2/25/75

THE WHITE HOUSE
WASHINGTON

Don R

Very impressive!

return to Rumsfeld

READER'S DIGEST

PLEASANTVILLE, N.Y. 10570

SENIOR EDITOR • *Eugene H. Methvin*

February 25, 1975

Dear Don:

Justice Douglas's recent illness plus the fact that four other justices are now 67 or older raised the possibility that President Ford may soon be faced with the necessity of making a nomination to the Court.

As a law-school trained journalist, I have covered the Court spasmodically, and watched it with deep interest, for seventeen years now, and hence have some ideas about considerations I believe should influence such a choice. And I would like to suggest a possible candidate. I'm sending these ideas to you as an old friend in deference to your judgment on whether and how to crank them into the decision-making process.

Today the Court is in an excruciating balance. The four Nixon appointees have been able for the most part to curb the lancing leftward tilt of the Warren Era, with help from the two "swing justices," White and Stewart. (See enclosed copy of my October 1972 Reader's Digest article, "The Supreme Court Changes Course.) But still they lose some crucial decisions with vast import to the nation. A prime recent example: the January 22, 1975, decision by 5-4 vote to "make a federal case" out of every secondary school student disciplinary suspension. This was another in a long series of massive reallocations of power in America away from the grassroots to our 600 federal judges, and ultimately to a five-man board of lawyers sitting in far-off Washington. As Justice Powell protested: "The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards, and two million teachers who heretofore have been responsible for the administration of the American school system." In a half-dozen major categories of cases, the activist majority of the Warren Era systematically took power away from state trial judges, juries, legislatures, and other grassroots bodies, and from the federal executive branch.

The Court had got so far out of step with reality -- literally with the needs of the American people -- that in 1968 it became a national issue. As Professor Philip Kurland, editor of the University of Chicago's Supreme Court Review, put it, "Both the Court and the law were at low tide. A restoration of public confidence was vital both to the continuance of the Court's powers and to the maintenance of the rule of law." Grassroots reaction was so strong Congress directly challenged the Court's Miranda decision Fifth Amendment interpretation by inserting in the 1968 Safe Streets Act a directive to federal trial judges to follow a different rule in admitting confessions. Chief Justice Warren clearly feared the political reaction and sought to prolong the liberal rule by timing his resignation to permit President Johnson, already a lame duck, to nominate his successor. Then in October 1968 the Senate rebuffed President Johnson's nomination of Abe Fortas. And Nixon in turn made his promise to change the Court's direction a major appeal in his electoral campaign. The 1968 events will in the long view of history be seen to add up to a "Limited Constitutional Revolution of 1968" comparable in our constitutional history to the "Limited Constitutional Revolution of 1938" by which President Roosevelt turned the Court around and brought it back into touch with the nation's social and economic needs.

Today, that 1968 revolution is only partially accomplished. In fact, it is in jeopardy. Three of Nixon's appointees are over 67 or older; they are among the Court's five oldest members. Only Rehnquist, of the solidly moderate or conservative justices, is youthful enough to be considered actuarially safe. If one of the Nixon Four should be forced to leave the bench, a single appointment, if ill-considered, could reverse the present balance and cause a radical swing back to the direction favored by the activist three, Brennan, Douglas and Marshall. It should never be forgotten, for example, that the runaway activism of the 1961-68 era was led by Warren, who was appointed by Eisenhower; and out front with him was another Eisenhower appointee, Brennan, who to this day is one of the three most radical activists. Another appointment like those two, and we could expect the worst!

On the other hand, if one of the Activist Three leaves the bench first, a sound appointment could provide the solid fifth vote that will permit the Court to go forward with the constructive realism and federalist restoration Chief Justice Burger has sought to encourage. Consolidating the change

begun by the limited revolution of 1968 could be the most lasting and fundamental accomplishment of the Ford Administration.

In my view, however, the next nomination needs to provide more than just another vote on the moderate conservative side. It should provide two additional badly needed qualities: brilliance and youth.

The brilliance is needed to provide the kind of persuasive opinions and constructive doctrine that will begin to change the one-sided liberal dominance of our law schools, and law reviews, and legal scholarship. For example, three years ago I surveyed the law reviews for articles on the "liberty versus license" issue (see enclosed RD article.) Not a single article had been written in the late 1960s and early 70s that could be called "pro-law enforcement" or supporting firm action in dealing with riotous demonstrations and disruptions, i.e., in defense of preserving the civil rights of the peaceful many versus the rebellious few. Moreover, with the possible exception of Justice Powell, no member of the Court now is writing the kind of reasoned, documented, compelling opinions that will command respect of today's law students and budding legal scholars. Since Robert H. Jackson and Felix Frankfurter, the voices of judicial restraint have been relatively unexciting and ineloquent.

The need for youth is obvious. The long career of Justice Douglas is an illustration. He was only 40 when appointed; through him President Roosevelt after 36 years is still having an impact on the Court and country. By choosing a youthful nominee, President Ford could likewise influence the nation's direction long after he leaves office. Moreover, a youthful nominee would give the Court the important asset of longevity. In doing my profile of Chief Justice Burger (RD, April '75, copy enclosed) I was impressed with the strength Justice Black provided in the crucial transition years, 1965-71. It does take a justice several years to get "up to speed," and ripe experience can vastly improve the quality of the Court's judicial statecraft.

How to fill this bill? My prime suggestion would be G. Robert Blakey. (A complete curriculum vitae is enclosed.) I obtained this from him some time ago without giving him any hint of my purpose. I have known Bob since he was a law

professor at Notre Dame. Beginning in 1969, when the Digest embarked on a long story series on organized crime, I began to collaborate very closely with him. Throughout this process I saw him at work and had many long conversations ranging over our criminal justice system and our political and constitutional institutions. And I will say that he is among the most impressive intellects and legal scholars I have ever met. Indeed, I was astonished when I got this curriculum vitae to discover he is two years younger than I am; I had thought him three or four years older, for he has a maturity of judgment and seasoned intellect much beyond his years. Moreover, I have talked to Sen. McClellan about Bob (again, without his knowing it) and my hope of seeing him on the U.S. Supreme Court. Sen. McClellan pronounced himself all in favor of the idea, and indeed urged me to push it at the White House. (This was during the Nixon Administration, when he thought his own sayso would carry little weight.)

While a professor at Notre Dame, Bob after the Warren Court voided existing wiretap laws produced a blizzard of scholarly documentation and law review articles that provided the groundwork for new legislation; that campaign prompted Sen. McClellan to bring him to Washington. As counsel to the Criminal Laws and Procedures Subcommittee, Bob provided the intellectual amperage that powered through the two major pieces of criminal legislation of our time: the 1968 Safe Streets Act with its crucial re-authorization of electronic surveillance, and the 1970 Organized Crime Control Act. The 1970 act revised the more extreme Warren Court interpretations of the Fifth Amendment, restoring the Amendment to a more balanced role; ironically, without that Act's authorization to compel witnesses in grand jury and legislative investigations, the cases against Agnew and Nixon could never have been built. The law provides prosecutors a powerful crowbar to use in tearing apart the complex, many-layered conspiracies of the underworld, political extremists, and corrupt officialdom.

After those two legislative labors Bob and Sen McClellan launched the massive project of committee preparation for the recodification of the federal criminal code. Bob had the basic research work done, and actually had hearings scheduled, when "Bloody Saturday" in the Justice Department derailed everything on Capitol Hill, above all in the Senate Judiciary Committee. As the Watergate stagnation spread, Bob, unable to foresee action on the legislative front, returned to Academia and took a professorship at the Cornell law school.

(Family obligations weighed heavily in his decision; he is a Catholic, with seven children to educate, and as a professor he gets free tuition for the youngsters' college education.) He still serves on the wiretap commission, named at Sen. McClellan's behest, and makes frequent trips to Washington.

The one quality that impresses me most about Bob is that he has the initiative to seek and analytical capacity to marshal the empirical data about social problems and the workings of our institutions on them. Justice Holmes used to say, "The life of the law is not logic; it is experience. A page of history is worth a volume of logic." Blakey would fit into the Holmes tradition of deference to legislative determination, and bring to Burger's side a vitally needed capacity to cut through the liberal rhetoric and hammer at the realities beyond the judicial ivory tower. It was just this passion for empirical data that in his early years in the Justice Department as one of Robert F. Kennedy's young turk racket-busters that set Blakey apart. He studied the realities of organized crime, the necessity for electronic surveillance, and proceeded to make himself the nation's foremost authority on the subject. He will bring that same drive and capacity to the Court. It is my strong conviction that those qualities are desperately needed up there that prompts me to urge these considerations on you.

Over to you!

Cordially,

Gene

THE WHITE HOUSE
WASHINGTON

Date 3/5/75

TO: DON RUMSFELD

FROM: JERRY H. JONES

For your files.