Possible Solutions

Judge Rakoff set out three possible solutions:

(1) Legal Insurance: He said that it had been tried, but had not caught on because of the high cost of the insurance and because people were less likely to foresee legal problems.

(2) On-line legal assistance: This is limited to preparation of legal documents and raises concerns about the unauthorized practice of law. A person giving on-line advice cannot represent clients in court.

(3) Certified legal practitioners: Services could be provided at a fraction of the cost.

The state of Washington has a program for licensed legal technicians that has been opposed by members of the bar and has developed slowly. Massachusetts and Utah are considering such programs. In 2014, a New York court made legal assistants available to help unrepresented litigants.

A program for certified legal practitioners could be staffed through law school courses, apprenticeships at law firms and licensing for legal advice. The certified legal practitioners could assist litigants in housing court, family court and city administrative courts. Over time, the practitioners could become specialized. The quality would probably not be as high as with law school graduates, but would provide services that would not be available at all otherwise.

In New York, setting up such a program would require a lot of work. Planners would have to figure out what practitioners could and could not do; law schools would have to develop programs; and law firms would have to set up apprenticeship programs.

Real justice will not be achieved if people do not have professional help in legal matters, Judge Rakoff said.

Legal History

Did William Rehnquist Lie to Become a Justice, and Then Chief Justice?

By C. Evan Stewart

In December 1952, William H. Rehnquist wrote a memorandum to his boss, Supreme Court Justice Robert H. Jackson. It likely was written just after the first set of oral arguments on the legendary case *Brown v. Board of Education*, 347 U.S. 483 (1954). The title of the memorandum was "A Random Thought on the Segregation Cases." To many legal historians it is the most "notorious" memorandum ever written by a Supreme Court clerk.

A Random Thought (or Two)

Rehnquist's memorandum is a brief, six paragraph document. The bulk of the memorandum deals with cases which caused the Supreme Court to get into "hot water" – *e.g.*, *Dred Scott* (*see Federal Bar Council Quarterly*, May 2016), *Lochner* (*see Federal Bar Council Quarterly*, February 2017), and the Court's decisions invalidating the first set of New Deal legislation (*see Federal Bar Council Quarterly*, February 2008).

The document then turns to parts of the oral argument recently proffered by John W. Davis and by Thurgood Marshall. Davis (of Davis Polk & Wardwell) represented the state of South Carolina; he had argued that the resolution of the issue must be left to Congress, and that the Justices' personal views should not play a decisive role in the outcome. In response, Rehnquist wrote:

> [T]he Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. 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 suggest that this is a question the Court

need never reach; for regardless of the Justice's individual views and the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its members individually are "liberal," and dislike segregation, now chooses to strike it down, it differs from the [Anti-New Deal Court] only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction.

Marshall (of the NAACP) had famously based much of his argument on sociological evidence. Indeed, before the Court, he asked that it take judicial notice of Gunnar Myrdal's "An American Dilemma: The Negro Problem and Modern Democracy" (Harper's 1944), which detailed the causes and consequences of segregation (the Court in fact took Marshall up on his request – *see* footnote 11 of its decision). To that point, the Rehnquist memorandum replied: "If the Fourteenth Amendment did not enact Spencer's *Social Statios* [sic] [a reference to Justice Holmes' famous dissent in *Lochner*], it just as surely did not enact Myrdal's *American Dilemma*."

If that had been the totality of Rehnquist's memorandum, it is highly unlikely it would have become so famous/infamous. It is the penultimate sentence that has caused the big kerfuffle: "*I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by 'liberal' colleagyes* [sic]*, but I think* Plessy *v.* Ferguson *was right and should be re-affirmed*." *Plessy*, of course, is one of the *worst* cases in the Court's entire jurisprudence, where the Court (with one dissent) embraced the "separate but equal" doctrine (*see Federal Bar Council Quarterly*, August 2016).

Nominee to the Supreme Court

Rehnquist joined the Nixon administration as an assistant attorney general, in charge of the Office of Legal Counsel. The president's first meeting with him did not go well; Nixon told his White House counsel (John Dean) that Rehnquist "dressed like a clown" (pink shirt, psychedelic tie, etc.). Nonetheless, in 1971, the president nominated Rehnquist, along with Lewis F. Powell, to fill the vacant seats of Justices Hugo Black and John Marshall Harlan II.

Rehnquist's nomination was opposed by many Democratic senators, but it looked like he would nonetheless be confirmed (the Senate Judiciary Committee voted out his nomination 12 to 4). On December 6, 1971, however, just as the Senate was ready to debate his appointment, *Newsweek* magazine released the text of the Rehnquist memorandum, written 19 years before. At first, Rehnquist stood silent on the document and whether he was even its author (his initials, WHR, are at the bottom of the memorandum).

Two days later, he delivered a letter to the chairman of the Senate Judiciary Committee, James O. Eastland (Democrat from Mississippi). In his letter, Rehnquist wrote:

> 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…. 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.
>
> ****
>
> 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.
>
> I believe that the memoran-

> dum 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.
>
> ****
>
> 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.

(Emphasis in original.)

Rehnquist's 1952 memorandum and his 1971 written explanation of it were debated by the Senate. After a week (and with Christmas looming), the nomination was approved by a vote of 68 to 26.

A Second Time Around

In 1986, Chief Justice Warren Burger announced his retirement and President Reagan nominated William Rehnquist to succeed him. Now Rehnquist's opponents would get to ask him – under oath – what they had not been able to do in 1971; to wit, they could interrogate him on his 1952 memorandum.

Rehnquist began his testimony before the Judiciary Committee by reaffirming his 1971 letter to Senator Eastland: "[I] have absolutely no reason to doubt its correctness now." He then tried to address/mitigate the discordant sentiments voiced in his memorandum. First off, he declared that he had always "thought Plessy against Ferguson was wrong," even when he had clerked for Justice Jackson. (This reiterated an assertion previously written in his 1971 letter to Senator Eastland.) At the same time, however, he noted that *Plessy* "had been on the books for 69 years, [that Congress had not acted in the interim, and] that the same Congress that promulgated the 14th Amendment had required segregated schools in the District [of Columbia]…. [Accordingly, he (and Justice Jackson)] saw factors on both sides." Rehnquist also pledged his fealty to *Brown* – both as to its outcome and reasoning. (This also tracked an assertion that had been made in his 1971 letter to Senator Eastland.) Rehnquist next attempted to put the historical portions of his memorandum into the context of Justice Jackson's own previously expressed views:

> Justice Jackson was a great believer in the idea of whatever you want to call representative democracy, the Court having made mistakes in the past by reading its own moral views into the Constitution. And much of the theme of this one and a half page memo is along those ideas that the Court has run afoul in the past by reading into the Constitution what it felt were the morally right views, only to find that it had made a mistake. And this apparently was an effort to apply those ideas to the *Brown* case.
>
> ****
>
> [T]he thesis which is very roughly and very shortly, certainly developed in the memo that most of the Court's mistakes up to that time had been reading its own moral notions into the Constitution was a view that Justice Jackson was a champion of. His entire book, "Struggle for Judicial Supremacy," is devoted to that thesis.

And lastly, he (and Senator Orrin Hatch (Republican from Utah)) noted that the Justices' notes from the initial, December 1952 conference – directly after the first oral argument (about the time of Rehnquist's memorandum) – showed a very uncertain set of Justices, perplexed about how best to move forward (of whom Jackson was but one).

Then came the attacks, the harshest of which came from Democratic Senators Howard Metzenbaum (Ohio), Ted Kennedy (Massachusetts), and Joe Biden (Delaware). Both Kennedy and Metzenbaum drilled in on the repeated use of "I" in the document. Kennedy: "Do the 'I's' refer to you, Mr. Rehnquist?" Rehnquist: "No, I do not think

they do." Kennedy: "You maintain that the 'I's' refer to Justice Jackson?" Rehnquist: "Yes. Obviously something for him to say."

To Metzenbaum's incredulous questioning on the "I's", Rehnquist offered these answers:

> Yes, I suppose one could read it either way. The "I's" in it certainly could have been mine rather, just looking at it as a text, rather than Justice Jackson's.
>
> ***
>
> I think the reconstructing again on the basis of this memo, I would suspect that a logical interpretation in the last paragraph is I perhaps imagined this was the way Justices spoke in conference.

When Biden questioned him on the part of the sentence which referenced being "excoriated by 'liberal' colleagyes [sic]," Rehnquist testified that he was referencing the likelihood of Jackson being "excoriated" at some future conference of the Justices; at the same time, he did not deny that he had had hard-fought policy arguments on this subject with his fellow clerks: "Again, it is hard to remember back, but I think it probably seemed to me at this time that some of the others simply were not facing the arguments on the other side, and I thought they ought to be faced…. I thought there were good arguments to be made in support [of the other side]."

Ultimately, the Judiciary Committee voted out the nomination 13 to 5 (besides the aforementioned anti-senators, Paul Simon (Democrat, Illinois) and Patrick Leahy (Democrat, Vermont) also voted "no"). Thereafter, the Senate confirmed Rehnquist by a vote of 65 to 33. He served as Chief Justice until his death on September 3, 2005. Rehnquist was succeeded by John Roberts, who had served as his law clerk in 1980-81.

Evidence Supporting Rehnquist's Testimony

The most direct evidence in favor of Rehnquist's explanation of the memorandum is his uncontradicted sworn testimony. Justice Jackson, having died on October 9, 1954 (after joining the Court's initial, unanimous decision, but before its "remedies" decision – *Brown v. Board of Education*, 349 U.S. 294 (1955) ("all deliberate speed")), was not in a position to dispute his former clerk's version.

Rehnquist's fellow clerk, Donald Cronson, also weighed in on this subject, first in a telegram sent from London three days after the *Newsweek* article. Cronson had also written a memorandum for Justice Jackson at the same time as Rehnquist (more about that later). As for Rehnquist's memorandum, Cronson recalled collaborating on it with Rehnquist; indeed, he claimed "a great deal of the content was the result of my suggestions … and it is probable that the memorandum is more mine than [Rehnquist's]." Cronson further stated that Jackson had asked for a memorandum "supporting the proposition that *Plessy* was correct." At the same time, however, Cronson also told *The New York Times* that both he and Rehnquist "personally thought at the time [1952] that the 1896 decision, *Plessy v. Ferguson*, was wrong."

Finally, it seems clear from Justice Jackson's prior decisions, writings, and contemporaneous evidence, especially at the time of the first set of oral arguments on *Brown*, that he was troubled by how to adequately deal with *Plessy*, Congress' role/responsibility to desegregate schools and public accommodations, Marshall's sociology arguments (which he never found persuasive), and how to effect an appropriate remedy (if the Court were to step in where Congress had failed to act). The fact that Jackson himself drafted six versions of a separate (but never published) opinion on *Brown* (long after Rehnquist's clerkship had ended – starting on December 7, 1953, ending on March 15, 1954) is further evidence that Jackson was struggling with how best to articulate a constitutional basis for the Court making a "political decision" against segregated schools.

Evidence At Odds With Rehnquist's Testimony

First and foremost, at no point in his career did Justice Jackson ever say or write *anything* indicating that *he* thought *Plessy* "was right and should be reaffirmed." Indeed, both in 1971 and 1986, Jackson's long-serving secretary accused Rehnquist of "smear[ing]" a great man: "Justice Jackson did not ask law

clerks to express his views. He expressed his own and they expressed theirs. That's what happened in this instance."

And it was not only partisan Democrats who were not buying Rehnquist's story. Years later, John Dean wrote: "I thought he lied. His explanation was so at odds with the style and contents of his memo to Jackson that it did not pass the smell test…. To say I was disappointed is an understatement."

Almost as implausible as Rehnquist's explanations (under oath) as to the "I's" not being him was his explanation of Jackson being "excoriated by 'liberal' colleagyes [sic]." First of all, there is no evidence of Jackson ever being excoriated by his Supreme Court colleagues. And while Jackson believed in judicial restraint, he was in fact a political liberal, having served President Franklin D. Roosevelt in a number of capacities before joining the Court (*e.g.*, Solicitor General, Attorney General). Finally, not only did other contemporaneous clerks (*e.g.*, Alexander Bickel, Donald Trautman, John Fassett) recall contentious, lunchtime debates with Rehnquist, so did Donald Cronson, who later wrote: "Bill Rehnquist defended the [pro-*Plessy*] position with gusto and cogency. His virtuoso performance [at the lunch-time debates] on the subject of *Plessy* may have led to the composition of the WHR memorandum."

And Cronson also proved unhelpful to Rehnquist in other ways as well. First off was his own 1952 memorandum, "A Few Expressed Prejudices on the Segregation Cases." Based upon Jackson's constitutional and jurisprudential views, not only did it offer numerous alternative ways to deal with *Brown* (including the one the Court ultimately chose: not overruling *Plessy* per se, but holding that "separate but equal" violated the Constitution when applied specifically to public schools), it also set forth Cronson's view that "*Plessy* was wrong." Perhaps more important was its use of pronouns, where Cronson consistently referred *not* to "I," but to Jackson's prerogative(s) (*e.g.*, "One of the main characteristics to be found in *your work* on this court is a reluctance to overrule existing constitutional laws…." (emphasis added); "*You* are still the justice."). In sum, the approach, tone, and style of Cronson's memorandum stands in fairly stark contrast to Rehnquist's.

Even more problematic was the fact that Cronson's memory got more refreshed as he thought more about his interactions with his co-clerk. In 1975, Cronson prepared another memorandum ("A Short Note on an Unimportant Memorandum"), which he sent on to Rehnquist; he expected that it would cause "the basically trivial episode of the WHR Memorandum [to] soon be allowed to obtain the obscurity that it deserves." It is in this document that Cronson first undercut Rehnquist's "excoriated" explanation (he also later did so in a 1986 *Washington Post* story). Cronson then posited that Rehnquist's attribution of the "I's" to Jackson "was a trivial error, and an entirely honest one." He went on to attempt to reconcile inconsistencies between his version of what happened in 1952 with Rehnquist's; but those attempts only highlighted that the circle could not be squared. In reply, Rehnquist asked Cronson not to publish his memorandum, suggesting that this was "a case where it is best to let sleeping dogs lie."

Another memorandum written by Rehnquist for Jackson during his clerkship also hurts his "I's" explanation. Before the Court in *Terry v. Adams*, 347 U.S. 461 (1953), was the issue of whether white-only pre-primary elections were constitutional. Rehnquist's memorandum first stated:

> I have a hard time being detached about this case, because several of the Rodell school of thought among the clerks began screaming as soon as they saw this that "Now we can show those damn Southerners," etc. I take a dim view of the pathological search for discrimination, a la Walker White, Black, Douglas, Rodell, etc., and as a result I now have something of a mental bloc against this case.

Rehnquist then went on to write:

> If you are going to dissent, I should think you might combine the ideas which you expressed last week with an attack on the reasoning of the two "majority opinions."

***

> Your ideas – the Constitution does not prevent the majority from banding together, nor does it attaint [sic] success in the effort. It is about time the Court faced the fact that white people on [sic] the South don't like the colored people; the Constitution restrains them from effecting this dislike through state action, but it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head.

When questioned about this memorandum by Senate Judiciary Committee members in 1986, Rehnquist was very clear in delineating that the "I's" meant him and the "you"/"Your" references meant Jackson.

(Interestingly, Jackson first drafted a dissenting opinion, in accord with Rehnquist's memorandum. Later, however, he changed his mind and joined Justice Clark's opinion, which concurred in the majority ruling that white-only pre-primaries violated the Fifteenth Amendment.)

Then there is the history of Rehnquist's views about *Brown* itself. While he pledged fealty to its holding and reasoning in 1971 and 1986, he was very careful not to testify that he agreed with it at the time it was handed down. And that is because he did *not*.

After clerking, Rehnquist moved to Phoenix and began practicing in a small firm which had (in his words) "very little to do with either past or current decisions of the Supreme Court of the United States." But that did not quiet his interest in those subjects or his desire to engage in public debate thereon. In 1957, for example, Rehnquist spoke at a local bar association and railed against, among other things, the Warren Court's "Black Monday" decisions (*Brown* was widely referred to throughout the South as "Black Monday"). In that same year, Rehnquist published the first of two articles in *U.S. News & World Report*. While the thrust of both articles was on the influence of the Supreme Court's "liberal" clerks, Rehnquist also threw in a critique of the Court's "expansion of federal power at the expense of State power" – a coded phraseology many Southerners were leveling at the Warren Court in the wake of *Brown* ("Impeach Earl Warren").

Then, in 1959, Rehnquist penned an article for the *Harvard Law Record*. Finding it appalling that no Senator had questioned Justice Charles Whittaker in his confirmation hearings about the *Brown* decision "decided three years before and implementing decisions [that] had been handed down in the interim," Rehnquist let Harvardians know how he really felt:

> 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.

In 1964, Rehnquist continued in a similar vein, opposing a proposed Public Accommodation Ordinance for Phoenix. In 1967, he published a letter defending *de facto* segregation in Phoenix's public schools; in that letter, Rehnquist posited that the elimination of such segregation was "distressing to me," as well as to many who "would feel we are no more dedicated to an 'integrated' society than we are to a 'segregated' society."

When he testified at his 1971 confirmation hearings, Rehnquist was very careful in what he said about *Brown*. Repeatedly, he testified that *Brown* represented settled constitutional law because a unanimous Supreme Court had ruled on the initial decision and it had been "repeatedly reaffirmed by a changing group of [Justices];" "that, to me, is very strong evidence that the Constitution does, in fact, require that result." (*See* 1971 Transcript at pp. 55, 76, 161, 167-69.)

In 1985 (the year before he was nominated to become Chief Justice), Rehnquist gave an interview to *The New York Times*. In it, he repeated his view that *Brown now* constituted well-settled constitutional law. But he candidly acknowledged that his views had changed about *Brown* since his clerkship: "I think they probably have…. 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."

* * *

So did William Rehnquist lie, misrepresent, dissemble to the Senate Judiciary Committee? I will let the reader(s) decide.

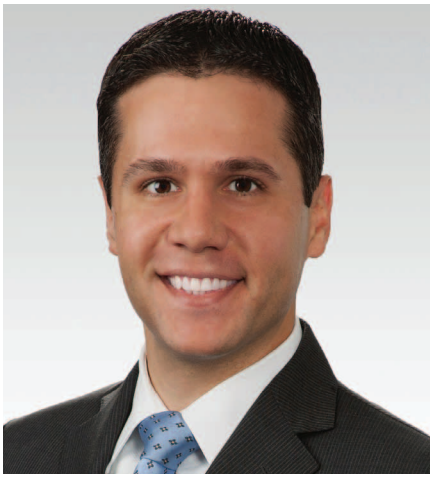
Postscripts

- The starting points for readers who want to know more on this subject (beyond the 1971 and 1986 hearing transcripts) are R. Kluger's "Simple Justice: The History of *Brown v. Board of Education*" (Knopf 1975); D. O'Brien's "Justice Robert H. Jackson's Unpublished Opinion in *Brown v. Board*" (Kansas 2017); J. Simon's "Eisenhower v. Warren" (Liveright 2018); and J. Barrett & B. Snyder, "Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown," 53 *Boston College Law Review* 631 (2012).
- It was not only conservatives and Southerners who found *Brown* to be a troubling decision. Learned Hand, for example, in his famous 1958 lectures at the Harvard Law School, attacked – in general – the Court as having become "Platonic Guardians," and – as to *Brown* specifically – it being a decision not based in law. In other words, if equal protection meant anything, *Plessy* had to be expressly overruled and *all* racial discrimination had to be found unconstitutional. *See also* H. Wechsler's "Toward Neutral Principles of Constitutional Law," 78 *Harvard Law Review* 1 (1959). But that would mean, among other things, all public accommodations would have to become non-discriminatory and various states' anti-miscegenation statutes would also have to be struck down; those equal protection advances would not come until the Civil Rights Act of 1964 and *Loving v. Virginia*, 388 U.S. 1 (1967).
- Many believe that *Brown* was a seismic break from *Plessy v. Ferguson*. But let us allow Chief Justice Warren to put that notion to rest: "Some people think *Brown* was revolutionary, … [but] I see it as evolutionary in character. Just look at the various cases that had been eroding *Plessy* for so many years [*e.g.*, *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down a Texas primary law disenfranchising blacks); *Shelly v. Kraemer*, 334 U.S. 1 (1948) (striking down restrictive covenants in real estate contracts); *Sweatt v. Painter*, 339 U.S. 629 (1950) (the University of Texas Law School required to admit a black student; creating an alternative all-black law school did not provide equal facilities, resources, or opportunities)]…. It was natural, the logical and practically the only way the case could be decided."

Intellectual Property Update

Combating Copyright Trolls with Rule 68

By Tal Dickstein



While patent trolls have plagued technology and pharmaceutical companies for years, a less well-known but equally vexatious creature has recently set its sights on media and entertainment companies – the copyright troll. Image recognition software