

WHEN THE full story of the Nixon administration is written, the chapter on selection of Supreme Court justices is likely to be one of the most fascinating but one of the least glorious. And the action of the past few days, culminating in the nominations of Lewis Powell and William Rehnquist, is likely to be a vital part of the narrative.

Once again, Mr. Nixon sought to employ his Supreme Court nominations—which he says are “by far the most important” which a President makes—to turn back the tide of judicial activism of recent years and, in the process, to gain short-run regional and ideological political advantage. And once again, after being rebuffed in an attempt to put lesser candidates on the highest court in the land, he has been forced to settle for someone better.

As in the case of Justice Harry Blackmun, nominated and confirmed after the Senate rejection of Haynsworth and Carswell, many people have breathed a sigh of relief that the new nominees were “not so bad.” Powell and Rehnquist may or may not deserve this limp and somewhat wary reception from political Washington. The circumstance of their selection is not their fault, but the President, the nominees and the country are stuck with it.

MR. NIXON'S battle with the American Bar Association's fitness committee, which reportedly left him “very angry” at the ABA, was in effect a confirmation battle in miniature. It says something about the caliber of Mr. Nixon's “conservative” choices that two of them were deemed unqualified for the high court by a 12-member bar committee dominated by conservatives.

Certainly there is nothing radical or bitterly partisan about Lawrence E. Walsh, the quiet-spoken ABA committee chairman, deputy attorney general of the United States under President Eisenhower and since then a partner in the prestigious New York law firm of Davis, Polk & Wardwell. Nor about Sumner H. Babcock, a Boston at-

torney who is past president of the Massachusetts Correctional Association. Nor Richard E. Kyle of St. Paul, former chairman of the Minnesota Supreme Court Advisory Commission and a former Army colonel.

To get the full flavor of this group, one must mention John A. Sutro of San Francisco, a director of the Bank of California and former national vice president of the Navy League; Sherwood W. Wise of Jackson, Miss., general counsel for the Mississippi Power & Light Co.; James M. Manire of Memphis, former president of the Shelby County Bar Association; and Washington's Charles Horsky, a member of the firm of Covington & Burling and adviser on D.C. affairs to Presidents Kennedy and Johnson.

Mr. Nixon spoke somewhat acidly of this “jury of 12” during his appearance Friday morning before the National Federation of Republican Women, but in fact he owes these men a vote of thanks. For if such seemingly cautious and conservative lawyers found the professional standing of his early choices to be wanting, it is highly probable that the nominees and the President who named them would have faced a terrible ordeal in the political forum of the U.S. Senate.

In a meeting Wednesday morning, senior members of the White House staff are said to have guessed that Mr. Nixon could push through the nominations of Herschel Friday of Arkansas and Mildred Lillie of California even without ABA approval, which by then had become increasingly uncertain. Some of the White House aides, however, reportedly advised against such an attempt on grounds that the political damage to the President of another battle over judicial fitness would be massive—even if he “won.”

IN THE END, Mr. Nixon pulled back from the brink of a decision which could have led to a precipitous loss of respect for himself and for the highest court of the land. As usual, he seems to have decided alone, with the counsel

of Attorney General John Mitchell presented to him by telephone and with other counsel playing only a small role.

Because of the leaks from the ABA, Mr. Nixon was forced to take account of public opinion, real and potential, and to absorb the full weight of the professional opinion of the conservative bar. The President is said to have sent for the newspaper articles and editorials on Friday and Judge Lillie shortly before his final decision.

This was a strange and messy procedure, but it seems to have averted tragedy. The American system sometimes works in unexpected and unintended ways. But sometimes it works.



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