluger, *Simple Justice* at 753 (cited in note 1).

13. See *Brown*, 347 U.S. at 496.

14. See copy of Memorandum from the Solicitor General to the Attorney General dated June 22, 1954. (This and all other memoranda cited herein from officials of the Department of Justice will be found in Container #32, File folder #3 of the Simon F. Sobeloff papers in the custody of the Manuscript Division of the Library of Congress). The stated purpose of the memo was to ask the Attorney General for the “loan” of a lawyer, Alan S. Rosenthal, then on the staff of the Civil Division, to the Solicitor General for help on the brief. The Attorney General in a conversation with the Solicitor General approved the Rosenthal “loan.” See copy of Memorandum from Brownell to Sobeloff dated June 25, 1954.

noyed Solicitor General Sobeloff and his chief assistant Philip Elman, had they not been forewarned during Sobeloff's prior conversation with Brownell. Brownell's memorandum said:

Before any definite acceptance of the Court's invitation to participate in these cases *you and I are to have a conference with the President*, at which time we will present to him the arguments pro and con as to the filing of a brief and participation in the oral argument.¹⁵

On July 7 the Solicitor General—in a memorandum whose tone suggests that it was written in large part by Elman—politely lectured the Attorney General, reminding him that:

1. The Supreme Court has expressly extended an invitation to the United States to participate in the reargument. While this by no means compels participation, such an invitation is not to be lightly declined. Further, since the United States participated in both the original argument and the first reargument, it might be somewhat difficult, especially in light of the Court's invitation, to explain to the public our failure to participate in the second reargument. . . .

2. . . . the Supreme Court is entitled to as much help as it can get in the difficult matter of formulating the decrees to implement the decisions we ourselves urged upon the Court. . . any proposal by the Attorney General carrying with it the implicit sanction of the President will unquestionably have considerable weight with the Court.¹⁶

The Solicitor General's lecture prompted a brief and ominous written response from the Attorney General. Dated July 15, 1954, it called on him to meet four days hence with Brownell, Deputy Attorney General William Rogers, and Assistant Attorney General Lee Rankin. Brownell explained:

. . . it may be we will wish to see the President before we make a formal statement as to whether we are going to participate in the further argument of these cases.¹⁷

At this point, apparently, the exchange of memoranda ceased

15. *Id.* (Emphasis added).

16. Compare Elman, as quoted in Kluger, *Simple Justice* at 650 (cited in note 1): "The attitude of Brownell and his principal aides in the Department of Justice was expressed by [Deputy Attorney General] Rogers, who said in effect '. . . Aren't we better off staying out of it?' . . . I told them that the Court's invitation to appear at the reargument was tantamount to a command." Note that Elman here was referring to the reargument on the merits of the case, not to the subsequent argument on relief. See also Elman, 100 *Harv. L. Rev.* at 833 (cited in note 2).

17. See Memorandum from Brownell to Sobeloff dated July 15, 1954.

for almost four months.¹⁸ It can be surmised that a kind of uneasy truce had been reached: the Solicitor General and his staff would continue working on the brief but on the understanding that nothing would be filed unless and until the President's approval was obtained.

By November 8 Brownell had read the draft of the Solicitor General's brief and the two had agreed to meet on November 10 to discuss it.¹⁹ On the same day, following their meeting, the Attorney General wrote the Solicitor General as follows:

I arranged with the President's Appointment Secretary for you (and if possible, Deputy Attorney General Rogers) to meet with the President on *Saturday, November 20, at 9:45 A.M.* to advise him of the highlights of the Government's proposed brief in the school segregation cases.²⁰

A single sheet of paper obtained from the Eisenhower Library is entitled "THE PRESIDENT'S APPOINTMENTS SATURDAY NOVEMBER 20, 1954" (hereinafter "Schedule").²¹ According to the Schedule, his first appointment was at 8:30 a.m. with Deputy Attorney General Rogers, Solicitor General Sobeloff, and Maxwell Rabb, Assistant Secretary of the Cabinet, "(re segregation)." They were scheduled to remain for half an hour. The President then had six other scheduled appointments prior to 10:30, in which he had to meet with at least eleven other people. For 10:30

18. Except for a contretemps in September involving Assistant Attorney General Warren Burger, then head of the Civil Division, (and later Chief Justice of the United States), Attorney General Brownell and Solicitor General Sobeloff. Alan Rosenthal, who as mentioned in note 14, had been assigned to the Solicitor General's Office to work on the brief, was abruptly ordered to return to the Civil Division by Burger who explained that the Civil Division's Appellate Section was short-handed. Brownell apparently decided that Rosenthal should continue to help write the brief in the school segregation cases. See handwritten memo to the Solicitor General from Assistant Attorney General Burger, probably sent on September 27, 1954, and handwritten memo apparently by Philip Elman to the Solicitor General dated "9/28".

19. In an undated typed note at the foot of Brownell's memo to Sobeloff of November 8, 1954, Sobeloff wrote the Attorney General that Mr. Elman could not accompany him to see the Attorney General because he "will be in Court at that time If he needs to be consulted — we can do so later." On November 10 Elman argued *United States v. Shubert*, 348 U.S. 222 (1955), and *United States v. International Boxing Club of New York*, 348 U.S. 236 (1955), both antitrust cases, in the Supreme Court.

20. Emphasis in original (in ink, probably by Sobeloff). The Attorney General was out of the country from November 13 to November 26, attending, at the request of the State Department, a meeting in Rio de Janeiro of the Inter-American Congress of Public Law Administrators. See letter dated December 5, 1991 from Herbert Brownell to the author, now in the files of *Constitutional Commentary*.

21. By letter dated May 7, 1991, Thomas W. Branigar, Archivist at the Dwight D. Eisenhower Library in Abilene, Kansas, advised me that the Appointment Schedule was all he could find in the Library relating to meetings in the President's office on November 20, 1954.

the Schedule contains only these words: "(Relocation Test)." The *New York Times*, *Washington Post* and *Sunday Star* for the following day each reported on page one that the President had entered an underground White House A-bomb shelter on Saturday. The *Post* article said that while underground the President "personally launched a communication test He passed 15 minutes in the underground shelter."

According to the Schedule, when the President returned to the Executive Office at 10:45 he had no appointments until 11:10 when the Solicitor General and Mr. Rabb returned to see him. The Schedule then contains these words: "(OFF THE RECORD - Remained until 11:50 A.M.)."

According to Mr. Rabb's recollection thirty-seven years after the event,²² at the 8:30 meeting there "was a presentation of points made in the brief" by the Solicitor General following which the four participants discussed the brief. It is a reasonable guess that the President went over the brief alone between 10:45 and 11:10 and wrote changes in his own handwriting either at that time or while Messrs. Sobeloff and Rabb were with him. Mr. Rabb recalls that "the President was anxious to test his thoughts on us" and thinks that "it was then that he made his handwritten changes."²³

Deputy Attorney General Rogers distinctly recalls that he saw the President twice that day and that on the second occasion he saw the changes that the President made and was very impressed with their quality.²⁴

The changes the President made in the brief were not basic but some were nevertheless significant. They demonstrate his desire to soften or mute the enthusiasm of the draft for desegregation. Perhaps most significant, on page 19 the draft submitted to the President read in part:

22. See letter from Maxwell M. Rabb to author dated Oct. 25, 1991 now in the files of *Constitutional Commentary*. Solicitor General Sobeloff is deceased.

23. *Id.*

24. In a conversation on October 29, 1991, Mr. Rogers told me that on the second occasion that day, he may have seen the President on another matter and that that would account for the fact that he is not listed in the Schedule as having been with the President when Messrs. Sobeloff and Rabb saw him the second time. He also said that one of the reasons he was impressed with the President's changes was that the President "had the [undeserved] reputation of not being very literate and not reading very carefully." See memorandum of conversation between the author and William P. Rogers dated Oct. 29, 1991 and now in the files of *Constitutional Commentary*. Former Attorney General Brownell said in reference to the President's handwritten changes in the brief, that the President "was rather facile in the use of a written language. He liked that better than he did speaking . . . [In] his oral remarks . . . he used to get kidded . . . about his syntax." See Oral History Eisenhower Administration Project, 2 *Reminiscences of Herbert Brownell* 162-63 (Columbia U. Press, 1967).

Racial segregation in public schools is unconstitutional and will have to be terminated as quickly as possible.

The President struck the last word, "possible" and substituted the word "feasible."²⁵

The famous phrase, "with all deliberate speed" seems to be closer to Eisenhower's phrase "as soon as feasible" than to that of the Solicitor General and his assistants who wrote "as quickly as possible."²⁶

In his oral recollections, more than thirty years after the events, Mr. Elman recollected that the Government's first brief, filed in December 1952, took the position

that if the Court should hold that racial segregation in public schools is unconstitutional, it should give district courts a reasonable period of time to work out the details and timing of implementation of the decision. In other words, "with all deliberate speed."²⁷

Despite this recollection, which is fully supported by the brief he cited,²⁸ in the brief on relief submitted to the President in November 1954 the Government urged speed, not deliberation, in implementing the Court order to desegregate the schools. It was probably Solicitor General Sobeloff who was personally responsible for the change in the tone of the third brief on the issue of delay

25. In what is apparently Solicitor General Sobeloff's handwriting, the heading of Section II of the brief on page 4 originally entitled "THE VINDICATION OF THE CONSTITUTIONAL RIGHTS INVOLVED SHOULD BE AS PROMPT AS POSSIBLE", the last word is stricken and the word "FEASIBLE" inserted. Conforming changes were made throughout the balance of the brief. See Appendix infra pp. 233-35. Some appear to be in the President's handwriting; others are apparently in Sobeloff's.

26. See *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). It is interesting to note that Sobeloff wrote to Mary Jane McCaffree at the Eisenhower College in New York City in a letter dated April 11, 1967 as follows:

The phrase "with all deliberate speed," about which you inquire, is not in this [the brief which is the subject of this article] brief. In this case, it appears for the first time in the Court's decree but it is of a much older coinage.

This letter will be found in Container #32, Segregation File Folder #5, Sobeloff papers (cited in note 14).

The letter started out by granting her request to borrow the page proof with the President's handwriting on it, but at the top right of the letter in Judge Sobeloff's handwriting appears the following: "Not sent - Spoke to H. Brownell Phoned Miss McC."

27. Elman, 100 Harv. L. Rev. at 827 (cited in note 2). For more on the origin of the phrase "with all deliberate speed," see Kluger, *Simple Justice* at 742-43 (cited in note 1) and Elman, 100 Harv. L. Rev. at 829-30 (cited in note 2). Assistant Attorney General J. Lee Rankin, who made the second argument in 1953 in the *Brown* case, was the first to use the phrase "with all deliberate speed" in that case. See Elman, 100 Harv. L. Rev. at 830 (cited in note 2).

28. See Brief For United States As Amicus Curiae at 27-31, *Brown v. Board of Education of Topeka*, 345 U.S. 972 (1953) (No. 8).

versus expedition in abolishing segregated schools.²⁹

The most extensive change the President made was the addition of several handwritten lines on page 8 of the proofs. (See next page for a facsimile of the original page with Eisenhower's handwritten amendments.) These are the words in the President's handwriting on page 8 of the page proof:

The Court's decision in these cases has outlawed a social institution which has³⁰ existed a long time in many areas throughout the country. Moreover, the Court's finding that segregation is a denial of constitutional rights is recognition of the importance of emotional [factors]; it is recognition that the impact upon the emotions of children can so affect their entire lives as to preclude their full enjoyment of constitutional rights. In similar fashion emotions are involved in the alterations that must now take place in [illegible] during the years [illegible] not only had the sanction of Supreme Court decisions but have been fervently supported by great numbers of people as both legal and moral.

Below is the same passage after having been "edited" and "cleaned up" by Elman:

[Segregation is] an institution, it may be noted, which during its existence not only has had the sanction of decisions of this Court but has been fervently supported by great numbers of people as justifiable on legal and moral grounds. The Court's holding in the present cases that segregation is a denial of constitutional rights involved an express recognition of the importance of psychological and emotional factors; the impact of segregation upon children, the Court found, can so affect their entire lives as to preclude their full enjoyment of constitutional rights. In similar fashion, psychological and emotional factors are involved — and must be met with understanding and good will — in the alterations that must now take place in order to bring about compliance with the Court's decision.³¹

President Eisenhower made several other less extensive handwritten changes which are described in the Appendix to this article.³² Each was carried over to the brief as filed except for the

29. This conclusion is based on my conversations with Mr. Elman on Nov. 8, 1991 and with Mr. Rosenthal on Nov. 14, 1991. See writer's memoranda of those conversations now in the files of *Constitutional Commentary*.

30. These italicized words were already in the proofs submitted to the President on Nov. 20, 1954 and are included in the text here for the sake of clarity.

31. See Elman, 100 Harv. L. Rev. at 842 (cited in note 2).

32. Some minor changes (e.g., punctuation, spelling) may not have been made by the President and so are not included.

However, the Court has consistently held that the Constitution is not a suicide pact. It is a living instrument, and its meaning must be drawn from the history and the traditions of the people. The Court's decision in these cases has outlawed a social institution which has existed for a long time in many areas throughout the country. The practical difficulties which may be met in effecting transition to nonsegregated public school systems must therefore be taken into account in determining the most effective means for ending school segregation in particular areas. The Court itself has recognized, in restoring these cases to the docket for further argument on the questions of relief, that these difficulties cannot be resolved by a single stroke of the judicial pen.

in public schools is not a separate and distinct phenomenon. It is part of a larger social pattern of racial relationships, whose origins and development are woven in the fabric of American history. The Court's decision in these cases has outlawed a social institution which has ~~been~~ *existed for a long time in many areas throughout* going deep in the history, traditions, and customs prevailing in a large section of the country. The practical difficulties which may be met in effecting transition to nonsegregated public school systems must therefore be taken into account in determining the most effective means for ending school segregation in particular areas. The Court itself has recognized, in restoring these cases to the docket for further argument on the questions of relief, that these difficulties cannot be resolved by a single stroke of the judicial pen.

Broadly speaking, therefore, the decrees in these cases should be framed to require a transition which achieves the most expeditious compliance with the constitutional mandate and at the same time permits the intelligent, orderly, and effective solution of the problems that may be encountered in desegregating school systems in particular areas.

IV

THE NATURE AND EXTENT OF THE PROBLEMS THAT THE DESEGREGATION OF PUBLIC SCHOOL SYSTEMS MAY ENTAIL WILL VARY FROM AREA TO AREA

As the Court has noted (347 U. S. at 495), there is a "great variety of local conditions,"

change which was edited by Elman.³³

On a separate page, but included in the page proof of the brief containing the President's handwritten changes, in handwriting that appears to be that of the Solicitor General, are the following words:

What final schism
in society
if we do not come this way

Effect upon society

Lincoln - 1/2 free &

On page 19 on the left margin in what appears to be the President's handwriting are the words "*Possibly here.*" It is not known whether the above "final schism" handwritten note is that referred to by the President when he wrote "*Possibly here.*" The words are not in the brief as filed. Perhaps the President dictated these words to the Solicitor General during their meeting and left it to him to decide whether and, if so, where to put this idea in the brief. In any event there was not much time for rewriting for the brief was filed with the Court the following Wednesday, November 24, 1954.

CONCLUSION

Attorney General Brownell gambled that Solicitor General Sobeloff would persuade the President to permit the brief to be filed without changes that would radically alter its tone of strong support for court-ordered desegregation. Brownell's gamble paid off. Recently, the former Attorney General recollected that after the meeting with the Solicitor General, the President was "entirely satisfied"

33. In a conversation with me on November 8, 1991, Mr. Elman said he thought he incorporated the President's changes in the Brief on Saturday afternoon, November 20.

Attached to the page proofs containing President Eisenhower's handwritten changes is a one sentence memorandum from Gretchen Stewart, who was Secretary to Mr. Rabb, to the Solicitor General, dated Nov. 26, 1954. This was two days after the Government's brief incorporating the President's changes had been filed with the Court. The memorandum reads: "In Mr. Rabb's absence, I enclose herewith page proofs which Mr. Elman asked be returned to you." Apparently what happened is that a copy of the brief as it was to be filed together with the proofs on which the President had written his changes were sent by Mr. Elman to Mr. Rabb for his and the President's perusal. At the direction of his boss, Mr. Sobeloff, Mr. Elman asked that the proofs be returned to Mr. Sobeloff.

Attached to the corrected proofs is a handwritten note, apparently in Mr. Sobeloff's handwriting, reading as follows: "This is the new proof - embodying the Saturday corrections - see especially pages 7-8." In a conversation with the author on November 8, 1991 Mr. Elman recollected that Sobeloff had asked that the proofs with the President's handwritten changes be returned to him for incorporation in his files should he ever get around to writing his memoirs. Ultimately, the famous page proof went to the Library of Congress as part of Sobeloff's papers.

with the brief on relief.³⁴ As Brownell put it, Sobeloff “was a very politic fellow.”³⁵ Thus, it appears that after the President made a few significant changes in the brief, combined with what must have been a soothing discussion with the Solicitor General, the brief survived presidential scrutiny relatively unscathed.

The history reconstructed in this article may lead readers to wonder whether there have been other instances in which Presidents got involved in the brief-writing process in the Supreme Court. In considering the answer to this question we should note, first, that after the Eisenhower Presidency, it became the custom—notably in the Johnson and Carter administrations—to interpose lawyers in the White House between the Attorney General and the President.³⁶ These lawyers included not only men who had the title of Counsel to the President but also other Presidential Assistants who were trained as lawyers (Stuart Eizenstat under President Carter, for example) as well as Presidential advisers who were lawyers but not even employed at the White House (Abe Fortas for President Johnson, for example). In any event, these appointments not only increased the attention paid by some Presidents to positions taken in the Supreme Court by the United States, but also gave Presidents and their staffs a more decisive role in the brief-writing process. Thus, there have been other instances in which Presidents have personally intervened by reviewing briefs to be filed in the Supreme Court on behalf of the United States—notably in the *Bakke* case.³⁷ Nonetheless, so far as I can discover, Eisenhower is

34. See Memorandum of conversation of author with Mr. Brownell on June 6, 1991. The Memorandum is now in the files of *Constitutional Commentary*.

35. *Id.* Compare the account in 2 *Reminiscence of Herbert Brownell* at 118 (cited in note 24).

36. See generally Griffin B. Bell, *Taking Care of the Law* (Morrow, 1982); Joseph A. Califano, Jr., *Governing America: An Insider's Report from the White House and the Cabinet* (Simon and Schuster, 1981) (“*Governing America*”).

37. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) President Carter intervened in a controversy between Attorney General Bell on the one hand and Vice President Mondale and Secretary Califano on the other hand, over the position the United States should take in the brief filed in that case. For one version of the controversy see Bell, *Taking Care of the Law* at 28-32 (cited in note 36). For a contrasting version, see Califano, Jr., *Governing America* at 234-43 (cited in note 36). Califano concluded his account of the President's intervention in these words: “. . . those who had pressed the President for a ringing endorsement of affirmative action had not been able to engage him, much less draw it out of him. He withdrew to Bell and his immediate staff.” *Id.* at 243. Bell, on the other hand, concluded by pointing out that the brief as submitted “supported neither Bakke nor the university. Instead, the government argued that more facts were needed . . . , and it urged the justices to send the case back to the lower court to develop the missing facts.” Bell, *Taking Care of the Law* at 32 (cited in note 36). Cf. Memorandum dated Nov. 29, 1991 of author's conversation with Stuart Eizenstat, Assistant to President Carter. The memorandum is in the files of *Constitutional Commentary*.

See also Joseph A. Califano, Jr. *The Triumph & Tragedy of Lyndon Johnson: The White*

the only President who personally changed words and added paragraphs in a draft of a Supreme Court brief.

APPENDIX

On the first line of page 2 of the proofs were the words, the "views of the United States . . . as detailed in this brief." Eisenhower wrote: "Is this correct, or is it Atty Gen? *or* Dept. of Justice." In the next page proof the words "United States" on both pages 2 & 3 were stricken and the word "Government" inserted. Note, however, that the title of the brief remained "BRIEF FOR THE UNITED STATES . . ."

At the bottom of page 4 the brief as submitted to the President read:

The balancing of the relevant considerations may lead inescapably to the conclusion that the legitimate interests of all concerned neither require nor tolerate anything short of immediate termination of the unlawful conduct.

Changes apparently made by the President resulted in having the sentence read:

The balancing of the relevant considerations may lead inescapably to the conclusion that the legitimate interests of all concerned require only immediate termination of the unlawful conduct.

Page 5 of the page proof submitted to the President contained these two sentences:

These are class actions. The *maintenance of segregated schools* is in violation of the constitutional rights not only of the individual plaintiffs but of all other "similarly situated" colored children upon whose behalf the suits were brought. [Emphasis added].

On the margin next to the words "The maintenance of segregated schools," the President wrote: "By this Court's decision." The brief as filed read, "Under the Court's decision the maintenance of segregated schools . . ."

On page 6 of the proofs the following sentences appeared:

The right of children not to be segregated because of race or color is not a technical legal right of little significance or value.

House Years 159-63 (Simon and Schuster, 1991) recounting President Johnson's participation in 1966 in determining the position the United States would take in the Supreme Court in the case brought by Penn Central's competitors to block the merger of the Pennsylvania with the New York Central, cf. *Baltimore & Ohio Railroad Co. v. United States*, 386 U.S. 372 (1967).

It is a fundamental human right, supported by considerations of morality *and decency* as well as law. [Emphasis added].

The words “and decency” were boxed in pencil and stricken, apparently by the President.

On the same page it was, apparently, the President who struck these words:

Experience has shown that normal contacts between people, in groups or as individuals, serve to diminish prejudice while enforced separation intensifies it. Race relations are improved when individuals, without distinction as to race or color, serve in the armed forces together, work together, and go to schools together.

Immediately following these words, this appeared in the page proof submitted to the President:

In the absence of *the most* compelling reasons to the contrary, therefore, there should be no [unnecessary] delay [Emphasis added].

The words “the most” are stricken on the page proof and the President wrote on the right margin, “unnecessary?” The words, “the most” are not in the quoted sentence in the brief as filed and the word “unnecessary” was added.

Changes were made on page 9 by substituting the word “between” for the word “among” and “their” for “its.” It is not clear that the handwriting on this page is that of the President. The same is true of a small change on page 17 in which the handwritten words “less of an” were substituted for the printed words “no greater.”

On page 18 the President struck the printed word “traditional” and substituted in handwriting the word “existing” so that the sentence read:

And the fear has been expressed in some quarters that the opposition to any departure from the *existing* pattern will manifest itself in the withdrawal of state aid to education [Emphasis added].

On page 20 of the page proof, four handwritten changes in language appear; none made any change in substance.

On page 25 the draft proof submitted to the President read:

Circumstances may require in particular areas that the program for desegregation extend over a period of a few years, but we know of no conditions anywhere which could justify

These words were stricken and, in what appears to be the Pres-

ident's handwriting,* the following words were substituted: "and that there can be no justification for . . ." The sentence then continued both before and after the change: ". . . failure to make an immediate and substantial start toward desegregation, in a good-faith effort to end segregation as soon as possible."

At the bottom of the same page, the draft submitted read: "Where a period of time may be allowed for transition," the President apparently struck "may be" and wrote "is."*

On page 26 three changes were made in handwriting that appears to be that of the President.* First, in the proofs submitted to the President the first full sentence on the page read as follows:

If the program for desegregation formulated by the defendants will remove, as expeditiously as possible, state-imposed [or state-supported] racial classifications of pupils in public schools, the lower courts should not substitute their judgment respecting the administrative [features] *appropriateness* of the program for that of the school authorities.

The words bracketed in the preceding sentence were added in handwriting on the margin and the word italicized was stricken. Second, the last sentence in the same paragraph read:

The essence of the Court's decision in these cases is that there be no governmental action which *creates* or supports school segregation. [Emphasis added].

The word "*creates*" was stricken and "enforces" written in the President's handwriting, substituted.*

On page 27 the last sentence in the paragraph marked (1) argued that the lower courts should direct "the defendants to submit within 90 days a plan for ending racial segregation." In the brief as filed, the words "as soon as possible" (apparently in the President's handwriting on the proofs)* were added after the word "ending." In the brief as filed, the word "feasible" was substituted for the word "possible [sic]."

* Passages in the text of this Appendix marked with an asterisk are changes made in the handwriting of President Eisenhower, based on the expert opinion of Edwin Alford of Bowie, Maryland. Mr. Alford is a handwriting expert whom the author retained for the purpose of verifying a few handwritten changes in the brief that did not clearly appear to have been changes made in the President's handwriting.

It is interesting to note that Mr. Alford was unable to decipher the two unclear words in President Eisenhower's handwriting that appear on page 8 of the brief. He believes that the second of the two undecipherable words is "young" but notes that the word does not make sense at the place it appears. See letter dated January 10, 1992 to Victor H. Kramer, from Edwin Alford, copy in the files of *Constitutional Commentary*.