

Book Disputes Rehnquist Race View

By John P. Mackenzie
Washington Post Staff Writer

A new book on the Supreme Court's 1954 school desegregation decision sharply questions the denial by Justice William H. Rehnquist that he made segregationist arguments as a law clerk two decades ago.

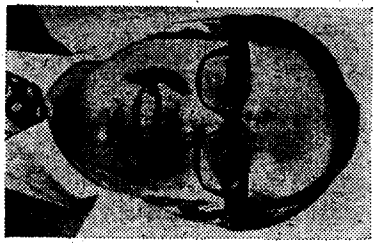
The book, an 823-page study of the school case titled "Simple Justice," by Richard Kluger, concludes that a 1952 Rehnquist memorandum, written when he was a clerk to the late Justice Robert H. Jackson, reflected Rehnquist's view—not Jackson's—that the high court should adhere to the doctrine of "separate but equal" in race relations.

The memorandum, lodged with Jackson's papers, surfaced late in 1971 when Rehnquist engaged in a confirmation fight over his nomination, was challenged on his past views on race.

Over Rehnquist's initials, the memo stated, "I think Plessy vs. Ferguson (the court's 1896 decision laying down the separate but equal doctrine) was right and should be reaffirmed."

Rehnquist said at the time that his best recollection was that the memo reflected Jackson's views rather than his own. But Kluger, citing previously unpublished material, says the evidence is to the contrary.

Reached by telephone in his Supreme Court chambers on Friday, Rehnquist said he would have no comment on the Kluger book or its conclusions,



WILLIAM H. REHNQUIST
...1952 memo is cited

parts of which he has read.

"My memory of what happened in 1952 was hazy enough in 1971," the justice said. "The passage of four years certainly hasn't improved it, so I will have no comment."

In addition to new data on the Rehnquist controversy, the book quotes from numerous previously secret materials shedding new light on the way the court's historic school decision was reached. They include:

—The draft of a concurring opinion written but never delivered by Jackson, containing the correct result, had failed to admit that the ruling departed from the Constitution's original meaning.

—A memorandum by the late Justice Felix Frankfurter, written in 1953 or 1954

for his own files, basing his vote to end public school segregation on his view that "changes in men's feelings for what is right and just" justified a new interpretation of the Constitution.

—A draft dissenting opinion by Justice Stanley F. Reed, applauding recent racial progress and arguing that blacks would achieve all their rights if separate schools would be made truly equal under judicial decrees.

Kluger, a former book publisher and onetime editor of the Book Week supplement that appears in The Washington Post and other newspapers, says Reed withdrew the opinion and his dissenting vote at the urging of the late Chief Justice Earl Warren.

At a time in May, 1954 when the vote stood at 8 to 1, Warren told Reed, "Stan, you're all by yourself in this now," and pleaded successfully that a unanimous decision would be in the national interest, the author says.

According to Kluger, Rehnquist's explanation about the 1952 memorandum was rebutted by other material in the Jackson files, including a memo by a fellow Jackson clerk, Donald Cronson, and other evidence showing that the justice was a consistent and "staunch libertarian and humanist" in racial matters.

Rehnquist said in 1971 that he believed the memo he inflated was designed to summarize Jackson's own views to assist him during debate on the school case in one of the justices' secret conferences.

Cronson then disclosed the existence of a second memorandum bearing his own signature, and offered a slightly different explanation—both memos, he said, were jointly written by the two clerks to give Jackson the benefit of two contrasting viewpoints.

Kluger, analyzing the texts of both memos, says the difference sharply in tone and point of view, strongly signifying that Jackson asked each clerk to state his own personal view as forcefully as he wished.

He noted that the Rehnquist memo repeatedly uses the pronoun "I," as in the sentence, "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 reaffirmed." Kluger says it was unlikely that Jackson could adopt those words as his own in a conference with fellow justices.

Kluger says the Rehnquist memo, rather than reflecting words Jackson might have used in describing his colleagues—that is, fellow justices—appeared to refer to Rehnquist's disagreements with fellow law clerks whom he considered more liberal than himself.

The author notes that the companion memo by Cronson clearly has the tone of an internal note from a clerk to his superior, using language such as, "One of the main characteristics to be found in your work on this court. . . ." The Cronson document argued that the 1896 decision should

be repudiated by the court but that Congress, not the court, should attempt to implement any change from segregation.

At the time of the Rehnquist controversy in 1971, the Cronson document could not be located for contrast with the memo signed by Rehnquist. Kluger says he discovered it in copies of the Jackson papers forwarded to him two years ago by Philip B. Kurland, University of Chicago law professor and custodian of the Jackson files.