

REVIEW & OUTLOOK

The Breyer Exception

President Clinton's appointment of Judge Stephen Breyer to the Supreme Court reflects the political philosophy that some of us, including centrist Democrats, had hoped we'd see as a matter of course from the Clinton presidency. The administration's erratic course has taken it far from the promises of the candidacy and the President's inaugural speech on personal and public responsibility. But this nomination has been received so favorably by so many that it makes us wonder what might have been.

In choosing Judge Breyer, Mr. Clinton found a mainstream Democrat supported by a broad coalition in both political parties. He seems to care about the law as it is written instead of concocting the airy theories percolating in many of America's law schools. He has brainpower and is held in high regard by other legal scholars, including many conservatives. He is, as routinely noted in news reporting in our era, even a white male. The more we think about it, the more we're amazed Mr. Clinton picked him.



Stephen Breyer

So much else of the rest of this administration has been a walk on the wild side. From the gender litmus test for attorney general, to Lani Guinier, to Arkansas cronies in the White House, to a policy-a-month on Haiti, to tax hikes and German-style health care, the Clinton presidency has rarely shown the competent New Democrat side of the campaign.

Even in choosing Judge Breyer, Mr. Clinton gave the impression of twisting himself to accommodate liberal interests. Interior Secretary Bruce Babbitt was his first choice, according to leaks by his aides, on the odd notion that what the Supreme Court really needs is a "politician"-activist. But a politician would have meant a political fight that Mr. Clinton doesn't need in the summer of health care and Paula Jones. Then he turned to an Arkansas friend and liberal judge, Richard Arnold, who was ruled out from illness, the president said. So he settled, almost grudgingly, for his third choice, the accomplished judge.

Yet look at the positive reaction to this third choice. Orrin Hatch, the Republican who deserves credit for warning Mr. Clinton about a likely fight over Mr. Babbitt, calls Mr. Breyer a "fine addition to the court."

Bob Dole and George Mitchell predict he'll be confirmed quickly. The legal community has sounded nothing but praise. Meanwhile, whatever liberal grouching exists won't get very far when Ted Kennedy is Mr. Breyer's godfather among Senate Democrats.

The rare criticisms heard so far demonstrate how broad Mr. Breyer's support is. On the left, Ralph Nader is alarmed, while Howard Metzenbaum complains that because he hasn't always sided with plaintiffs, Mr. Breyer must be the candidate of "big business." This says more about the connection between lawsuits and American liberalism than it does about Judge Breyer. On the right, Pat Buchanan's political group has also shouted opposition.

We suspect Mr. Breyer is no Robert Bork, but his writings suggest he is at least someone Mr. Bork could have a discussion with. In particular, Judge Breyer has shown an understanding of economic markets that is too rare in legal circles. In antitrust, he's been known to include a supply-demand curve in his opinions. As a Senate staffer, he was one of the leaders in fighting for airline deregulation, a historic success for average American consumers (though not without trauma for companies and unions that regulation had protected).

Judge Breyer's 1992 Oliver Wendell Holmes Lecture is an especially thoughtful, moderate critique of modern American economic regulation. It describes the "vicious circle" of regulation that often begins with public and media overreaction to some risk (such as toxic waste), and Congress then galloping to regulate that risk out of existence, which only makes public anxiety worse. "The fact that it is frightening people is no excuse for those in charge of public policy to act irresponsibly," he told the Alexis de Tocqueville Institution in an interview only last month. Since Messrs. Nader and Metzenbaum have made a habit of scaring people about just about everything, with plaintiffs' lawyers cashing in on the results, it's no wonder they don't like Stephen Breyer.

The tragedy of the Clinton presidency is that there are too few Stephen Breyer-types on board. And those few who are around—Lloyd Bentsen comes to mind—have little influence over such central projects as the health care redesign of one-seventh of the U.S. economy. Even at this stage, we'll hope that a success with Judge Breyer will prompt Mr. Clinton to make his type the rule and not the exception.