

Nixon's odd view of the Court

It's possible to disagree with the points of view of President Nixon's two Supreme Court nominees, but harder to question the ability and character of Lewis Powell Jr. and William Rehnquist. In the relief everybody feels at their choice, it is still important to ask why the President was earlier ready and eager to settle for less.

In all the preceding weeks of leaks and rumors, it came clear that Nixon's real preferences were Herschel Friday, a Little Rock lawyer, and Mrs. Mildred Lillie, a Los Angeles judge. Only after a bar association committee questioned the undistinguished qualifications of both did Nixon switch to his better backup names.

What the President was really hoping to achieve is hard to explain in ways that do him credit. In foreign policy and in economics, he has shown himself capable of imaginative reversals of past policy, but not in that troubled social area where he and Attorney General John Mitchell persist in burrowing down old narrow paths. The President would like to undo some of the landmark decisions of the Supreme Court; he enforces them with the minimum of zeal and hopes to see them reversed by men he appoints to the bench. His record of appointments to the lower federal courts is on the whole good, and his choice of Chief Justice Burger is generally applauded. But he came to Justice Blackmun only after going through the

spectacle of the Haynsworth and Carswell defeats, and his recent list of Supreme Court possibilities suggested a search for minds so mediocre that they could be counted on to remain set in their prejudices. The President seemed to believe that one way to diminish the influence of the Court was to make it less worthy of respect.

After finally extricating himself from his first choices, Nixon delivered what was in the circumstances an audaciously pious assertion of his devotion to judicial excellence. He also got himself into some confusion between jurists who are politically conservative and those who are judicially conservative. The latter more or less believe that a justice should seek his answers in legislative intent, judicial precedent and constitutional wording, instead of trying to legislate the political beliefs and social changes he may himself favor. Fair enough: men of as diverse political views and as impressive minds as Oliver Wendell Holmes, Louis Brandeis and Felix Frankfurter have all lived by that creed.

But preferring such judicial restraint to those who would pursue a "personal political and social view" on the bench was not all that President Nixon had in mind. He believes that the Supreme Court has lately "gone too far" in assuring rights to those under arrest, thus "weakening the peace forces as against the criminal force

es in our society." As Harvard Law School Professor Alan Dershowitz says, "A judicial philosophy—if it is truly judicial rather than 'political' or 'social'—does not speak in terms of giving the peace forces 'tools' to 'protect the innocent from criminal elements.'" The complexity of this issue—at a time when the country is necessarily concerned both by the caliber and temperament of many police officers, and by the alarming rise in violent crime—is good reason for having men of some intellectual distinction on the bench.

Both Messrs. Powell and Rehnquist are known, in the meaningful shorthand of our times, as law-and-order men. Powell, at 64 a well-respected Richmond lawyer, should be a steady and sensible influence. Rehnquist is 47, refreshingly young for the High Court, a Goldwater conservative and Mitchell assistant with a brilliant legal mind; he can be expected to undergo some sharp questioning from Democratic senators about the rigidity of his past remarks on crime and civil liberties. He seems the more judicially activist of the two. But justices on the highest court have a way of surprising themselves and their presidential sponsors. All that can be known in advance is some sense of a man's character and intellect, and in both cases the President's confidence appears well-grounded. The President should feel encouraged to aim as high in the future.