

Nixon Problem: Woman Justice?

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WASHINGTON, Sept. 23 — The retirement of Supreme Court Justice John M. Harlan gives President Nixon a rare opportunity to nominate two Justices at once and presents a real possibility that the time may have come for a woman Justice to sit on the Supreme Court. Presumably, the President will have uppermost in his mind to mold a "Nixon Court" that will impress his strict-constructionist philosophy upon the law for decades to come. These will be his third and fourth vacancies to fill, and if he wins a second term, he will probably appoint at least a five-member majority of the court.

Warren G. Harding appointed four justices in an 18-month period and left a conservative court that bedeviled the New Deal for years. Then attrition gave Franklin D. Roosevelt eight seats to fill, and he and his Democratic successors created a liberal tribunal that is just now giving way to the political thinking of the Nixon era.

Now the opportunity to nominate two jurists has presented Mr. Nixon with a chance to obtain political gain and psychic satisfaction from a wide range of options — the most obvious of which would be to name the first woman Justice at a time when the nation's most restless majority group is pressing for recognition.

A Basic Conflict

This opportunity has also confronted Mr. Nixon with a basic conflict: how to pick a woman who could be depended upon to go along with his plans for the Court.

The departure of Hugo L. Black leaves only three liberal holdovers from the Warren era — William O. Douglas, now 72 years old; Thurgood Marshall, who has suffered from a variety of ailments recently and William J. Brennan Jr.

Mr. Nixon is expected to replace Justice Black with another Southerner but one of a decidedly more conservative hue. He would join four other Justices who tend to line up on the conservative side — Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Byron R. White and Potter Stewart.

However, Justice White and Justice Stewart occasionally side with the liberals, so Mr. Nixon's conservative majority could be a shaky one unless Justice Harlan's replacement

He Faces Conflict in Filling Vacancies on High Court

proped to be a consistent member of the "Burger bloc."

This is where the selection of a woman Justice becomes delicate. For while Mr. Nixon likes to appoint Republicans who are strict constructionists, the leading women lawyers and judges tend to be Democrats who are flexible in their judicial views.

Mrs. Nixon told reporters yesterday that she had been "talking it up" with her husband to appoint a woman to the high bench. She said, "If we don't get one this time, they're certainly grooming them for next time."

Three Women Cited

She mentioned the three women that Mr. Nixon had appointed to lower courts—Cornelia G. Kennedy of the Federal District Court in Michigan and Sylvia Bacon and Normalie H. Johnson of the Superior Court of the District of Columbia. Only Mrs. Kennedy is considered a plausible choice, and if she were a male nominee, her credentials would be considered thin.

The obvious choice would have to be Shirley M. Hufstедler, the nation's highest ranking woman jurist, who sits on the United States Court of Appeals in San Francisco. She is so highly regarded that during the last year she delivered both the Holmes Lecture at Harvard and the Cardozo Lecture in New York — roughly the equivalent of playing in the World Series and the Super Bowl in the same year.

Other distinguished possible candidates are Dorothy Nelson, dean of the School of Law at the University of Southern California; Herma Hill Kay, professor of law at Berkeley, and Soia Mentschikoff, a law

professor at the University of

Chicago. None have demonstrated sufficient judicial inflexibility to be expected to stand hitched in the conservative camp after confirmation.

There are, of course, other considerations in replacing Justice Harlan. His retirement leaves no representative from New York, which traditionally has a seat. Mr. Nixon also ruffled Jewish feelings when he appointed Justice Blackmun, a Protestant, to fill the "Jewish seat" vacated by Abe Fortas. Finally, Mr. Nixon believes in filling high judicial offices with Republicans.

New York Mentioned

This has prompted speculation that the nomination could go to Rita Hauser, a prominent New York Republican woman lawyer of Jewish-Protestant parentage. Mr. Nixon appointed her to be a United Nations representative, but her age—37 years—seems to make her an unlikely replacement for the 72-year-old Justice Harlan.

Also, Mrs. Hauser once proposed that people of the same sex be allowed to marry—a proposal that appears to set her apart from the staid tradition of prior Nixon appointees.

A final possibility is Mary Gardner Jones, a New York Republican who serves on the Federal Trade Commission. However, she has gained a reputation as a moderate that might make Mr. Nixon shy away.

There are, of course, many other women lawyers, and Mr. Nixon, who has not let lack of fame prevent him from making Supreme Court nominations in the past, could come up with one that fits his conservative mold.

But he may conclude that the concept of a woman Supreme Court Justice is one, whose time has not yet come—until another of the Court's liberals steps down, and it would be safe to take a chance on appointing a woman.