Excerpt from Simple Justice, by Richard Kluger

At the age of sixty, his ambitions to be President or Chief Justice now largely behind him, Robert Jackson remained the most intellectually charming member of the Court. The commendable and difficult job he had done as chief counsel for the United States at the International Military Tribunal at Nuremberg had made him a world figure, and his work at the Court had demonstrated his firm command of constitutional law in all its sinuous complexity. Off the bench, he enjoyed life in exurban McLean, Virginia, at his manorial home, Hickory Hill, later owned by John and then Robert Kennedy; he loved to fish and ride and hike and go camping and to take a belt of his favorite brand of bourbon. What he did best of all, though, was write. Probably only Holmes matched or surpassed him as a stylist. It was Jackson who penned the ultimate aphorism on the Court's uniqueness: "We are not final because we are infallible, but we are infallible only because we are final."

A partial clue to Justice Jackson's posture toward the segregation cases may be found in his admirable 1941 book, *The Struggle for Judicial Supremacy*, in which he wrote:

> . . . Legal learning is largely built around the principle known as *stare decisis*. It means that on the same point of law yesterday's decision shall govern today's

> decision. Like a coral reef, the common law thus becomes a structure of fossils. . . . Precedents largely govern the conclusions and surround the reasoning of lawyers and judges. In the field of common law they are a force for stability and predictability, but in constitutional law they are the most powerful influence in forming and supporting reactionary opinions. The judge who can take refuge in a precedent does not need to justify his decision to the reason. He may "reluctantly feel himself bound" by a doctrine, supported by a respected historical name, that he would not be able to justify to contemporary opinion or under modern conditions.

Such a conviction freed Jackson from the sort of constricting doctrinal devotion that made Frankfurter seem a far more consistent jurist. It also seemed to free Jackson from the obligation to follow his own prior judicial positions. In a 1950 opinion, he could thus bluntly warn Congress to leave men's minds alone in its zeal to check the domestic spread of Communism by repressive laws, yet the very next year he voted with the Court majority upholding the Smith Act that punished Communist leaders not for any overt acts they took toward overthrowing the government but because of their conspiratorial speech and teachings. In one case, he would scorn Harlan Stone's doctrine that the First Amendment, or any part of the Constitution, could occupy a "preferred position" among the rights and protections granted by the great document; in other cases, he himself seemed to espouse a preferred position for the Fourth Amendment, outlawing unreasonable searches and seizures. He was proud of his dissent in *Korematsu*, one of the Japanese-American relocation cases during the Second World War, but he was on the majority side in the companion (and not readily distinguishable) *Hirabayashi* case. He was, in short, often as inconsistent and unpredictable as he was brilliant.

As Jackson reviewed the legal arguments in *Brown*, he saw no basis in the prior uses of the law for overruling segregation. By his own lights, though, this hardly shut the door on such a ruling. Nor did he doubt, according to a memo he wrote fifteen months later, that the continued practice of segregation was not wise or fair public policy. Yet he shared Frankfurter's belief that the Court's decision could hardly take the form of a simplistic rendering of his own—or the rest of the Justices'—personal convictions in the matter. He saw little help in the extra-legal sociology and psychology that the black lawyers had introduced into the case; all that struck Jackson as rather too subjective and unmeasurable. And he was worried about how a Court decision outlawing segregation would affect the nation's respect for "a supposedly stable organic law" if the Justices were now, overnight as it were, to alter an interpretation of the Fourteenth Amendment that had stood for more than three-quarters of a century. Even if he could have put that concern aside, he had doubts that a seemingly "ruthless use of federal judicial power" would have much effect in truly abolishing Jim Crow practices.

The Justice asked his two 1952 Term clerks for an advisory memorandum on the segregation cases. The two clerks later seemed to disagree on whether their memos were intended to be a playback of Jackson's own views or a statement of the varying positions Jackson might adopt in the case, and

internal evidence suggests that they may have been neither but were instead invited statements of each clerk's personal views of the case. One memo, initialed "DC" on the bottom for clerk Donald Cronson, a Chicago Law School graduate, was titled "A Few Expressed Prejudices on the Segregation Cases," and stated that, according to its author's prejudices, "there is no doubt that Plessy was wrong" and should have been decided along the lines of Harlan's dissent. But to say that *Plessy* was wrongly decided did not dispose of the matter, the Cronson memo went on, because the decision had resulted in the growth of important institutions—"not only rules of law, but ways of life"—and under those circumstances, Cronson said, he questioned "the wisdom or propriety of overruling the case, right or wrong." He acknowledged that there was perhaps not much justification for keeping an incorrect ruling on the books, but "where a whole way of life has grown up around such a prior error, then I say that we are stuck with it—until such time as Congress sees fit to act. . . ." The Court, Cronson thought, should confess error in *Plessy*—just how, he did not say—and "straighten out the mess so that Congress may by legislation prohibit segregation." If Congress chose not to do so, even after being advised by the Court that segregation was unconstitutional, then surely the Court should not do so by a sweeping decree, Cronson concluded.

The second memo was less ambiguous. It was titled "A Random Thought on the Segregation Cases" and is of historical interest because of the initials at the bottom—"whr"—which stand for William H. Rehnquist, who nineteen years later became the one hundredth man to sit on the Supreme Court. His memo threatened for a time to cost him that seat. The memo, Rehnquist advised the Senate while it was weighing his nomination to the high court in 1971, had been written at Justice Jackson's request and represented Jackson's views on the segregation cases. The Justice wanted the memo, Rehnquist said, to arm himself when speaking at the conference of the Justices. The informal nature of the memo, Rehnquist reflected, made him think that it had been "prepared very shortly after one of our oral discussions on the subject." The first half of the two-page Rehnquist memo is a gratuitous thumbnail sketch of the Court's earlier tendency to read its own economic views into the Constitution. The second half of the memo bemoaned the possibility of the Court's reading its own social views into the Constitution by now voting to outlaw segregation. Rehnquist wrote in part, allegedly paraphrasing the position Jackson was about to state to his fellow Justices:

> . . . Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would submit that this is a question the Court need never reach. . . . If this Court, because its members individually are "liberals" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects.

To those who argue that personal rights are more sacrosanct than property

rights, the memo added, "the short answer is that the Constitution makes no such distinction." Then it continued:

> . . . One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.
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> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed. . . .

If Rehnquist was telling the truth to the Senate in 1971* and the words in

* There is much evidence, both internal and external, that casts doubt on Rehnquist's account of the nature of his memorandum. After it was published in *Newsweek* at the time of the Senate confirmation hearings, some liberal Senators and civil-rights proponents took the memo at face value—that is, as a statement of Rehnquist's own views, since it bore his initials and an informal, rather personal-sounding title, "A Random Thought on the Segregation Cases"—and challenged his suitability to be appointed to the Court in view of his having apparently favored the upholding of segregation. Faced with growing resistance to his nomination, Rehnquist sent a letter on December 8, 1971, to Senate Judiciary Committee Chairman James Eastland which said that to his best recollection after some nineteen years, "the memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views at the conference of the Justices, rather than as a statement of my views." Rehnquist went on to say that Jackson had asked him to assist "in developing arguments which he might use in conference when cases were discussed. He expressed concern that the conference should have the benefit of all of the arguments in support of the constitutionality of the 'separate but equal' doctrine, as well as those against its constitutionality." The clear implication was that Rehnquist's memo was intended to add armor to Jackson's defense of *Plessy*. Rehnquist wound up his explanation to the Senate by stressing that the memo was very unlike most of those normally done by the clerks of the Court in analyzing cases, that the style of the memo was hardly that of a clerk addressing the Justice he worked for but was prepared by Rehnquist "as a statement of Justice Jackson's tentative views for his own use at conference," and that Rehnquist himself fully supported (in 1971) "the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision."

Of the two living people who might have corroborated Rehnquist's explanation to the Senate, one offered elaborations that seemed to conflict with the Rehnquist account, and the other sharply denied it.

Rehnquist's fellow clerk, Donald Cronson, by then an executive with Mobil Oil in the company's London office, cabled a message to Rehnquist that Republican Senate Minority Leader Hugh Scott placed in the *Congressional Record* for December 9, 1971. Cronson wrote, "It is my recollection that the memorandum in question is my work at least as much as it is yours and that it was prepared in response to a request from Justice Jackson. . . ." That was the first piece of information supplied by Cronson which did not quite mesh with Rehnquist's explanation: Rehnquist had not suggested that the memo was a collaborative effort. Cronson went on to say that prior to the memo which bore Rehnquist's initials at the end, "another memorandum was prepared of which I still have a copy. It is my recollection that I actually typed the first memorandum, although it is possible that you did. It was in any case the result of collaboration between us." Cronson then described the first memo, which he said contended that *Plessy* had been wrongly decided but that the Court should leave it to Congress to implement any change in the practice of segregation—that is, the memo titled "A Few Expressed Prejudices on the Segregation Cases" and carrying Cronson's initials at the end, which survives in Justice Jackson's papers. Later, Cronson said, Jackson asked for a second memo "supporting the proposition that *Plessy* was correctly decided. The memorandum supporting *Plessy* was typed by you, but a great deal of the content was the result of my suggestions . . . and it is probable that the memorandum is more mine than yours."

Cronson's explanation raises at least three questions: (1) Why did Rehnquist fail to

his undated memo even remotely reflected Jackson's views, then the Justice must have undergone a considerable change of heart about presenting them to his colleagues at the Court conference on December 13, 1952, for little in Burton's notes on Jackson's remarks resembles any of the thoughts attributed to him in the Rehnquist memo. And nothing in the memo that Jackson himself prepared on the subject in February 1954 remotely suggests that he ever thought that *Plessy* had been rightly decided.

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mention the first memo in his letter to the Senate? (2) If Jackson had requested two memos reaching opposite conclusions on the rightness of *Plessy*, why did Rehnquist claim that the second memo—the one bearing Rehnquist's initials—represented Jackson's view of the case? Cronson did not suggest that Jackson had changed his mind after the first memo, only that he wanted a second memo reaching the opposite conclusion. (3) If Rehnquist and Cronson had collaborated on both memos to the extent that Cronson suggests (and Rehnquist never suggested), why did each memo carry the initials of just one of the clerks, why were the styles of the memos so different, and why would Rehnquist not want to inform the Senate that another man was co-author of the memo that was the subject of such controversy—especially if, as Cronson put it, the memo was "more mine than yours"?

The other person who might have corroborated Rehnquist's explanation of the memo was Mrs. Elsie Douglas, Jackson's secretary and confidante for the nine years preceding his death in October 1954. She told the Washington *Post* that by attributing the views of a pro-segregation memo to Jackson, Rehnquist had "smeared the reputation of a great Justice." She challenged Rehnquist's assertion that Jackson would have asked a law clerk to help prepare the remarks he would deliver at a conference of the Justices, especially in view of Jackson's acknowledged gift for spontaneous eloquence and his splendid oral performances before the Court while Solicitor General and while serving at the Nuremberg war-crimes trials. She told *Newsweek* that Rehnquist's account was "incredible on its face."

Without resort to the statements by Cronson or Mrs. Douglas, Rehnquist's attribution to Jackson of the views in the 1952 Term memo bearing Rehnquist's initials is challenged by internal evidence in both the Rehnquist and Cronson memos:

(1) The titles of both memos are strikingly inappropriate to the use Rehnquist claims Jackson had in mind: as a draft of the Justice's views for presentation to his fellow Justices. Is it possible that Cronson would have titled his memo "A Few Expressed Prejudices on the Segregation Cases" or Rehnquist would have called his "A Random Thought on the Segregation Cases" if either or both had been drafted for use by the Justice at conference? The Justices, one would think, would hardly be inclined to conceive of their considered views as either "prejudices" or "a random thought." But such titles would be entirely appropriate if Justice Jackson had simply asked each of his clerks to put down informally his own personal views on the case for the Justice's consideration.

(2) Is it possible that Jackson would have bothered to deliver so crude and elementary a summary of the Court's historic position on property rights and its preferential treatment of business interests—the subject of the first half of the Rehnquist memo? Every member of the Vinson Court except Burton was a veteran New Dealer, entirely familiar with the court-packing fight and the Court's pre-1937 biases.

(3) Is it possible that Jackson would have disaparaged, as Rehnquist indicates in the memo that the Justice planned to, "150 years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses" when Jackson himself wrote many a decision protecting minority rights? Among the most eloquent was Jackson's opinion in the second flag-salute case, *West Virginia Board of Education v. Barnette* in 1943, which took the side of the Jehovah's Witnesses and concluded with one of the Justice's most memorable passages: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein . . ."

(4) Is it possible that so confident and civilized a man as Robert Jackson would have told his brother Justices anything remotely approaching what Rehnquist writes at the end of his memo purportedly reflecting Jackson's views—namely, "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy* . . . was right and should be affirmed"? The "I" in that passage, according to Rehnquist, was supposed to be Jackson, not his clerk, but when and where might Jackson have been excoriated by his "liberal" colleagues? And what colleagues might those be? Surely not his

According to Burton's notes, Jackson began his comments to the Justices with the aside that if they were going to take their time to thrash the cases out it would be better for them not to take a vote that day. Burton's diary entry for that date indicates that the suggestion was adopted: "We discussed the segregation cases thus disclosing the trend but no even tentative vote was taken." Burton's notes on Jackson's presentation are hard to decipher, but they seem to say that Jackson had found nothing in his reading of legislative

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fellow Justices, who would hardly have spoken ill of him for expressing genuine convictions. A far more plausible explanation might be that the "I" of the memo is Rehnquist himself, referring to the obloquy to which he may have been subjected by his fellow clerks, who discussed the segregation question over lunch quite regularly, who were almost unanimous in their belief that *Plessy* ought to be reversed, and who were, for the most part, "liberal." Support for this surmise is lent by an article that Rehnquist wrote in the December 13, 1957, issue of *U.S. News & World Report*. Under the title "Who Writes Decisions of the Supreme Court?" it says, as part of a complaint against the leftward bias of the clerks: "Some of the tenets of the 'liberal' point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business. . . ." The telltale use of quotation marks around the word "liberal" adds to the suspicion that the "I" of the Rehnquist memo was never meant to be Robert Jackson speaking to his brethren. That Rehnquist was ideologically a pole apart from his fellow clerks that year is suggested by the comment of Harvard law professor Donald Trautman, who clerked for Justice Frankfurter that term. "As I knew him, he was a reactionary," Trautman told the *Harvard Law Record* of October 24, 1971, at the time of Rehnquist's Court appointment. "I would expect him to be a reactionary today, but you never know what a person will do once he's appointed."

(5) While Rehnquist claimed his memo was intended to convey Jackson's words and thoughts, it would be difficult to support such a claim for the companion Cronson memo, which is plainly a memo from a clerk to his Justice, as evidenced by the paragraph that begins, "One of the main characteristics to be found in *your* work on this Court is a reluctance to overrule existing constitutional law . . . [emphasis added]."

(6) In his disclaimer to the Senate, Rehnquist did not say that he agreed with the *Brown* decision when it was made, only that he agreed with it in 1971, when he was being scrutinized for appointment to the Supreme Court—and when "an unpopular and unhumanitarian position" in favor of segregation might well have cost him his seat on that Court. That Rehnquist may once have felt otherwise about the outcome in *Brown* can be inferred from a passage in an article by Rehnquist in the *Harvard Law Record* of October 8, 1959, a dozen years before his appointment:

> . . . There are those who bemoan the absence of *stare decisis* in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the constitution which have been most productive of judicial law-making—the "due process of law" and "equal protection of the laws" clauses—are about the vaguest and most general of any in the instrument. The Court in *Brown v. Board of Education* . . . held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court [the one that decided *Brown*] thinks the framers thought it.

It remains to be said that William Hubbs Rehnquist has been, from the first dawning of his political awareness, a forceful, outspoken conservative with a low threshold of tolerance for civil-liberties claimants and the civil rights of minorities. "The Justice's views on the law, the Constitution, discrimination and crime seem indistinguishable today from those [that] friends recall in his late adolescence," wrote veteran Washington correspondent Warren Weaver, Jr., in an article on Rehnquist in the October 13, 1974, issue of the *New York Times Magazine*. "While most people's views evolve and shift as they grow older, Rehnquist's conservative outlook seems to have been adopted and then flash-frozen while he was an undergraduate at Stanford. . . . A law-school classmate at Stanford, an unabashed liberal, recalls: 'Rehnquist was very consistently more than just conservative. . . .' Another fellow student observed: 'Bill was the school conservative. A lot of us had mixed views about him. He was very sharp, a brilliant student, but

or judicial history that suggested segregation had been thought unconstitutional anywhere along the line. He thought Thurgood Marshall's brief contained more sociology than law, and he had his doubts that racism could be overcome in America "by putting children together." Still, he thought the Court might be able to justify the abolition of segregation on political grounds, though he did not see how the Justices could claim a judicial basis for the decision. He would likely go along with such a politically framed decision provided it gave the segregating states "reasonable time" to adjust to the ruling. But if the Court were to rule that the South had been acting illicitly all along, he would have trouble going along.

Jackson's 1953 Term clerk E. Barrett Prettyman, Jr., elaborates: "Justice Jackson was wary. He wanted to make sure that the Court was going to shoot straight. He didn't want it to accuse the South of behaving unconstitutionally all those years, especially since the history of the Fourteenth Amendment didn't really point to the conclusion that *Plessy* should be reversed. In short, he wanted the Court, in ending segregation, to admit that it was making new law for a new day."

Had it been practicable, Jackson's preference might have been to follow the essence of the Cronson memo and urge the Court to shape an advisory opinion holding: (1) the *Plessy* doctrine had been attenuated and neutralized by a whole line of cases, most recently *Sweatt* and *McLaurin* (but others as well in the areas of transportation, restrictive housing covenants, and voting rights); (2) if the Court in *Plessy* had meant to deny Congress's power to outlaw segregation under Section 5 of the Fourteenth Amendment, then the Court had erred; but (3) in the absence of congressional initiative in the

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so far-out politically that he was something of a joke.'" In private law practice in Phoenix, he gave a speech in 1957 denouncing Justices Black and Douglas, among others, as "left-wing" and called them down for "making the Constitution say what they wanted it to say." He was an ardent supporter of fellow Arizonan Barry Goldwater's political fortunes, and as a Phoenix civic leader Rehnquist spoke out forcefully against a local anti-discrimination ordinance and asserted in opposition to a 1967 desegregation program in the city's schools that "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." As an Assistant Attorney General and head of the Office of Legal Counsel in the Nixon administration, he was well known as the Justice Department's most ardently prosecutorial advocate of wiretapping, government surveillance, preventive detention, and other so-called law-and-order techniques of a totalitarian cast. In 1970, he drafted for the White House a proposed constitutional amendment prohibiting bussing to achieve desegregation. In the Supreme Court, he has consistently voted to constrict civil rights and civil liberties, opposing the claims of, among others, women seeking abortions, poor people who had to wait a year before qualifying for public medical services, aliens applying for civil-service jobs and lawyer's licenses, and Negroes seeking expanded school-desegregation efforts in Denver, Richmond, and Detroit. He has voted to retain the death penalty, to permit warrantless searches for narcotics of people stopped for minor traffic offenses, and to authorize government agents to lure a defendant into a crime if he was deemed to have a "predisposition" to commit it anyway. In antitrust cases, he usually sided with business against government; in labor cases, he usually sided with management against unions. In September 1974, he gave a speech characterizing himself as a "libertarian" in the sense of one who conceives minimum-wage and maximum-hour legislation as interfering impermissibly with an employer's freedom of choice.

Taking the careers and judicial assertions of both men in their totality, one finds a preponderance of evidence to suggest that the memorandum in question—the one that threatened to deprive William Rehnquist of his place on the Supreme Court—was an accurate statement of his own views on segregation, not those of Robert Jackson, who, by contrast, was a staunch libertarian and humanist. The Senate confirmed Rehnquist's nomination, 68 to 26.

matter, the Supreme Court ought not to intrude, for it lacked the administrative machinery and specialized local knowledge to oversee the desegregation process, not to mention the will to do so. Jackson felt strongly that Congress had shunned its responsibility and he had implied as much in one of his questions during the oral argument. The idea of an advisory opinion was thus appealing to Jackson but not to Frankfurter, who mentioned it skeptically to Elman. The worst thing the Court could do, in Frankfurter's view, was to get up on its hind legs and then get right down again; better not to have heard the cases at all than to issue an opinion implying a moral imperative to cure a social evil but confessing the Court's incapacity or indisposition to attend to the matter until Congress had done so first.

Jackson, then, was keeping his options open. His reluctance to see any real judicial basis for overturning segregation—and his flirtation with the sort of advisory opinion that the Court had insisted since John Marshall's day it could not constitutionally issue to the other branches of government—were almost certainly why Frankfurter, in his May 20, 1954, letter to Reed, listed Jackson as a probable vote to affirm segregation as of the 1952 Term. That was one good reason why Frankfurter badly wanted to hold off a vote.