

A Rehnquist Ode (circa 1953), and Jackson Against Baseball

*John Q. Barrett**

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The Spring 2008 issue of THE GREEN BAG 2D contains my article, *A Rehnquist Ode on the Vinson Court (circa 1953)*. This article, which follows, publishes for the first time a fifty-five year old composition—a spoof of Gilbert and Sullivan lyrics—by the late William H. Rehnquist.

The Rehnquist ode, which dates back to his Supreme Court clerkship with Justice Robert H. Jackson during 1952 and 1953, demonstrates the young author's personality and sense of humor. It also reflects his inside knowledge of the low regard that some of the 1950s Supreme Court justices had for some of their brethren. Among other topics, the composition touches on the plethora of separate opinions that these Justices habitually produced, and on Chief Justice Vinson's preoccupation with baseball.

The article also demonstrates that Justice Jackson was not a baseball fan—sadly, them's the facts.

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For a selected archive of Jackson List posts, see my homepage at www.law.stjohns.edu. To join the Jackson List, which does not display recipient identities or distribute their email addresses, send a note to barrettj@stjohns.edu.

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Second Series • Spring 2008



Volume 11 • Number 3

Published by The Green Bag, Inc., with support from the George Mason University School of Law.

GB



ARTICLES

Our great Mikado, virtuous man,
When he to rule our land began,
 Resolved to try
 A plan whereby
Young men might best be steadied.

So he decreed, in words succinct,
That all who flirted, leered or winked
(Unless connubially linked),
Should forthwith be beheaded.

And I expect you'll all agree
That he was right to so decree.
 And I am right,
 And you are right,
And all is right as right can be!

William Schwenck Gilbert

The Mikado, Act I (1885)



A REHNQUIST ODE ON THE VINSON COURT

(CIRCA SUMMER 1953)

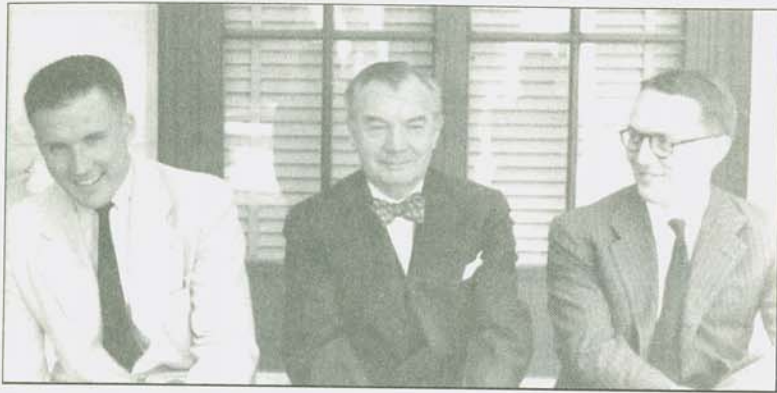
John Q. Barrett

The late William H. Rehnquist had an active, sometimes irreverent sense of humor, a love of music and strong, if often carefully guarded, opinions on many topics, including Supreme Court justices.

This article publishes for the first time a Rehnquist composition that dates back to his seventeen-month Supreme Court clerkship with Justice Robert H. Jackson during 1952 and 1953. The document is a typewritten spoof of Gilbert and Sullivan lyrics. Rehnquist, who was in his late twenties when he banged out this ditty, gave it to Jackson. The Justice filed it without written comment, and it has been sitting in his files for more than fifty years.¹

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¹ The Rehnquist document is whr, *PARODY: Tune, Pish Tush's solo from Act I of Mikado* ("Our great mikado, virtuous man, etc."), in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C. ("RHJ LOC"), Box 120, Folder 5. For some years, these Jackson Papers were in the custody of Professor Philip B. Kurland in Chicago. They have been in the Library of Congress for more than twenty years. I do not know of anyone who interviewed Chief



Justice Robert H. Jackson, flanked by his law clerks, William Rehnquist (left) and George Niebank. According to Niebank, this photo and the ones on pages 292 and 295 were taken by C. Sam Daniels, one of Justice Hugo Black's law clerks, in spring 1952. Daniels gave prints to Niebank shortly thereafter as mementos, and 50 years later Niebank donated them to the Robert H. Jackson Center. The photos are published here with permission from the Jackson Center.

The Rehnquist lyrics demonstrate his skill as a writer and a parodist. They also document his knowledge of 1950s Supreme Court Justices' gripes about and low regard for some of their judicial brethren.

Rehnquist's Gilbert and Sullivan parody focuses on the plethora of separate opinions that the 1950s Supreme Court Justices habitually produced, and on one subject that was, to Justice Jackson, particularly galling: Chief Justice Fred M. Vinson's preoccupation, including during his working hours at the Supreme Court, with baseball.

INTRODUCTION TO AUTHOR REHNQUIST

William Rehnquist is best known for, of course, his long service on the Supreme Court, for its decisions during his tenure as Chief Justice of the United States, and for his many individual opinions. It also is well known, including from Rehnquist's own

Justice Rehnquist about this document.

writings and speeches, that one of his formative experiences was his Supreme Court clerkship with Justice Robert H. Jackson from February 1952 until June 1953 (the second half of the Court's October Term 1951 and all of its October Term 1952).² Rehnquist's clerkship, in fact, gave him the material for his first Supreme Court "opinion" – in 1957, just a few years after Jackson's death, Rehnquist attracted considerable public attention when he wrote, drawing explicitly on his inside knowledge as a former Supreme Court law clerk, a very opinionated national magazine article describing his fellow law clerks as politically "to the 'left' of either the nation or the Court."³

William Rehnquist's strong, sometimes stern views, both in his youth and later, did not mean that he was humorless. To the contrary, he was a man with a light, relaxed side who enjoyed spoofs, skits, contests and clever compositions. Among many examples, we know that he played charades with enthusiasm⁴ and that he sometimes mailed entries to the *Washington Post's* "Dr. Gridlock" contests, which challenged readers to match vanity license plates to their cars' makes and models.⁵

Rehnquist occasionally showed his sense of humor, and even provided glimpses of his irreverent streak, at the Supreme Court. As a law clerk, Rehnquist was photographed in 1952 smoking and drinking (an unknown beverage) at his desk at the Court, and also delivering remarks as his co-clerk George Niebank bowed in worship before one of the Supreme Court's internal courtyard fountains.

² See, e.g., William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 ALBANY L. REV. 533 (1980); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 17-98 (1987); WILLIAM H. REHNQUIST, *THE SUPREME COURT* 3-35 (2001).

³ William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD RPT., Dec. 13, 1957, at 74, 75.

⁴ See R. Ted Cruz, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 10, 16 (2005).

⁵ See Robert Barnes, *Justices Are of an Opinion, but Not Often*, WASH. POST, Mar. 26, 2007, at A13.



Rehnquist at ease in Justice Jackson's chambers. Photo by C. Sam Daniels, courtesy of the Robert H. Jackson Center.

As a new Justice, he urged Chief Justice Burger to institute an annual law clerks' show parodying the Court; he also once tried, with less success, to persuade the Supreme Court press corps to put on a similar show for the Justices.⁶ And at a Court Christmas show in 1975, one performance number, sung to the tune of *Angels from the Realm of Glory*, featured lyrics by Justice Rehnquist — a well known critic of *Miranda v. Arizona* — and his law clerk Craig Bradley:

Liberals from the realms of theory
Should adorn our highest bench
Though to crooks they're always cheery
At police misdeeds they blench.
Save *Miranda*! Save *Miranda*!
Save it from the Nixon four!⁷

⁶ See Linda Greenhouse, *How Not to Be Chief Justice: The Apprenticeship of William H. Rehnquist*, 154 U. PENN. L. REV. 1365, 1371 (2006).

⁷ CRAIG BRADLEY, CRIMINAL PROCEDURE: RECENT CASES ANALYZED 95 (2007). Rehnquist also helped to plan the entertainment sketches for his annual law clerk

Justice Rehnquist also would sometimes, especially before he became chief justice (and, of course, older), show amusement on the bench. One example occurred in 1972 during oral argument in the Supreme Court case that produced the leading decision on obscenity and the First Amendment, *Miller v. California*.⁸ When defense attorney Burton Marks, responding to a Rehnquist question, actually spoke in the Supreme Court chamber about "beaver shots" in pornographic magazines, the Justices reportedly were visibly startled. When Mr. Marks ignored that reaction and promptly used the phrase again, young Justice Rehnquist grinned broadly.⁹

In addition to his humor, Chief Justice Rehnquist also was a conspicuous, and at times opinionated, man of music. He was an enthusiastic singer, including in his Lutheran church (where his inability in 2004 to sing hymns first made him suspect that he was seriously ill).¹⁰ Rehnquist made it a point each December for fifty years to hear a performance of Handel's *Messiah*¹¹ and, in each of his years as a Justice, he led caroling at the Supreme Court's Christmas — "Christmas," not "Holiday"¹² — party.¹³ He led sing-alongs at judicial

reunion dinners. See David G. Savage, *Former Rehnquist Clerks Recall His Wit, Warmth*, L.A. TIMES, Sept. 7, 2005, at A13.

⁸ 413 U.S. 15 (1973).

⁹ See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 247 (1979). An audiotape of the November 7, 1972, *Miller* oral reargument is available on line through The Oyez Project, www.oyez.org/cases/1970-1979/1971/1971_70_73/reargument. In that recording of the reargument, Mr. Marks can be heard using the phrase "beaver shots" at counter reading 16:54 and repeating the phrase soon thereafter. To my ears, the audiotape captured only deep silence as a reaction to Mr. Marks's vocabulary.

¹⁰ See Charles Lane, *Rehnquist Eulogies Look Beyond Bench; Chief Was a Family Man and a Tennis Fanatic*, WASH. POST, Sept. 8, 2005, at A3 (summarizing eulogy remarks by Rehnquist's pastor).

¹¹ See *id.* (reporting James Rehnquist stating in his eulogy for his father that "[f]or half a century, [Chief Justice] Rehnquist had never missed a performance of Handel's 'Messiah' at Christmas time").

¹² See Craig Timberg, *Sing-along Strikes a Sour Note; Chief Justice's Selection of 'Dixie' Distasteful, Some Say*, WASH. POST, July 22, 1999, at B1.

¹³ See, e.g., WOODWARD & ARMSTRONG, *supra* note 9, at 270.

conferences.¹⁴ And he knew college fight songs – during an oral argument, he once sent a note from the bench to his law clerks, listing the first lines of five fight songs, asking them to name the correct colleges and, later, returning their weak answers with grades (“2 out of 5 – 40%”).¹⁵

Rehnquist used musical references in his written Court work. He circulated a proposed opinion in *Barnes v. Glen Theatre, Inc.*,¹⁶ a First Amendment/nude dancing case, for example, beneath a cover memorandum that closed by quoting, surely from memory, lyrics from singer Johnny Mercer’s 1940s hit, *Acc-Cen-Tchu-Ate the Positive*.¹⁷ In 1994, in a copyright infringement case brought by singer and guitarist John Fogerty, the Supreme Court of the United States decreed, through the pen of Chief Justice Rehnquist, that Creedence Clearwater Revival is “one of the greatest American rock and roll groups of all time.”¹⁸

¹⁴ See Timberg, *supra* note 12.

¹⁵ See David G. Leitch, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 20, 23 (2005).

¹⁶ 501 U.S. 560 (1991).

¹⁷ The Chief Justice’s memorandum expressed his

great hope that the enclosed draft will dispel some of the confusion about the case which has, unfortunately, been engendered by the dissenting and concurring opinions. The theme of this fourth draft is a very positive one, and it can be summed up in the following verse from a once popular song:

“Accentuate the positive
Eliminate the negative
Latch on to the affirmative
Don’t mess with Mr. In Between.”

“WHR,” Memorandum to the Conference Re: No. 90-26, *Michael Barnes v. Glen Theatre, Inc.*, May 2, 1991, in Thurgood Marshall Papers, Box 534, Folder 9, Library of Congress, Manuscript Division, Washington, D.C., quoted in Joan Biskupic, *The Mysterious Mr. Rehnquist; Where Is the Chief Justice Going and Who Will Follow?*, WASH. POST, Sept. 25, 1994, at C1.

¹⁸ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 519 n.2 (1994).



Rehnquist (left) and co-clerk George Niebank cavort on the rim of a fountain at the Court. Photo by C. Sam Daniels, courtesy of the Robert H. Jackson Center.

The musical-inclined William Rehnquist was, in particular, a big fan of Gilbert and Sullivan operas. In a 1980 case where his colleagues invoked a range of constitutional provisions and theories, Justice Rehnquist mocked them at the beginning of his solo dissenting opinion by quoting lyrics (and ascribing them to the majority) that are sung by the Lord Chancellor in Gilbert and Sullivan’s operetta *Iolanthe*:

The Law is the true embodiment
of everything that’s excellent,
It has no kind of fault or flaw,
And I, my lords, embody the Law.¹⁹

¹⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Rehnquist, J.,

In spring 1986, just weeks before he was appointed chief justice, Rehnquist donned a wig to play a solicitor in a theatrical spoof of Gilbert and Sullivan.²⁰ Two years later, he was spotted singing along, obviously knowing the lyrics by heart, at a performance of Gilbert and Sullivan numbers featuring legal themes.²¹ And most famously, some months after seeing the Lord Chancellor character in *Iolanthe* wearing four gold stripes on his robed arms, Chief Justice Rehnquist took the bench on January 17, 1995, wearing similar attire.²² Chief Justice Rehnquist wore his striped robe for the rest of his tenure on the Court. He also wore the striped robe during President Clinton's impeachment trial²³ and, after the President's acquittal, borrowed a line from *Iolanthe* to answer a press question about his own role in that proceeding:

Q: What did that whole [impeachment] process – and what was it important that you thought you, as chief justice, should accomplish in that process?

A: Well, not very much. There's a line from Gilbert and Sullivan's *Iolanthe* that – let me see if I can think of it. "When Wellington whipped Bonaparte, as any child can

dissenting). This Gilbert and Sullivan lyric is related conceptually to one of Justice Jackson's most famous lines about the Supreme Court, written while Rehnquist was one of Jackson's two law clerks: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

²⁰ See David G. Savage, *14 Years on Court; Rehnquist's Conservatism Remains Firm*, L.A. TIMES, June 18, 1986, at 1; Chuck Conconi, *Personalities*, WASH. POST, May 9, 1986, at D3.

²¹ See Chuck Conconi, *Personalities*, WASH. POST, May 2, 1988, at B3.

²² See Al Kamen, *In the Loop*, WASH. POST, Jan. 18, 1995, at A15 (quoting the explanation offered by Supreme Court press officer Toni House). Chief Justice Roberts, formerly a Rehnquist law clerk, revealed last year his understanding that Chief Justice Rehnquist, after he had donned his stripes, urged but did not persuade his fellow justices to add stripes to their own robes. See Bill Barnhart, *Roberts Strives for Consensus on Court*, CHI. TRIB., Feb. 2, 2007, at 1, 8.

²³ See Linda Greenhouse, *Rehnquist, in New Arena, Appears at Home*, N.Y. TIMES, Jan. 8, 1999, at A14 (describing the Chief Justice wearing his gold-striped robe during President Clinton's impeachment trial).

tell, the House of Peers throughout the war did nothing in particular and did it very well." And I feel that's about what I did at the impeachment trial. I did nothing in particular and I did it very well.²⁴

THE REHNQUIST DOCUMENT

The newly discovered composition by law clerk Bill Rehnquist demonstrates all of these qualities: his early attachment to Gilbert and Sullivan, his irreverent wit, and his strong opinions about the Supreme Court justices of the 1950s.

In 1952 or 1953, Rehnquist typed and gave to Justice Robert H. Jackson a sheet of spoof lyrics that fit the tune of a famous song from Gilbert and Sullivan's most popular operetta (which arguably is the most popular opera ever), *The Mikado*:

PARODY: Tune, Pish Tush's solo from Act I of *Mikado*
("Our great mikado, virtuous man, etc.")

- | | |
|----|--|
| 1 | Our Great Chief Justice, Virtuous Man |
| 2 | When He to Rule Our Court Began |
| 3 | Resolved to try |
| 4 | A plan whereby |
| 5 | The Judges might be steadied |
| 6 | So he decreed with stern portent |
| 7 | That who thereafter did dissent |
| 8 | Unless he had the Chief's consent |
| 9 | Would forthwith be beheaded |
| 10 | This hard decree, of such import |
| 11 | Caused great dismay throughout the court |
| 12 | Verbose and mum, and smart and dumb |
| 13 | Were equally affected |

²⁴ The Charlie Rose Show, Transcript #2881, Feb. 16, 2001, quoted in Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at A1.

14 The judges who by F.D.R.
 15 Had come to lord it o'er the bar
 16 Took great offense
 17 At this pretense
 18 By one whom Harry'd selected
 19 Now Stanley Reed evades the ban
 20 In about the only way he can
 21 "Without a label
 22 No one is able
 23 To tell if I'm dissenting"
 24 And Bill and Hugo wrote the Chief
 25 "It is our most considered belief
 26 Your rule has taint
 27 of prior restraint
 28 To it we're not consenting"
 29 Felix too was up in arms
 30 When Fred stood fast against his charms
 31 "My weekly speech
 32 Should rightly reach
 33 The ears of errant lawyers"
 34 R.H.J. the Chief embraced
 35 "With this restriction on me placed
 36 With Shay and you
 37 I'll now pursue
 38 The vagaries of baseball."

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ANNOTATIONS

- 1 *Our Great Chief Justice, Virtuous Man*: This sarcastic reference is to Chief Justice Fred M. Vinson, who served from 1946 until 1953. During Vinson's lifetime, Rehnquist, along with his boss Justice Jackson and many others, regarded Vinson as far short of "great" in his job, and nothing indicates that Rehnquist ever changed his opinion. Vinson's perceived failings on the Court in-

- cluded laziness, shallow thinking and ineffective leadership.²⁵ I am unaware of questions about Chief Justice Vinson's moral "virtue," however, and many of his colleagues and others liked and admired him as a man.
- 2 *When He to Rule Our Court Began*: Vinson was appointed to succeed the late Chief Justice Harlan Fiske Stone in 1946.
- 5 *The Judges might be steadied*: Under Chief Justice Stone (1941-46), the Justices were often divided. Some of their personal animosities also came to be well publicized. After President Truman nominated Vinson to succeed Stone, Justice Jackson disclosed publicly some of Justice Black's behavior to which he (Jackson) previously had objected privately – the so-called "Black-Jackson Feud."²⁶ In this context, Truman and others, probably including Vinson himself, looked to Vinson to improve relations among the Justices.
- 9 *Would forthwith be beheaded*: Rehnquist exercising poetic license.
- 12 *Verbose and mum, and smart and dumb*: These characterizations – of Supreme Court Justices, not Snow White's dwarfs – of course are subjective. Many at the time would have pinned "verbose" on Justice Felix Frankfurter, an irrepressible talker. None was really "mum," at oral argument or otherwise. Most thought that they were quite "smart." And, as this parody of course indicates, some thought that Chief Justice Vinson and perhaps one or more of the Associate Justices were, to put it unkindly, "dumb."²⁷

²⁵ See WILLIAM M. WIECEK, XII HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, 409-10 (2006) (describing Vinson as "unanimously regarded as the least successful Chief Justice"). For an early assessment, see John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. CHI. L. REV. 212 (1954).

²⁶ See, e.g., Edwin M. Yoder, Jr., *Black v. Jackson: A Study in Judicial Enmity*, in THE UNMAKING OF A WHIG AND OTHER ESSAYS IN SELF-DEFINITION (1990).

²⁷ See, e.g., RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 587-88 (2004 ed.) (quoting a former Minton clerk on how several Justices "would discuss in [Vinson's] presence the view that the Chief's job should rotate annually and ... made no bones regarding him – correctly – as their intellectual inferior") (ellipses in original).

- 13 *Were equally affected*: The Vinson Court did strike some major blows for equality.²⁸
- 14 *The judges who by F.D.R.*: The FDR appointees who still served on the Supreme Court in the early 1950s were, in order of seniority, Associate Justices Hugo L. Black, Stanley Reed, William O. Douglas, Felix Frankfurter and Robert H. Jackson. Three other FDR appointees left the Court during the 1940s: Justice James F. Byrnes resigned in 1942 and Justices Frank Murphy and Wiley B. Rutledge each died during summer 1949.
- 15 *Had come to lord it o'er the bar*: This is Rehnquist needing a rhyme – neither the 1950s Vinson Court nor particularly its “Roosevelt Justices” was anti-Bar, although some elements of the legal profession, including lawyers with whom Rehnquist was acquainted, had been no fans of FDR, particularly during the 1930s.
- 18 *By one whom Harry'd selected*: President Harry Truman, who many of the Roosevelt New Dealers not surprisingly regarded as an accidental president and a lesser one than FDR had been, was a very close friend, from the 1930s forward, of his Chief Justice nominee, Fred Vinson. Indeed, it was widely known by 1951, shortly before Rehnquist arrived at the Court as a law clerk, that Chief Justice Vinson was President Truman's nightly confidante and his desired successor in the White House.²⁹ When Rehnquist wrote these lines, Truman was either, in 1952, a deeply unpopular president who had decided not to run for reelection (and what was regarded as likely defeat) or, in 1953, an ex-president then regarded as unsuccessful. Truman also had, by

²⁸ See *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Henderson v. United States*, 339 U.S. 816 (1950).

²⁹ See, e.g., Felix Belair Jr., *Mr. Truman's Friend – And His Nominee?*, N.Y. TIMES MAG., Dec. 16, 1951, at 13; see also Drew Pearson, *The Washington Merry-Go-Round: Vinson Eyed for Acheson's Job*, WASH. POST, Feb. 17, 1951, at B15 (reporting discussions between Sen. Owen Brewster (R.-ME) and President Truman, and between Chief Justice Vinson and Sen. Brewster, about Vinson becoming Secretary of State).

- the time of Rehnquist's clerkship (1952-53), made all four of his Supreme Court appointments: Chief Justice Vinson (1946) and Associate Justices Harold H. Burton (1945), Tom C. Clark (1949) and Sherman Minton (1949).
- 19 *Now Stanley Reed evades the ban*: FDR nominated Reed, his Solicitor General for almost three years, to the Supreme Court from that office in 1938.
- 23 *To tell if I'm dissenting*: Justice Reed sometimes wrote or joined opinions that did not state with much clarity whether they embodied the Court's judgment, concurred in it or dissented from it.³⁰ A prominent example of this was *Brown v. Allen*, a case that Rehnquist, as Jackson's law clerk, worked on extensively.³¹
- 24 *And Bill and Hugo wrote the Chief*: Associate Justices William O. Douglas and Hugo L. Black voted together very regularly during the late 1940s and early 1950s, especially in cases where they could voice their near-absolute view of the First Amendment's protection for “freedom of speech.”
- 28 *To it we're not consenting*: Douglas and Black were regarded widely as champions of constitutional protection for free speech.³²
- 29 *Felix too was up in arms*: “Felix” was Justice Frankfurter, who often was “up in arms” about something, often Chief Justice Vinson.

³⁰ See, e.g., *New York ex rel. Whitman v. Wilson*, 318 U.S. 688, 691 (1943) (Frankfurter, J., joined by Roberts and Reed, JJ.); cf. *Andres v. United States*, 333 U.S. 740 (1948) (Reed, J., for the Court) (which leading commentator John P. Frank at the time described gently as “not quite clear,” see John P. Frank, *The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1, 50 (1948)).

³¹ 344 U.S. 443 (1953). For a biting description (by a former Jackson clerk) of the votes and opinions in *Brown v. Allen*, see James M. Marsh, *The “Supreme Court:” Mr. Dooley Should Take Another Look*, 16 THE SHINGLE 179-80 (1953), quoted in ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 97-98 (2001).

³² See, e.g., John P. Frank, *The United States Supreme Court: 1950-51*, 19 U. CHI. L. REV. 165, 221 (1952) (Black's former law clerk and biographer describing “constitutional opposition to restrictions on speech” as one of the things “that is really important to him”).

- 30 *When Fred stood fast against his charms*: “Fred” was Chief Justice Vinson. Justice Frankfurter worked constantly, indefatigably, both in writing and in person, to bring each of his judicial colleagues to his views on matters great and petty. Some Justices found this to be charming (at times), while others, including Vinson, more generally found Frankfurter to be annoying and resisted his “charms.”
- 31 *My weekly speech*: By all accounts, Frankfurter regularly made long speeches during the Justices’ Saturday Conference discussions of argued cases and petitions for review.³³
- 33 *The ears of errant lawyers*: Court Conference discussions were and are closed to the public.
- 34 *R.H.J. the Chief embraced*: “R.H.J.” was Justice Robert Houghwout Jackson. He was cordial to Vinson’s face but was not his intimate, sometimes sought to avoid his company – *e.g.*, by often avoiding the Justices’ group lunches where Vinson would talk on about baseball³⁴ – and probably never received a Vinson hug.
- 36 *With Shay and you*: “Shay” was the nickname of Justice Sherman Minton, who often agreed with Vinson and shared his interests.
- 38 *The vagaries of baseball*: Ah, baseball. As law clerk Rehnquist and everyone else at the Supreme Court during Chief Justice Vinson’s service knew very well, Vinson was a former college and semi-professional baseball player who was a passionate fan of the game.³⁵

In 1951, Major League Baseball offered to Chief Justice Vinson its then-vacant Commissioner’s job. Vinson was sorely tempted – he once, while visibly upset, told his law clerks that it was “killing” him that he could not appropriately leave the Su-

³³ See, *e.g.*, Leonard B. Boudin, *Book Review*, 89 HARV. L. REV. 282, 291 (1975) (noting that Frankfurter’s own diary descriptions of his Conference remarks reveal “a pontifical quality”).

³⁴ Justice Frankfurter shared this Jackson antipathy. See FRANCIS A. ALLEN & NEAL WALSH ALLEN, *A SKETCH OF CHIEF JUSTICE FRED M. VINSON* 95 (2005).

³⁵ See *id.* at 8-11.

preme Court for a job that would triple his \$25,000 salary and let him “go to a ball game every afternoon!”³⁶

Baseball also reportedly offered the job of Commissioner, also without success, to Justices Robert Jackson and “Shay” Minton.³⁷ When Jackson’s law clerk George Niebank read a newspaper story about this job offer to Jackson, he immediately told his 1950-51 co-clerk, John Cushman. When Jackson came in to chambers that morning, the clerks asked him, “How about this – you being Commissioner of Baseball?” “What?” he replied. “Yes,” the clerks said, “the paper said you may be Commissioner of Baseball.” “You know, I don’t even know one field from another,” said Jackson.³⁸

Baseball did not interest Jackson as an athlete or as a fan.³⁹

³⁶ Newton N. Minow, *Unlike in Vinson’s Day, It’s a Win-Win Deal Now*, CHI. TRIB., Apr. 11, 1994, at 17.

³⁷ See Shirley Povich, *This Morning*, WASH. POST, Feb. 1, 1951, at 16 (“In recent weeks, representatives of the [baseball owners’] committee have been active in Washington sounding out the receptiveness of three United States Supreme Court Justices to an offer of the baseball commissionership. Successively, they have been brushed off by Justices Fred Vinson, Robert Jackson and Sherman Minton.”); but see *Baseball Job Turned Down By FBI’s Hoover*, Jim Farley, WASH. POST, June 21, 1951, at 17 (reporting Justice Minton’s denial of reports that he had been offered the commissionership). A fourth Justice, William O. Douglas, also reportedly was one of baseball’s many “leading candidates” for the commissionership. See *Cut Candidate List for Chandler Post*, N.Y. TIMES, Feb. 11, 1951, at 1, 2.

³⁸ George C. Niebank, Jr., speech to the Jamestown, New York, Bar Association, June 7, 2000.

³⁹ In 1939, then-Solicitor General Jackson described his “simple” hobbies to an inquiring writer:

Since my work is a continuous round of contest and competition, I prefer only hobbies which are non-competitive. I decline hobbies in which a score is kept, such as bridge or golf. They are too apt to result in watching your score instead of enjoying the game. My hobbies vary with the season, for they are associated with the out-of-doors and with the rural environment in which I am happy to have been reared – a leisurely and rambling walk with no effort to make mileage, or long horseback rides are always enjoyed. Skiing or skating in winter and tennis in summer are pleasant exercise and diversion, although I do not excel in any of them. I

Baseball's top management job also did not appeal to Jackson — when he was nominated in February 1951 for the Nobel Peace Prize for his work five years earlier as chief prosecutor at Nuremberg of the principal Nazi war criminals, he told a former law clerk who had sent congratulations that he (Jackson) did not “expect anything will come of it, but if nothing more than the nomination comes, it is a recognition of the work from a quarter that I think is particularly helpful. Anyway, it is better than Baseball Commissioner!”⁴⁰

In early 1952, law clerk George Niebank was joined in Jackson's chambers by a new co-clerk, Bill Rehnquist. During his seventeen clerkship months, Rehnquist obviously learned about Jackson's non-flirtation with becoming Commissioner of Baseball and much more.



William Rehnquist apparently mailed his Gilbert and Sullivan parody to Justice Jackson at the Supreme Court — the document originally was folded to fit in a letter-sized envelope (which has not been preserved). The document being mailed suggests that it dates from a period when Jackson and Rehnquist were not together in Washington. This could have been summer 1952, when Jackson traveled during the Court's summer recess. The

like sail skating and boating and puttering in the garden, and almost anything that can be done out-of-doors without keeping any score. Scores and records and competitions are about the only things I can't tolerate in the line of sports.

Letter from Robert H. Jackson to Louis M. Notkin, Jan. 20, 1939, in RHJ LOC, Box 17. In 1950, Justice Jackson said no when a friend suggested that they take in a ballgame during a daytime, cross-country train trip layover in Chicago: “Personally, I don't care much about baseball and haven't seen a game in a good many years. Why don't we take our chances on what we can do during the day[?]” Letter from Robert H. Jackson to Harrison Tweed, June 9, 1950, in RHJ LOC, Box 20, Folder 20.

⁴⁰ Letter from Robert H. Jackson to James M. Marsh, Feb. 28, 1951, in RHJ LOC, Box 16, Folder 7.

document also could date from summer 1953, after Rehnquist had completed his seventeen-month clerkship with Jackson and moved to practice law in Arizona. I think that the latter is much more plausible. The document's confident, Court-knowing tone suggests an author who had been more than Jackson's junior clerk for the final five months of the Court's October Term 1951. The document's implicit reference to *Brown v. Allen*, decided in February 1953, also indicates that the author had experienced the Court's next Term. And because the composition is about a living Chief Justice Vinson, that (plus good taste) means that it was composed before his sudden death on September 8, 1953.

In Justice Jackson's chambers, his secretary Mrs. Elsie Douglas had the practice of opening his mail and sending it to him — in his personal office or, when he was away from the office, out of Washington, for more than a brief period — for reading. In this instance, she wrote “Rehnquist” in pencil on the paper next to the sender-author's typed initials, maybe before sending it to Jackson or maybe later (even much later), as she filed or later reviewed the paper.

Jackson received and presumably read the composition. Then he refolded the document — perhaps he was carrying and reading it while traveling — and wrote, on its back, a spare “No Ans.”⁴¹



⁴¹ Jackson's files also contain, interestingly enough, another typed parody of Gilbert and Sullivan. Composed by an unknown author, it laments the lot of a Chief Justice dealing with a Mann Act (“white slave”) case involving a “harlot's ... vacation” from Nebraska to “Californication.” Those facts point to *Mortensen v. United States*, 322 U.S. 369 (1944), which the Court decided when Harlan Fiske Stone was Chief Justice of the United States and Bill Rehnquist was a U.S. Army Air Corps weather observer in North Africa. See *In the Supreme Court (By Gilbert, C.J.; Sullivan, J., dissenting)*, in RHJ LOC, Box 16, Folder 3.

PARODY: Tune, Pish Tush's solo from Act I of Mikado ("Our great mi-
kado, virtuous man, etc.")

Our Great Chief Justice, Virtuous Man
When He to Rule Our Court Began
"resolved to try
A plan whereby
The Judges might be steadied

So he decreed with stern portent
That who thereafter did dissent
Unless he had the Chief's consent
Would forthwith be beheaded

This hard decree, of such import
Caused great dismay throughout the court
Verbose and mum, and smart and dumb
Were equally affected

The Judges who by F. D. R.
Had come to lord it o'er the bar
Took great offense
At this pretense
By one whom Harry'd selected

Now Stanley Reed evades the ban
In about the only way he can
"Without a label
No one is able
To tell if I'm dissenting"

And Bill and Hugo wrote the Chief
"It is our most considered belief
Your rule has taint
of prior restraint
To it we're not consenting"

Felix too was up in arms
When Fred stood fast against his charms
"My weekly speech
Should rightly reach
The ears of errant lawyers"

R. H. J. the Chief embraced
"With this restriction on me placed
With Shay and you
I'll now pursue
The vagaries of baseball."

whr

(Rehnquist)

The original text of William H. Rehnquist's poem, "PARODY: Tune, Pish Tush's solo from Act I of Mikado." From the Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 120, Folder 5 (circa summer 1953).

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ACKNOWLEDGMENTS

John Q. Barrett (*A Rehnquist Ode on the Vinson Court*, p. 289) thanks Gregory L. Peterson and Brad Snyder for their Jackson, Rehnquist and baseball expertise and their helpful comments on a draft of this article and Richard C. Spatola and Karen J. Newbury for excellent research assistance.

Mary L. Dudziak (*Thurgood Marshall's Bill of Rights for Kenya*, p. 307) extends special thanks to her daughter Alicia Dudziak for assistance.

William T. Pizzi (*"Makeup Calls" in Sports & Courts*, p. 333) thanks his research assistant, Cameron Munier.

Hart Pomerantz (*The Statement of Account*, p. 403) was assisted by Allan Rouben.

