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Decision by Richard Harris

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DECISION. By Richard Harris, New York: E.P. Dutton & Company, 1971. Pp. 220. $5.95.

The keen political reporting that readers of *The New Yorker* have come to expect of Richard Harris is well displayed in this book drawn, not at all distantly, from a series of articles in that magazine. He recounts the Senate's decision not to advise and consent to the appointment of Judge Harrold Carswell to the Supreme Court. The principal actors are of course United States Senators, but his narrative is at least as much of their staffs and of the lobbyists. Judge Carswell himself hardly appears, certainly never as a person with any purpose in life other than to be available for the particular controversy—no doubt the use of Judge Carswell that history will also make. The President and his staff appear only as the butt of insults by Senators and their staffs, attacks not so much on impure motives as on incompetence in influencing the Senate. A full account of the transaction would include more complete studies of many people and groups outside the Senate and the anti-Carswell lobby; but a full account, perhaps like David Danelski's exemplary study of the confirmation of Justice Pierce Butler,[1] would be political science or history rather than journalism. Even as journalism, and readily granting a pitch of excitement that would match Allen Drury, *Decision* has its faults. The most serious is that the author so closely shares the political instincts of those who defeated Carswell that he also shares their hyperbole and simplism. The most obvious is that the leitmotiv for nobility is orchestrated so loudly that it drowns out most of Senator Bayh's words.

One of the reasons it is hard to write with consistent objectivity about the politics of Supreme Court appointments is the curious ambivalence of our major metaphors for that Court's function. On one hand, the business of finding statutes unconstitutional is seen as simply a by-product of the day-to-day course of litigation, preferring Marbury's claim or Madison's because one legal text is of greater authority than the other. A court whose greatest function were so conceived should be run like any other and staffed by those whose strong suits are personal probity and legal craft, persons equipped and disposed like Mr. Justice Roberts "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares

1. D. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964) [hereinafter cited as DANELSKI].

with the former."[2] Thus, Hamilton stressed the need for the artificial reason and judgment of law:

> [I]t will readily be conceived, from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges.[3]

On the other hand, judicial review is made the principal element in the great enterprise of subjecting political appetites to fundamental limits. A court so conceived would be directed more by wise statecraft than by skill in applying legal rules, "[f]or . . . everything turns upon the spirit in which [the judge] approaches the questions before him."[4] Theory urges that these qualities could exist together; practice reminds us that there are Brandeis and the others. So we forgive Marshall his excluded middle and *petitio principii* as willingly as we would Judge Hand his otherworldly notions of judicial review.

The trouble is that Carswell had neither virtue. His published district court opinions are not even the "first rate second rate" that Holmes originally thought of Taft,[5] and of Carswell's larger moral impulses little, perhaps blessedly, is known. The evidence against Carswell is solid, but not so overwhelming as Harris makes it seem. It is true that Carswell was often reversed by the Court of Appeals for the Fifth Circuit, but too many explanations are possible to call that fact "stunning,"[6] and it no more shows "that whatever else Judge Carswell was, he was not the 'strict constructionist' of the Constitution that President Nixon claimed him to be"[7] than it does that the Fifth Circuit tends to reverse itself. Had Holmes, Brandeis and Cardozo been federal district judges during the period of their great dissenting opinions, one suspects that their reversal rate would have exceeded Sutherland's, Van Devanter's or McReynolds', particularly if it is true that appeals are most likely where the law is least settled. After all, more than 97 per cent of Carswell's

2. United States v. Butler, 297 U.S. 1, 62 (1936).
3. THE FEDERALIST No. 78, at 529 (J. Cooke ed. 1961) (A. Hamilton).
4. Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930).
5. 1 HOLMES-LASKI LETTERS 339 (M. Howe ed. 1953).
6. R. HARRIS, DECISION 101 (1971) [hereinafter cited as HARRIS].
7. *Id.* at 102.

decisions were not appealed.[8] And the fact that Carswell was once reversed "as being 'clearly in error'—an uncommonly harsh statement for such a court to make"[9] would be more convincing if courts of appeals were not in many circumstances forced to affirm judgments not "clearly erroneous."[10]

There is similar exaggeration in making out the case that Carswell used his official positions for illicit segregationist ends. For example, four black juveniles were convicted for participating in a demonstration, sentenced to a reformatory and then released after they filed a suit to desegregate the institution. Judge Carswell dismissed the case when the plaintiffs were no longer subject to the segregated institution,[11] which no more makes him "a man who really, personally, does not like black people" than Brandeis' action in the *Atherton Mills* case[12] makes him a friend of capitalists who brutalize working children.

There was other evidence more convincing of Carswell's lack of commitment to racial justice: his overtly racist campaign speech at age twenty-eight, which Senator Brooke is probably right in thinking beyond the age of forgivable youth; his tendency to abuse civil rights lawyers, although most lawyers who have lost cases important to themselves would recognize the probable overstatement in the recitals of unfairness; and his role in incorporating a private club which acquired the previously municipal Tallahassee Golf Club, although it is unfortunate that the Supreme Court is less clear than Mr. Harris that such subterfuges are illegal.[13] The golf club incident perhaps received more attention than it intrinsically deserved because that was the subject on which Judge Carswell attempted to mislead the Senate.

All this is a fair case against Judge Carswell. Not that he was actually incompetent so much as utterly undistinguished; the chairman of the American Bar Association's Committee on Federal Judiciary put it reasonably accurately, although drawing perverse conclusions, when he wrote: "[the published opinions] neither gave promise of outstanding scholarship nor did they foreclose it."[14] Neither would his laundry list. Mere unforeclosed possibility of legal talent might be tolerable in a Supreme Court Justice if there were prospects of a grand vision of the

8. Walsh, *Selection of Supreme Court Justices,* 56 A.B.A.J. 555, 557 (1970) [hereinafter cited as Walsh].
9. HARRIS, *supra* note 6, at 53.
10. FED. R. CIV. P. 52(a).
11. HARRIS, *supra* note 6, at 53.
12. A. BICKEL, UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 1-20 (1957).
13. Palmer v. Thompson, 403 U.S. 217 (1971).
14. Walsh, *supra* note 8, at 557.

Court's role and a dedication to its great ends. The absence of both qualities is totally damning of a nominee, but is probably not a politically effective case. It is easy to see why lobbyists went beyond, to the case that Carswell wickedly used his official power to harass blacks and others to the best of his (feeble) ability. Yet the reporter should not follow the attack without question.

Another problem in reliably assessing particular Supreme Court appointments is the indefiniteness with which ultimate authority is assigned. President Nixon probably blundered tactically, and certainly historically, when he wrote Senator Saxbe: "The question arises whether I, as President of the United States, shall be accorded the same right of choice in naming Supreme Court Justices which has been freely accorded to my predecessors. . . ."[15] Even if the President meant not to consider Tyler a predecessor (his score was one for six), he could hardly disclaim Washington, Madison, Quincy Adams, Jackson, Polk, Fillmore, Buchanan, Grant, Cleveland or Hoover, all of whom were formally denied at least one appointment by the Senate. The President continued: "The fact remains, under the Constitution it is the duty of the President to appoint and of the Senate to advise and consent."[16] But why it should be their duty to consent to his nomination, rather than his to take their advice, is left unsaid. It is equally strange to suggest, as Harris does, that the appointment of Carswell "was a gross violation of the Constitutional rule that the three branches of government must be separate and equal."[17]

While the Carswell confirmation was before the Senate, Charles Black published a note arguing that "there is just no reason at all for a Senator's not voting . . . on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office."[18] A heartening footnote is given by Harris' report that Senator Schweiker, after reading Black's article and being led to study the Constitutional Convention, reversed his premature endorsement of Carswell.

Another problem in choosing Justices, or writing about the choice, is that a judge's future often seems unpredictable from his past. Scigliano concludes "that about one justice in four whose performance could be evaluated did not conform to the expectations of his appointer. . . ."[19] Lawyers' culture celebrates many such instances, prosecutor to Earl Warren, Klansman to Hugo Black, and so on. On careful examination,

15. HARRIS, *supra* note 6, at 155.
16. *Id.* at 156.
17. *Id.* at 12.
18. Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 663 (1970).
19. R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 147 (1971).

few of these dramatic changes turn out to be both unpredictable and important. The most famous example is Theodore Roosevelt's appointment of Holmes, based on evaluation of Holmes' willingness to bust the trusts; his dissent in the *Nothern Securities* case[20] was a disappointment. But by and large Roosevelt must have been satisfied with Holmes.[21] Similarly, few who knew Senator Black seriously thought that his appointment would advance the racist cause; the Klan, which has occasionally worked to influence Supreme Court appointments,[22] was certainly not known to be working for Black. If the unpredictability of judicial behavior is a myth, its persistence is nonetheless easily explained; the reader of *Decision* will find it almost his only comfort as he is constantly reminded of the fortuities of judicial selection.

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20. Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

21. Roosevelt's letter of inquiry to Lodge shows more concern with Holmes' philosophy than with his stand on concrete issues. Roosevelt was, for example, troubled by Holmes' views of Marshall but cheered by his Phi Beta Kappa Address. 1 LODGE-ROOSEVELT CORRESPONDENCE 517-19 (1925). *But see* 6 T. ROOSEVELT, LETTERS 1393 (E. Morrison ed. 1952), an early negative assessment.

22. *See* DANELSKI, *supra* note 1, at 165-66.

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