10-28-1969

10-28-1969 Correspondence from Harlan to Burger

John M. Harlan
US Supreme Court Justice

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White ✓
Mr. Justice Fortas
Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

From: Harlan, J.

Circulated: OCT 28 1969

Recirculated: _____

October 28, 1969

Re: No. 632 - Alexander v. Holmes County

Dear Chief:

I spent last evening reviewing the various circulations that have been made respecting the disposition of this case. In light of the variety of views that have been expressed at our recent Conferences, and looking at the matter from an institutional standpoint, I have come to the view that the most satisfactory disposition of the case would be that suggested in the proposed order embodied in Mr. Justice Marshall's circulation of October 27, preceded by the preamble of your circulations of October 25 and 27, but unaccompanied by an opinion as suggested in your second circulation of yesterday. I think, however, that both the Marshall order and preamble should be modified along the lines indicated below.

With respect to the Marshall order, I suggest that:

Paragraph 2 should be modified to read as follows: "2. In formulating its order, the Court of Appeals may consider in its discretion the recommendations submitted by the Department of Health, Education and Welfare on August 11, 1969, together with any amendments or modifications necessary to provide reasonable means for achieving such immediate termination of a dual school system. The Court of Appeals shall in no event defer desegregation of the schools in Holmes and Meridian Counties until the beginning of the school year 1970-71."

With respect to the last line in paragraph 3, I would substitute for "on or before" the phrase "forthwith and in no event later than."

I think that paragraph 6 of the order should be revised to read "The mandate of this Court shall issue forthwith and the Court of Appeals is requested, so far as possible and necessary, to lay aside all other business of the Court in order to carry out this mandate."

Finally, if the disposition of this case is delayed beyond the end of this week, I would change the date November 10, 1969," in paragraph 3, to "November 17, 1969."

As regards the preamble to the order, I suggest that its present form should be revised to read somewhat as follows: "We brought this case here upon an expedited writ of certiorari, _____ U.S. _____, to review a determination of the Court of Appeals for the Fifth Circuit extending from August 11, 1969, to December 1, 1969, the filing of plans by the Department of Health, Education and Welfare and postponing from September 1, 1969, to an indefinite date the disestablishment of the presently segregated school systems in the 14 counties involved in this litigation and substituting therefor unitary school systems. The petition for certiorari was granted on October 9, 1969, and the case set down for argument on October 23, 1969. The question presented is one of paramount importance involving as it does the denial of the fundamental rights of some 137,000 children, Negro and White, who are presently attending Mississippi schools under segregated conditions. Based on our review of the submissions and consideration of the oral arguments, and in light of this Court's recent decisions to the effect that the phrase "all deliberate speed" is no longer an acceptable formula for supplanting existing racially segregated school systems by unitary school systems in which neither race nor color plays any part in the attendance of pupils, see Griffin v. School Board, 377 U.S. 218; Green v. New Kent County, 391 U.S. 430, we conclude that the Court of Appeals erred in granting the extension and postponement referred to, and we issue the following order and judgment:"

You will doubtless note that I have suggested the omission in this preamble of the paragraph in your earlier drafts indicating in effect that the Government is in accord with the accelerated desegregation program which our order envisages. I think such an intimation is quite unpersuasive because, although the Government did envisage the accomplishment of steps towards desegregation prior to the commencement of the school year 1970-71, it has continued to maintain the proposition that the HEW should be given until December 1 to file its plans. Frankly, I think it undesirable to blink the fact that the Government stands in opposition to the central and only issue in the case before us.

Since the dictation of this letter was underway before Justice Brennan's proposals of today were received, I would like to add the following. As I see it the differences between his suggestions and those made in this letter relate (1) to the explicit provision of "outside" dates; (2) to the use in the Marshall order of the words "interim" and "terminal"; and (3) to the specific reference to the treatment of Holmes and Meridian. If these factors continue to stand as road blocks to obtaining as much unanimity among us as possible, then I would be prepared to cast my vote for the Brennan proposals. My preference, however, is for the two outside dates because I think such dates will strengthen the hand of the Court of Appeals in resisting dilatory tactics on the part of any of the litigants, and under the modifications proposed to the Marshall order the Court of Appeals is encouraged to act at earlier dates. As for the specific reference to Holmes and Meridian Counties, I think that the orders now under consideration, while plainly contemplating desegregation in those counties, do not make explicit the required relief and thus invite the possibility that the parties will seek to limit the effect of our decree to only those districts where termination of dual schools was originally envisaged for the 1969-70 school year.

Sincerely,

J.M.H.

The Chief Justice

CC: The Conference