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Earl E. Pollock

THE LAW CLERKS OF CHIEF JUSTICE EARL WARREN: EARL E. POLLOCK

Interviews conducted by
Laura McCreery
in 2004

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Earl Pollock

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01-00:00:38
McCreery: All right, this is videotape number one. Today is May 18, 2004. I'm Laura McCreery speaking, and on this tape, I'm interviewing Earl E. Pollock at his home in Sarasota, Florida, for the oral history project, Law Clerks of Chief Justice Earl Warren. We said that we would start today, Mr. Pollock, with a little of your own background, so I wonder if you could state your date of birth and talk a little about where you were born.

01-00:01:08
Pollock: I was born February 24, 1928, in a little town in Nebraska. Decatur, Nebraska. My family moved from there when I was still a babe. I grew up in Sioux City, Iowa, not too far away from Decatur. After graduating from Central High in Sioux City, I enrolled at the University of Minnesota. I received my Bachelor of Arts degree from Minnesota, let's see, in 1948. I had attended Minnesota for my entire undergraduate education, except for my sophomore year, when, for family reasons, I returned to Sioux City and spent my sophomore year at Morningside College. After graduating from Minnesota, I spent a year in the graduate school taking courses in sociology, among other things. Also, instructing freshman students in the school of speech. After about a year of that, before I received my master's degree, I went to Chicago thinking about enrolling in law, but still very unsure whether that's really what I wanted to do. Fortunately, I met a couple in Chicago that took an interest in me. He happened to be a lawyer in Chicago. Invited me to work in his law office as a clerk, to get an idea of what law was all about. Spent about a year doing that. The following fall, I enrolled at Northwestern University School of Law. Graduated from Northwestern in June 1953.

01-00:03:48
McCreery: You had that bit of time, then, between finishing at Minnesota and starting law school, so that was the time you spent clerking in this law office?

01-00:03:56
Pollock: That's right. Then I continued clerking afternoons when I was in law school, during the first year of law school. I spent two years as kind of a clerk. I've always been very grateful for that, because unlike my fellow classmates at Northwestern, who were deeply at odds as to what law was all about, I had already had the benefit of that experience, and I had pretty well determined that this is what I wanted to do and what I thought I was capable of doing.

01-00:04:43
McCreery: How did you select Northwestern? Was it the proximity?

01-00:04:47
Pollock: Absolutely. It was proximity. Northwestern Law School is located, as you know, just about a mile from downtown Chicago. This enabled me to continue working in the afternoons, and at the same time, attend classes in the morning.

01-00:05:08
McCreery: What was the process of applying, do you recall?

01-00:05:12
Pollock: I don't recall. I don't recall.

01-00:05:15
McCreery: Would you tell me a little bit about the law faculty at Northwestern at that time?

01-00:05:20
Pollock: The law faculty, I thought, was extraordinary. People like Nathanial Nathanson, who was a constitutional law professor. Phil Kurland, who eventually went to University of Chicago. He was a former law clerk of Felix Frankfurter, and was nationally known in the field of jurisdiction and Supreme Court. Frank Allen, who taught real property law. Dan Schuyler. Bill Pedrick. Willard Wirtz, who eventually became secretary of labor. Walter Schaefer, who eventually became Chief Justice of the Illinois Supreme Court. It was a very distinguished faculty.

01-00:06:23
McCreery: Which of these were particularly influential or involved with you as a student?

01-00:06:31
Pollock: Probably I would single out Nat Nathanson and Phil Kurland. I spent, I know, one summer working for Nat on a project that he was doing for, I think, World Federation, involving some of the legal aspects that would be involved in—[phone ringing] does that bother you?

01-00:07:09
McCreery: It's okay.

01-00:07:10
Pollock: Involved in going further in the development of international organization. I recall a seminar that a group of us had with Phil at his apartment, dealing with a variety of legal issues.

01-00:07:38
McCreery: Given you'd had the experience in the law office before starting school, did you have particular interests in the law yourself going in?

01-00:07:52
Pollock: I really had no particular interest, except a general one in litigation. Way back in, I guess, junior high school days, I became very much interested in books about lawyers such as Clarence Darrow. I remember reading, with great interest of his exploits in the Loeb-Leopold case, and about a number of other eminent trial lawyers. So I had this general interest, but it really wasn't until I was in law school that I developed, I think, twin interests. One in constitutional law, which was taught by Nat Nathanson, and the other, antitrust law. Antitrust law was generally taught by a man who became a very

good friend of mine, Jim Rahl. But Jim, during my third year of law school, he took a leave of absence to work on the celebrated GM-DuPont case that was pending in the Federal District Court in Chicago. A substitute was obtained. Happened to be John Paul Stevens. As a result of that, I became a friend of John Stevens, and of course he was not only a very successful Chicago antitrust lawyer, but then he became a judge of the seventh circuit court of appeals, and naturally, as everyone knows, a justice of the United States Supreme Court.

01-00:09:54
McCreery: As law school progressed, did you have in mind particular plans for yourself?

01-00:10:02
Pollock: If I had any plans, it probably would have been to teach law. I think what intrigued me most about law was the intellectual challenge of it. I think I thought to myself that that was not only where my interest would lie, but also perhaps where my best talents would lie. On the other hand, I never really thought of myself as a practicing lawyer. I somehow thought that that was something for which I was perhaps not best qualified.

01-00:11:05
McCreery: How did you study?

01-00:11:07
Pollock: How did I study? Not as hard as I should have. My wife and I married at the end of my first year. We moved into a tiny little apartment on the Near North Side of Chicago. This was about two to three blocks from where Betty worked at Bonwit Teller, and about half a mile from the law school. Betty frequently reminds me that I usually would not start studying until she had gone to bed. In those days, she would go to bed fairly early. That's changed. I'm afraid I've corrupted her. That's when I would do my studying. Sometimes fairly late into the night. She'd perhaps wake up about one o'clock and dress up, and we'd go out on Rush Street. Our apartment was right on Rush Street, or half a block away. We'd stop for not a drink, but a snack and coffee, and then call it a night. Whenever I could, I would sleep late. I was notorious for missing a lot of my early morning classes.

01-00:12:47
McCreery: A night owl, to be sure.

01-00:12:49
Pollock: A what?

01-00:12:49
McCreery: A night owl.

01-00:12:51
Pollock: Yes, I was.

01-00:12:52
McCreery: You were involved in other things in law school, too, such as editor-in-Chief of the *Law Review*. How did that come about?

01-00:13:00
Pollock: That came about as a result of my being invited to participate in the competition to join the *Law Review*. As I recall, that took place at the end of the first year, and I think, although I had been working all afternoons my first year, I wound up being first in my class in terms of grades, so I was among the group that was invited to write for the *Law Review*. Then, at the end of the second year, the *Law Review* board elected me as editor-in-Chief.

01-00:13:54
McCreery: How did you like that job?

01-00:13:57
Pollock: It was a lot of work. That was the hardest thing that I did in law school. Hard not in the sense that I didn't enjoy it, but hard in the sense of involving an enormous amount of time. It was, of course, a student-run organization. There was a lot of things to be done in terms of editing, not only student notes, and editing articles and soliciting articles and book reviews, but also sort of running the organization.

01-00:14:52
McCreery: It's a management job as well, isn't it?

01-00:14:54
Pollock: A management job as well.

01-00:14:56
McCreery: And you were participating in Order of the Coif?

01-00:14:59
Pollock: Yes.

01-00:15:00
McCreery: Tell me a little about that.

01-00:15:01
Pollock: I never really participated in it. As I recall, I was simply notified near the end of my third year that I had been, I guess, elected, or selected, for Order of the Coif. It came as a surprise to me, and I was very pleased about it.

01-00:15:20
McCreery: Is there anything else you'd like to say about law school?

01-00:15:26
Pollock: At the end of law school, I was confronted with a very difficult choice. I had applied for a Fulbright scholarship at the London School of Economics, and I was advised that I had been awarded the scholarship, which would have meant a year for my wife and myself in London, something that we thought would

be a marvelous way to start a legal career. But also, almost the same time, I was recommended to Chief Justice Fred Vinson for a clerkship. I went to Washington, had an interview with the Chief Justice, and lo and behold, he asked me to become his clerk.

01-00:16:35
McCreery: How were you recommended to him?

01-00:16:38
Pollock: I was recommended by a professor at Northwestern, Willard Pedrick, who had been a law clerk of Vinson when Vinson was on the court of appeals for the District of Columbia. At least that's my recollection, although it's been a long time now. Bill Pedrick became a prominent member of the faculty. I did not have a great deal of contact with Pedrick in the law school, because his area was taxation. I think I took a course in taxation from him, but I never really expressed great interest in the subject. But I knew Professor Pedrick, and I think probably on the basis of my having been editor-in-Chief, and also, I think, winding up first in my class at the end of the law school period, I think it was on that basis that I was recommended for a clerkship.

01-00:17:53
McCreery: Do you recall the moment when you went to Washington and met with the Chief Justice about that possible position?

01-00:18:00
Pollock: I do remember having the interview, but I can't really recall what he said or what I said.

01-00:18:11
McCreery: Do you recall any first impressions of him?

01-00:18:15
Pollock: The only impression I had was that he was very pleasant and very courtly, I think probably reflecting his Kentucky background.

01-00:18:28
McCreery: That could be. As an aside, where and when did you take the bar exam?

01-00:18:36
Pollock: I did not take a bar exam until I had finished clerking. It was not required. As a result, I don't think I took the bar until summer of 1955, because I clerked for two years.

01-00:19:03
McCreery: Okay, thank you. I know you eventually took it in Illinois, is that correct?

01-00:19:07
Pollock: When I left the Washington area to join my firm, I was admitted to practice on the basis of reciprocity. I don't recall taking the Illinois bar. I was admitted on

the basis of my having been a member of both the Virginia bar and the District of Columbia bar.

01-00:19:45
McCreery: I see. Okay. Now, to return to your story, you had these two offers. One from Chief Justice Vinson, and one from the London School of Economics.

01-00:19:54
Pollock: And I was really torn. I was really torn, because they were both marvelous opportunities. I decided that the clerkship was just too attractive to turn down.

01-00:20:11
McCreery: Describe the process of moving to Washington in the summer of 1953 and taking that up.

01-00:20:23
Pollock: I remember that we managed to buy our first car at that time, a lovely little blue Plymouth. We packed it up with whatever we had and drove to Washington, I stopping off for a few days at a little resort in Michigan. We got to Washington, and, as I recall, stayed in an extremely stuffy motel room until we could arrange housing. We rented an apartment in the Barcroft complex in Arlington, Virginia. I think I started work almost immediately.

01-00:21:21
McCreery: What were your expectations going in?

01-00:21:30
Pollock: I can't really recall. I can only assume that I was exhilarated with the prospect of dealing with the extraordinary issues confronting the Supreme Court, including, as I knew, the segregation cases. Probably as a result of my friendship with Nat Nathanson, I had been very keenly aware of current constitutional issues. In addition, of course, running the *Law Review* necessarily involved me in that kind of subject matter.

01-00:22:27
McCreery: So you went with some anticipation. What did you find in those first few weeks with Chief Justice Vinson?

01-00:22:38
Pollock: My memory on that is pretty dim. This was, of course, a period between terms. I don't recall spending much time with Chief Justice Vinson that summer. He was gone a good part of the time. I was involved, along with other clerks in reviewing certiorari petitions that would be coming up for review at the beginning of the 1953 term in October. There were several occasions, I know, when my wife and I drove the Chief Justice home to his apartment. It was all very friendly. But I don't really recall any significant, substantive discussion with him during that period. Then, of course, as you know, on September 8, 1953, really just about a day or so after my wife and I had driven him home, he died suddenly, and the world changed drastically for all of us.

01-00:24:12
McCreery: Do you recall how you got that news of his heart attack and death?

01-00:24:16
Pollock: No, I don't. No, I don't.

01-00:24:19
McCreery: But as you say, you knew ahead of arriving in Washington that the desegregation cases were among those to be taken up in this term, in this case re-argued from the previous year. I take it you didn't have much chance to interact with Chief Justice Vinson on that topic.

01-00:24:37
Pollock: No. No.

01-00:24:42
McCreery: Tell me, then, how you proceeded. There was a period of several weeks before Chief Justice Warren was appointed by President Eisenhower. How did things proceed in that meantime?

01-00:24:57
Pollock: I thought it was entirely possible that my Supreme Court clerkship would be very, very short, because there was no assurance whatsoever that I would be reappointed. In the interim, I was given an interim appointment as a law clerk to Justice Black. He was the Senior Justice, and in effect was acting as Chief Justice, although he never had that label or title. The announcement then came that President Eisenhower had appointed Earl Warren. I remember going to the airport and being one of the throng of spectators watching him arrive at National Airport. It was shortly after that that he informed me and my fellow clerks that he wanted us to continue as his clerks.

01-00:26:24
McCreery: You were serving in that capacity along with William Oliver and Richard Flynn.

01-00:26:29
Pollock: That's right.

01-00:26:30
McCreery: So he kept the three of you on?

01-00:26:32
Pollock: He did. He did. I wasn't sure whether it was at that point or later on that he also asked me to continue for a second year. I had expected that I would continue with Chief Justice Vinson for a second year. The practice then was that one clerk would be named as—very fancy title—Chief law clerk to the Chief Justice. I had been designated as the clerk who would fill that spot. I had been looking forward to a two-year stint, the second year as Chief law clerk. I'm not sure exactly when it happened, but Warren asked me to serve in that capacity for him as well.

01-00:27:44
McCreery: Now, how did you understand the Chief law clerk's role to differ from that of the other clerks?

01-00:27:58
Pollock: Probably there were two differences. There may have been others, but two that I recall. It involved, first of all, supervision of the handling of the in forma pauperis petitions. At that time, it was one of the responsibilities of the Chief's law clerks to prepare memos on all of the in forma pauperis petitions received from prisoners and the like, who generally were submitting longhand applications for review, complaining about various injustices, seeking habeas corpus review, or some type of relief from the Supreme Court. Copies of those would then be sent to the other Justices' offices, so that the other clerks did not participate in that function at that time. In addition to preparing those memos, each memo would make a recommendation as to whether the case warranted review. What would happen is that the Chief Justice would send to the other Justices a list of these recommendations, assuming that he concurred in the recommendations. The list, unfortunately, was called the dead list, with the thought that unless one of the justices wanted to take the case off that list, it would be included on the agenda for the conference. If it wasn't included on the agenda for the conference, then it was automatically denied, and so listed. One of the things that I think the Chief law clerk had to do was to, I guess, administer or supervise that function.

In addition—and this was by no means any kind of an official function—as the Chief law clerk, I undertook to invite a series of eminent Washingtonians, as well as Justices, to join the law clerks from time to time at lunch. A couple years before, Supreme Court law clerks would have their meals in the Supreme Court cafeteria. One or more justices became concerned that conversation among those clerks in the public cafeteria would be heard, thereby violating security as to pending cases. As a result, a room was found, I think in the basement of the court, which was assigned to the clerks. What we would do is go to the public cafeteria, which was a buffet, get our lunch, and then everybody would head to this room. We would then be able to talk about cases without violating secrecy. We also took advantage of that to have, as guests in addition to the various Justices, leading lawyers, cabinet officials, and others.

01-00:33:24
McCreery: Who are some of the individuals you brought in for that?

01-00:33:29
Pollock: Well, let's see. I remember Henry Cabot Lodge. Dean Acheson. Quite a few others. I can't remember right now.

01-00:33:48
McCreery: You mentioned the confidentiality aspect. What were you told about that, and by whom?

01-00:33:55
Pollock: I don't recall being told anything about it. It was just simply assumed by me and by others that this was the court's business and not anybody else's, and that the court naturally expected confidentiality. The first time that confidentiality was really raised was in connection with the segregation cases. Probably at the very first conference at which Warren either presided or attended (the first few conferences after he was appointed were conducted by Hugo Black at Warren's request, because Warren wanted to get a better idea of what the routine was).It was decided that special precautions as to confidentiality should be maintained. I'm not sure the chronology of this, but whether it was at that time or at a later conference, it was stipulated that only the Chief's law clerks would be involved in the matter.

01-00:35:50
McCreery: In the desegregation cases?

01-00:35:51
Pollock: Yes. That stipulation was not honored by probably half of the justices, so that, in a number of the other offices, the clerks did indeed participate with their justice in discussing the matter, and I think, in many instances, or at least some instances, that proved to be highly desirable. For example, connection with the conferences that Barrett Prettyman and Justice Jackson had.

01-00:36:38
McCreery: So when you say the clerks for those justices did participate, you mean along the lines that they normally would?

01-00:36:44
Pollock: Yes, that's right.

01-00:36:46
McCreery: Rather than holding back on the—

01-00:36:48
Pollock: As you know, no one except the Justices was present at the conferences. Typically, at the end of the conference, each justice would retire to his particular chambers, call in his clerks, and in the case of the Chief Justice, would also call in the clerk of the court, who would receive from the Chief Justice what the orders were that were to be entered as a result of the decisions made in the conference. And, of course, after the Clerk of the court would depart, the Chief Justice would tell the clerks, and I think the same thing went on in the other offices, that the court decided to do this, or the court decided to do this, so that the clerk would have a pretty good idea of what were the crucial decisions made in the conference. I think it had been agreed that, in connection with the segregation cases, that would not be done in the other offices, except for the Chief Justice. As I say, that was not honored.

01-00:38:27
McCreery: Because these cases were being reargued, and your awareness of their importance, shall we say, how did work on these proceed from a procedural standpoint?

01-00:38:48
Pollock: I don't exactly recall the circumstances, but I know I was assigned, from among the three clerks, to work on the segregation cases. That meant that part of my responsibility was to exhaustively review the many briefs that were filed in the case, and then to prepare what was called a bench memo for the Chief Justice that might be of assistance to him in preparing for the oral argument, which then was going to be held early December. I think December seventh, eighth, and ninth. Also part of my responsibility was to attend the argument, to be in a position to discuss with the Chief Justice what went on at the argument. Those were the things that I did.

01-00:40:07
McCreery: In holding these cases over from 1952, there was said to be particular things that the justices wanted to look at again. What were those?

01-00:40:22
Pollock: The two key subjects were the legislative history of the Fourteenth Amendment, and second, if the court were to strike down *Plessy*, what should the court do by way of implementation? There were five questions, but I think the five questions really related to those two subjects. To a great extent, it was not necessarily the answers to the questions that the court was looking for. Asking the questions was (although this, of course, occurred before I even started work there, so I'm basing this in part on my own combination of my speculation and what I know from other sources) that this was a dilatory tactic in order to put the cases off for another year, since clearly the court was not ready to come together on a decision by the end of the 1952— or '53 term.

01-00:42:00
McCreery: What do you know about the court not being ready to come to a decision?

01-00:42:07
Pollock: I have no personal knowledge, except what I gathered not from Chief Justice Vinson, but from conversations with other clerks, and, of course, today, from the multitude of papers of the various justices that have been made public and are now in the public domain.

01-00:42:45
McCreery: Of the two main issues that you just mentioned, first of all the history of the Fourteenth Amendment, and then second of all, if *Plessy* were overturned, what would be the implementation, if any, where did the court spend the bulk of its time?

01-00:43:13
Pollock: The two issues, in a very real sense, are tied together. Technically, the court deferred implementation questions until re-argument in the 1954 term.

Implementation and the question of constitutional violation were intimately tied together. I can't relate to you, on the basis of personal knowledge, what the discussions were, let's say, between Chief Justice Warren and the other members of the court, and of course what went on in the Court's conferences. Of course, we now know some of those things as a result of the eventual release of the Justices' papers. Although I can't assert this on the basis of personal knowledge, the documents show very clearly that the Court was very much concerned about, among other things, whether it was an appropriate function of the Supreme Court to overturn *Plessy vs. Ferguson*, which had become ingrained in American institutions for nearly sixty years, and second, whether a decision striking down *Plessy and Ferguson* could be implemented, and if so, how, and whether the cost to the nation of implementation would be unbearable in terms of resistance to desegregation and injury to the court's prestige and status.

01-00:45:49

McCreery: As we know, the decision, when it came, was unanimous. There's been much interest in how that came to be so. Chief Justice Warren, in his own memoirs, states that all the justices came to view it as important that they come out unanimous, and yet there are many accounts suggesting some of the justices were not so inclined and had not been so inclined the previous year. Did you have—

01-00:46:25

Pollock: That's absolutely the case. As a matter of fact, Justice Douglas, in his autobiography, says that the end of the 1952 term, the vote was five to four, in favor of retaining *Plessy vs. Ferguson*. It's also abundantly clear that both Jackson and Frankfurter were deeply conflicted on the issue, because here you had, together with Reed, three stalwart New Dealers who had, while they were in the Roosevelt Administration, vehemently opposed to the judicial philosophy of "the nine old men" in adopting positions, constitutional positions, based on personal predilections. I think all three men would have immediately said that of course they're opposed to segregation, but were troubled by whether they could as Justices, given the position that they had taken against judicial usurpation, take that big jump at this time, or would this involve, essentially, a political decision of the type which they had strongly opposed? I think it's only because of the extraordinary leadership of Earl Warren that things were turned around.

01-00:48:45

McCreery: Can you elaborate on what you mean by that?

01-00:48:53

Pollock: Felix Frankfurter made a famous quip on the day of Vinson's funeral. He said to his former law clerk, Phil Elman, who was then an assistant to the solicitor general, "This is the first evidence I have that there really is a god." He didn't mean by that that he was glad Vinson was dead. He didn't like Vinson and I don't think Vinson liked him. But what he meant was, maybe now there will

be someone who can bring the diverse factions of the Supreme Court together. And they were diverse. Jackson and Black hated each other. Frankfurter and Douglas had an intense dislike for each other. Many of the justices disliked Vinson and thought that he was a poor Chief Justice in terms of his administrative and leadership abilities. Warren came in with his commanding personality and his remarkable degree of patience. He undertook to talk on an individual basis with each of the justices, tried to ascertain what their concerns were, tried to see if there were ways of meeting those concerns. As part of this process, at the conference after the December 1952 argument, no vote was taken. That's very unusual. In the normal course of events, in conferences held after arguments, justices will vote. That's not always the case, but that's usually the case. Then the Chief Justice, if he's in the majority, will later assign one of the justices to write the opinion, or assign himself. Or, if he's not in the majority, then the next most senior justice in the majority would do that. No vote was taken at that time, for the reason, I guess you might say, of keeping everybody loose and maintaining everybody's options. I think Warren wanted to avoid a situation where somebody would be frozen into a position, particularly frozen into a negative position. Maybe this would be a good time to take a break.

01-00:52:28
McCreery: Okay. I'll turn this off.

Begin Audio File 2

02-00:00:27
McCreery: Okay, here's tape number two. It's still May 18, 2004. This is Laura McCreery continuing the interview with Earl Pollock. We were just talking about the process leading up to the *Brown* case decision, and you were saying that Chief Justice Warren chose not to take a vote among the justices until a later stage than usual. You talked about that might have been a tactic to keep people loose.

02-00:00:57
Pollock: I think so. I think he was very anxious not only to achieve unanimity, but unanimity with only one opinion. I think he recognized that it was vital that the court speak with one voice. Even if there had been a unanimous vote, the force of that unanimity would be undercut if there were one or more concurrences with a justice saying, in effect, "Well, I'm going along with the conclusion, but I have a different take on it." We have that situation very commonly now, with some cases being decided by the Supreme Court being accompanied by as many as seven or eight opinions. In the campaign finance case that was decided last December, there were 286 pages of opinions. Anything like that, anything remotely like that would have likely made it increased, to a very great extent, the resistance that was almost certain to follow any decision striking down *Plessy against Ferguson*. He worked on that very carefully. There was no doubt in my mind where he was going to vote on the segregation cases, just as I think nobody had much doubt that

Vinson was going to vote the other way. It was only through Warren's very patient dealing with the other justices that he was able to forge this consensus that he was seeking so ardently.

02-00:03:49
McCreery: Do you have much knowledge of how he worked on individual justices, shall we say?

02-00:03:55
Pollock: No, I don't. I probably had some knowledge of it, but I have no memory of it. If he and I did have conversations about that, it would have been of a very limited nature. Basically, he was doing that entirely on his own. This lasted, really, for four and a half months. Many people, I think, assume that right after the argument, the usual procedure ensued with somebody being assigned the opinion, and research going on, and writing going on, and one draft after another. That simply didn't happen. It wasn't until April 1954 that any aspect of the writing process commenced. It commenced with Chief Justice Warren taking a tablet of yellow paper, and I think on something like nine pages, scratching out what I think he regarded as his notes—he later called it an outline—of how he envisaged the opinion. I think those nine longhand pages are available on the internet somewhere.

What happened is then he had these typed by his secretary, Margaret McHugh. He called me into his office on—it was either April 29, Thursday, or April 30, Friday. Told me that the court was now unanimous. Gave me his memorandum, which, as I say, he called an outline, but it was headed "memorandum." It was then three pages typed. He was very specific about what he wanted. He said the opinion had to be short, it had to be non-legalistic, it had to be understandable to the average American, and had to be something that could be published on the front page of a newspaper. He also made it very clear—I don't remember the words he used—he also made it very clear that time was of the essence, and what I understood by that—he didn't tell me this in so many words—was that he now had the unanimity that he was seeking and he wanted to get an opinion out pronto, before anybody changed their mind.

The very next day, I started work on this. I worked for twenty-four hours straight. His memorandum really established the basic framework of the ultimate opinion. And it also included two of the most famous sentences that wound up in the final opinion. One was, "We cannot turn the clock back to 1868, the time of the Fourteenth Amendment, or to 1896, the time of *Plessy vs. Ferguson*." Then the other sentence that was in his original memorandum was about the effect of state-sponsored segregation on the hearts and minds of black children. I worked on it that weekend. I think this was also in longhand, because I didn't have a typewriter at home. Brought it in the office first thing Monday morning and had it typed up. I also had typed up a little cover memo, which has been published someplace. Apparently this document and the drafts

of the opinion are at the Library of Congress. But it goes along the lines, "Here is my draft, but I recommend that there be a structural change, that the District of Columbia case be removed from this, because it is, of course, governed by the due process clause of the Fifth Amendment, and the Fifth Amendment has no equal protection clause. The four state cases, in my view, should be decided entirely on the basis of the equal protection clause." I personally delivered the revision and the cover memo to the Chief. The short of it was that he accepted the revision with little change and also agreed with the structural recommendation. The other two clerks were assigned the job of preparing a separate opinion for the District of Columbia case.

That was on a Monday, May 3. As I recall, there were two more revisions, but basically very minor changes. Essentially, the May 3 revision was the way that the opinion stood when it was distributed to the other justices on May 8. The Chief personally delivered copies to the justices who were present at the court at the time, and he personally delivered a copy to Justice Jackson in the hospital. Dick Flynn and I delivered Minton's copy to him at his apartment in—just across the street from the court. Then we delivered Black's copy to him at his home in Alexandria while he was in the middle of a tennis game. He had his own tennis court there. He stopped the game and thanked us for the delivery. That then put the draft in the hands of the other justices, and in the next few days, some comments and suggestions came in. Douglas sent a note saying he wouldn't change a word. Frankfurter wanted a couple of word changes. One of them I really regretted. A sentence in the Chief's original memorandum spoke of segregation imposing a mark of inferiority on black children. For some reason, Frankfurter successfully had that changed to "generates a feeling of inferiority in black children." I thought that was regrettable, because to me, the mark of inferiority concept [rejected in the *Plessy* opinion] was at the heart of the decision. Frankfurter made one or two other word changes, but they were very minor. Stylistic. Burton made a couple of very minor changes, like removing the word "Southern" from a phrase where it said "Southern states." He wanted it just changed to "in some states." Clark made similar comments. In later years, Clark claimed that he had asked the Chief Justice to remove this controversial footnote eleven, but I'm quite sure he never made any such objection. If anybody had objected, it would have been immediately stricken. The only thing that Clark objected to in the footnote was that people might get the idea that he was the "Clark" that was cited in the footnote, so in order to accommodate him, I suggested to the Chief, "Let's just put the initials K.B. in front of Clark," and the Chief agreed. As a result, that apparently is the only violation of the Harvard Bluebook method of citation that appears in that opinion. We were amazed and pleased that there were no substantive changes, and that the May 3 revision was essentially accepted. That led to the conference on May 15, at which all of the justices finally signed off on the draft. It was decided to deliver the opinion on May 17.

02-00:17:31
McCreery: Once you circulated the draft opinion and these proposed changes came back, you were able to accommodate them all fairly easily, would you say?

02-00:17:43
Pollock: Yes, very easily. Jackson, for example, wanted to add a sentence about the progress in education and the professions that the Negro race had made. That was added. He also wanted to, I think, also add something about segregation in areas other than public education, but that was turned down by Warren, because the whole effort here was to limit the decision entirely to public school education, although we knew in the back of our minds that once segregation was knocked down in public schools, desegregation in other facilities would also follow, as did happen. Almost all of the language changes—and they were basically all minor in nature—were accepted. There was no objection to the draft in its entirety or to any part of it, except in terms of a word here or a sentence there.

02-00:19:22
McCreery: As you've stated so well, the legwork had already been done in bringing them to the point of wanting it to be unanimous.

02-00:19:32
Pollock: That's right. Then the question really became, could we maintain the unanimity with this opinion? That's, I think, one of the key reasons why the Chief wanted it done in the way that he did. He wanted it to be such that the unanimity would be maintained and that there wouldn't be targets—that's my word, not his—that people could shoot at and say, "Wait a minute, I can't go along with that. I can't join that." I think one of the key reasons for making the opinion compact was to keep the group together, maintain the consensus, and avoid unnecessary collateral issues.

02-00:20:49
McCreery: So in that last court conference on May 15, was it a fairly easy matter, then, to reach that final decision, as far as you know?

02-00:21:05
Pollock: I can't say. I wasn't present at the conference. All I know is that the Chief was delighted that we were able to proceed with this. I might add about the nature of the opinion, although it's probably obvious from what I've already said before, that this was not an opinion which was designed to please law professors or legal technicians. It was intended for a functional purpose. That is, to maintain the unanimity and to gain acceptance by the American people. It was not a conventional opinion.

02-00:22:04
McCreery: How well did it succeed on that basis?

02-00:22:09
Pollock: I think it succeeded as well as any opinion could have achieved in the circumstances. There was terrible resistance, but I don't think that was

attributable to the opinion as distinguished from the Court's conclusion. I think, if anything, the nature of the opinion at least avoided much of the resistance that might have developed if there had been a split decision, or if there had been condemnation of the South, or if there had been an approach that was essentially accusatory. The resistance that followed was, of course, tragic, but the Chief Justice did his job, and I think the opinion did its job.

02-00:23:10
McCreery: Tell me what you recall about the day that the decision was announced.

02-00:23:17
Pollock: The word "electric" comes to mind. There are a number of law clerks from other offices who weren't there because their justices had taken very seriously the strictures about secrecy. Some of them came back from lunch very angry that they had missed this. Some other justices told their clerks, "Maybe you might want to be there in court today." There were about two or three routine opinions that were delivered, I think by other justices. Maybe three-quarters an hour into the delivery of opinions, Warren said, "I have the opinion of the court in *Brown against*"—and so on. Of course, there had been a big buzz when he announced that he had the opinion, because a number of people in those days would come each Monday on the possibility that this would be the day that they would hear the opinion. Today, of course, opinions are delivered on almost any day, not just on Mondays. He read it word for word, until he came to—I'm not sure whether it was the language about "We hold separate but equal must be rejected" or whatever particular line it was in the opinion—he inserted the word "unanimously," and that created another buzz, because I think it was widely doubted that the court would be able to unite on a unanimous opinion.

02-00:25:45
McCreery: Then the aftermath in the media and the public. Just tell what you recall.

02-00:25:51
Pollock: I can't recall much. It was an exciting time, but that's fifty years ago.

02-00:25:57
McCreery: I know it is.

02-00:25:59
Pollock: One of my big regrets is that I never kept a journal. I wish I had.

02-00:26:06
McCreery: As an aside, I wonder what the clerks themselves thought of the work on this case, and what they were hoping to see happen.

02-00:26:18
Pollock: I don't know. I don't know. I really couldn't evaluate that. Do you mean in terms of the ultimate outcome or the opinion itself?

02-00:26:42
McCreery: Just the opinion itself.

02-00:26:44
Pollock: I really don't know. I'm sure I did then. There had to have been all kinds of discussion about it at the time, but I can't recall that, Laura.

02-00:26:55
McCreery: That's all right. I just thought I'd ask. Now, much has been made of the fact that Chief Justice Warren received no word from the White House in response to the *Brown* decision. Do you recall any discussion of that within the court?

02-00:27:11
Pollock: I do not. No personal knowledge.

02-00:27:17
McCreery: Because one thing that's of interest is just the nature of his not only relationships, but interactions with the other branches of government. In a case like this, he must surely have been hoping for some show of support.

02-00:27:37
Pollock: As I understand it, that show of support never appeared. And indeed, there was some basis for thinking that Eisenhower was not all that happy with the decision.

02-00:28:00
McCreery: Certainly, there's evidence that their relationship cooled over time.

02-00:28:04
Pollock: Yes, including the comment attributed to Eisenhower that Warren and Brennan were two of his biggest mistakes.

02-00:28:30
McCreery: I don't know how much you've thought about this. You've been forced into it a bit with the fiftieth anniversary yesterday, as it happens, of announcing this decision, but what are your views on how this has stood up to its intention? You discussed the fact that implementation was a separate question, but what are your thoughts on—

02-00:28:56
Pollock: I wouldn't say it was a separate question. It was handled separately, but—

02-00:29:01
McCreery: That's a better way to put it. Taken up at a separate time.

02-00:29:07
Pollock: If it hadn't been contemplated to be handled in that way, you wouldn't have had the May 17, '54 decision. Clearly, in my mind, unanimity would never have been achieved, except on the understanding that desegregation was not going to be ordered forthwith. I don't think that would have been acceptable, and I think that that was perhaps part of the discussions that Warren had with

his fellow justices. It is sometimes said that the court should simply have said, "All schools shall desegregate forthwith." Well, I think that's naïve, because we wouldn't have had a unanimous segregation decision if that had been the case. In addition, I think it would have been a national disaster in terms of the violence and opposition that might well would have been encountered.

02-00:30:37
McCreery: That's an important point, isn't it? How that fit in with his ability to get a unanimous decision.

02-00:30:45
Pollock: Absolutely. The Chief became, I know, very frustrated later on about the resistance, and I think even once said, "Maybe we should have just ordered it forthwith," but I don't think he meant that. He was too savvy a justice and politician to believe that that would have worked.

02-00:31:21
McCreery: Certainly, he had to bring all of that to bear on this delicate situation.

02-00:31:25
Pollock: Absolutely.

02-00:31:26
McCreery: What did you learn from him in the course of this case?

02-00:31:38
Pollock: I learned quite a bit from him, not just in connection with that case. I think, among other things, he demonstrated to me that constitutional adjudication is not a technical exercise, and that, necessarily, there are political—using the term "political" in its best sense, not party politics—there necessarily is an important political element to decision-making.

02-00:32:21
McCreery: A human element.

02-00:32:22
Pollock: A very human element. Indeed, if the Chief is to be criticized, I would say it would be because, in some cases, he overemphasized the human element versus the legal considerations.

02-00:32:51
McCreery: What do you think?

02-00:32:55
Pollock: I think that I would probably regard myself as probably somewhat more conservative in my in my constitutional views. I guess I am more concerned than Warren was about what I think is the frequently undemocratic aspect of judicial review, in the sense that you have nine unelected lawyers with life tenure establishing national policy on crucial issues, when in many instances I think those issues should be decided by legislators or by the people, perhaps,

by constitutional amendment. It's a very ticklish exercise, because I clearly support the *Brown* decision. I think it was necessary, but to some extent, the *Brown* decision unleashed a view that deciding cases on the basis of personal predilections is all right. I think there may be a failure to understand that the *Brown* case and segregation is one thing, and following one's predilections in many other areas is maybe quite another thing. After all, in the *Brown* case, it seems to me that even on a relatively conservative basis, its decision was quite justified. What *Brown* did was undo a horrendous and egregious interpretation of the equal protection clause by the court in *Plessy*. In particular, that part of *Plessy* which arrogantly stated that if blacks see segregation as imposing a badge of inferiority on them, that is essentially a matter of their own perception. That isn't quite the words, but that's the thrust of it. It was really on that basis that the court in *Plessy* rejected the notion that segregation imposed a badge of inferiority on the blacks. Well, I think it clearly did impose a badge of inferiority on the blacks, and one did not need social sciences to reach that determination.

On the day after the decision, Scotty Reston wrote in the *New York Times* a column that the case was decided on sociological, not legal grounds. I think that's wrong. He was apparently influenced by the fact that there was a little footnote that said that readers might refer to some social science studies that have some relevance to that, but that was not in any sense the basis for the court's decision. If they're saying that the decision is sociological, it's probably true in the very limited sense that Supreme Court can't decide cases in a complete legal vacuum, and can't ignore the fact that segregation did impose a badge of inferiority on blacks. To say that that is sociological and not constitutional is to play word games. Then there are critics who say there aren't any cases relied upon in the *Brown* case. Well, there are cases that are cited, in which the court had to defer the separate but equal issue because in those cases, there were not equal facilities and therefore, the issue did not have to be faced. But when you're repudiating an egregiously bad decision, there are no cases to refer to which say, "We're going to rely on these cases to show that this 1896 is egregiously wrong." What you have to do is look at the 1896 decision and determine: is that a sensible, rational interpretation of the Fourteenth Amendment, particularly in terms of what *Plessy* said concerning its rejection of the badge of inferiority argument? The fact that there were no legal cases which the court could point to saying that *Plessy* was wrong, or the fact that the court took cognizance of the real-life impact of segregation on black children, does not make the opinion sociological, nor does it make it any less of a constitutional law decision in the best traditions of the Supreme Court.

02-00:40:09
McCreery: This was simply a case where *Plessy* needed a fresh look.

02-00:40:13
Pollock: Absolutely.

02-00:40:14
McCreery: Indeed, this was the result of some decades of effort to get to the point of 1954.

02-00:40:19
Pollock: Absolutely.

02-00:41:06
McCreery: Let's jump for a moment to the later cases that we now call Brown Two. The six states, I guess it was, all of which opposed the desegregation. To what extent did you work on that spade of cases?

02-00:41:25
Pollock: I really had very little involvement in that. To a great extent, the work on those cases, on the implementation phase, was done by an inter-chamber committee, I think maybe of seven or eight law clerks, who deeply researched the procedural aspects of that. My recollection of that part of Brown Two is very limited.

02-00:42:08
McCreery: Did you see that case argued by chance?

02-00:42:10
Pollock: I'm sure I did, but I can't remember it.

02-00:42:20
McCreery: I wonder if you're in a position to comment a little bit more on Chief Justice Warren's feelings after—not feelings, but his experiences—after *Brown* was decided in 1954, and on how it played out. Did you have much chance to converse with him about that as time went on? He lived another twenty years.

02-00:42:49
Pollock: I did. Would see him from time to time, either in his office or at reunions. But I can't really recall specific conversations. I knew that he was frustrated and unhappy with the degree of resistance.

02-00:43:21
McCreery: How much—

02-00:43:21
Pollock: Of course, he was also conscious of the fact, although it didn't bother him, of how he was demonized by the South.

02-00:43:34
McCreery: In a very personal way.

02-00:43:35
Pollock: Yes.

02-00:43:39
McCreery: Of course, he himself was able to write about that. Document those experiences. In terms of your time as a clerk, though, is there anything to be said about some of the other things that you worked on? I know *Brown* was at the center of the action.

02-00:44:03
Pollock: Years ago, I probably could have given you chapter and verse, but I really have forgotten most of these things. I remember some of these cases. I remember, for example, the *Harris* case, involving the constitutionality of the federal lobbying act. The Chief felt very, very strongly about the need to sustain regulation of lobbying. The only way that we were able to sustain that statute was by really acting almost like a legislature and rewriting the statute in the sense of cutting out an arm here and a few toes here, all in the interest of preserving the basic prohibition, because it was a very difficult case in terms of the First Amendment and the right of citizens to petition for redress. The Chief recognized all that, but felt that there was a need to regulate to the maximum extent the efforts of lobbyists to influence legislation.

02-00:45:50
McCreery: Certainly, the Chief had held high public office in California. Did he articulate the reasons for his strong views on lobbying?

02-00:46:00
Pollock: I don't recall. I'm sure he did. But I can't recall.

02-00:46:07
McCreery: You've already mentioned that you had some interest in antitrust work already at the time you came in.

02-00:46:13
Pollock: Yes.

02-00:46:14
McCreery: You touched, for example, on the General Motors and DuPont case that came up. Did you work on any antitrust matters as a law clerk?

02-00:46:29
Pollock: Yeah. Let's see. I'm glad you reminded me. One was a very interesting res judicata issue. This was *Lawlor against National Screen Service*. It was kind of an intellectually challenging case. I think it involved a situation where the same plaintiff that had settled a case involving very similar allegations before, and then brought another case a couple years later—same defendant, same allegations. The difference was in, I think, in terms of the time period. As I recall, the lower court had held that the earlier case was res judicata and biased the later case, and I think the Supreme Court reversed, in an opinion by Warren, on the very sensible ground that when you're dealing with a different time period, you're dealing with a different cause of action. There also was a very interesting antitrust case involving—what?—I think Partmar and

Paramount Pictures, in which I think the Chief dissented, on my strong urging. Oh, and there was also the baseball case.

02-00:48:40
McCreery: The one leading to baseball's exemption?

02-00:48:42
Pollock: Yes. Yeah. I don't remember the details, but there was an old Holmes decision, I think, that exempted baseball, and a new issue came up. I seem to recall that the court decided to decide the case on a per curiam basis. I remember I was concerned that, if the court was going to cite, the Holmes case as being authoritative, it could be misunderstood as also adopting what I think was a rather primitive view of the interstate commerce clause. I think I suggested to the Chief that a sentence be added to the per curiam to make clear that the reference to the earlier case was made only insofar as it held that baseball was exempt. It was really kind of a form of damage control. I'm sure there were also some other antitrust cases.

02-00:50:30
McCreery: Of course, you went on to make quite a specialty of that area of the law. Perhaps you could just talk for a moment about how you went on to the solicitor general's office in the Justice Department after your clerkship.

02-00:50:46
Pollock: When I was finishing my clerkship, I had a number of unsolicited opportunities to go with private firms. But as I mentioned before, I had in the back of my mind that what I wanted to do was to eventually go into teaching law. It seemed to me that what I wanted for the next few years, or couple years anyway, would be hands-on experience. I was very much concerned that if I went to a private law firm, that I'd wind up doing research or being a number two or number three guy on a case, whereas, I guess, spending as much time as I did attending oral arguments in the Supreme Court, I began to get the idea that I could do this pretty well myself. So I was eager to get involved, and I also wanted to get involved in antitrust. At my request, the Chief called Stanley Barnes, who was then head of the antitrust division, and who had been a judge in California probably appointed by Warren. I talked with Barnes, and he offered me a position in the appellate section, also with the assurance that I'd have the opportunity to get some cases on my own right away. I did that for a year, and then out of the blue came an invitation to go to the solicitor general's office as an assistant to the solicitor general. I was there for two and a half years, until I had an unsolicited offer from the firm that I spent the rest of my career with.

02-00:53:16
McCreery: How did that come about?

02-00:53:25
Pollock: Actually, it came about, at least in part, from a case that I had argued in the Supreme Court, *FTC against Standard Oil*. A Robinson-Patman patent case.

The two key lawyers on the other side, representing Standard Oil and some affiliated parties were Hammond Chaffetz of Kirkland and Ellis in Chicago, who, it so happened, was one of those that had asked me to join their firm, and Bill Simon of Howrey Simon of Washington. Apparently, Bill Simon was a very good friend of Jack Levy of Sonnenschein Nath and Rosenthal—the firm had a somewhat longer name at that time. Jack Levy was leaving Sonnenschein. He had been the partner in charge of antitrust for Sonnenschein. It was a relatively small firm. Thirty lawyers. Now it's 700. Apparently, Jack called Bill Simon to get recommendations as to who might take over this antitrust position at Sonnenschein, and I guess Bill recommended me. The next thing I knew was that a very distinguished lawyer, the most senior of the lawyers at Sonnenschein, a marvelous man named Bernie Nath, called me to make an appointment at my office in Washington. I didn't have really much of an idea of what this was all about, but he came to see me. He told me that Jack was leaving, that they had heard very good things about me, and they asked me to become a partner in the firm. Since I was then only, what, five and a half years out of law school, and three and a half years after taking the bar, I ultimately concluded that this was an offer I could not refuse. I was very happy that I accepted. I had a very happy career at the Sonnenschein firm.

02-00:56:34
McCreery: Thank you. I just wonder if you could finish by just reflecting a little bit on your experience as a law clerk for Earl Warren.

02-00:56:43
Pollock: It was a tremendous experience. It was obviously an experience that shaped not only my approach to the law, but maybe my view of myself as a lawyer, and my understanding of how the law does work and how the law ought to work. It was an absolutely critical experience. I'm very fortunate that I had that opportunity. Then I was doubly fortunate in that I not only had the experience of the clerkship but, lo and behold I had the extraordinary opportunity to work with Earl Warren in preparation of the most important decision in the history of the Supreme Court. So I consider myself a lucky man.

02-00:57:53
McCreery: Anything else you would like to add?

02-00:57:55
Pollock: No. I think I've probably spoken too much.

02-00:57:58
McCreery: You did a very nice job. Thank you so much.

[End of Interview]