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# *Brown v. Board of Education* and Attacks on the Courts: Fifty Years Ago, Fifty Years Later

## A JUSTICE AT STAKE REPORTERS GUIDE

How the Brown decision triggered a tidal wave of attacks on the Supreme Court-

and how attacks on the courts continue today.

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*"Cries of alarm are not restricted to the South. They come from every part of the United States. Curb the Supreme Court. Abolish the Supreme Court. Impeach the members of the Supreme Court. Harsh, bitter demands have come from every corner of the country."*
Congressman Overton Brooks

**Fifty Years Ago:** On May 17, 1954, the U.S. Supreme Court handed down a unanimous decision in *Brown v. Board of Education of Topeka,* finding school segregation unconstitutional and cracking the foundations of American apartheid. The 50th anniversary of this historic decision has generated much reflection on the meaning of *Brown* for education, integration and civil rights.

But less attention has been paid to the importance of *Brown* for the courts themselves.
In the course of upholding the Constitution and protecting the rights of the less powerful, what happens when the judiciary repudiates an entrenched social institution? How do courts remain independent in the face of a withering political backlash?

Justice at Stake has prepared this guide to help reporters, commentators and others answer these questions. The report catalogues the attacks on the Supreme Court in the aftermath of *Brown*: attacks on its legitimacy, accusations of tyranny, efforts to weaken judicial power, attempts to undercut the political independence of the justices, impeachment threats, and the Southern Manifesto that sought to portray *Brown* as the villain in America's civil rights struggles. These attacks intensified when the Court issued rulings protecting the rights of Americans targeted during the McCarthy era.

**Fifty Years Later:** Anniversaries can provide striking demonstrations of what has changed in the interim, and what hasn't. Coincidently, May 17 will mark more than just a half century since *Brown*. It's also the deadline set by the Massachusetts Supreme Judicial Court for state officials to permit gays and lesbians to marry, following its decision that the state constitution affords them the same protections as any other couple.

Of course, no two social justice movements are the same. False comparisons should be avoided. But the real comparisons are worth considering, even beyond the simple observation that both cases involve minorities seeking the same rights granted to others.
Both rulings triggered harsh condemnations of judicial activism, and courts run amok. Both prompted legislation and constitutional amendments to reverse their consequences. Both led to threats to impeach judges. Both sparked wider debate

of long-standing social issues. And at their core, both rulings were about real people's lives, hopes and dreams.

Fifty years later, courts are again under attack. Threats of impeachment are again being uttered casually. Recent legislation, from the Patriot Act to last year's "Feeney Amendment," has stripped judges of their powers to protect the rights of those among us who have less power. The courts are again being treated like cartoon villains—and their legitimacy, along with their role as the guardian of our rights, is again being challenged.

## UNDERCUTTING THE COURT'S LEGITIMACY

Since judges must sometimes make unpopular decisions, their power depends greatly on their sense of public legitimacy. And of course, they should be accountable in the public arena. **But when public figures—especially legislators who have the power to weaken our courts—cross the line from ordinary criticism to destructive and misleading attacks on the very work of the courts, they send a signal to the public that the judiciary's work is not to be respected**.

Days, weeks, and even years after *Brown*, its opponents worked hard to de-legitimize the Supreme Court, in part by threatening defiance. These critics—including legislators, governors and even judges—set the stage for the Massive Resistance movement that followed.

- "A court decree is worthless unless it is supported by public opinion," warned Mississippi Senator James Eastland. "The South will not abide by nor obey this legislative decision by a political court," he later added. "The only weapon possessed by the Court is the citation for contempt, and that is an ineffective weapon."

- Georgia Governor Herman Talmadge called the decision "a step towards national suicide," and warned that it would take "several divisions of troops to police every school building in Georgia."

- In a pamphlet titled *Black Monday*, Mississippi judge Thomas Brady predicted that whites would fight to the death to preserve racial purity. "We say to the Supreme Court and to the entire world, you shall not make us drink from this cup….If this happens, then it will take an army of one hundred million men to compel it."

- "The State of Georgia is no longer concerned as to whatever methods of enforcement the Supreme Court employs," said state attorney general Eugene Cook, "since we made provisions to circumvent the decision." Cook also proposed making it a capital offense to assist federal authorities in enforcing *Brown*.

- "If the people of any state says that a United States Supreme Court decision is not the law of the land, the people of that state, until it is really resolved, have a doubt in their mind and a right to have that doubt," Richard Butler, counsel for the Little Rock school board, told Chief Justice Warren during the oral argument over implementing *Brown*.

- "The real law of the land is the same today as it was on May 16, 1954," said federal judge Richard H. Atwell, after twice refusing to comply with *Brown* and being commanded to do so by an appeals court.

- "The Supreme Court," added journalist John Temple Graves, "has tortured the Constitution. The South will torture the Supreme Court decision."

In the weeks after *Brown*, white "citizens' councils" began to spring up, attracting an estimated 250,000 supremacists across the south. Ku Klux Klan membership grew, legal attacks on the NAACP intensified, and black voters were purged from the rolls and subjected to new poll taxes. The state of Georgia passed a resolution "interposing" state sovereignty where it felt the Court had exercised a power not granted to it in the Constitution, kicking off an interposition campaign endorsed in eight states. The foundations of massive resistance were laid.

In 1956, Alabama Governor Jim Folsom was turned out by a 3-1 margin for a variety of sins of moderation, including failing to attack the Supreme Court after *Brown*. School boards began devising an array of evasions to avoid desegregation. One official joked that southern whites owed the Court "a debt of gratitude" for "caus[ing] us to become organized and unified."

President Eisenhower promised to enforce the decision. But his public ambivalence left an open field for those who attacked the Court and resisted *Brown*. The day after the decision, asked by a reporter whether he had any advice for the South, the President replied, "Not in the slightest." Two years later, he added, "I think it makes no difference whether or not I endorse it. It is difficult through law and force to change a man's heart." His opponent, Democrat Adlai Stevenson, also stressed the need for caution and persuasion: "You do not upset habits and traditions that are older than the Republic overnight."

## EQUATING THE COURT'S DESEGREGATION DECISION WITH TYRANNY

Every decision produces winners and losers, and court decisions should be scrutinized in the political arena. But **when public officials and commentators accuse one branch of government of actually subverting democracy—the civil equivalent of treason—a line is crossed, and the effect is to tear down the legitimacy of the courts.** In the 1950s, after the world war against fascism

and during the Cold War and McCarthy eras, charges of subverting democracy were more than hot rhetoric. And in the aftermath of *Brown* and the McCarthy cases, the theme of subversion became a staple of attacks on the Court.

- "While we are thinking of tyranny in Hungary," said South Carolina Senator Strom Thurmond, commenting on the suppression of an uprising there, "I wish to take a few minutes to discuss tyranny in the United States, and when I say that, I mean the tyranny of the judiciary in the United States."

- Representative Mendel Rivers called the Supreme Court a "greater threat to this Union than the entire confines of Soviet Russia."

- Georgia Congressman James Davis complained of "usurpation of power which amounts to tyranny." He offered a warning for northerners: "[W]hile it may be Georgia or Arkansas which suffers today from such wrongful usurpation of authority, next year it may be Oregon, Maine, or Illinois….While the subject today is schools, the next usurpation may involve taxes, or criminal law, or the right to own property.

- The Florida legislature submitted a resolution denouncing the "usurpation of power" by the Court. Tennessee condemned the "oppressive usurpation" of the Court.

- Wrote columnist James J. Kilpatrick: "These nine men repudiated the constitution, spit upon the Tenth Amendment, and rewrote the fundamental law of this land to suit their own gauzy concepts of sociology."

- The *National Review* called *Brown* "an act of judicial usurpation" that "ran patently counter to the intent of the Constitution," as well as being "shoddy and illegal in analysis."

On the other hand, the U.S. State Department saw *Brown* as a powerful Cold War tool in the contest for global public opinion. Within an hour of the decision, the Voice of America broadcast the decision to Eastern Europe in 34 different languages.

## WEAKENING THE COURT'S POWERS

For some critics of *Brown*, words were not enough. They proposed a variety of means to **curb the very powers of the Supreme Court** and the independence of its justices, including a variety of constitutional amendments.

- Numerous lawmakers introduced constitutional amendments reserving exclusive control of public education to the states. Senator Eastland proposed

an amendment to give states the exclusive power to regulate "health, morals, education, marriage and good order in the State."

- Two Virginia Congressmen introduced bills requiring unanimous consent of the court to invalidate a state constitution or statute. Another constitutional amendment would have given Congress the power, by a vote of two-thirds, to limit the authority of federal courts to strike down statutes as unconstitutional.

- Georgia Senator Carl Vinson introduced a bill saying that no decision older than 50 years could be reviewed unless authorized by Congress. Florida congressman Robert Sikes called for a constitutional amendment to prevent the court from modifying or changing *any* prior decisions construing the constitution or prior acts of congress.

- "Power intoxicates them," former Justice Supreme Court justice James F. Byrnes wrote in *U.S. News & World Report.* "It is never voluntarily surrendered. It must be taken from them. The Supreme Court must be curbed."

## ABOLISHING LIFE TENURE AND APPOINTMENTS

*Brown*'s opponents quickly recognized that the Court's independence rested in part on the Constitution's requirements that judges be appointed by the President and be given life tenure.

- Numerous bills were introduced to abolish life tenure on the Court and replace it with terms as short as four years.

- Some lawmakers proposed scrapping appointments in favor of electing the Supreme Court. (Senator Long proposed that voters be separated into nine judicial districts.

- Another proposal would have denied Court positions to anyone who had served in the previous five years as a member of congress, the head of an executive department, director of certain government agencies, or as a member of certain commissions—requirements that would have prevented the appointments of Justices Black, Douglas, Warren, and Clark. Another proposal, that justices be natural born citizens, would have disqualified Justice Frankfurter.

Later that year, unhappy Senators delayed the confirmation of Justice John Marshall Harlan, the grandson of the sole dissenter in the 1896 *Plessy v. Ferguson* decision reversed by *Brown.*

## IMPEACHMENT THREATS

The Constitution sets stringent standards for impeachment—"treason, bribery, or other high crimes or misdemeanors"—while noting that judges shall serve "during good behavior." Before *Brown*, only two attempts had ever been made to impeach Supreme Court justices. In the aftermath of *Brown*, along with decisions to implement it and other cases protecting the rights of individuals accused of Communist affiliation or subversion, lawmakers and other leaders began to talk openly of **removing offending justices from office.**

- Senator Strom Thurmond called for the impeachment of Warren and other members of the Court.
- The Georgia legislature called for impeachment of five justices for giving aid and comfort to the enemy and guilty of high crimes and misdemeanors "too numerous to mention."
- An "Impeach Earl Warren" campaign was launched, complete with billboards next to America's highways.

## THE SOUTHERN MANIFESTO

The attacks on the court following *Brown* culminated in the "Southern Manifesto," signed by 101 members of Congress in the spring of 1956. As critics had before, the Manifesto sought to de-legitimize the court and paint the Court's nine justices as tyrants.

- "The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law.
- "We regard the decisions of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.
- "We decry the Supreme Court's encroachment on the rights reserved to the States and to the people, contrary to established law, and to the Constitution.
- "We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation.

The *Wall Street Journal* warned that the Manifesto was "not the voice of any calloused demagog. The hundred men spoke for millions of people, some frustrated, some bewildered, some disheartened, and some fearful." Congressman Davis of Georgia added that he signed the Manifesto, "because the time is here to defend free government or to surrender to judicial dictatorship."

## CONCLUSION

Looking back five decades, the good news is that the most radical attempts to attack the Court and roll back *Brown* did not succeed. The U.S. Constitution was not amended. No justice was impeached. Accusations of sedition did not stick, and the court's legitimacy survived.

But the partial failures of racists and reactionaries are no cause for celebration. The attacks on the Courts had real consequences. They opened a new front in the war to defend legalized segregation, prolonging even the simplest justice for years. They emboldened bigots to stand in schoolhouse doors, filibuster legislation, burn crosses and lynch blacks and their supporters.

And the critics of *Brown* refined a line of attack that continues and thrives to this day: that unpopular decisions should be *punished*, by attacking judges, and weakening the courts that protect our rights. The real lesson of *Brown*, as far as our judiciary is concerned, is a timeless one: the need to stand up for the courts that stand up for our rights.

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