

June 7, 2017

Josh:

I have pulled out my own papers on *Dames v. Moore* and also looked back at a pile of material I have collected from the Lewis Powell papers at Washington and Lee and other documentary sources. Because all of this unfolded 30 years ago this month, I simply do not recall what my impressions were, beyond what I wrote in the *Washington Star* at that time and is reflected in my clippings.

The bottom line from this perusal is that I do not have what I would regard as dependable proof about why Rehnquist went from apparent vehement opposition to the Iran hostage/assets deal and even to expedition of review to becoming the author of the opinion upholding that deal – albeit one that he considered to be quite narrow – and to turning out a very impressive opinion for the court (doing so, as I will later explain, in about two days, even while becoming somewhat ill.) I do have some ideas, as you requested, from the materials before me.

Powell's handwritten notes of the "special" June 11, 1981, Conference at which the Court both granted the cert petition before judgment of *Dames & Moore* (docket 80-2078) and agreed to the government's suggestion for expedition show that Rehnquist "Disagrees on every Q." – with the word "every" underlined twice, and the "Q" being a reference to the questions that CJ Burger had recited at the beginning of the discussion, to wit: "Would expedite, grant Cert, & set for argument Wed June 24. Allow Iran to intervene."

All of the other Justices except Potter Stewart voted with the Chief, the notes and an accompanying tally sheet show. The notes say of Stewart: "Deny cert. We are being stampeded. (No reason to expedite before judgment)"

On the bottom of the tally sheet, Powell noted that Brennan had said that the *Dames & Moore* petition was "a good test case" but Justice White expressed some doubt that this was the "best case."

After that, the hearing was held on June 24. My story on the front page of the *Star* noted that Rehnquist had been "the most critical member of the court," suggesting "sarcastically" that Rex Lee's argument for the deal "amounted to a claim that 'the president can violate the Bill of Rights on his own.' " My story added that White and Stewart "showed almost as much

skepticism as Rehnquist did.” (Incidentally, by the time of that hearing, Stewart had already announced, on June 18, that he would retire on July 3). My story also recounted a hypothetical question that Rehnquist asked the government of Iran’s lawyer about the president’s power to ban anyone in the U.S. for one year from criticizing the Ayatollah and whether, if someone did, the U.S. would be liable for damages to Iran.

The materials I have do not include the vote when the Court discussed the case after the hearing. But it is almost certainly true that, however Rehnquist may have voted on affirmance or reversal, he quickly wound up with the assignment from Burger to write the opinion.

We know that from a Friday June 26 memo to Rehnquist from Justice White commending him for a “very good” draft, which White said he had given “a quick reading.”

Also, on the following Monday, the 29th, Justice Powell wrote a very interesting note to Rehnquist, concluding with “We are all much indebted to you and I hope that your severe discomfort over the weekend was merely a natural reaction to the great pressure under which you have worked. The bracing air of New England should be restorative.” (Powell also confessed to Rehnquist in that note that, if the “honor of the United States had not been pledged,” Powell would have had “great difficulty” sustaining the deal.)

We have to assume, of course, that Burger did the assignment, because we presume he was in the majority and we know he was very jealous of his assigning function. Why might he have chosen Rehnquist? This was, of course, a really big case, and not only had Rehnquist voted against even granting review, and been critical at oral argument, he also was the second most junior Justice. Could it be that, at age 57, Rehnquist was deemed young enough to handle the onerous chore of turning out a big opinion fast? Why didn’t Burger take it for himself or assign it to a more senior Justice? Might it have been that, knowing how Rehnquist had felt about the case, he might be trusted to write the narrowest opinion possible to dispose of the case?

And, of course, if you go back and read the final Rehnquist opinion delivered on Thursday July 2, you will note that he wrote the following: “we stress that the expeditious treatment of the issues involved by all of the courts which have considered the President’s actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of

deciding the issue” – also invoking the *Ashwander* doctrine. And, perhaps naturally, he also made a reference to Justice Jackson about the duty to decide.

That is about as much as I can get out of what I have here.

Regards,

Lyle