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A few ironies in Nixon's appointments to Supreme Court

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WASHINGTON — Sam Ervin and other civil libertarians no doubt will want to question William H. Rehnquist extensively on his Bill of Rights views, but no serious threat to Senate approval of President Nixon's two Supreme Court nominees is likely. A few ironies of the situation are nevertheless worth pointing out.

It has been extensively remarked upon, for instance, that the administration ended its short-lived policy of seeking advance approval for Supreme Court nominees from the American Bar Association, just at a time when that policy had saved Nixon from two misconceived nominations. Not only was the result two better qualified nominees than those originally chosen; but when the ABA turned down Nixon's first choices, it probably also spared him and the nation another bruising and disillusioning confirmation battle in the Senate—a battle nobody needed.

The fact that Lewis Powell and Rehnquist were Nixon's second choices also sheds strange light on the rhetoric he used in naming them. Among other things, he said that Supreme Court nominations are the most important a President makes. He labelled Powell "a very Great American" and Rehnquist "one of the finest legal minds in this whole nation today," and predicted that both would earn the kind of respect accorded Justices Black and Harlan, whom they will replace.

That's fine, and may even prove true; everyone should hope so. But if so, on what grounds did Nixon pass over these outstanding men in the first place, and send to the ABA the names of two persons that body's reviewing group then labelled "not qualified"? That question is worth asking because it is precisely this kind of gap between presidential rhetoric and presidential action that has disrepute—where once it was so nearly undisputed.

For another thing, if Powell proceeds to easy confirmation as expected, where will that leave Nixon's impassioned declaration of 18 months ago that the Senate would not confirm anyone who "had the misfortune of being born in the South," and that the defeat of G. Harrold Carswell had been "regional discrimination"?

It will leave the earlier statement looking more like political demagoguery than it did at the time, which is not easy to do. It also mocks the administration's past contention that Carswell was the best Southern nominee then to be found; where was Powell? He is older now than he was in 1970, and anyway, Nixon himself told reporters that "ten of him is worth 30 years of most."

Moreover, in that angry statement accusing the Senate of discriminating against the South by rejecting Carswell, Nixon contended that the Supreme Court is best constituted when "each section of the country and every major segment of our people can look to the court and see there its legal philosophy articulately represented." The other night, the same President said that "with only nine seats to fill, obviously every group in the country cannot be represented on the court," and therefore his criteria were legal excellence and judicial philosophy.

But let this change be ascribed to growth in office, a process in which inconsistency can be a jewel. A final irony remains in the President's insistence that he had hunted for and found the kind of nominee who would "interpret the Constitution, and not . . . place himself above the Constitution or outside the Constitution . . . he should not twist or bend the Constitution . . . to perpetuate his personal, political and social views."

That sounds fine, but it is a view that ill comports with Nixon's following lecture on "judicial philosophy" (right out of his 1968 campaign speeches), contending that "some court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society."

This is not a constitutional but a "personal, political and social view" to which Nixon, like any American, is entitled. But the clear implication of his speech was that he had chosen two men who shared it ("It is with these criteria in mind that I have selected" them, he said). It remains to be seen, therefore, whether the President really has selected two nominees, however able, who will interpret the Constitution without bringing "personal, political and social" views to the task.

Rehnquist, in particular, as "the President's lawyer's lawyer," presumably has shared in Atty. Gen. John Mitchell's policy decisions, and has advocated many of them before Congress. When he interprets the Constitution on, say, wiretapping, it will be remarkable if he does not bring something of the Mitchell-Nixon attitude to the task; after all, he helped formulate it.