REHNQUIST'S MISSING LETTER: A FORMER LAW CLERK'S 1955 THOUGHTS ON JUSTICE JACKSON AND *BROWN*

Brad Snyder*
John Q. Barrett**

Abstract: "I think that *Plessy v. Ferguson* was right and should be reaffirmed." That's what Supreme Court law clerk William H. Rehnquist wrote privately in December 1952 to his boss, Justice Robert H. Jackson. When the memorandum was made public in 1971 and Rehnquist's Supreme Court confirmation hung in the balance, he claimed that the memorandum reflected Jackson's views, not Rehnquist's. Rehnquist was confirmed, but his explanation triggered charges that he had lied and smeared the memory of one of the Court's most revered justices. This Essay analyzes a newly discovered document—a letter Rehnquist wrote to Justice Felix Frankfurter in 1955, criticizing Jackson—that reveals what Rehnquist thought about Jackson shortly after *Brown* and the Justice's death. The 1955 letter was not known during Rehnquist's 1971 or 1986 confirmation hearings. It is also currently missing and may have been stolen from Frankfurter's Papers at the Library of Congress. This Essay argues that Rehnquist's 1955 letter represents his disappointment with *Brown* and the beginning of his outspoken criticism of the Warren Court. The letter, this Essay contends, says less about how Rehnquist felt about Jackson and more about Rehnquist's disappointment over his Justice's role in the most important Supreme Court decision of the twentieth century.

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* Assistant Professor of Law at the University of Wisconsin Law School.

** Professor of Law at St. John's University School of Law and Elizabeth S. Lenna Fellow at the Robert H. Jackson Center.

Introduction

"I think that *Plessy v. Ferguson* was right and should be reaffirmed."[1] This was the stark conclusion of what has become the most notorious Supreme Court law clerk memorandum ever written. William H. Rehnquist wrote this pro-*Plessy* memorandum to his boss, Justice Robert H. Jackson, during the December 1952 oral arguments in the school segregation cases. Rehnquist's memorandum argued that overturning *Plessy*'s separate but equal doctrine would repeat the *Lochner*-era mistake of justices reading personal preferences into the Constitution.

Justice Jackson did not follow the memorandum's advice. In May 1954, nearly a year after Rehnquist had completed his clerkship, Jackson joined the *Brown v. Board of Education* decision that invalidated racially segregated schools.[2] Five months later, Jackson died of a heart attack. *Brown* turned out to be the last significant decision of his judicial career.

In 1971, President Nixon nominated Rehnquist, then Assistant Attorney General heading the Office of Legal Counsel (OLC), to serve on the Supreme Court. On the eve of the Senate floor debate on Rehnquist's nomination, *Newsweek* magazine revealed the existence of his pro-*Plessy* memorandum.[3]

Rehnquist, who as head of OLC had worked on Clement Haynsworth's and G. Harrold Carswell's failed Supreme Court nominations,[4] knew that perceived opposition to *Brown* could sink his own nomination.[5] Nor did he want the Judiciary Committee to use the memorandum as an excuse to reopen its hearings.

With his confirmation hanging in the balance, Rehnquist wrote a letter to Senate Judiciary Committee Chairman James O. Eastland, a Mississippi Democrat:

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[1] Memorandum from William H. Rehnquist to Justice Robert H. Jackson, A Random Thought on the Segregation Cases 1, circa December 1952, Robert Houghwout Jackson Papers, Library of Congress, Manuscript Division [hereinafter Jackson Papers], Box 184, Folder 5.

[2] 347 U.S. 483, 495 (1954).

[3] *Supreme Court: Memo from Rehnquist*, Newsweek, Dec. 13, 1971, at 32, 32.

[4] *See Justice Letter on Haynsworth and Bowling Lane Case*, Wash. Post, Sept. 21, 1969, at A8 (reprinting the letter from Rehnquist to Senator James O. Eastland defending Haynsworth's Supreme Court nomination); William H. Rehnquist, Letter to the Editor, *A Reply to Two Editorials on the Carswell Nomination*, Wash. Post, Feb. 14, 1970, at A14 (replying to editorials against Carswell's Supreme Court nomination).

[5] *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 Rutgers L. Rev. 383, 384 (2000).

> As best I can reconstruct the circumstances after 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 . . . .
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> . . . .
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> . . . I am satisfied that the memorandum was not designed to be a statement of *my* views on these cases. Justice Jackson not only would not have welcomed such a submission in this form, but he would have quite emphatically rejected it and, I believe, admonished the clerk who had submitted it. I am fortified in this conclusion because the bald, simplistic conclusion that "*Plessy v. Ferguson* was right and should be re-affirmed" is not an accurate statement of my own views at the time.
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> I believe that the memorandum was prepared by me as a statement of Justice Jackson's tentative views for his own use at conference. The informal nature of the memorandum and its lack of any introductory language make me think that it was prepared very shortly after one of our oral discussions of the subject. It is absolutely inconceivable to me that I would have prepared such a document without previous oral discussion with him and specific instructions to do so.[6]

Rehnquist also wrote in his letter to Eastland, "In view of some of the recent Senate floor debate, I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision."[7]

This letter saved Rehnquist's confirmation and survived further scrutiny when he repeated it under oath during his 1986 confirmation hearings to be chief justice. But Jackson's former secretary[8] and law

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[6] 117 CONG. REC. 45,440 (1971) (emphasis in original).

[7] *Id.*

[8] John P. MacKenzie, *Controversy Deepens over Rehnquist Memo*, WASH. POST, Dec. 10, 1971, at A1 (quoting Jackson's former secretary Elsie Douglas, who accused Rehnquist of having "'smeared the reputation of a great justice'" and stated that "'I don't know anyone in the world who was more for equal protection of the laws than Mr. Justice Jackson'"); Letter from Elsie Douglas to Senator Edward M. Kennedy, Aug. 8, 1986, Joseph Rauh Papers, Library of Congress, Box 287, Folder 5.

> It surprises me every time Justice Rehnquist repeats what he said in 1971 that the views expressed in his 1952 memorandum concerning the segregation case then before the Court were those of Justice Jackson rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom I served as secretary for many years. Justice Jackson did

clerks[9] believed that Rehnquist had falsely impugned Jackson, one of the Court's most revered justices, as pro-*Plessy*. Rehnquist's explanation has provoked much journalistic and scholarly debate about whether he lied.[10]

This Essay analyzes a newly discovered document that reveals what Rehnquist thought about Jackson shortly after *Brown* and the Justice's death. In 1955, Rehnquist wrote Justice Felix Frankfurter a letter criticizing Jackson's "tendency to go off half-cocked."[11] He also wrote that

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> not ask law clerks to express his views. He expressed his own and they expressed theirs. That's what happened in this instance.

Letter from Elsie Douglas to Senator Edward M. Kennedy, *supra*.

[9] E. Barrett Prettyman, Jr., 1953 & 1954 Terms Law Clerk to Justice Jackson, Lecture at the Chautauqua Institution 1–2 (Aug. 24, 2010) [hereinafter Prettyman Chautauqua Lecture] (on file with authors) (arguing that Rehnquist's clerkship with Jackson had been "rocky" and that Rehnquist's explanation for the memorandum contradicts Jackson's unpublished draft concurrence in *Brown*); Letter from James M. Marsh, 1947 & 1948 Terms Law Clerk to Justice Jackson, to Professor Todd C. Peppers 11 (Apr. 25, 2000) [hereinafter Marsh Response to Peppers's Questionnaire] (on file with authors) (recalling a 1986 Jackson clerks reunion, hosted by new Chief Justice Rehnquist at the Supreme Court, where "[a] number of the clerks, including me, . . . were especially angry when it came out that he was attributing to Jackson his own negative views on the [de]segregation issue"); Murray Gartner, 1944–46 Terms Law Clerk to Justice Jackson, Letter to the Editor, *Whose Memo?*, N.Y. Times, Jan. 14, 1999, at A20 ("It cannot be said too often that the views set forth in the 1952 Rehnquist memorandum . . . were his and not Justice Robert H. Jackson's, contrary to Mr. Rehnquist's representation at the Senate hearing on his confirmation as Chief Justice.").

[10] *See* Noah Feldman, Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices 393–95 (2010); John W. Dean, The Rehnquist Choice 274–84 (2001); Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 304–09 (2004); Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality 606–09, 609 n.* (1976); Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 20–21 (2005); 12 William M. Wiecek, History of the Supreme Court of the United States: The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953, at 420, 689, 691, 696–703 (2006); Saul Brenner, *The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts, or Mirrors of His Justice's Mind?*, 76 Judicature 77, 79–81 (1993); Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and* Brown, 72 Temp. L. Rev. 51, 54 n.21 (1999); Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 Ind. L. Rev. 535, 553–59 (1996); Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson and the* Brown *Case*, 1988 Sup. Ct. Rev. 245, 245–47; Brad Snyder, *What Would Justice Holmes Do (WWJHD)?: Rehnquist's* Plessy *Memo, Majoritarianism, and* Parents Involved, 69 Ohio St. L.J. 873, 873–76 (2008); Mark Tushnet with Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 Colum. L. Rev. 1867, 1880 (1991).

[11] *See* Letter from Prettyman to Justice Felix Frankfurter, Oct. 13, 1955, Felix Frankfurter Papers-Harvard Law School [hereinafter FF-HLS], Box 170, Folder 6, Pt. III, Reel 2, at 327–31 & Felix Frankfurter Papers-Library of Congress [hereinafter FF-LC], Box 194, Reel 94, at 315–18 (reprinted at Appendix, *infra*).

Jackson's judicial opinions "don't seem to go anywhere," and he questioned Jackson's impact on the Court.[12] The 1955 letter was not known during Rehnquist's 1971 or 1986 confirmation hearings. It is also currently missing and may have been stolen from Frankfurter's Papers at the Library of Congress.

This Essay reconstructs Rehnquist's 1955 letter to Frankfurter and argues that it represents Rehnquist's disappointment with *Brown* and the beginning of his outspoken criticism of the Warren Court. The letter, this Essay argues, says less about how Rehnquist felt about Jackson and more about Rehnquist's disappointment over his Justice's role in the most important Supreme Court decision of the twentieth century.

I. Rehnquist's 1955 Letter to Frankfurter and Its Disappearance

Rehnquist's 1955 letter would have been a bombshell at his Supreme Court confirmation hearings in 1971 and 1986. Senators may have interpreted the letter as revealing Rehnquist's hidden antipathy toward Jackson. They also may have used the letter to question the credibility of Rehnquist's attribution of the pro-*Plessy* views in his memorandum to Jackson.

Two recent commentators have interpreted Rehnquist's letter in this way. Attorney E. Barrett Prettyman, Jr., who succeeded Rehnquist as Jackson's law clerk, has made a "guess" that Jackson hired only one clerk because he "never got along too well with one of his two clerks preceding me—later-to-be Chief Justice William Rehnquist—and that that relationship, in fact, was pretty rocky all Term long."[13] Prettyman

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[12] *See id.*

[13] Prettyman Chautauqua Lecture, *supra* note 9. The late James M. Marsh, like Prettyman a solo Jackson clerk and one of the Justice's favorites, also believed that Jackson returned to one clerk in summer 1953 because there was "friction between the justice and Rehnquist as well as tension between Rehnquist and co-clerk Donald Cronson . . . ." Todd C. Peppers, Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk 127 (2007); Marsh Response to Peppers's Questionnaire, *supra* note 9 (hypothesizing that Jackson returned to one clerk because "maybe the Rehnquist-Cronson combo discouraged him" and "Barrett Prettyman was a sure thing"). In fact, Jackson was open to the possibility of hiring a second law clerk to work with Prettyman during the next Term. *See* Letter from Jackson to Phil C. Neal, Apr. 7, 1953, Jackson Papers, Box 17, Folder 5 (describing Jackson's hiring of Prettyman to be his next law clerk and adding, "I plan to do with one clerk until January or February [1954]. It was my thought then to take on a second for the rest of the term . . . [but I] probably will not make any commitment on that subject until after I am in California this [1953] summer . . . ."). It seems that Jackson later decided, because Prettyman was so capable, that he only needed one clerk—an arrangement that he had used from 1941 to 1949. *See* Letter from Elsie L. Douglas to

surmised that the opinions in Rehnquist's missing letter "were hardly comments reflecting a close relationship between the two men."[14]

Professor Noah Feldman, who interviewed Prettyman and then discussed the Rehnquist letter in his recent book, concluded: "Rehnquist had never much liked Jackson, and at the time of his confirmation he had no particular reason to protect his former boss, who had been dead for seventeen years."[15]

Our take is somewhat different. Although Rehnquist meant his 1955 criticisms of Jackson, Rehnquist's letter must be read and understood in its legal, political, and personal context. We argue, based on Rehnquist's other writings during the mid- to late 1950s, that his 1955 letter to Frankfurter reflected deep disappointment with *Brown* and the beginning of the rights-oriented agenda of the Warren Court.

In the summer of 1955, Rehnquist wrote to Jackson's closest colleague on the Court and most frequent visitor in chambers, Justice Felix Frankfurter.[16] Frankfurter, who attempted to befriend every justice's law clerks, had charmed Rehnquist during his clerkship.[17] Rehnquist and Frankfurter shared a love of argument and had a mutual willingness to engage in intellectual debates.[18] Frankfurter was the only justice

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Richard E. Sherwood, Feb. 26, 1954, Jackson Papers, Box 188, Folder 11 (advising a prospective law clerk, with "regret," that "there will be no vacancy next term, as our present Law Clerk [Prettyman] has proved so very satisfactory that the Justice has asked him to stay another year and he has decided to do so").

[14] Prettyman Chautauqua Lecture, *supra* note 9. Prettyman, after reviewing a final draft of this Essay, reiterated his belief that Rehnquist, as a law clerk, disliked Jackson. Telephone Interview with E. Barrett Prettyman, Jr. (Jan. 3, 2012). Prettyman also claimed that Jackson knew this at the time, and that this explains why Jackson said that Prettyman could be Jackson's law clerk following Rehnquist if Prettyman was willing to be a solo law clerk. *Id.* Prettyman recalled the look on Jackson's face and the tone of his voice when he said "one clerk" as indicating that Jackson thought that Rehnquist had deliberately undermined and disrespected him. *Id.* According to Prettyman, Rehnquist disapproved of Jackson even before the Court decided *Brown* because Rehnquist foresaw the possibility that Jackson would support the Court's decision. *Id.* Prettyman suggested that Rehnquist praised Jackson following Rehnquist's clerkship for reasons of expediency and to protect his future. *Id.* Jackson's death, Prettyman concluded, liberated Rehnquist to reveal his true anti-Jackson feelings to Frankfurter. *Id.*

[15] Feldman, *supra* note 10, at 393.

[16] *See, e.g.*, Max Freedman, *Justice Frankfurter and Judicial Review*, *in* Max Freedman et al., Perspectives on the Court 3, 13 (1967) (discussing how Frankfurter's "long-enduring and cherished friendship[] with Justice Jackson . . . became an endless source of joy").

[17] William H. Rehnquist, The Supreme Court: How It Was, How It Is 78, 81 (1987) (describing Rehnquist's fondness and admiration for Justice Frankfurter).

[18] *Id.* at 77 ("I was tremendously drawn to him by his willingness to discuss and argue while asking no quarter by reason of his position or eminence."). Rehnquist discussed his disagreement with Frankfurter about a Supreme Court decision that term and his attempt to find a state supreme court decision that proved his point. *Id.* at 76.

who had attended the clerks' May 2, 1953 engagement party for Rehnquist, kissing Rehnquist's fiancée Nan Cornell's hand upon meeting her.[19] After Jackson's death in October 1954, Frankfurter was Rehnquist's closest connection at the Court.

The summer after Jackson's death, Frankfurter mailed Jackson's family, friends, and admirers a special reprint of Frankfurter's *Harvard Law Review* and *Columbia Law Review* tributes to Jackson.[20] Frankfurter likely sent his reprint to Rehnquist, both because of Rehnquist's clerkship with Jackson and his intellectual thrust-and-parry relationship with Frankfurter.[21]

Presumably in response, Rehnquist wrote Frankfurter a very critical assessment of Jackson's career. This Rehnquist letter is not among Frankfurter's archived papers in the Library of Congress. Between 1970 and 1973, a researcher or researchers pilfered diaries and other documents from Frankfurter's papers, prompting an FBI investigation.[22] "The shrewdness with which the choice was made of the stuff to be stolen, leaving the rest, showed it was a scholarly larceny," Supreme Court expert Max Lerner wrote.[23] The thief later returned many items in response to a public appeal from syndicated columnist Jack Anderson.[24] Many Frankfurter diaries and letters, however, are still missing, and Rehnquist's 1955 letter appears to be among them.

Fortunately, the letter can be reconstructed because, in 1955, Frankfurter showed the letter to two former law clerks who knew Rehnquist. Frankfurter first showed it to Alexander M. Bickel, one of

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[19] *Id.* at 77.

[20] Frankfurter wrote two separate tributes, both published in April 1955. *See* Felix Frankfurter, *Foreword*, 55 COLUM. L. REV. 435 (1955); Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937 (1955). He had them reprinted together and sent copies of the special reprint to many Jackson friends and admirers. *See, e.g.*, Inscribed Reprint from Felix Frankfurter to John Lord O'Brian, approximately July 1955, John Lord O'Brian Papers, Special Collections, Charles B. Sears Law Library, University of Buffalo, Box 54, Folder 3; Letter from Charles E. Wyzanski, Jr., to Felix Frankfurter 1–2, July 14, 1955, FF-LC, Box 113.

[21] Frankfurter kept Rehnquist's address, along with those of other Jackson clerks, on file in his chambers. *See* Justice Jackson's Law Clerks, FF-HLS, Pt. III, Reel 9, at 61.

[22] *See* Jack Anderson, *Scholar Steals Frankfurter Papers*, WASH. POST, Sept. 14, 1973, at D21; *accord* Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger*, 142 U. PA. L. REV. 1985, 1989 (1994) (noting the "major theft, or perhaps multiple thefts, from the collection of Frankfurter papers at the Library of Congress in 1972," as was "widely publicized the next year").

[23] Max Lerner, . . . *In the Spirit of Frankfurter*, L.A. TIMES, Oct. 25, 1973, at B7.

[24] *See* Jack Anderson, *The Frankfurter Papers*, WASH. POST, Oct. 21, 1973, at C7; Anderson, *supra* note 22; Jack Anderson, *Thief Heeds Plea to Return Papers*, WASH. POST, Oct. 19, 1973, at D23.

Frankfurter's favorite clerks and Rehnquist's intellectual sparring partner during the 1952 Term. Frankfurter then showed it to E. Barrett Prettyman, Jr., who also was close to Frankfurter and clerked for him after Jackson's death.

On August 28, 1955, Frankfurter sent the letter to Bickel, then a research associate at Harvard Law School. "Bill R. says things that are more pertinent than some of Louis Jaffe's romancing [in his *Harvard Law Review* tribute to Jackson]," Frankfurter wrote Bickel.[25] It is unclear what Frankfurter thought about most of Rehnquist's points. Frankfurter disagreed, however, with a minor one. Rehnquist argued that Jackson had become more conservative about free speech after serving as chief U.S. prosecutor of major Nazi war criminals at Nuremberg. As proof, Rehnquist claimed that Jackson's 1952 dissent in *Beauharnais v. Illinois*,[26] recognizing state power to limit free speech, represented a switch from Jackson's famous 1943 opinion in *West Virginia State Board of Education v. Barnette*,[27] which upheld the rights of school children who were Jehovah's Witnesses not to salute the American flag. Frankfurter disagreed. He wrote Bickel, "I am surprised at Bill's loose talk that R.H.J. 'repudiated' *Barnette* in *Beauharnais*."[28] Frankfurter concluded his note by asking Bickel, "*Please return.*"[29]

Bickel returned the letter to Frankfurter two days later with only a brief comment. "Thank you for Bill Rehnquist's letter, which interested me very much indeed, and which I return herewith. . . . It certainly is in character—alive and incisive, except, as you note, for the loose reference to the *Barnett* [sic] case."[30]

Frankfurter then sent Rehnquist's letter to Prettyman. Most of what we know about the content of Rehnquist's letter comes from Prettyman's five-page response. Dated October 13, 1955, Prettyman's re-

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[25] Letter from Frankfurter to Bickel, Aug. 28, 1955, FF-HLS, Pt. III, Reel 31, at 970 (referring specifically to Louis L. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940 (1955)); *cf.* Letter from Frankfurter to Jaffe, May 2, 1955, FF-LC, Box 70.

> Dear Lou:
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> Anything that comes from your pen, if I may say so with respect, is thoughtful as well as stimulating. I wish we could make your paper on Jackson the basis of a seminar, at least for half a year, preferably for a whole year, on the judicial process in the Supreme Court.

Letter from Frankfurter to Jaffe, May 2, 1955, *supra*.

[26] 343 U.S. 250, 287 (1952) (Jackson, J., dissenting).

[27] 319 U.S. 624, 642 (1943).

[28] Letter from Frankfurter to Bickel, Aug. 28, 1955, *supra* note 25.

[29] *Id.* (emphasis in original).

[30] Letter from Bickel to Frankfurter, Aug. 30, 1955, FF-HLS, Pt. III, Reel 31, at 971.

sponse definitely was stolen from Frankfurter's Library of Congress papers in the early 1970s, but it was among the documents that Jack Anderson received from the thief and returned to the library.[31]

According to Prettyman, Rehnquist's letter made four main points about Jackson:

(1) "Justice Jackson reached the apex of his career as Solicitor General [during 1938–1940]" and did not leave "a lasting influence on the Court";
(2) "the Justice had a tendency to go off half-cocked";
(3) "the Justice's opinions don't seem to go anywhere"; and
(4) "[Rehnquist] never felt that he became a personal friend of the Justice's."[32]

Prettyman responded vigorously and eloquently to each of Rehnquist's points:

- About Rehnquist's suggestion that Jackson's 1938–1940 Solicitor Generalship (rather than his subsequent stint as Attorney General, Supreme Court justice, or chief prosecutor at Nuremberg) represented the apex of Jackson's career, Prettyman wrote:

  > [I]t's far too early to reach any such conclusion. . . . [I]t is impossible to tell where [Jackson] was *most* successful. . . . [I]t is not at all clear whether Nuremberg will be rated one of the world's great achievements—or a bad political bust. . . . [I]t is too early to appreciate the significance of his role on the Court.[33]

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[31] The stolen documents were returned in the form of photocopies, which the Library of Congress marked with an X for identification before reintegrating them into the Frankfurter Papers. *Compare* Letter from Prettyman to Frankfurter, Oct. 13, 1955, *supra* note 11, at 1–5 (photocopies marked X on the lower left-hand corner of each page), *with* Letter from Prettyman to Frankfurter, Oct. 13, 1955, Jack Anderson Papers, George Washington University Library, Box 295, Folder 10 (containing an unmarked photocopy of Prettyman's letter). *See generally* Library of Cong., Material Missing from the Felix Frankfurter Papers; Felix Frankfurter: A Register of His Papers in the Library of Congress 1 (1997) (on file with authors) (describing the reintegration of documents into the Library of Congress collection).

[32] Letter from Prettyman to Frankfurter, Oct. 13, 1955, *supra* note 11, at 1–3.

[33] *Id.* at 1–2 (emphasis in original). Jackson described the "solicitor generalship" "as the highest prize that could come to a lawyer" and "the most enjoyable period of my whole official life." Dr. Harlan B. Phillips, Robert H. Jackson interview transcripts, Columbia Oral History Project, 1952–53, edited by Jackson, at 563, 581, Jackson Papers, Box 190, Folder 5 [hereinafter Jackson Edited COH]. Jackson also mentioned that "Brandeis, so Tommy

- Prettyman, citing the legal profession's enormous respect for Jackson and the quotability of his opinions, concluded: "Bill's statement about the Justice not leaving a lasting influence on the Court is foolishness."[34]
- Regarding Jackson's "tendency to go off half-cocked," Prettyman conceded that there was "a basis in truth for this." But Prettyman also had seen Jackson "change his mind, on big as well as little points" and "tear up a whole opinion" to join one of Frankfurter's.[35] "And certainly," Prettyman wrote, "any man with the Justice's views who could join the segregation opinions could hardly be characterized as going off 'half-cocked.'"[36] Prettyman also observed that, on other occasions, Jackson's "deep-rooted knowledge of the law" allowed him to make quick decisions.[37]
- Prettyman wrote that Rehnquist's comment that "the Justice's opinions don't seem to go anywhere" made Prettyman "slightly ill."[38] It reminded him of criticism of his namesake and father, who for ten years had been a D.C. Circuit judge. "The idea that a judge has to stick to some 'philosophy,'" Prettyman wrote, "no matter where it leads him in individual cases, is repulsive to me."[39] Prettyman acknowledged that Jackson held "certain basic, established beliefs," but Prettyman observed that Jackson did not "let these beliefs carry him along without looking into each set of merits; I don't think he 'tagged,' or categorized, cases and let the tag control."[40]

Corcoran and Felix Frankfurter told me, has [sic] told the President that I ought to be named Solicitor General for life." *Id.* at 666, Box 191, Folder 1.

[34] Letter from Prettyman to Frankfurter, Oct. 13, 1955, *supra* note 11, at 1–2.

[35] *Id.* at 2.

[36] *Id.* at 3. As early as 1950, Jackson expressed concern at conference about the Court's institutional role in the school desegregation cases. He recognized that the Court was departing from the Fourteenth Amendment's history and Court precedent and making social policy, and he wanted the Court to declare segregation unconstitutional and leave the enforcement to Congress. *See* Snyder, *supra* note 10, at 882–89 (quoting conference notes from the 1950–1952 Terms); Letter from Robert Jackson to Charles Fairman, Mar. 13, 1950, at 2, Jackson Papers, Box 12, Folder 10. Despite his institutional concerns, Jackson voted against school segregation in every case.

[37] Letter from Prettyman to Frankfurter, Oct. 13, 1955, *supra* note 11, at 2–3.

[38] *Id.* at 3.

[39] *Id.*

[40] *Id.* (comparing Wickard v. Filburn, 317 U.S. 111 (1942), with United States v. Five Gambling Devices, 346 U.S. 441 (1953)); *see also* E. Barrett Prettyman, Jr., Book Review, 44 VA. L. REV. 678, 680 (1958) (reviewing EUGENE C. GERHARDT, AMERICA'S ADVOCATE: ROBERT H. JACKSON (1958)) (describing Jackson the Justice as "not easily 'pegged.' You cannot

- Finally, regarding Rehnquist's observation that "he never felt that he became a personal friend of the Justice's," Prettyman conceded that Jackson was "an extremely complicated person" and agreed with Rehnquist that Jackson "had a measure of reserve, even for close friends," and "was often quite lonely."[41] Acknowledging Jackson's faults, such as letting his personality conflicts with Justice William O. Douglas affect some of his votes, Prettyman concluded, "[W]hen I add the man up, I come out with almost boundless admiration for him. What a wonderful experience it was to know him!!"[42]

Frankfurter, after receiving Prettyman's extensive comments, may or may not have replied to Rehnquist. It would have been highly unusual for Frankfurter, a prolific and disciplined correspondent, not to respond to any letter, much less a provocative one about his dear friend Jackson. Frankfurter's Library of Congress papers, however, contain no copy of a reply to Rehnquist; if they once did, it has been stolen. Rehnquist's papers at the Hoover Institution at Stanford University also contain no correspondence from this time period and nothing at all, from the mid-1950s or later, from Frankfurter.[43]

II. Explaining Rehnquist's Letter

What caused Rehnquist to write his harsh assessment of Jackson in the summer of 1955? It is undoubtedly true that Jackson's death liberated Rehnquist to write as he did. The most salient intervening event between Rehnquist's clerkship (1952–53) and his letter (1955), however, was the Warren Court's unanimous 1954 decision in *Brown v. Board of Education.*

We conclude that Rehnquist's letter to Frankfurter primarily reflects Rehnquist's disappointment with *Brown* and the Warren Court.

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explain his votes and his opinions by saying that he was for or against 'civil rights,' that he was anti- or pro- 'big-business.'").

[41] Letter from Prettyman to Frankfurter, Oct. 13, 1955, *supra* note 11, at 2–3.

[42] *Id.* at 4–5. The first writer who (to our knowledge) mentioned Prettyman's letter noted only its comment that Jackson's feelings about Justice Douglas had some effect on some of Jackson's votes. This scholar did not consider the rest of the letter or note that Prettyman was disagreeing with almost every other aspect of a Rehnquist letter criticizing Jackson. *See* William Domnarski, The Great Justices 1941–54: Black, Douglas, Frankfurter and Jackson in Chambers 58 (2006).

[43] *See Register of the William H. Rehnquist Papers*, Online Archive of Cal., http://www.oac.cdlib.org/findaid/ark:/13030/kt4z09r7tn (last visited Feb. 19, 2012) (Rehnquist Papers finding aid).

We base our argument on the following factors: (1) Rehnquist wrote admiring letters to Jackson in July 1953 and just prior to *Brown* in April 1954, letters that indicate that Rehnquist enjoyed his clerkship and agreed with most of Jackson's opinions and judicial philosophy;[44] (2) Rehnquist apparently never wrote to Jackson after *Brown*;[45] (3) Rehnquist's letter is consistent with his harsh public comments about *Brown* and the Warren Court throughout the late 1950s;[46] and (4) Rehnquist, in the mid- to late 1960s, reiterated his admiration for Jackson.[47] In our view, Rehnquist's disappointment with *Brown* provides the most plausible motivation for his harsh 1955 letter about Jackson.

A. *Rehnquist's Positive Post-Clerkship Correspondence with Jackson*

Rehnquist's post-clerkship correspondence with Jackson indicates that Rehnquist enjoyed his clerkship and admired his former boss.[48] To be sure, Rehnquist's letters could be interpreted as nothing more than flattery while the Justice was alive and able to assist Rehnquist in his career. Rehnquist, however, was not the flattering type and did not seek Jackson's help in Rehnquist's Arizona job search (although Jackson did serve as a Rehnquist character reference for the Arizona bar).[49] Rehnquist's clerkship memoranda, moreover, reveal several areas of substantive agreement between the two men—particularly in criminal cases. These areas of agreement, as well as admiration for Jackson, are apparent in Rehnquist's post-clerkship correspondence.

1. July 1953 Correspondence

Rehnquist's July 1953 letter to Jackson immediately after his clerkship reveals a former law clerk enamored with the Justice and his opinions. In the letter, Rehnquist admired Jackson's concurring opinion in *Rosenberg v. United States*,[50] in which the Court lifted Justice Douglas's stay of execution of convicted atomic spies Julius and Ethel Rosen-

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[44] *See infra* notes 48–77 and accompanying text.

[45] *See infra* notes 78–84 and accompanying text.

[46] *See infra* notes 85–105 and accompanying text.

[47] *See infra* notes 106–129 and accompanying text.

[48] Letter from Rehnquist to Jackson, circa Apr. 26, 1954, at 1, Jackson Papers, Box 19, Folder 3; Letter from Rehnquist to Jackson, circa July 1953, Jackson Papers, Box 19, Folder 3.

[49] Letter from Jackson to Miss Marjorie Merritt, Oct. 6, 1953, Jackson Papers, Box 22, Folder 6 ("[Rehnquist is] a young man of unusual ability and fine character. I am sure he will make a highly creditable member of the Bar of Arizona.").

[50] 346 U.S. 273, 289 (1953) (Jackson, J., concurring).

berg.[51] *Rosenberg* had been one of the most watched cases of the 1952 Term.[52] The Court repeatedly refused to grant certiorari in *Rosenberg*, and then Douglas granted a last-minute stay.[53] Rehnquist, who had written several memoranda recommending that the Court deny certiorari in *Rosenberg*,[54] had left for Arizona before the Court vacated the stay during a special term.[55]

The Court's special term captured the nation's—and Rehnquist's—attention. Douglas granted the stay based on the Rosenbergs' argument that they had been tried and sentenced under the wrong statute.[56] Although Jackson had been sympathetic to some of the Rosenbergs' earlier arguments for a stay and hearing,[57] he joined the majority in lifting Douglas's stay.[58] The Rosenbergs were executed the next day.[59] Rehnquist requested and received a set of the Court's *Rosenberg* opinions,[60] including Jackson's argument that the Ex Post Facto Clause prevented the Rosenbergs from being charged under the more lenient Atomic Energy Act because their espionage occurred before it was passed.[61]

In his 1953 letter to Jackson, Rehnquist agreed with Jackson's Ex Post Facto argument and praised his former boss for addressing a point "that was bothering every lawyer in the country" and for having the "guts to write an opinion on this lawyer's point, and subject yourself to the inevitable maudlin outcry about 'technicalities' when 'human life is

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[51] Letter from Rehnquist to Jackson, circa July 1953, *supra* note 48.

[52] Brad Snyder, *Taking Great Cases: Lessons from the* Rosenberg *Case*, 63 VAND. L. REV. 885, 886 (2010).

[53] *Id.* at 888.

[54] JAMES SIMON, INDEPENDENT JOURNEY 302–03 (1974) (quoting a missing three-page Rehnquist certiorari memorandum No. 687 urging Jackson to deny the last-minute request for certiorari).

[55] Handwritten note by Jackson's secretary Elsie Douglas 2, circa June 15, 1953, Jackson Papers, Box 177, Folder 3 (listing law clerk Rehnquist's departure date as June 6, 1953).

[56] *Rosenberg*, 346 U.S. at 311, 318–21 (Douglas, J., dissenting) (outlining the reasons why he originally granted the stay).

[57] Snyder, *supra* note 52, at 910–11.

[58] *See Rosenberg*, 346 U.S. at 289–93 (Jackson, J., concurring); Snyder, *supra* note 52, at 917–19 & n.171 (clarifying that Jackson did not initiate or attend any ex parte meeting between Chief Justice Vinson and Attorney General Brownell); *id.* at 944–45 (evaluating Jackson's positive and negative roles in case).

[59] Snyder, *supra* note 52, at 932.

[60] *See* Letter from Rehnquist to Jackson, circa July 1953, *supra* note 48.

[61] *Rosenberg*, 346 U.S. at 290 (Jackson, J., concurring).

involved.'"[62] Rehnquist wrote that "many lawyers" regarded Jackson as "the only lawyer on the Court."[63]

Rehnquist reported that "average Americans" supported the Court's decision.[64] On his drive from Washington, D.C. to Wisconsin (to visit his parents) and then on to Arizona (his new home), Rehnquist had spoken about *Rosenberg* with "more than fifty people" and found "only . . . one [who] did not whole-heartedly approve of what the court did."[65]

Rehnquist also conveyed his general views about capital punishment:

> Every condemned man deserves the right to a careful hearing and review through the orthodox channels, but this does not mean that the highest court of the nation must behave like a bunch of old women every time they encounter the death penalty. I think there is no doubt but what [sic] the average state court does a better job with a run of the mill capital case than the federal judiciary, particularly the Supreme Ct, did with the Rosenbergs. This is because [state court judges] regard the death penalty as differing, if at all, only in degree, from the other important legislative decisions which they are bound to enforce.[66]

At the end of the letter, Rehnquist requested permission to write a *Stanford Law Review* article about *Rosenberg* based on publicly available information.[67] Jackson consented,[68] but Rehnquist never wrote the article, perhaps because his marriage and nascent Arizona legal career intervened.

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[62] Letter from Rehnquist to Jackson, circa July 1953, *supra* note 48.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Letter from Rehnquist to Jackson, circa July 1953, *supra* note 48; *accord* Snyder, *supra* note 52, at 945 n.337 (arguing that Rehnquist misread Jackson's views on capital punishment, as Jackson's concurring opinion distinguished between lifting Douglas's stay and "indorsing [sic] the wisdom or appropriateness to this case of a death sentence" (quoting *Rosenberg*, 346 U.S. at 289–90 (Jackson, J., concurring))). Jackson's views on the death penalty differed from Rehnquist's. *See* Letter from Rehnquist to Jackson, circa July 1953, *supra* note 48; *see also* John Q. Barrett, *Justices and the Death Penalty* 3–5 (archived version of Dec. 3, 2010 Jackson List post), www.stjohns.edu/media/3/54fb81b9eb614148b8b9dac6c758b414.pdf?d=20101203 (explaining Jackson's opposition to the death penalty).

[67] Letter from Rehnquist to Jackson, circa July 1953, *supra* note 48.

[68] Letter from Jackson to Rehnquist, July 13, 1953, Jackson Papers, Box 19, Folder 3.

2. April 1954 Correspondence

Rehnquist wrote Jackson an equally complimentary and admiring letter in late April 1954, a few weeks before the Court's May 17 decision in *Brown v. Board of Education*.[69] In the letter, Rehnquist wished Jackson a quick recovery from his recent heart attack and then commented on the Court's term.[70] "I know that you are anxiously awaiting my critique of the year's work of the Court to date," Rehnquist wrote with some self-directed sarcasm.[71] "I am, in short, surprised to find out how thoroughly I agree with most everything you have done, and how well you seem to get along, without me."[72] Rehnquist praised a few of Jackson's dissents in habeas corpus cases and opinions in state tax cases.[73]

Nearly a year removed from Jackson's chambers, Rehnquist reminisced about his clerkship and compared it to Jackson's decades of law practice before becoming a judge:

> I have occasionally reflected on the experience which I got while working for you; I think there is a tendency when one first leaves a job like that, and turns to the details of a general law practice, to feel, "Why, hell, that didn't teach me anything about practicing law." In a sense it didn't, and in that regard I am sure you would be the first to agree that there is no substitute for actually practicing. But I can't help feel that, in addition to the enjoyment from the personal contacts, one does pick up from a clerkship some sort of intuition about the nature of the judicial process. It is so intangible I will not attempt to describe it further, but I think it is valuable especially in appellate brief-writing.[74]

In the same letter, Rehnquist expressed dismay with newly-appointed Chief Justice Earl Warren:

> Most everyone here [in Phoenix] was quite disappointed by the nomination of Warren to the Chief Justiceship; perhaps this is less than fair to the man, since there[]certainly is no affirmative blot on the record. But I cannot help choking every time I hear the line peddled by, among others, TIME maga-

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[69] Letter from Rehnquist to Jackson, circa Apr. 26, 1954, *supra* note 48, at 1.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 2.

> zine, to the effect that "what the court really needs is not so much a lawyer as an administrator and conciliator." What the Court really needs is a Chief Justice; an ability to handle the administrative side and to compromise dissidence would be an asset to an able, experienced lawyer in the job, but they certainly are no substitute for some experience in the forums whose actions he is called on to review, nor for the ability to think and write about law. I think the few opinions of Warren'[s] I have seen have not been[]very good, but I don't suppose one should hold that against him; maybe writing opinions is an art for which the knack is acquired.[75]

Rehnquist seems to have been implying that President Dwight Eisenhower should have nominated Jackson to succeed the late Chief Justice Fred Vinson; Eisenhower and some of his aides had initially favored elevating Jackson to be Chief.[76] Rehnquist did not seem to know that Jackson and then-Governor Warren had become friends at summer encampments at the Bohemian Grove.[77] Nor did Rehnquist know while writing these admiring letters that Jackson was about to join Warren's opinion in *Brown*.

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[75] Letter from Rehnquist to Jackson, circa Apr. 26, 1954, *supra* note 48, at 2. Jackson noted on this Rehnquist letter that he "*Ansd by hand.*" *Id.* at 1. We have not located this letter, which apparently was Jackson's final writing to Rehnquist.

[76] *See, e.g.*, Herbert Brownell with John P. Burke, Advising Ike: The Memoirs of Attorney General Herbert Brownell 166 (1993) (recalling that Jackson was the only sitting justice considered for chief justice 1953, but that he was ruled out based on senatorial hostility to his having taken the Nuremberg prosecution job and supported President Franklin Roosevelt's Court-packing plan in 1937); Arthur Krock, *Helping the President Pick a Chief Justice*, N.Y. Times, Sept. 18, 1953 (Late City Edition), at 22 (acknowledging Warren as front runner but also reporting that "[a] good many of the guessing-game have put their stakes on it" that President Eisenhower would make Jackson chief); James Reston, *President Discusses Driscoll as the Successor to Durkin*, N.Y. Times, Sept. 13, 1953 (Late City Edition), § 1, at 1 (mentioning that some Eisenhower aides preferred Jackson over Warren for chief); Note from Prettyman to Jackson, circa Sept. 12, 1953, *appended to* Warren Duffee, *Jackson Held Favorite for Top Court Job*, Wash. Post, Sept. 12, 1953, at 2, Jackson Papers, Box 184, Folder 3 ("I told you that speech was conservative. *Now* look what's happening.") (emphasis in original).

[77] *See* Letter from Jackson to Frankfurter 1, circa July 1954, FF-LC, Box 70, Folder "Jackson, Robert H. undated miscellany" ("Bohemian Grove, Sunday, date forgotten . . . . The Chief is here in fine form . . . ."); Telegram from Jackson to Earl Warren, Sept. 30, 1953, Jackson Papers, Box 31, Folder 2 ("Both as a prospective associate and a longtime friend I welcome you.").

B. *Rehnquist's Conspicuous Silence After* Brown

For someone who liked to send Jackson letters about decisions in cases he had worked on, Rehnquist was conspicuously silent about *Brown*. By contrast, C. George Niebank, Jr., Rehnquist's co-clerk in the first half of 1952, wrote Jackson soon after the *Brown* decision.[78] Niebank described the decision as "not startling" and "unquestionably right" from a moral perspective:[79]

> However, had the responsibility been mine, I would seriously have considered ruling that it was a very sensitive problem of a peculiar and local nature, impossible to solve on a national basis, and best left to the police power of the states. Although I think the evil consequences predicted to follow from the decision are grossly overexaggerated [sic], there certainly will be at least a few areas in which serious problems are going to arise. It will be very interesting to see how they are resolved.[80]

It would have been natural for Rehnquist, like Niebank, to write after the *Brown* decision because Jackson played a conspicuous supporting role in the high drama of that day. Jackson checked himself out of the hospital to return to the bench for the Court's May 17 announcement of its unanimous decision.[81]

Rehnquist must have been surprised to learn that Jackson had voted as he did in *Brown*. Rehnquist had thought that he knew Jackson's mind on this issue. Rehnquist's 1952 Term pro-*Plessy* memorandum did state some of Jackson's views—specifically, the Justice's belief in the Court's limited institutional role, his preference that it defer to majority rule, and his desire that it not repeat the mistakes of the *Lochner* and early New Deal era when the justices read their personal views into the Constitution.[82] No longer Jackson's law clerk during the 1953–1954

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[78] Letter from C. George Niebank, Jr., to Jackson 1, May 26, 1954, Jackson Papers, Box 17, Folder 6.

[79] *Id.* at 1.

[80] *Id.* at 1–2.

[81] Elsie Douglas, Note re: Segregation Cases, appended to Jackson's Draft Concurrence, Mar. 1, 1954, Jackson Papers, Box 184, Folder 8 ("He came directly to the Court from the hospital that day so that there might be a full bench when these cases were handed down."); Letter from C. George Niebank, Jr. to Jackson, May 26, 1954, *supra* note 78, at 1 ("It was a bit startling though to learn that you returned to the bench for the handing down of the *Segregation Cases*.").

[82] *See, e.g.*, Robert H. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 135–55 (John Q. Barrett ed., 2003); Snyder, *supra* note 10, at 882–89; Letter from Jackson to Charles Fairman, Mar. 13, 1950, *supra* note 36, at 2, 3. *See generally* Robert

Term, Rehnquist never saw the impact of Chief Justice Warren's leadership on the Court, never heard the second round of oral arguments in the school desegregation cases, and never read Jackson's draft concurring opinion in which he explained his vote to hold segregated schools unconstitutional.

After *Brown*, Rehnquist never again saw or, to our knowledge, wrote to Jackson. That October, Jackson suffered another heart attack and died. Two months later, Rehnquist wrote a letter to Jackson's widow, Irene, expressing condolences and praising the justice but conceding that he never really knew him.[83] "I am sure that I saw only one side of a many-sided man," Rehnquist wrote, "but as an employer, and, in a way, a preceptor, he was fair, considerate, and wise."[84] *Brown*, followed so soon by Jackson's death, may have caused Rehnquist to realize that there were subjects on which he and Jackson had disagreed fundamentally.

C. *Rehnquist's Attacks on the Warren Court*

Rehnquist's 1955 letter to Frankfurter should be interpreted as the beginning of Rehnquist's anti-Warren Court and anti-*Brown* speeches and writings during the late 1950s. The letter began a pattern of hostility to the Warren Court's individual rights agenda, hostility that manifested itself in public attacks on a Court that Rehnquist viewed as moving in the wrong direction.

1. Rehnquist's 1957 Arizona Speeches

In a September speech to the Maricopa Young Republican League, Rehnquist publicly attacked the Warren Court for its June 1957 decisions protecting the rights of suspected Communists.[85] Rehnquist spoke a week after Governor Orval Faubus had deployed the Arkansas National Guard to prevent the integration of Little Rock's Central High School.[86] Rehnquist attacked Warren's credentials to be Chief Justice

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H. Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics (1941) (commenting on the supremacy of the judiciary during the *Lochner* era).

[83] Letter from Rehnquist to Irene Jackson, Dec. 8, 1954, Jackson Papers, Box 7, Folder 4.

[84] *Id.*

[85] Service v. Dulles, 354 U.S. 363, 388–89 (1957); Yates v. United States, 354 U.S. 298, 303 (1957); Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957); Watkins v. United States, 354 U.S. 178, 214 (1957); Rehnquist's FBI File, PX-3510, § 1.

[86] In Rehnquist's FBI file, the handwritten notation at the top of the news clipping about his Maricopa speech says "the Little Rock Crisis." Rehnquist's FBI File, PX-3510, § 1.

and accused the Court's liberals of "making the Constitution say what they wanted it to say."[87] His criticism echoed his anti-*Lochner* warnings in his 1952 pro-*Plessy* memorandum to Jackson.

Rehnquist's speech was not his only Arizona attack on the Warren Court. During that same period, Justice Douglas's 1952 Term clerk, Charles Ares, who had begun teaching at the University of Arizona Law School, invited Rehnquist to speak to the Lima County Bar Association.[88] Ares recalled that Rehnquist railed against the Warren Court and its "Red Monday" and "Black Monday" decisions.[89] "Red Monday" referred to the four cases decided on June 17, 1957, protecting the rights of suspected Communists.[90] "Black Monday" most likely referred to *Brown*.[91]

2. Rehnquist's 1957 *U.S. News and World Report* Article

After his two speeches in Arizona, Rehnquist criticized the Warren Court before a national audience. In a December 13, 1957, *U.S. News and World Report* article, *Who Writes the Decisions of the Supreme Court*,[92] Rehnquist took aim at his former intellectual adversaries, the Court's liberal law clerks, and provided additional evidence that *Brown* represented a pivotal point in his views about the Court. He specifically argued that liberal clerks allowed their "unconscious" biases to skew their certiorari memoranda.[93] He did not argue that the clerks changed the outcomes of the Court's decisions, but he explained that they did help set its agenda.

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[87] *Id.*

[88] Telephone Interview with Charles Ares, law clerk to Justice Douglas (Sept. 7, 2006).

[89] *Id.*

[90] Arthur J. Sabin, In Calmer Times: The Supreme Court and Red Monday 138 (1999).

[91] Tom Brady, a Mississippi circuit court judge, gave a speech about *Brown* in 1954 to the Sons of the American Revolution and later that year turned the speech into the book *Black Monday* that was "published and popularized throughout the South." Anders Walker, Note, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following* Brown v. Board of Education, 47 Duke L.J. 399, 399 & n.3 (1997) (citing generally Tom P. Brady, Black Monday (1954)); Anthony Lewis, *Segregation Group Confers in Secret*, N.Y. Times, Dec. 30, 1955 (Late City Edition), at 1 (referring to Judge Brady and his book); *see Senators Assail and Praise Court*, N.Y. Times, Sept. 30, 1958 (Late City Edition), at 22 (quoting Senator Strom Thurmond of South Carolina as referring to *Brown* as "Black Monday").

[92] William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. News & World Rep., Dec. 13, 1957, at 74, 74–75. Beneath Rehnquist's byline, it read: "Former Law Clerk to Justice Jackson of U.S. Supreme Court." *Id.* at 74.

[93] *Id.* at 74–75.

Rehnquist made clear that his real target was not only liberal clerks but also the Warren Court:

> 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, and great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren.[94]

Although Rehnquist did not refer to *Brown* by name, "expansion of federal power at the expense of State power" was a way that segregationist senators referred to the decision in 1950s Supreme Court confirmation hearings.[95] Others linked *Brown* to the Warren Court's protection of suspected Communists.[96] South Carolina Governor (and former U.S. Supreme Court Justice) James F. Byrnes wrote in *U.S. News* in 1956 that "[t]he present trend brings joy to Communists and their fellow travelers who want to see all power centered in the Federal Government . . . ."[97]

Rehnquist's article triggered public responses from two 1952 Term clerks. William D. Rogers, a former clerk for Justice Stanley Reed, replied in *U.S. News* that Rehnquist's article constituted "a grave and a serious charge."[98] Rogers suggested that "it would be possible to view all the law clerks who worked during the 1952 term of Court as 'left' only from a 'far right' position."[99] He concluded that the "small minority of cases" in which Rehnquist believed that liberal law clerks unconsciously biased their work "must include the segregation cases . . . ."[100]

Alexander Bickel, Frankfurter's clerk during the 1952 Term, responded in the *New York Times Magazine*.[101] Although Bickel left

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[94] *Id.* at 75.

[95] *See* Snyder, *supra* note 5, at 398–404 (recounting segregationist senators' veiled questions about *Brown* to Supreme Court nominee Judge John M. Harlan in 1955).

[96] *See, e.g.*, James F. Byrnes, "*The Supreme Court Must Be Curbed*," U.S. News & World Rep., May 18, 1956, at 50, 58.

[97] *Id.*

[98] William D. Rogers, *Clerks' Work Is "Not Decisive of Ultimate Result*," U.S. News & World Rep., Feb. 21, 1958, at 114, 114.

[99] *Id.* at 115.

[100] *Id.*

[101] Alexander M. Bickel, *The Court: An Indictment Analyzed*, N.Y. Times Mag., Apr. 27, 1958, at 16, 16.

Rehnquist's name out of the published article, a draft stated that "with all due appreciation of his great gifts . . . the whole wide world of varied political views opens up to the left of William H. Rehnquist. If antidotes [for alleged law clerk "leftism"] were needed, he was a universal one."[102]

3. Rehnquist's 1959 *Harvard Law Record* Article

Rehnquist's criticisms of the Warren Court and *Brown* continued in an October 1959 *Harvard Law Record* article about Justice Charles Whittaker's confirmation hearings.[103] Rehnquist was shocked that the Senate had not asked Whittaker about *Brown*, "decided three years before[,] and implementing decisions [that] had been handed down in the interim."[104] Rehnquist wrote:

> The Supreme Court, in interpreting the constitution, is the highest authority in the land. Nor is the law of the constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. 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 thinks the framers thought it.[105]

Rehnquist's negative views about *Brown*, as captured in his late 1950s writings, are strikingly similar to his 1952 pro-*Plessy* memo.

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[102] Alexander M. Bickel, Supreme Court Law Clerks 2, n.d., FF-LC, Box 215, Folder "Bickel, Alexander M.— 'Supreme Court Law Clerks.'"

[103] William H. Rehnquist, *The Making of a Supreme Court Justice*, Harv. L. Rec., Oct. 8, 1959, at 7, 10.

[104] *Id.* at 7.

[105] *Id.* at 10. Rehnquist's article triggered a response from Harvard law professor Paul Freund, who wrote that Supreme Court nominees should not be required to declare how they will vote on "fundamental issues." Paul A. Freund, Letter to the Editor, *Rehnquist Article Elicits Response*, Harv. L. Rec., Oct. 8. 1959, at 15.

D. *Rehnquist's Abiding Appreciation for Jackson*

1. Rehnquist's 1964 Letter to Prettyman

More than ten years removed from clerking at the Court and from the specific sting of *Brown*, Rehnquist revealed his appreciation for his old boss. In 1964, responding to Prettyman's request for ideas for proposed Jackson memorial lectures,[106] Rehnquist acknowledged that he was no longer a Supreme Court insider.[107] "As you might imagine, practice in a small firm in Phoenix, Arizona, has very little to do with either past or current decisions of the Supreme Court of the United States," he wrote Prettyman.[108] "To say that I am not current on the doctrine of our high court in most fields is a considerable understatement . . . ."[109]

Rehnquist had shifted his focus to his own law practice, supporting Arizona Senator Barry Goldwater's 1964 presidential bid, and opposing local civil rights legislation.[110] Rehnquist opposed the 1966 Model State Anti-Discrimination Act and described the Phoenix school superintendent's 1967 elimination of de facto racial segregation as "distressing to me" because many people "would feel that we are no more dedicated to an 'integrated' society than we are to a 'segregated' society . . . ."[111]

In his 1964 letter to Prettyman, Rehnquist emphasized aspects of Jackson's career that Rehnquist agreed with and had nothing to do with *Brown* or civil rights.[112] One critical difference between the 1955 letter to Frankfurter and the 1964 letter to Prettyman was that

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[106] Letter from Prettyman to Rehnquist, Dec. 18, 1964, Prettyman Papers, University of Virginia Law Library [hereinafter Prettyman Papers], Box 1, Folder 1. The lectures ultimately occurred in 1967 and 1968. *See* Charles S. Desmond, Paul A. Freund, Potter Stewart & Lord Shawcross, Mr. Justice Jackson: Four Lectures in His Honor 1–5 (1969) (including introductions by John Lord O'Brian, Charles D. Breitel, John M. Harlan, and Whitney North Seymour).

[107] Letter from Rehnquist to Prettyman, Dec. 21, 1964, Prettyman Papers, Box 1, Folder 1, at 1.

[108] *Id.*

[109] *Id.*

[110] *See* William H. Rehnquist, Letter to the Editor, *Public Accommodations Law Passage Is Called "Mistake,"* Ariz. Republic, June 4, 1964, *reprinted in Nominations of William H. Rehnquist of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 92d Cong. 307 (1971) [hereinafter *Rehnquist Confirmation Hearings*]; Letter from Rehnquist to Prettyman, Dec. 21, 1964, *supra* note 107, at 1; William H. Rehnquist, Statement at the Public Hearings on the Public Accommodation Ordinance Proposed for the City of Phoenix (June 15, 1964), *in Rehnquist Confirmation Hearings*, *supra*, at 305.

[111] William H. Rehnquist, Letter to the Editor, *"De Facto" Schools Seen Serving Well*, Ariz. Republic, Sept. 9, 1967, *reprinted in Rehnquist Confirmation Hearings*, *supra* note 110, at 309.

[112] Letter from Rehnquist to Prettyman, Dec. 21, 1964, *supra* note 107, at 1–4.

Rehnquist now understood that Jackson "regarded as most important" in his life's work his role as the chief U.S. prosecutor of Nazi war criminals at Nuremberg.[113] Rehnquist thus suggested Jackson's role at Nuremberg as a lecture topic.[114] He also suggested lectures on Jackson as a "lawyer's judge . . . deeply schooled in the private practice of law" based on Jackson's concurring opinion about the common law work-product doctrine in *Hickman v. Taylor*,[115] and on how Rehnquist and other western lawyers remembered Jackson.[116]

Rehnquist also echoed themes from his 1955 letter to Frankfurter. Highlighting his opposition to the Warren Court's protection of the rights of the accused, Rehnquist argued that "Jackson's views as to . . . criminal law pointed in a direction different to that which has been followed by the majority of the Court since his death."[117] He pointed to Jackson's opinion in *Stein v. New York*,[118] which affirmed state murder convictions despite allegedly coerced confessions; Rehnquist, in clerkship memos to Jackson, had advocated these outcomes.[119] In his 1964 letter, he repeated the argument that Jackson's views on free speech had become more conservative after Nuremberg. "Having worked with him on *Beauharnais*, I think it is accurate to say that by this time his views had

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[113] *Id.* at 1; *accord* Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945–1946, at xxix, xxxvii (rev. ed. 1999) (describing "hard months at Nuremberg" as "well spent in the most important, enduring, and constructive work of my life"); Jackson Edited COH, *supra* note 33, at 1475–76 (describing Nuremberg as "the most satisfying and gratifying experience of my life. . . . I regard it as infinitely more important than my work on the Supreme Court, or even anything that I did as Attorney General.").

[114] Letter from Rehnquist to Prettyman, Dec. 21, 1964, *supra* note 107, at 1–2. Years later, as chief justice, Rehnquist lectured on this topic. *See, e.g.*, William H. Rehnquist, Remarks of the Chief Justice at Dedication of the Robert H. Jackson Center, Jamestown, New York (May 16, 2003), http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_05-16-03.html; William H. Rehnquist, Remarks of the Chief Justice at the American Law Institute Annual Meeting (May 17, 2004), http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_05-17-04a.html [hereinafter Rehnquist 2004 ALI Speech].

[115] 329 U.S. 495, 514 (1946) (Jackson, J., concurring) (supporting common law work-product doctrine based on pragmatic experiences with discovery); *see id.* at 516 ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.").

[116] Letter from Rehnquist to Prettyman, Dec. 21, 1964, *supra* note 107, at 2.

[117] *Id.*

[118] 346 U.S. 156, 159–97 (1953); Letter from Rehnquist to Prettyman, Dec. 21, 1964, *supra* note 107, at 3.

[119] *See* Certiorari Memo, *Stein, et al. v. New York*, Jackson Papers, Box 182, Folder 4; Memo, *Stein, Cooper, Wissner* 2, Jackson Papers, Box 182, Folder 4; Memo, *In Re Stein, Cooper, and Wissner* (argued this day) 1, Jackson Papers, Box 182, Folder 4.

swung around to a position quite different from that represented by *Barnette*," Rehnquist wrote.[120] "I do not mean to suggest that his earlier views were more or less valid than his later ones, but only that any lecture devoted to this subject ought to take full cognizance of the shift."[121]

Rehnquist's 1964 letter also contains two important psychological insights that help us to understand his earlier shock and disappointment with Jackson's vote in *Brown* and his hopes as a law clerk that Jackson would share his pro-*Plessy* views. First, Rehnquist began his 1964 letter as he had written to Frankfurter in 1955: "I do not feel that I was ever an intimate of the Justice's . . . ."[122] Second, in discussing his interpretation of Jackson's views on free speech, Rehnquist wrote: "I am very much of a conservative, and I realize that one is inevitably tempted to read his own views into the opinions of others—particularly those whom he respects."[123]

2. Rehnquist's 1969 Letter to Bickel

In 1969, Rehnquist, having joined the Republican establishment as President Nixon's head of the OLC, expressed more profound admiration and respect for Jackson.[124] In August 1969, Rehnquist wrote Bickel, then a prominent Yale Law School professor, about recent Jackson scholarship:

> I read Eugene Gerhart's biography of Jackson when it came out [in 1958], and regarded it as quite inadequate and partaking too much of hero worship. I simply have not kept up with law review articles and that sort of thing since his death, and until reading [Glendon] Schubert's work, which quotes some of the effusions of [Fred] Rodell, etc., I had no idea of the scathing things that some people were saying about Jackson.
>
> I was never close to him personally, though he was a delightful person to work for; I did admire a good deal of his ju-

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[120] Letter from Rehnquist to Prettyman, Dec. 21, 1964, *supra* note 107, at 3.

[121] *Id*. at 3–4.

[122] Letter from Prettyman to Frankfurter, Oct. 13, 1955, *supra* note 11, at 3–4; Letter from Rehnquist to Prettyman, Dec. 21, 1964, *supra* note 108, at 1.

[123] Letter from Rehnquist to Prettyman, Dec. 21, 1964, *supra* note 107, at 3.

[124] *See* Linda Greenhouse, *Rehnquist Memos from Nixon Years Studied by Panel*, N.Y. Times, Aug. 7, 1986, at A1.

> dicial output, and sympathize with much of the philosophy behind it.[125]

This candid, pre-1971-Supreme-Court-confirmation-battle recollection of Jackson suggests that Rehnquist had enjoyed his clerkship, admired his justice, and agreed with most of Jackson's jurisprudence.

Rehnquist also conveyed his admiration for Jackson by pursuing the idea of writing a positive book about him. In this 1969 letter, Rehnquist asked Bickel about writing "a [Jackson] biography combined with a bit of philosophical analysis and defense" and about gaining access to Jackson's Papers.[126] Bickel encouraged Rehnquist to write the book and to contact the keeper of Jackson's Papers, Professor Philip B. Kurland.[127]

Rehnquist pursued Bickel's suggestion. During a visit to Jackson's former secretary Elsie Douglas at her Washington, D.C. apartment, Rehnquist spoke to her about gaining access to the Justice's Papers that she had loaned to Kurland.[128] Rehnquist again said that he wanted to write a book about Jackson and respond to some of the Justice's critics.[129] Rehnquist's Supreme Court nomination, however, intervened.

Conclusion

Brown v. Board of Education is one of the most important decisions in the history of American constitutional law. *Brown* also was one of the

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[125] Letter from Rehnquist to Bickel, Aug. 8, 1969, Alexander M. Bickel Papers, Yale University, Sterling Memorial Library [hereinafter Bickel Papers], Box 7, Folder 124, at 2 (referencing Eugene C. Gerhart, America's Advocate: Robert H. Jackson (1958) and Glendon Schubert, Dispassionate Justice: A Synthesis of the Judicial Opinions of Robert H. Jackson (1969)).

[126] *Id.* at 2–3.

[127] Letter from Bickel to Rehnquist, Aug. 21, 1969, Bickel Papers, Box 10, Folder 198, at 1.

[128] Letter from Elsie L. Douglas to William E. Jackson, Oct. 2, 1969 (on file with authors). Jackson had, in his will, left "the entire contents of [his Supreme Court] office" to Mrs. Douglas, and it was on her authority that the Jackson Papers were loaned to Kurland while he worked on a Jackson biography. *See* Robert H. Jackson, Last Will and Testament, Dec. 6, 1952, Jackson Papers, Box 241, Folder 3, at 2; Letter from Bickel to Rehnquist, Aug. 21, 1969, *supra* note 127, at 1; *see also* Letter from Frankfurter to Erwin N. Griswold, Nov. 1, 1955, FF-LC, Box 149 ("[Regarding the Jackson Supreme Court papers,] Jackson had such a scrupulous sense about the confidential nature of these papers that he did not deem it desirable for even [his son] Bill to have control over them. They were bequeathed to Mrs. Elsie Douglas, Jackson's secretary (and now mine), in whose good sense and discretion he rightly had complete confidence. Hers is the ultimate disposition of these papers.").

[129] *See* Letter from Elsie L. Douglas to William E. Jackson, Oct. 2, 1969, *supra* note 128.

most significant events in the lifetime and legal experience of William H. Rehnquist, and it is central to understanding his feelings about the Justice he clerked for, Robert H. Jackson.

We believe that Rehnquist generally liked and admired Jackson. Rehnquist's post-clerkship letters to Jackson in July 1953 and April 1954 reflect their substantive areas of agreement. Rehnquist's respect for Jackson also comes through in the 1964 letter to Prettyman suggesting Jackson lecture topics and in the 1969 letter to Bickel expressing Rehnquist's desire to write a positive biography of Jackson.

Rehnquist's overall impression of Jackson included some criticism. Rehnquist surely made harsh comments about Jackson in the 1955 letter to Frankfurter. Rehnquist's primary problem with Jackson, however, was his vote in *Brown*. Indeed, Rehnquist's problem was with the Warren Court that Jackson had served on for its first year; Rehnquist disagreed with the rights-protective jurisprudence that *Brown* embodied and generated. Rehnquist made this plain by publicly criticizing the Warren Court during the mid- to late 1950s.

Rehnquist did not have to come to terms with *Brown* until *Newsweek* jeopardized his 1971 Supreme Court confirmation by revealing his 1952 pro-*Plessy* memo. His letter to Senator Eastland not only attributed pro-*Plessy* views to Jackson but also endorsed *Brown* as a matter of fundamental fairness.

As an associate justice, Rehnquist was still conflicted about *Brown*. In 1985, he conceded that his views about *Brown* had changed since his Jackson clerkship. "I think they probably have," he told journalist John A. Jenkins.[130] Then, after conceding that *Brown* was good law, Rehnquist added: "I think there was a perfectly reasonable argument the other way. . . . Whatever I wrote for Justice Jackson was obviously a long time ago, and to kind of integrate it into something I'm telling you now, I find rather difficult."[131]

Even near the end of his chief justiceship, Rehnquist found it difficult to praise *Brown*. In the Foreword to the Supreme Court Historical Society's book commemorating *Brown*'s fiftieth anniversary, he wrote two terse paragraphs describing the decision but not praising it.[132] On May 17, 2004, he delivered a prepared speech at the American Law In-

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[130] John A. Jenkins, *The Partisan: A Talk with Justice Rehnquist*, N.Y. Times Mag., Mar. 3, 1985, at 28, 32.

[131] *Id.*

[132] William H. Rehnquist, *Foreword* to Black, White, and *Brown*: The Landmark School Desegregation Case in Retrospect, at v (Clare Cushman & Melvin I. Urofsky eds., 2004).

stitute's annual meeting in Washington. He chose to address the topic of Justice Jackson and Nuremberg and did not even acknowledge that the day marked the fiftieth anniversary of *Brown*.[133]

Rehnquist's views about *Brown* were much more complicated than were his views about Jackson. Rehnquist respected Jackson and enjoyed being his law clerk.[134] Rehnquist's 1955 letter to Frankfurter, now missing and unknown until recently, reflects the beginning of Rehnquist's personal *Brown* backlash more than it reflects dislike of Justice Jackson.

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[133] Rehnquist 2004 ALI Speech, *supra* note 114.

[134] *See* William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 Alb. L. Rev. 533, 533 (1980) (conceding that he was not "intimate personal friends" with Jackson but "greatly admired him"); James C. Rehnquist, Remarks at Chief Justice Rehnquist Memorial Service 7–10 (June 15, 2006) (on file with authors), *available at* www.c-spanvideo.org/program/193011–1 (time counter 20:58–24:20) (discussing his father's admiration for Jackson).

Appendix

Letter from E. Barrett Prettyman, Jr., to Justice Felix Frankfurter (handwritten)

October 13, 1955

Honorable Felix Frankfurter
Supreme Court of the United States
Supreme Court Building
Washington, D.C.

Dear Mr. Justice Frankfurter:

This is—finally—an answer to Bill Renquist's [sic] letter on Justice Jackson. Due to the delay, I've had a chance to mull over some of his points.

1. Bill says Justice Jackson reached the apex of his career as Solicitor General. I think it's far too early to reach any such conclusion. Certainly, the Justice was happy in that job, probably happier than in any other. He was made for the job, by temperament and ability, and he hit it at a time when he could still see a vigorous and successful future ahead of him. But his own happiness aside, it is impossible to tell where he was *most* successful. Even after 10 years, for example, it is not at all clear whether Nuremberg will be rated one of the world's great achievements—or a bad political bust. If it turns out to be the former, the Justice's place in history will center upon that event. I also think it is too early to appreciate the significance of his role on the Court—time has a way of making great Justices out of men who seemed even mediocre (which the Justice was not) at the time. Thus, Bill's statement about the Justice not leaving a lasting influence on the Court is foolishness; I already detect a scramble to cite and quote the Justice—and not only his livelier passages. After all, "the Bar" had a profound respect for this man, and his place in the law is largely in their hands.

2. Bill says the Justice had a tendency to go off half-cocked. There is, of course, a basis in truth for this. But I would add two points: (1) he was not necessarily stubborn about changing his initial impressions. He respected the facts and a good sound argument, and I saw him change his mind, on big as well as little points, on countless occasions. I have seen him tear up a whole opinion (in a case in which he eventually joined your opinion). And certainly any man with the Justice's views

who could join the segregation opinions could hardly be characterized as going off "half-cocked." (2) The Justice had a thorough and deep-rooted knowledge of the law, and many "flash" opinions or decisions were actually grounded on a lot more than appeared on the surface. He got a tremendous amount, for example, out of a good, short, concise cert memo—he would see the troubles immediately, and his additional questions about cases were always directly to the point and usually determinative of the result.

3. Bill says the Justice's opinions don't seem to go anywhere. This is the point that burns me most. I once heard a Court of Appeals law clerk make this remark: "you can almost always tell where [D.C. Circuit Judges Henry] Edgerton and [David] Bazelon will come out, and you can usually tell about [their colleagues Judges Justin] Miller and [Bennett Champ] Clark, but that [my father, their colleague Judge E. Barrett] Prettyman—you just can't figure him." And instead of saying this with respect, his tone meant; "Prettyman doesn't even know his own mind." This kind of reasoning, which was perpetuated in *Time's* obituary on Jackson, makes me slightly ill. The idea that a judge has to stick to some "philosophy," no matter where it leads him in individual cases, is repulsive to me. Do Judge L. Hand's opinions "go anywhere"? I think Justice Jackson had certain basic, established beliefs which formed a rock bed for his opinions; but I don't think he let these beliefs carry him along without looking into each set of merits; I don't think he "tagged," or categorized, cases and let the tag control. *Cf. Wickard* v. *Filburn* with *5 Gambling Devices*.

4. Bill says he never felt that he became a personal friend of the Justice's. I can only speak for myself on this. I think Justice Jackson was an extremely complicated person—and any one who doesn't believe he was should read through the letters received by Mr. [Sidney] Alderman after he wrote a draft of the Jackson memorial [published as part of the Supreme Court's April 1955 Jackson memorial service]. Those letters almost all came from close friends of the Justice's, and yet they took diverse and opposite views of the man's personality. When I first became his law clerk, I thought he must not like me; I thought I just wasn't getting through to him. But as I studied him, I came to recognize the small signs that meant friendship, displeasure, etc. He was never demonstrative, except in anger, but I got to feel, perhaps mistakenly, that he liked me. He took me on a fishing trip once, and coming back in the evening, as we were chatting in the back of the boat, he came as close as he ever did to saying: We're having a good year, aren't we?; we like each other, and we get along fine. For me, this peculiar friendship meant more than I could ever express.

I do agree with Bill that the Justice always had a measure of reserve, even for close friends. I think few people ever *felt* that he was completely revealing himself to them. I think he was often quite lonely. But for me, this made the good times even better and the rare insights into his personality even more precious.

I think the Justice had faults, of course;* but I must admit that when I add the man up, I come out with almost boundless admiration for him. What a wonderful experience it was to know him!!

Sincerely,

Barrett

* One of these, which Bill does not mention, is that the *personalities* of others affected him strongly, often influencing his thinking. I think how he felt about Justice Douglas had *some* effect on some of his votes.