

Crossing the Judicial Line

Evidence is accumulating, though it is fragmentary, that Chief Justice Warren E. Burger has skated close to the line between the branches of government. The line is hardly a distinct one and Burger would not be the first member of the Supreme Court to cross it, but the evidence, such as it is, serves to raise questions about what restraints on the judiciary are proper and practical.

The White House transcripts show Burger in consultation with Attorney General Richard G. Kleindienst last year when the search was on for the first special Watergate prosecutor. "Incidentally, the chief justice and I are very close friends," Kleindienst tells President Nixon in the edited

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transcript for April 15. He then represents the Chief Justice as favoring the special prosecutor idea and recommending a candidate. Kleindienst may have overstated the case, but there has been no denial that one or more contacts were made.

More evidence has come to the attention of this newspaper in the form of two letters from Burger to former Attorney General John N. Mitchell. The first was dated April 4, 1969, when Burger was still a judge on the United States Court of Appeals here. The second was dated Oct. 13, 1971, at the height of concern by the administration and the nation over who would be named to replace the Supreme Court's departed giants, Hugo L. Black and John Marshall Harlan.

The correspondence, by its tone and in its references to frequent conversations, confirms the impression long held in Washington that a confidential relationship developed early in the Nixon administration between Burger and Mitchell. The letters speak only of the qualifications of candidates for judicial posts, just as the known-Kleindienst communications centered on what might be called a matter of personnel. But these were some of the most sensitive positions in government, and Mitchell seems to have issued an open invitation in 1969 for Burger's recommendations for advancement in the lower courts as well as the highest.

History records some conspicuous examples of confidential relationships between the highest officials in the judicial and executive branches. President Taft heard from justices over their preferences for replacing a chief justice. Justice Felix Frankfurter

pressed without success for President Roosevelt to elevate Judge Learned Hand, and he counseled, in the name of national unity as opposed to his personal choice, for the nomination of Harlan Fiske Stone as wartime chief justice. Taft as chief justice freely volunteered judicial candidates and headed off others. Outside of personnel matters, the role of former Justice Abe Fortas as adviser to President Johnson is only the latest example of that breach of the barriers.

Since Fortas, the proprieties of judicial-executive contacts have been much debated. The rights and wrongs are seen differently depending on the nature of the contact, who initiated, and what kind of advice was given. The clearest wrong is executive involvement in Supreme Court decision-making, as occurred before the Dred Scott decision. Perhaps a little less dangerous is a President's use of a justice as a regular source of ideas for executive decision-making. But when an executive office is uninformed, as it so frequently finds itself, on how to man the judiciary, it is a hard thing to say a President or his Attorney General should never consult a justice. The Burger-Mitchell exchanges suggest both the pitfalls and the potential for such consultation.

The quality of the advice was mixed. Able men were mentioned approvingly. But G. Harrold Carswell, who in 1970 was rejected by the Senate for

the high court, was considered "well qualified for promotion" from the U.S. District Court in Tallahassee to the Fifth U.S. Circuit Court of Appeals—in Burger's 1969 view. Could this have been part of what led Mitchell to believe that Carswell was Supreme Court caliber a year later?

Compensating for this advice was Burger's approval of the greatly distinguished Judge Frank Johnson of Alabama, but offsetting that was the equal praise Burger gave to Herschel Friday, Mitchell's fellow bond lawyer from Little Rock, Ark. Burger told Mitchell that Friday possessed "superior professional qualifications" and would strengthen the court, which had lost its giants, Black and Harlan. Within a week of this advice, the American Bar Association's judiciary committee found Herschel Friday wanting and President Nixon turned to Powell (who also had Burger's approval) and Rehnquist.



Warren E. Burger

In April, 1969, Chief Justice Burger, then an appeals court judge, began sending names to Mitchell, saying it was in response to Mitchell's request "to give you my observations on district judges and other (sic) over the country who might warrant consideration for appointment or promotion on their professional qualities. I enclose three names for the present and will be able to add others from time to time."

Those favored were Carswell, U.S. District Judge Edward T. Gignoux of Portland, Me., and Herbert J. Miller Jr., Washington attorney and former head of Robert F. Kennedy's criminal division. "Carswell was the youngest U.S. Attorney appointed in the Eisenhower administration and one of the very able ones. He is now chief judge for the Northern District of Florida. He is well qualified for promotion," said Burger. Very soon thereafter he was promoted to the Fifth Circuit. Gignoux, often mentioned as Supreme Court material, was "one of the outstanding district judges in the system and highly qualified for promotion," Burger said. Miller "is able, articulate and has a realistic view of criminal justice," said Burger, whose own view of the subject had attracted Mitchell and Mr. Nixon.

Burger's opinion of Carswell may have been altered by the thorough inspection of his judicial record that helped to cause his Senate defeat. In October, 1971, Burger referred to "the completely unwarranted rejection of Judge Haynsworth and the subsequent rejection of Judge Carswell" as two of the "bruising episodes" that had left the high court "sorely damaged as an institution in this last decade."

Other traumas on Burger's list in-

cluded Justice Arthur Goldberg's leaving the court for the United Nations ambassadorship, "the distressing episode of Mr. Fortas' embarrassment, and the seemingly hurried effort to make him Chief Justice, followed by his resignation from the Court." These "wounds" were hurtful even after laying aside "the charge as to past appointments to this court of lawyers with a narrow background or limited or partisan point of view." (The tone of that observation does not have the ring of utmost candor but suggests instead that more candid judgments were voiced in their many private conversations.)

The "pending problem," as Burger referred to it, was how to replace Justices Black and Harlan, "two strong and able justices one of whom had become virtually a legend." The guiding consideration, said Burger, must be "strengthening the court" with "the two ablest lawyers available." Looking to the Southeast, he commended Powell, "who is 64 but who has had no judicial experience," Judge Johnson from Black's Alabama "who is just past 50 and has had fifteen years of solid judicial experience, and Friday, any of whom "would strengthen the court at a time when it desperately needs reinforcement." (As with Carswell in 1969, could Burger's advice have played a critical role in the preference for Friday?)

"In the Northeast," where Harlan had come from "you will recall that I rate the Second Circuit (New York, Connecticut and Vermont) potentials as including Judge Harold Tyler, Judge Walter Mansfield and probably Judge (William H.) Mulligan and Judge (Charles D.) Breitel (of New York's highest state court). Judges like (J. Edward) Lumbard and (Henry J.) Friendly, who are highly qualified, are 68 or older. In the First Circuit (Massachusetts, Maine, Rhode Island and New Hampshire) there is Chief Judge Bailey Aldrich, who is 64. Justice Paul Reardon (of the Massachusetts Supreme Judicial Court) and Judge Gignoux."

Burger pressed upon Mitchell his "strong conviction" that if one of the nominees were a practicing lawyer, "and thus not likely to be widely known outside his own area, it is virtually imperative for the court's needs that the other be a judge who is nationally recognized in the sense of Lumbard, Friendly, Justices Louis Burke (of California) and Paul Reardon or the others I have mentioned above." The intimation that Mitchell was leaning toward Friday is inescapable, since Powell, a former ABA president, was known outside Richmond, Va.

"I have set out my views with the

candor that is compelled by the crucial importance of the subject," Burger concluded, "and I leave it in your sound discretion whether you wish to hand it over to your client," the President. "I stand ready, as I indicated in our most recent conversation, to discuss the matter."

Burger apparently stood ready to counsel Kleindienst as well after Mitchell left government. But the extent to which justices stand ready in the future — and what they stand ready to talk about with the President or his men—may be governed increasingly by the realization that the contacts may be recorded, not just in the history books, but in tomorrow's newspaper.