WILLIAM REHNQUIST
... letter attacked

Controversy Deepens Over Rehnquist Memo

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The controversy around Supreme Court nominee William H. Rehnquist deepened yesterday as his former boss' secretary strongly criticized him while an earlier memo on the desegregation case came to light.

Elsie Douglas, for nine years secretary to the late Associate Justice Robert H. Jackson (and later secretary to the late Associate Justice Felix Frankfurter), said Rehnquist "smeared the reputation of a great justice" by attributing to Jackson the views of a controversial 1952 court memorandum.

The earlier memo was reported by Donald Cronson, an international lawyer based in London, who said the controversial memo was not the first memo submitted to Justice Jackson—and in fact was contrary to the one Rehnquist first submitted.

The controversial 1952 memo, written by Rehnquist to Justice Jackson when the assistant attorney general was a Supreme Court clerk, supported the separate-but-equal doctrine for school segregation laid down by the court in 1896.

Cronson shared law clerk duties with Rehnquist under Jackson during the 1952-53 term when the school desegregation cases were pending before the Supreme Court.

Cronson explained the situation in a telegram from London. It was released yesterday by Senate Minority Leader Hugh Scott (R-Pa.), one of those who favors Rehnquist for confirmation.

Cronson confirmed Rehnquist's recollection that the views in the controversial second memorandum were not Rehnquist's.

According to Cronson, the controversial memo was prepared by both law clerks at Jackson's request to balance the earlier memo—which both

See NOMINEES, A8, Col. 1

Controversy Deepens Over Rehnquist Memo

NOMINEES, From A1

clerks had written urging the overruling of the separate-but-equal doctrine laid down in 1896.

Scott said he would have more to say on Cronson's telegram before a cloture vote scheduled for today. Scott lodged another petition designed to trigger a mandatory vote on cloture for Saturday if today's effort fails.

Mrs. Douglas, the former secretary, said her shock at Rehnquist's letter was two-fold. "I don't know anyone in the world who was more for equal protection of the laws than Mr. Justice Jackson," she said, denying the memo's contention that school segregation was not sufficiently extreme a deprivation to warrant intervention by the courts. She said her reaction was "one of shock."

As for preparing the justice's conference remarks, Mrs. Douglas said the memo was "absolutely incredible on its face" to anyone who knew how Jackson worked. "I'm sure he would never think of asking a law clerk to prepare such a memorandum for use in the conference," she said.

Mrs. Douglas recalled that Jackson's reputation for spontaneous eloquence had prompted the tribute from Frankfurter that he should be appointed "Solicitor General for life."

Jackson was Solicitor General—the government's top courtroom lawyer arguing the major cases in the Supreme Court—and Attorney General before his appointment to the high court in 1941. His orations at the post-World War II war crimes trials in Nuremburg are widely regarded as classics of advocacy.

Sen. Birch Bayh (D-Ind.) and Brooke attacked Rehnquist's version of the memo's meaning, saying its tone and structure made it impossible for the words to be intended as something Jackson would adopt as his own.

Bayh, in a floor speech, and Brooke, in remarks inserted in the record said the law clerk could not have intended seriously that Jackson should criticize "150 years of attempts on the part of this court to protect minority rights of any kind—whether those of business slaveholders or Jehovah's Witnesses."

They pointed out that Jackson had been the author of a famous 1943 Supreme Court opinion vindicating the rights of Jehovah's Witness school children to refrain from an otherwise compulsory flag salute.

Bayh argued that the Senate, despite its adjournment rush, is not ready to vote on the nomination on the basis of the unresolved charges. A Justice Department spokesman said the record "speaks for itself" and pointed to Scott's counter-revelation.

In other developments, Sen. Jacob K. Javits (R-N.Y.) joined Sen. Edward W. Brooke (Mass.) as the second Republican to speak against Rehnquist. Sen. J. W. Fullbright (D-Ark.) came out against the nominee in a speech denouncing his advocacy in congressional testimony of the supremacy of the executive branch over Congress, a theme Fulbright has criticized in foreign policy debates.

Opponents of Rehnquist received a setback on Wednesday when they were unable to dissuade Sen. William Proxmire (D-Wis.) from announcing that he would vote for the 47-year-old assistant attorney general. Proxmire said he differs with Rehnquist but respects his intellect and temperament.

Striker Killed In Argentina

BUENOS AIRES, Argentina, Dec. 9 (AP)—A longshoreman was shot to death today and a dozen dockers were injured, when striking stevedores clashed with the national coast guard.

The longshoremen's union identified the dead worker as Jose E. Gutierrez, 31.

The union is on strike in protest against a new labor contract, enacted by the government.

Text of 1952 Memo Written by Rehnquist

A memorandum prepared by William H. Rehnquist for the late Supreme Court Associate Justice Robert H. Jackson in 1952 has figured in the Senate debate on Rehnquist's nomination to the Supreme Court.

The memorandum recommends that the court should uphold the separate-but-equal doctrine of race relations.

In an explanatory letter read in the Senate Wednesday, Rehnquist said:

". . . As best I can reconstruct the circumstances after some 19 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 . . .

"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 . . ."

Rehnquist served as a law clerk to Justice Jackson in 1952. The text of the memorandum:

A RANDOM THOUGHT ON THE SEGREGATION CASES

(MEMORANDUM BY MR. REHNQUIST TO MR. JUSTICE JACKSON

One-hundred fifty years ago this court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. Marbury vs Madison. This was presumably on the basis that there are standards to be applied other than the personal predilections of the justices.

As applied to questions of interstate or state-federal relations, as well as to interdepartmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically coordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the first 10 and the 14th Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. Fletcher vs Peck, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. Scott vs Sanford was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high-water mark of the trend in protecting corporations against legislative influence was probably Lochner vs N.Y. To the majority opinion in that case, Holmes replied that the 14th Amendment did not enact Herbert Spencer's social statics. Other cases coming later in a similar vein were Adkins vs Children's Hospital, Hammer vs Dagenhart, Tyson vs Banton, Ribnik vs McBride. But eventually the court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

To the argument made by Thurgood (Marshall), not John Marshall, that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and 50 years of attempts on the part of this court to protect minority rights of any kind — whether those of business, slaveholders, or Jehovah's Witnesses — have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present court is unable to profit by this example, it must be prepared to see its word fade in time, too, as embodying only the sentiments of a

transient majority of nine men.

In these cases now before the court, the 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 on 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 McReynolds 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.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think **Plessy vs. Ferguson** was right and should be re-affirmed. If the 14th Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma*.