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Nixon and Material for Court

PRESIDENT Nixon's astonishing attitude toward the Supreme Court, which has now painted him into a political corner, was revealed Oct. 8 when he met at the White House with top advisers to discuss filling the two vacancies.

Blatantly mediocre prospects were suggested and, consequently, the possibility of disapproval by the American Bar Assn. (ABA) was raised. Mr. Nixon bristled and, startling his unbelieving aides, made clear in uncharacteristically colorful language just what the ABA could go do about it. In short, the President was not going to let questions of legal quality interfere with his political designs for the Supreme Court.

That led to two incontestably mediocre elections, a wave of public and professional repugnance and, finally, a White House decision to rethink the whole business. At the weekend, Mr. Nixon had dug himself into another hole.

At the heart of Mr. Nixon's court troubles is his determination to appoint law-and-order conservatives pleasing to the old segregationist South without regard to ability. That determination is shared, with monomaniacal inflexibility, by Mitchell and Deputy Attorney General Richard Kleindienst.

KLEINDIENST, in particular, is convinced of boundless political capital flowing from anti-liberal court selections. In charge of recommending judicial appointments, Kleindienst sought out hardliners without worrying about quality.

Two weeks ago, during a session of top administration officials, a fascinating possibility for the court was put forward: Elliott Richardson, Secretary of Health, Education and Welfare. A former attorney general of Massachusetts, the greatly respected Richardson would be an adornment on the court. Under no conditions, said Kleindienst. The reason: Richardson is too liberal on civil rights and, therefore, would displease the South.

Later, moderate administration officials proposed Edward Levi, president of the University of Chicago. A renowned legal scholar, Levi is a strict constructionist and scarcely a wild-eyed radical. Besides, he would end the absence of any Jews on the court, an absence begun under Mr. Nixon in 1969 for the first time in 53 years. But Levi, too, was vetoed. The reason: He did not fit the law-and-order, anti-civil rights formula.

The wholly political nature of the selection process

can be seen in the attitude toward a woman justice. Originally, Mr. Nixon had no intention of appointing a woman but, gradually, realized that would be bad politics, indeed.

THAT SET OFF a mad search for a law-and-order woman judge. Perhaps the best qualified prospect, Judge Shirley Hufstедler of the U.S. Court of Appeals in Los Angeles, was immediately ruled out as a liberal Democrat. Finally, Kleindienst hit pay dirt. He gleefully told associates he had found in California State Appeals Judge Mildred L. Lillie a very tough lady with no use for the Warren court's libertarianism.

The line was finally drawn at conservative Democratic Sen. Robert Byrd of West Virginia, who has never practiced law and is not a member of the bar. He was just too unqualified for Mitchell. The upshot last week was the selection of Mrs. Lillie and Herschel H. Friday of Little Rock, Ark., best known as attorney for anti-integration suits.

Four other names were sent to the ABA for approval, in case trouble developed over Friday or Mrs. Lillie. Until the last minute, the list also included U.S. District Judges Arlin Adams of Philadelphia (who is Jew-

ish) and the highly regarded Frank Johnson of Montgomery, Ala. Finally, however, they were eliminated for being too liberal. Their inclusion might generate a late campaign for them. Thus, the six names sent the ABA were uniform in both mediocrity and acceptability to the segregationist South.

MR. NIXON was ill-prepared for what happened when those names were published last Thursday. The press and the bar condemned the choices. Even high White House staffers were hearsick. Moderate Republicans wondered out loud whether Mr. Nixon's interest in excellence, meager in many other governmental appointments, had hit bottom. Prominent Jewish Republicans were furious that no Jew was on the list.

The furor forced Mr. Nixon to rethink his position. Although Judges Friday and Lillie definitely had been picked, the White House issued a smokescreen statement that 15 names were still under consideration. So, at this writing, the President must either stick to his undistinguished selections or ignominiously retreat. Once again, playing politics with the Supreme Court has proved the worst politics of all.