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Where Was Mitchell?



LARGELY OVERLOOKED in President Nixon's abrupt and wise retreat in the squalid Supreme Court battle of 1971 was the inexplicable failure of his Justice Department advisers to smell the approaching storm and lead the President to shelter.

For example, the President received private information raising serious questions about Little Rock attorney Herschel Friday's qualifications for the high court after the decision to appoint him. That information came not from Attorney General John N. Mitchell's sleuths at Justice but from the President's own official family in the White House.

Moreover, not until far too late in the administration's search for needles of mediocrity in the haystack of highly qualified jurists and attorneys did Mr. Nixon learn that Judge Mildred L. Lillie of the California Court of Appeals would be formally opposed by her local bar association of Los Angeles.

Conceivably the President was so emotionally fixed on the idea of naming unknown mediocrities to the high court, as though he were appointing building inspectors or members of a local police

court, that Mitchell and Deputy Attorney General Richard G. Kleindienst lacked their usual influence. But the contrary opinion—that they let him down—is widely accepted.

Thus, when the Judiciary Committee of the American Bar Association secretly found both Friday and Judge Lillie unqualified for the Supreme Court early last week (a verdict that leaked to the press on Oct. 20), Mr. Nixon instinctively reacted as he always does in the face of genuine crisis. He holed up alone with a thick sheaf of critical press stories, the familiar pad of yellow foolscap and his own thoughts in his hideaway in the Executive Office Building. Mitchell was not at his side.

The President did not leave his hideaway until 11 p.m. on Tuesday night. He was there most of the day on Wednesday, and there on Thursday he personally wrote his televised speech for Thursday evening.

It was during that solitary period that the President decided he could not deliver on his commitment to Friday or Judge Lillie. The reason was not so much the ABA's verdict of "not qualified" or the crescendo of in-

formed public opinion against his choices. It was his rising fear that one or both might be rejected by the Senate.

With the Senate having rebuked him twice by refusing to confirm Clement Haynsworth in 1969 and G. Harrold Carswell in 1970, a third and possibly a fourth rejection in 1971 carried too grave a political risk.

But the Justice Department had left Mr. Nixon with no ready alternatives. Of the six possible appointees dispatched to the ABA for consideration, only Friday and Judge Lillie were bona fide. The other four, including Democratic Sen. Robert C. Byrd of West Virginia, were mere smoke-screens.

Accordingly, once he decided to dump his two real choices, Mr. Nixon faced another crisis. He had publicly pledged to announce his selections by late last week, and as of mid-week he had no serious alternatives.

That led to the surprising—but highly praised—selection of Lewis F. Powell Jr., a former ABA president and much-respected Richmond, Va., attorney. Powell was the very first name considered after the late Justice

Hugo L. Black announced his resignation on Sept. 17. He was immediately ruled out by the Justice Department, however, on grounds of age—he is 64—and the President's preference for younger jurists.

Squeezed by the pressure of events, the President resurrected Powell in the space of 48 hours. He then turned to his own administration for 47-year old Assistant Attorney General William H. Rehnquist, a cerebral right-wing ideologue whose record of intellectual brilliance rebuts any charge of mediocrity. Rehnquist has already been criticized for recommending federal wiretapping without court orders, but most politicians believe he will win Senate confirmation without much trouble.

Thus Mr. Nixon at the last moment turned away from blatant mediocrity, to the vast relief of some of his own intimates. With the element of surprise he glories in, he recouped a situation fraught with political disaster. Left unexplained is why Mitchell and Kleindienst once again failed to do their homework and permitted the President to crawl so far out on a rotten limb.

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