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Editorial

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EDITORIAL RESPONSE

The Next Supreme Court Appointment

In our March issue we published an editorial by the Journal's Editor-in-Chief, in which he advocated that the next appointee to the Supreme Court of the United States—and, indeed, any future appointee—should be an “able, experienced federal or state court judge who, by his judicial decisions and opinions, has evidenced a viewpoint of moderation with respect to the issue of individual civil liberties and public safety”. Following is a response to this editorial which we received from *Professor H. H. A. Cooper*, of the Universidad Nacional Mayor de San Marcos de Lima, whose professorship is that of “a British technical aid post”:

I read with considerable attention your challenging March editorial. Might an English lawyer, whose own studies have been principally in this field, be permitted an observation or two?

I question the wisdom of filling the next Supreme Court vacancy primarily by reference to the existing crime problem. Clearly in making the appointment the improvement of law enforcement and the diminution of the causes of crime should not be absent from the President's mind. I do not feel, however, that this fact ought to weigh so heavily in his judgment. Crime is far from the exclusive consideration of the Supreme Court Justice, though naturally it attracts more attention than the more pedestrian of his activities. Ought the President to appoint, then, a judge whose experience and whose duties in the future are so definitely oriented? Would this not have a dangerously narrowing effect, not merely as a precedent for future appointments, but also by reducing the appointee to a second-class status

by comparison with those of this colleagues designated by reference to more ample criteria?

Secondly, and with considerable deference, I question whether it is constitutionally correct for the President to appoint by reference to some supposed notion of pre-existent judicial philosophy. The appointee ought to be chosen, not because he is assumed to represent any particular standpoint in relation to matters likely to come before him in a judicial capacity but rather because he will make a good judge. This implies, under a common law system, that he will try as faithfully as possible to reflect in his decisions and opinions the social conscience of the nation as he interprets it, an objective rather than subjective notion. “Hard Line” or “Liberal” labels may well serve to distinguish the Justice as a component part of the Court—for he after all remains an individual and is distinguishable from his colleagues—but it is unrealistic so to label him before he has demonstrated his position, which is merely an index of how he conceives of and goes about his interpretative function, and to appoint him with a specific role in mind would, to my view, be improper and tantamount to packing the Bench, albeit with worthy motives.

I also venture to question the value of restricting selection to the ranks of the lower Judiciary. Granted this affords a rational criterion as to aptitude as a judge, but this should not be overstressed in the particular context as a close study of the English system of selection will show. Few appointments to the House of Lords are made direct from the Bar,

but a notable exception in recent years was Lord Radcliffe, one of the greatest of appeal judges. Often an excellent trial judge is disappointing or ill at ease in the rarefied atmosphere of the highest of tribunals, as witness Lord Devlin. Academics are not appointed in England, though there are those who argue we missed much by not having appointed Sir Frederick Pollock to the Bench, but would you really want to deny yourself another Frankfurter? The stature of the Court is surely best enhanced by appointing to it men of calibre

who are likely, (for one can realistically hope for no more) to be good judges, moderates in the sense of holding no particular philosophy, but rather by reason of their possession of those qualities of balance and good sense that guarantee the declaration of sound law.

I am not unmindful of the problems to which you postulate this as an answer, but I do not feel the erection of this novel philosophy of judicial appointments is a solution and in the long run is, I feel sure, likely to cause more difficulties than it resolves.