Mr. Mitchell on the Qualifications of Court Nominees

Your editorial of Oct. 14 criticized the names of six persons reported to have been submitted to the American Bar Association Committee on Judicial Selection in connection with the two exisiting vacancies on the Supreme Court. The editorial suggests that potential nominees should have "made seminal contributions to an understanding of the law or have won eminence in their calling by distinguished pleadings or judgments or commentaries;" at another point, the complaint is made that none of the six names represents "an outstanding, a truly great, exemplar of the law." The editorial concludes with the observation that candidates for the court "need to offer something more than astonishment that [the President] could have thought of them at all."

The ablest of practicing lawyers seldom win any sort of nationwide eminence in their calling, either by "distinguished pleadings" or by use of other more contemporary skills of their profession. The Canons of Ethics have traditionally precluded lawyers from trumpeting their own abilities, and the ablest practitioner is seldom known even to his brethren at the bar beyond the geographical region in which he practices. With rare exceptions those practicing lawyers who acquire national reputation do so by use of the press conference and news release. Short of this type of notoriety, which few would consider a qualification for appointment to the Supreme Court, the best lawyers are unknown nationally.

The same is true, though perhaps to a lesser extent, of lower court judges. Virtually none of them develops a national reputation with the public at large, or even with the members of the bar and bench outside of his own part of the country. There have been exceptions—such as Benjamin Cardozo when he was Chief Judge of the New York Court of Appeals, or Learned Hand when he was a judge of the Second Circuit. But the very rarity of such exceptions proves the general rule.

It would be instructive to apply The Post's suggested qualification test for Supreme Court nominees to these appointments made by recent Presidents during the last generation excepting, of course, reference to justices presently sitting: Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James F. Byrnes, Robert H. Jackson, Wiley B. Rutledge, Harold H. Burton, Fred M. Vinson, Sherman Minton, Tom C. Clark, Earl Warren, John M. Harlan, Charles E. Whittaker, Arthur Goldberg, and Abe Fortas. How many of these, at the time of their appointment, had made "seminal contributions to an understanding of the law" or were "truly great exemplars of the law"? Very few, unless one were to subscribe to the view that the holding of high public office by itself confers these esoteric qualities *ex officio*. How many rendered able and worthy service in their tenure on the Court? A good many. As one of them—Felix Frankfurter—said after nearly 20 years as an associate justice:

> "Yet it is still today as it was when [John] Randolph wrote in 1790 that "in a great measure . . . the Supreme judges will form themselves after their nomination.' "

The Post in this instance seems to be insisting on qualifications for a nominee which find support neither in the practice of Presidents nor in the experience of the court itself. Your editorial of Oct. 14, 1971, seems to me to suffer from the same misplaced sense of omniscience as did your comment of Oct. 3, 1937, following Justice Black's revelation of his membership in the Klan:

> "By this confession, extracted from Mr. Black only when he was unable to continue his attitude of concealment, the reputation of the American judiciary is permanently smirched."

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(See editorial, "The Court Nominees: Reflections on The Process".)