MEMORANDUM

Date: May 20, 1994
To: Senator Dole
From: Alec Vachon
Re: Clinton Violated Spirit of ADA and Law under Rehabilitation Act in Rejecting Judge Richard Arnold as his Supreme Court Nominee

* According to press reports (see below and attached), Clinton rejected Judge Richard Arnold because of a history of cancer. Press reports seem conflicting on the medical details, but his condition does not appear life-threatening and his health is good. Clinton was apparently concerned about the long term (10-15 years).

* By making a "pre-employment inquiry" about Arnold's health, Clinton violated the spirit of ADA (ADA does not apply to Federal Government) and may have broken the law under the Rehabilitation Act of 1973 (which does apply to the Federal Government) -- which now uses the ADA as its standard for discrimination. The key section of ADA reads:

"No employer shall discriminate against any qualified individual with a disability because of such individual's disability in regard to job application procedures, the hiring and discharge of employees . . . and other terms, conditions, and privileges of employment."

EEOC regs prohibit pre-employment medical questions:

"The ADA prohibits medical inquiries or . . . examinations before making a conditional job offer to an applicant. This prohibition is necessary because the results . . . frequently are used to exclude people with disabilities from jobs they are able to perform."

* Press comment is negative, with one exception (attached):

--Orlando Sentinel (editorial, Tuesday, May 17), calls Clinton's action "unethical."

--USA Today (news article, Thursday, May 19), describes ire of other cancer survivors.

--Frank Rich, New York Times op-ed columnist (Thursday, May 19), thought Arnold would bring an important perspective to the Supreme Court.

--Wall Street Journal, in an editorial today (Friday, May 20), took a different approach -- calling Clinton's decision "reasonable and rational," and then attacked ADA.

THE ORLANDO SENTINEL

<May> 17, 1994 Tuesday, 3 STAR

SECTION: EDITORIAL; Pg. A7

HEADLINE: THE CANDIDATE WHO CAME IN FROM THE DARK

BYLINE: By Thomas V. DiBacco, Special To The Sentinel

BODY:

President <Clinton's> nomination of federal appeals <Judge> Stephen Breyer for his second Supreme Court appointment illustrates what might be dubbed the major deficiency of his administration, namely, poor management.

The president really didn't want Breyer, as illustrated by the unhappy demeanor that he showed late Friday during the solitary announcement in the White House Rose Garden. His first choice was Bruce Babbitt, the interior secretary; next was old friend <Judge Richard Arnold> of Arkansas. But there were only three names on the president's short list, with Breyer a leftover from last year's selection process in which Ruth Bader Ginsburg won the nod.

Thus, when opposition to Babbitt and <Arnold> emerged, <Clinton> had no choice but to choose Breyer. Conservatives were delighted because, as consumer activist Ralph Nader was quick to criticize after the announcement, <Judge> Breyer has been more supportive of business interests than consumers during the years. Liberals support Breyer because Sen. Edward Kennedy has been his major backer - and there's enough evidence in Breyer's judicial record to support some of their causes, too, such as abortion rights.

Had <Clinton> permitted his staff to come up with a longer list of strong candidates and operated under the tenet that he had ample time to fill the slot (October is the actual month when Justice Harry Blackmun's retirement is effective), he would have been able to exercise real choice. As it was, <Clinton> was testy in answer to a reporter's question that suggested poor management of the process:

"When we have these appointments that only I make," snapped the president, ". . . .with all respect to my aides - I think I know as much or more about it as they do."

Maybe, but the president of the United States must act presidential, and candidates should be treated with due courtesy. Sadly, the events of last week were scarcely elevating: We were told on Monday, May 9, that an announcement was forthcoming. By Tuesday, word leaked out that Babbitt was the man, leading to a rash of criticism from Western senators who took offense at the Interior secretary's strong environmental stance.

According to The New York Times, the president also personally called doctors regarding the health of <Judge Arnold,> who for years has been battling chronic lymphocytic leukemia; <Clinton's> strategy must be not only the first of its kind but may be unethical, given the usual confidentiality of medical records. Also on Tuesday, the president and Sen. Kennedy conferred during a joint appearance at a meeting of the American Federation of Teachers.

Then late Wednesday night, in a meeting that ran into the wee hours of Thursday, the president brought Babbitt to the White House to soften him up for the bad news and possibly boost his ego by suggesting that he was really needed at the Interior Department. After Thursday morning, when the press was told an announcement would come by day's end, representatives of women's groups made

known their opposition to <Judge Arnold.> So no announcement came on Thursday. The president's decision was made for him: Breyer was the only one left.

Is this any way to make a decision regarding a nominee for the nation's highest court?

To be sure, Breyer is distinguished as a judicial scholar and <judge.> I recall having reviewed his book Regulation and Its Reform for Harvard's Business History Review in 1982, and I couldn't say enough good things about his moderate stance and ability to write and argue effectively. And there is little doubt that Breyer is his own person when it comes to interpreting the law. About the only wart in his background is his failure to have fully paid Social Security taxes on a part-time household worker, but news reports suggest that the Internal Revenue Service ruled that Breyer acted within the law. Certainly, this issue will get a full airing before the Senate Judiciary Committee.

But Americans for the foreseeable future may identify <Judge> Breyer - if, as appears likely, he is confirmed - as the dark-horse candidate to become a Supreme Court justice who won the race because the White House didn't have its act together. Unfortunately, in terms of the 42nd president's track record thus far, it's not the only memory of bad management at 1600 Pennsylvania Ave.

GRAPHIC: DRAWING: Stephen Breyer DOROTHY AHLE
LANGUAGE: ENGLISH
LOAD-DATE-MDC: May 18, 1994

USA TODAY
<May> 19, 1994, Thursday, FINAL EDITION

SECTION: NEWS; Pg. 5A

HEADLINE: From cancer survivors, a cry of discrimination/'Disease-ism' joins ranks alongside racism, sexism

BYLINE: Tony Mauro

BODY:

When President <Clinton> said last week he would not appoint his friend <Richard Arnold> to the Supreme Court because <Arnold> had cancer, few questions were raised.

But for many of the 8 million Americans who have survived cancer, it was a chilling reminder that from the White House on down, cancer still bears a stigma that can create a high barrier to employment and other opportunities.

Some legal experts say that in a different setting, <Clinton's> basis for not appointing <Arnold> would have been downright illegal under the Americans with Disabilities Act.

"If <Richard Arnold> were applying to be general counsel of IBM, they could not consider his cancer history," says Seton Hall law professor Barbara Hoffman. "Fear of future recurrence is not acceptable."

The act does not apply to judicial appointments, but the rejection still stung.

"The choice of Steve Breyer was excellent, but it was tainted by rejecting someone because of cancer," says Paul Tsongas, former presidential candidate who had a cancer similar to <Arnold's.> "If he had been rejected because of race or color, there would have been outrage, but this kind of discrimination is accepted."

<Arnold,> a federal appeals <judge> in Arkansas, was first diagnosed with a lymph system cancer called non-Hodgkin's lymphoma 19 years ago. He was treated recently with radiation and precautionary chemotherapy in connection with a lymphoma discovered last year in his mouth.

"We had to have the progress of his health ultimately resolved," <Clinton> said Friday in explaining why he did not pick <Arnold,> choosing Boston <judge> Breyer instead.

Grace Parsons Monaco of the Candlelighters Childhood Cancer Foundation says:

"My phone started ringing Saturday morning. I heard a lot of raspberries for the president."

Some of the calls were from parents of cancer survivors who have been fighting with increasing success against discrimination that shuts out opportunities for their children.

"There had been so much optimism, we've made so much progress, and then this comes out," Monaco says. "There's racism and sexism and there's disease-ism too."

White House officials say <Clinton> is mindful of cancer discrimination issues.

But the rarity of Supreme Court openings, paired with <Clinton's> desire to replace liberal Harry Blackmun with a justice who could serve well past his own administration, made it necessary to take <Arnold's> life expectancy into account, the White House says.

That consideration of future health "is exactly what the ADA was meant to prevent," says Dan Fiduccia, an advocate for cancer survivors in Cupertino, Calif. "<Clinton> basically said it's OK for the president to do this, so it's OK for others to do it."

Lawyers say that under the ADA, employers may not even ask applicants initially if they have had cancer, AIDS or other illnesses. Once a person is found qualified, illnesses can be considered only if the employer can show that the applicant's immediate ability to do the job would be affected.

No one suggests that concern would apply to <Arnold,> 58.

<Arnold> declines to comment, but friends say he has never missed a day of work because of cancer since he was diagnosed. <Arnold> has said that people with his kind of cancer will have it when they die - but they'll die of other causes.

Last year <Arnold> received low-level radiation treatment after a dentist detected signs of lymphoma in his gums. That was followed up by mild chemotherapy in pill form this year. The treatment was evidently successful, but last week White House officials reportedly asked independent doctors to review <Arnold's> medical records and provide some assurance that he could serve on the high court for 15 years.

As late as last Thursday night, <Arnold> was said to be <Clinton's> favorite for the lifetime position. But when medical assessments arrived Friday without any 15-year assurances, <Clinton> apparently called <Arnold> and told him he would not be picked.

White House officials say that if <Arnold> continues in good health for the next year, he would top the list for any future high court vacancy.

But cancer survivor advocates say <Arnold> could have been picked this time.

"No doctor would ever guarantee anybody's health for 15 years, or the next day," says Monaco. "Second tumors can be cured. Any person with a 20-year history of lymphoma cannot be killed easily."

4 justices have cancer history

Supreme Court justices with cancer histories:

Harry Blackmun, 85: Prostate cancer, diagnosed in 1977. Has been treated for at least one recurrence, in 1986. He's retiring this summer.

Sandra Day O'Connor, 64: Breast cancer, diagnosed in 1988.

John Paul Stevens, 74: Prostate cancer, diagnosed in 1992.

William Brennan Jr., 88: Vocal cord cancer, diagnosed 1977. Retired 1990.

Messages differ on the illness issue President <Clinton> on <Richard> <Arnold:> "I have the greatest respect for his intellect, for his role as a jurist, and for his extraordinary character. . . . But, as has been widely reported in the press, <Judge Arnold> has cancer and is now undergoing a course of treatment. I think we had to have the progress of his health ultimately resolved."

Americans with Disabilities Act

"No employer shall discriminate against any qualified individual with a disability because of such individual's disability in regard to job application procedures, the hiring and discharge of employees . . . and other terms, conditions, and privileges of employment."

Equal Employment Opportunity Commission

"The ADA prohibits medical inquiries or . . . examinations before making a conditional job offer to an applicant. This prohibition is necessary because the results . . . frequently are used to exclude people with disabilities from jobs they are able to perform."

chairman of the Korea Society.

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ethanol-based additive) in reformulated gasoline (RFG).

Particularly in the face of growing opposition from a diverse chorus of voices.

So far, more than 50 U.S. senators and about 120 members of Congress have written to the EPA in an attempt to dissuade that generally responsible agency from passing a rule that would not benefit the environment but, at the same time, would increase an already generous subsidy enjoyed by the ethanol industry.

And the lawmakers are not alone in their opposition.

In commenting on the proposal, the California Energy Commission left no doubt about its sentiments. In a letter to the EPA, the Commission said it "opposes EPA's proposed Regulation of Fuels and Fuel Additives: Renewable Oxygenate Requirement for Reformulated Gasoline."

"This proposal," the Commission wrote, "is a departure from the 'negotiated regulation' agreement, moves the EPA away from their position of 'oxygenate neutrality' and interferes with the free market for oxygenates by further assisting an already heavily subsidized ethanol industry."

For the record, the ethanol industry presently enjoys an annual tax break of $500 million for the ethanol used in gasohol. The proposed mandate would add an estimated $340 million to

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FRANK RICH

A Justice Denied

Judge Arnold's useful perspective.

Death is the last taboo in America, a word to be avoided the moment it hits home. But in the public arena, death is inescapable. Arguments about abortion rights, the assisted suicides of Jack Kevorkian and capital punishment are all arguments about when life begins and ends and who, if anyone, should call the shots. Even the health-care debate is in part a referendum on the myriad routes that can be taken to death and the cost of reaching that final destination.

This is why all the Monday-morning quarterbacking about President Clinton's choice of a new Supreme Court justice may miss the point. The lost runner-up on Mr. Clinton's short list of three was not the politically controversial Bruce Babbitt but the medically controversial Richard S. Arnold, a highly regarded chief judge on the Federal Court of Appeals who has been under treatment for lymphoma since 1978.

Judge Arnold, who is 58, survived as a candidate until nearly the last moment. But the President, who originally found no conflict between the judge's illness and his capacity for work, kept polling more doctors for second opinions. Finally, as a White House aide told The New York Times, "it became more and more difficult to project with any sense of confidence that Judge Arnold would be able to serve 15 or 20 years on the bench."

The political reasons that a President wants Supreme Court appointees with longevity are obvious. But there may be higher reasons for choosing a man or woman who has been forced to confront mortality by coping daily for 16 years with a serious illness. Were Judge Arnold to live only 14 more years — taking him to 72, the average life expectancy of white American men — or even considerably less, his facing down of his own death might make those limited years of service an extraordinary asset to American jurisprudence, not a liability.

His experiences would have an immense practical value — and no doubt a humanizing effect — in deliberations where the very definition of life and death can be up for grabs. More important than his firsthand knowledge of clinical issues of illness, medicine and dying, however, would be his depth of perspective on life before the grave. A man who has been forced into sustained contemplation of his own end is likely to have a firmer fix on what really matters than many of us do.

When the critic Anatole Broyard wrestled with prostate cancer, he wrote of feeling "as concentrated as a diamond or a microchip" — and shared his sharpened lucidity with grateful readers. The novelist Reynolds Price, who has been paralyzed with spinal cancer since 1984, offers similar testimony in his new memoir, "A Whole New Life." Weighing his 10 years of catastrophic illness against the 50 healthy years that came before, he says the last decade has "brought more in and sent more out — more love and care, more knowledge and patience, more work in less time." He's written the same number of books (13) in those 10 years as he did in the preceding 50.

I have no special knowledge of Judge Arnold's condition; given that he functions in a high-powered judicial role now and did not withdraw his name from consideration for the Supreme Court, he is presumably able to serve. That his chances were done in by his diagnosis and its continuing treatment puts him in a similar position to millions of Americans who are in one way or another shunted aside when serious illness strikes.

"Nowadays the style is to hide death from view," explains Sherwin B. Nuland in his best seller, "How We Die." Dr. Nuland points out that the number of American deaths taking place in solitary hospital confinement has risen from 50 percent to 80 percent since 1949. Not because modern hospitals work miracles but because we want to sequester the dying where they can't disturb us.

Yet the sick often have more to say than the healthy do. Americans, who deny their own deaths but are all too eager to regulate the rights of others to live or die, desperately need the counsel of people like Judge Arnold. Dying, after all, may be the sole aspect of life that everyone in the country still has in common. On a high court where so many jurists represent specific constituencies, a justice on intimate terms with death promises untold benefits for us all. □

New York Times, Thursday, May 19, 1994, p. A25.

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It says Mr. Carville and company best to verify that they are.

Bill Clinton and the ADA

A senior manager had a job to fill last week: Supreme Court Justice. At one point the senior manager wanted a qualified candidate, Judge Richard Arnold of Arkansas. But first he personally talked with two of the doctors who had treated Judge Arnold for low-level lymphoma. The senior manager decided against naming the job candidate, afraid he might not be able to work 15 to 20 years. Someone else got the job.

President Clinton's decision was reasonable and rational. And managers all over America know what he undoubtedly doesn't: If a private employer had done the same thing, it clearly would have been illegal under the Americans with Disabilities Act.

Milton Bordwin, editor of a newsletter on the legal risks facing business, **told us the president "would have been hauled into court and forced to pay damages" if he were a private-sector employer.** In fact, the first big settlement under the ADA involved a security guard who sued claiming he had been let go because he was a cancer patient. Cancer victim groups are already attacking Mr. Clinton.

Under the Americans with Disabilities Act it is "unlawful" to "make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability." An exception is made if a disability would directly inhibit someone's ability to do a job. That wouldn't have applied to Judge Arnold.

White House officials say they had to take Judge Arnold's life expectancy into account because the president wanted someone who could serve past his own administration. Sounds reasonable to us. But that wouldn't have passed muster with the ADA. "Longevity may be desirable, but isn't part of a judge's job description," says Russell Roberts, a business professor at Washington University in St. Louis. "Many Supreme Court justices have served only a few years."

Mr. Bordwin says the ADA prevents employers from even asking applicants if they have ever had cancer, AIDS or other afflictions. "We are going to spend millions for hundreds of dollars worth of problem solving."

Indeed, this month Lawyers Weekly magazine warned that the ADA not only covers disabled employees, but also those who are merely *perceived* to be disabled. Lawyers Weekly spelled it out with recent cases:

A salesman suffering from "attention deficit disorder" was fired because he couldn't follow verbal directions. His problem isn't considered a disability, but he claimed his employer *acted* as if it were one. He won a settlement.

A federal appeals court recently upheld a $100,000 award to an obese Rhode Island woman who wasn't hired as an attendant in a mental-care home. The employer claimed her weight would prevent her from evacuating patients in an emergency. The court ruled that though the woman wasn't disabled, the employer had perceived her to be so, and thus had to pay damages.

President Clinton would have blown his famous gasket if Lloyd Cutler had told him that his handling of Judge Arnold and his conversations with the doctors were illegal and actionable. Welcome to reality. And the next time some businessman is worrying to him about the costs of complying with the administration's proposed health care plan, he might keep in mind that these people already have the extremely costly disabilities-act sword hanging over their heads. Mr. Clinton was lucky that Judge Arnold went away quietly. In the real world, the disappointed send in their lawyers for some money.

Asides

The Abrams Case

A federal appeals court is now considering whether to disbar for one year former Reagan State Department official Elliott Abrams, who under assault by Lawrence Walsh's prosecutors, pleaded guilty to misleading Congress. The suspension move is the work of the D.C. bar. The political hostility is predictable, but the piling-on career wrecker by Beltway lawyers is really beyond the pale.

kaput. Mr. Dole rarely gets ahead of his members.

The GOP backbone only got stiffer when Nebraska Democrat Bob Kerrey joined them. Along with Oklahoma's David Boren, Mr. Kerrey has endorsed the Chafee bill. But he told me he will also oppose any mandate, employer or individual, which means he wants to move Chafee even further toward sensible ground.

Is Mr. Kerrey carrying water for his best friend in the Senate, Pat Moynihan? "I told Pat my belief is that the Chafee bill is the best bill, substantively and politically," he says. "I love the first lady and love Bill Clinton, but neither one of them has votes down here." Without Mr. Kerrey, adds a source close to Mr. Moynihan, getting to 50 votes would be hard, much less 60.

So naturally, liberals aren't heeding Mr. Moynihan; they're griping about him, at least in private. Ardent Clintonian Sen. Jay Rockefeller (W.Va.) this week cited nearly all extant Democrats as "profiles in courage" on health care—except Mr. Moynihan, his own committee chairman. Harold Ickes, the White House health care political genius, is so smart he's never even spoken to his fellow New Yorker.

Sen. Moynihan

All of this misjudges Mr. Moynihan, who is a president's man. If given his orders, he will probably fight for a partisan, 11-9, vote in his committee, as he did on last year's tax bill. But it won't be his fault if a partisan bill fails on the Senate floor.

President Clinton will get credit for any reform that passes, but by ignoring Mr. Moynihan he risks getting nothing at all. Maybe some Republicans will cave under partisan pressure, but as ClintonCare sinks in the polls that becomes ever less likely. On the other hand, Mr. Clinton could easily get 60 votes, and maybe 80, for an insurance reform stripped of mandates, price controls and other Magaziner gargoyles.

If they stay united, Republicans wouldn't even have to filibuster ClintonCare per se; they could just offer amendments by the hundreds. Most amendments would sound plausible to Americans who are today much more skeptical of government than they were in the 1960s. The White House threat is that Republicans will pay in November, but they might benefit if they can point to a less radical reform that even many Democrats wanted.

Mr. Clinton wants Americans to believe they can live with liberalism again, but that requires some modesty about liberal purposes. Instead of blaming Mr. Moynihan, Democrats would do better to ask him to relate what happened to liberals following the 1960s, the last time they overreached.

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Wall Street Journal; Friday, May 20, 1994; p. A10.