9 DEC 71

THE NEW YORK TIMES, THURSDAY, DECEMBER 9, 1971

Texts of Rehnquist Letter to Senator

Special to The New York Times

WASHINGTON, Dec. 8 — Following is the text of a letter from William H. Rehnquist, Supreme Court nominee, to Senator James O. Eastland about a memorandum that has become involved in the Senate debate over his confirmation, and the text of the memorandum:

The Letter

A memorandum in the files of Justice Robert H. Jackson bearing my initials has become the subject of discussion in the Senate debate on my confirmation, and I therefore take the liberty of sending you my recollection of the facts in connection with it. 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.

At some time during the October term, 1952, when the school desegregation cases were pending before the Supreme Court, I recall Justice Jackson asking me to assist him in developing arguments which he might use in conference when cases were discussed. He expressed concern that the conference should have the benefit of all of the arguments in support of the constitutionality of the "separate but equal" doctrine, as well as those against its constitutionality.

In carrying out this assignment, I recall assembling historical material and submitting it to the Justice, and I recall considerable oral discussion with him as to what type of presentation he would make when the cases came before the Court conference.

Sharp Difference Noted

The particular memorandum in question differs sharply from the normal sort of clerk's memorandum that was submitted to Justice Jackson during my tenure as a clerk. Justice Jackson expected case submissions from his clerks to analyze with some precision the issues presented by a case, the applicable authorities, and the conflicting arguments in favor either of granting or denying certiorari, or of affirming or reversing the judgments below. While he did expect his clerks to make recommendations based on their memoranda as to whether certiorari should be granted or denied, he very definitely did not either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided.

The memorandum entitled "Random Thoughts on the Segregation Cases" is consistent with virtually none of these criteria. It is extremely informal in style, loosely organized, largely philosophical in nature, and virtually devoid of any careful analysis of the legal issues raised in these cases. The type of argument made is historical, rather than legal. Most important, the tone of the memorandum is not that of a subordinate submitting his own recommendations to his superior (which was the tone used by me, and I believe by he Justice's other clerks, in their submissions), but is instead quite imperious—the tone of one equal exhorting other equals.

Would Have Been Rejected

Because of these facts, 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

Eastland and Memo of 1952 on Rights Cases

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 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.

In closing, I would like to point out that during the hearings on my confirmation, I mentioned the Supreme Court's decision in Brown v. Board of Education in the context of an answer to a question concerning the binding effect of precedent. I was not asked my views on the substantive issues in the Brown case. 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.

The Memorandum

A Random Thought on the Segregation Cases

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

As applied to questions of inter-state or state-Federal relations, as well as to inter-departmental disputes within the Federal Government, this doctrine of judicial review has worked well. Where theoretically co-ordinate 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 ten and the Fourteenth 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 V. Peck, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. Scott v. Sanford was the result of Taney's effort to protect slaveholders from legislative interference.

Post-Civil War Trend

After the Civil War, business interests 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 v. N. Y. To the majority opinion in that case, Holmes replied that the Fourteenth Amendment did not enact Herbert Spenser's social statics. Other cases coming later in a similar vein were Adkins v. Children's Hospital, Hammer v. Dagenhart, Tyson v. Banton, Ribnik v. 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 judical function to thwart public opinion except in extreme cases.

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 of 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. To the argument made by Thurgood, 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 fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehohovah's Witnesses — have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think Plessy V. Ferguson was right and should be re-affirmed. If the Fourteenth Amendment did not enact Myrdal's American statics, it just as surely did not enact Mydal's American Dilemma.