

ABSTRACT

“New Democrat” Justices? President Clinton’s Appointments to the U.S. Supreme Court

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Notwithstanding his voiced disapproval of the alleged ideological bent of the selection process applied by the two preceding Republican administrations, President Bill Clinton declared that he would employ a litmus test for any forthcoming Supreme Court nominees, including a belief in constitutional rights to privacy and abortion. He added that he would search for someone “with a big heart and political experience.” That, of course, meant a liberal. Yet what kind of liberal? A nominee in the William Brennan mode or one closer to the more centrist-liberal commitment of Judge Richard Arnold, the president’s longtime friend? Clinton’s first opportunity and test came with the retirement of Justice White in 1993: The president offered the vacancy to Mario Cuomo, New York’s liberal governor, and a host of others of similar persuasion. Ultimately, Clinton chose U.S. Court of Appeals Judge Ruth Bader Ginsburg, whose subsequent jurisprudential record on the Supreme Court falls squarely on that of Justices Brennan, Douglas, Thurgood Marshall, and Chief Justice Warren, as well as that of her current colleagues, Stevens and Souter. She has not disappointed Clinton’s expectations.

Justice Blackmun’s retirement, a bit more than a year after White’s, provided Clinton with his second, and final, opportunity to fill a Court vacancy. After offering it to ex-federal judge and Senate majority leader George Mitchell, who declined, the president turned to U.S. Appeals Court Judge Stephen Breyer, whom he had previously considered but rejected. Breyer, who had served on the U.S. Sentencing Commission and as chief counsel of the Senate Judiciary Committee, was unquestionably a liberal, but one of evidently more pragmatic bent jurisprudentially than his colleague Ginsburg. Thus, while he can usually be counted upon to be a predictable member of the liberal quartet of the Court on such questions as civil rights and civil liberties, he has not infrequently left them in the realm of economic proprietary issues and even at times on separation of church and state and related free exercise of religion questions. In political contemplation his voting record could hence be viewed as hewing to the kind of centrist Democratic philosophy that characterized the Clinton presidency rather than the avowedly left-liberal one of President Jimmy Carter.