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# BOOK REVIEW

## *THE REHNQUIST CHOICE*

BY JOHN W. DEAN

NEW YORK: THE FREE PRESS, 2001

PP. IX, 333, \$26.00

*Reviewed by John P. Frank<sup>†</sup>*

This book is drawn from real conversations on a big subject. John Dean, as the older of us will recall from the Watergate hearings, was a central figure on the Nixon staff. He was deeply involved in the Nixon efforts to achieve a “conservative Court.” And Nixon had many opportunities.

The first Nixon appointee was Chief Justice Burger. The story of that appointment is briefly but well told. Attorney General Mitchell, deeply involved in all of the Nixon appointments, said, “Burger’s the first guy to run for the job of a Chief Justice – and get it.”<sup>1</sup> This appointment was easy for Nixon; it was, he said, “The most personal of [my] presidency to date.”<sup>2</sup>

Then came difficulty. The President, at Burger’s nudging, selected Judge Clement F. Haynsworth, chief judge of the Fourth Circuit Court of Appeals. This one has personal memories: Bill Rehnquist, then in the Department of Justice, and I were two of the most vigorous pushers in favor of Haynsworth’s confirmation. His defeat, which was pure character assassination by those who were angry over the earlier Fortas defeat in the Carter administration and were determined to get somebody, was a great misfortune. But it happened.

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<sup>1</sup> JOHN W. DEAN, *THE REHNQUIST CHOICE* 14 (2001).

<sup>2</sup> *Id.*

The President's next choice was Harold Carswell, of Florida and the Fifth Circuit Court of Appeals. I personally read every Carswell opinion and in a memorandum at the time concluded that he was nowhere near up to the job. The Senate took a similar view, intensified by the fact that Carswell gave some incorrect answers before the committee and came away leaving the impression, as much as these things can exist at so elevated a level, that he was a liar and a dunce. The author attributes the support for the Carswell proposal to Chief Justice Burger, who liked him, and to Bill Rehnquist, who in the Department reviewed his professional work.

This is the one place in the volume in which I have some doubt as to accuracy; I cannot believe that Bill Rehnquist, whom I came to know well in his years in Arizona and who was a great lawyer, would possibly have recognized Carswell as up to his professional standard. The author notes that Carswell had, in his short time on the district court, been reversed in 58 percent of his decisions by the Circuit, which appeared to be more than any other federal judge.<sup>3</sup> As Mr. Dean says, "It is not clear how Rehnquist missed this unpleasantly conspicuous problem."<sup>4</sup> It was in this connection that Roman Hruska, a supporter of Carswell, made his famous statement, "Well, even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't all have Brandeises and Frankfurters and Cardozos and stuff like that there."<sup>5</sup>

The President then brought peace. He chose Harry Blackmun of Minnesota, the Eighth Circuit. The appointment was confirmed, 94-0.

These stories are briskly told in the beginning pages of Dean's volume because what, in its full length, the book is about is the successors to Justice Black and Justice Harlan, who retired at about the same time. In their last days, they occupied nearly adjoining hospital rooms. They had had differences, but they had been friends, and they went together.

Nixon's first choice was William Poff, a conservative Democratic congressman from Virginia. The name was leaked to test the waters, and the reception was not good. Finally, Poff, distressed with what he thought would be a hard-hitting confirmation process, took

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<sup>3</sup> *Id.* at 21.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

his name out of the running and the President was left with a need for a fresh start.<sup>6</sup>

Nixon wanted more appointments than he was going to have, which was a prodigious number. His administration set out to find something "on" Justice William O. Douglas, so as to force him off the Court. This was ineffective and Nixon was left with the Black-Harlan vacancies.

The President then set out to find successors for Black and Harlan. One thing he was clear on, Nixon was against bussing, a popular issue at the time, and the instruction he gave his staff was, "I'm not going to put anybody in that thing that doesn't share my views on bussing, period."<sup>7</sup> Initial thoughts turned also to William French Smith; as Nixon said in his initial conversation with staff, "he's conservative as hell, isn't he? I heard he's a hell of a conservative . . . and one of the good guys."<sup>8</sup>

Talk also turned to Caspar Weinberger. Nixon pointed out favorable qualities: Weinberger appeared to have a Jewish name and so might sell with the Jewish voters, though he was in fact an Episcopalian. Moreover, Nixon liked the fact that "he has the reputation of being liberal but actually he's not."<sup>9</sup>

Nixon left largely to Attorney General Mitchell and Chief Staff Advisor Erlichman the need of digging up some names. He had one explicit instruction: "I have to have an absolute commitment for him on bussing and integration. I really have to. Go out and tell 'em that we totally respect his right to do otherwise, but if he believes otherwise, I don't want to appoint him to the Court."<sup>10</sup> Poff became a prime likely choice. And there was the second seat to be considered. Nixon was reluctantly willing to appoint a woman and his first inclination was in favor of Mildred Lillie of the court of appeals in California. Shirley Hufstедler of the same court was instantly and emphatically rejected. ("She's left, isn't she?" Nixon asked.)<sup>11</sup>

On the Harlan successor, the President gave his criteria to the staffer on the hunt for someone: "strict construction."<sup>12</sup>

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<sup>6</sup> Dean Erwin Griswold of Harvard, truly a mighty man in the law, was Solicitor General under Johnson and was carried forward in the Nixon administration. As the chief lawyer in the Department on Supreme Court matters, it was remarkable that he was never asked for his view on the vacancies. As Mitchell put it, "While Griswold's a good Republican he doesn't understand, nor always appreciates, Richard Nixon's politics." *Id.* at 27..

<sup>7</sup> *Id.* at 41.

<sup>8</sup> *Id.* at 51.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 115.

<sup>12</sup> *Id.* at 81.

Nixon had a clear perspective on the Court at this time of change. The “ones that have any brains” he thought were “Fortas . . . Black and Harlan. Those are the only three. Harlan’s a very able man. Black is a very able man. Fortas was, of course, very smart, a Jew to begin with. And Warren’s a dumb Swede. He was thick [dumb as hell]. All this bullshit about distinguished judges, Burger is more distinguished than any of them.”<sup>13</sup>

When Poff fell out of consideration, intense and extensive thought was given to Senator Robert Byrd of West Virginia. This one eventually frosted over, too, but not without considerable thought. The focus then turned to Hershel Friday of Arkansas. Dean, who had looked into the matter, reported that:

If I needed a lawyer for a business deal in Arkansas, I would hire this man without question. He’s a fine transactional lawyer. He’s probably a brilliant legal technician. He knows Arkansas law and practices as well as anyone in his state, I’m sure. He’s highly intelligent and articulate. He is obviously a man of integrity. . . . The problem is, John [Mitchell], that Hershel Friday has never had occasion to think about the issues that Supreme Court Justices confront or for that matter the subjects most federal judges confront today. We took him through both typical and topical constitutional issues like church-state relations, rights of privacy, abortion, capital punishment, reapportionment, pre- and post-arrest procedures, First Amendment issues, Fourth Amendment issues like search and seizure and wiretapping, to name just a few off the top. Often, he didn’t have a clue to what we were talking about and when he did, he didn’t know how he felt about the matter because he had never thought about it. . . . He’s like a blank sheet of paper.<sup>14</sup>

The talk between Nixon and his Attorney General then turned to the easy one, Lewis Powell of Richmond. The only hesitancy here was on Powell’s side; he was not sure that his eyesight was good enough for the job. He ended up concluding that it was adequate.

Simultaneously, Nixon focused on Mildred Lillie of California. The President was not concerned that neither of his prospects was a Harvard graduate: “The whole point is that this number one law school bullshit is getting me down a little, isn’t it you?” he asked Mitchell.<sup>15</sup> Mitchell replied, “It has for about thirty years. They just

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<sup>13</sup> *Id.* at 97.

<sup>14</sup> *Id.* at 159.

<sup>15</sup> *Id.* at 211.

don't produce the product."<sup>16</sup> The President summed up their dialogue, "Look, you've seen a lot of Harvard men around, they're soft in the head. And they don't work as hard. But, now, this Fordham man might be all right. I've seen some pretty good Fordham graduates, haven't you?"<sup>17</sup> During this period, the name of William Rehnquist first came up for serious consideration. Mitchell made the suggestion and had to tell the President who Rehnquist was, though the President remembered that he was an assistant attorney general and said, "he was . . . a great student, and a pretty tough guy."<sup>18</sup>

In a chapter headed, "While Howard Baker Dithered," Nixon reviewed his options. The Lillie proposal was running into trouble with the American Bar Association. The relevant committee voted 11 to one that she was not qualified. The President had much respect for Lawrence Walsh. But this time, for lack of anything else they could do, Mitchell and the President discussed the method of communicating with Rehnquist that he was to be the choice. The President strongly admonished Mitchell not to tell Jaworski or Walsh because they have staffs who would leak. "You know they've got these Jews that work – Walsh has – that work for him and they leak, the Jews leak, John, you know that."<sup>19</sup> Mitchell agreed. The President then asked "Have you told Rehnquist yet?" The response was, "Not yet, but I'm sure he will be more than pleased." The President to Mitchell responded, "I would expect so."<sup>20</sup>

I have given enough sampling of the quotes to show that the author has mined the presidential tapes to great advantage. We now know how four Justices came to the Supreme Court. Anyone who wants the basic details of Supreme Court appointments will find this book superb.

Rehnquist in Phoenix, with whom I once combated regularly, is a great lawyer and a fair adversary. He has been a Chief Justice of grace, distinction and firmness. This is a vivid account of how he almost accidentally, and by default, gained the highest legal post in the land.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 219.

<sup>19</sup> *Id.* at 247.

<sup>20</sup> *Id.* at 247-48.

